Garret v County of Suffolk
2017 NY Slip Op 30284(U)
February 14, 2017
Supreme Court, Suffolk County
Docket Number: 12-31474
Judge: Daniel Martin

[* 1]

SHORT FORM ORDER

COPY

INDEX No. 12-31474
CAL. No. 15-01768OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN

MOTION DATE 2-23-16 (001)
MOTION DATE 3-22-16 (002)
ADJ. DATE 5-31-16
Mot. Seq. # 001 - MD
002 - Mot D

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MICHAEL GARRET, an infant under the age of 14 years by his father and natural guardian, KEITH GARRET and KEITH GARRET, individually,

Plaintiffs,

- against -

THE COUNTY OF SUFFOLK, TOWN OF BABYLON and HAMLET OF BABYLON,

Defendants.

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Upon the following papers numbered 1 to 33 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-20 ; Notice of Cross Motion and supporting papers 21-31 ; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers 32-33 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Town of Babylon for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the cross motion by plaintiffs for summary judgment on the issue of liability, or, in the alternative, granting leave to supplement and amend their summons and complaint is granted only to

the extent that plaintiffs may amend the complaint to omit allegations against the County of Suffolk and the Hamlet of West Babylon, and is otherwise denied.

This is an action for personal injuries arising from an accident which occurred on April 24, 2012, at John Pape Memorial Park in the Town of Babylon, in the County of Suffolk, when the infant plaintiff allegedly tripped over a hole in the rubberized surface of the playground, striking his head on a piece of playground equipment. Plaintiff Keith Garret seeks damages for loss of services.

Defendant Town of Babylon ("Town") now moves for summary judgment dismissing the complaint. In support of the motion it submits, *inter alia*, a copy of the pleadings, the verified bill of particulars, the infant plaintiff's deposition transcript, the deposition transcript of plaintiff Keith Garret, General Municipal Law §50 deposition transcript and deposition transcript of Nicole Garret, the deposition transcript of Leo Sottile, the affidavit of Jennifer Taub, dated January 11, 2016, the affidavit of Pat M. Farrell, dated January 11, 2016 the affidavit of Thomas Stay, dated January, 2016, and copies of five photographs. Plaintiff's oppose the Town's motion and cross move for summary judgment. In support of the cross-motion plaintiffs submit, *inter alia*, the affidavit of Nicole Garret, dated March 8, 2016, 12 photographs, defendant's response to plaintiffs' demand for discovery and inspection, and a proposed amended complaint.

Nicole Garret, infant plaintiff's mother, testified that on April 24, 2012 she accompanied her two year old son to a Town park. She testified that it was the first time Michael had been to that park, identified in the notice of claim as John Pape Memorial Park. She testified that the accident occurred at about noon, within two minutes of their arrival. There was only one entrance to the park. Michael wanted to go towards a slide or some other play apparatus when he tripped in a hole and hit his head on a "piece of sheet metal," which she described as being one of three painted stools, without any covering. She testified that when his head hit "it went ding." She testified that at the time he fell she was looking around the playground to see if there were any other people there, where the exits were, "that kind of thing." Michael was close enough at that time to reach out and grab. She testified that the hole was in the rubber-like turf which covered the playground. Mrs. Garret testified that the hole was about a foot wide, with various levels of depth. She testified that Michael was trying to walk out of the hole when he tripped over the higher part, and his head went straight into the metal stool.

An examination of the now four year old infant was attempted by the Town but failed to elicit any reliable testimony. Plaintiff Keith Garret testified, but had no independent know ledge of the accident.

Leo Sottile testified that he is employed by defendant as a public works coordinator, who oversees all daily maintenance jobs, including Town parks. He testified that John Pape Memorial Park is a Town park. He explained that he would perform maintenance at such park, fence work and playground repairs as needed, and that how often he visited the park depended on what was needed. Upon being shown a photographs of the area where the infant plaintiff was injured, specifically the hole in the surface, he testified that if he saw a surface in such condition, his crew would repair it. Mr. Sottile testified there are no records kept of park inspections and there is no regular scheduled inspections of the parks, including John Pape Memorial Park. He testified that something should be covering the top of the stool apparatuses. He

testified that once rubberized surface and playground equipment was installed, his department would maintain it.

The affidavit of Jennifer Taus states that she is an employee of the Town Clerk's office, which is responsible for keeping and maintaining records of all written notices of roadway and sidewalk defects received. Her job duties include intake and logging in of written notices of such defects. The affidavit states that she has searched the records of the Clerk's office for any prior written notices of any defect with regard to either the playground surface or playground equipment at John Pape Memorial Park, prior to April 24, 2012. She states that her search revealed that the records contain no prior written notice of any defect for that location with regard to either the playground surface or playground equipment, specifically, a stool apparatus, prior to April 24, 2012.

The affidavit of Patrick M. Farrell states that he is the Deputy Commissioner of Public Safety, and, as such, he oversees the uniformed enforcement personnel who are responsible for protecting park resources. When a complaint is made to his department regarding a Town park an incident report is generated describing the nature of the complaint. Mr. Farrell states that he caused a search to be made regarding an alleged incident involving plaintiffs made to the Office of Public Safety which occurred on April 24, 2012, regarding the playground surface or playground equipment, specifically, a stool apparatus, and that the records of his department contain no incident reports or complaints regarding either the playground surface or playground equipment, prior to April 24, 2012.

The affidavit of Thomas Stay states that he is the Commissioner of the Department of Public Works for the Town, which involves overseeing the construction, maintenance and repair of all Town owned properties. He states that he caused a search to be made of the records of the Department of Public Works regarding any prior written notice(s) of any defect with regard to either the playground surface or playground equipment at John Pape Memorial Park, prior to April 24, 2012. Mr. Stay states that the records of his department contain no incident reports or complaints regarding either the playground surface or playground equipment, specifically, a stool apparatus, at John Pape Memorial Park, prior to April 24, 2012.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must offer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The Town has failed to establish its prima facie entitlement to summary judgment herein. Defendant first argues that the complaint herein should be dismissed because the Town received no prior written notice of the defects which allegedly caused the infant plaintiff's injuries. "A municipality that has adopted a prior written notice law cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies" (***Barnes v Incorporated Vil. of Port Jefferson***, 120 AD3d 528, 529, 990 NYS2d 841 [2d Dept 2014]; *see* ***Carlucci v Village of Scarsdale***, 104 AD3d 797, 961 NYS2d 318 [2d Dept 2013]; ***Wilkie v Town of Huntington***, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006], citing ***Amabile v City of Buffalo***, 93 NY2d 471, 693 NYS2d 77 [1999]; ***Lopez v G&J Rudolph***, 20 AD3d 511, 799 NYS2d 254 [2d Dept 2005]).

Section 158-2 of the Town Code of the Town of Babylon states:

> No civil action will be maintained against the Town for damages or injuries to person or property sustained by reason of any defective, dangerous, unsafe, out-of-repair or obstructed sidewalks of the Town or in consequence of the existence of snow, ice or anything upon any of its sidewalks, unless such sidewalks have been constructed or are maintained by the Town pursuant to statute; nor shall any action be maintained for damages or injuries to person or property sustained by reason of such defective, dangerous, unsafe, out-of-repair or obstructed sidewalks or in consequence of such existence of snow, ice or anything upon any of its sidewalks unless written notice thereof, specifying the particular place, was actually given to the Town Clerk or to the Commissioner of the Department of Public Works of the Town and there was a failure or neglect to cause such defective, dangerous, unsafe, out-of-repair or obstructed sidewalks to be remedied, such snow or ice to be removed or to make the place otherwise reasonably safe within a reasonable time after the receipt of such notice.

"It is axiomatic that prior written notice laws are in derogation of the common law and must be strictly construed" (***Windsor Ct. Assoc., LP v Village of New Paltz***, 27 AD3d 814, 815, 809 NY2d 477 [3d Dept 2006]; *see* ***Gorman v Town of Huntington***, 12 NY3d 275, 879 NYS2d 379 [2009]; ***Fisher v Town of N. Hempstead***, 134 AD3d 670, 20 NYS3d 167 [2d Dept 2015]; ***Selca v City of Peekskill***, 78 AD3d 1160, 912 NYS2d 287 [2d Dept 2010]). In ***Walker v Town of Hempstead***, 84 NY2d 360, 618 NYS2d 758 (1994), the Court of Appeals construed General Municipal Law § 50–e (4) as limiting the reach of prior written notice provisions to defects occurring at six enumerated locations—streets, highways, bridges, culverts, sidewalks and crosswalks. The Court of Appeals explained:

> Furthermore, we can only construe the Legislature's enumeration of six, specific locations in the exception (i.e., streets, highways, bridges, culverts, sidewalks or crosswalks) as evincing an intent to exclude any others not mentioned (*see*, McKinney's Cons. Laws of N.Y., Book 1, Statutes § 240 ["where a statute creates provisos or exceptions as to certain matters the inclusion of such provisos or exceptions is generally considered to deny the existence of others not mentioned"]). Although, as defendant points out, the statute retains the validity of the excepted notice of defect provisions "where such notice now is, or hereafter may be, required by law", the phrase "such notice" can only be interpreted as encompassing notices of defect at the six locations previously specified.

Walker v Town of Hempstead, 84 NY2d at 367, 618 NYS2d 758.

However, in the wake of ***Walker v Town of Hempstead,*** *supra*, courts have consistently found that municipalities are not prohibited from requiring prior written notice of defects for areas over which the public has a general right of passage, and which are the functional equivalent of a sidewalk or highway (*see* ***Scoville v Town of Amherst***, 277 AD2d 1038, 1039, 716 NYS2d 186 [4th Dept 2000] (bike path); ***Bacon v Mussaw***, 167 AD2d 741, 744, 563 NYS2d 854 paved bike path which was public right of way; ***Schneid v City of White Plains***, 150 AD2d 549, 541 NYS2d 234 [2d Dept 1989] (paved pedestrian walkway). Defendant argues that the rubberized mat in the playground is the functional equivalent of a sidewalk, relying on, among other cases, ***Ortsman v Town of Oyster Bay*** 178 AD2d 588, 577 NYS2d 482 (2d Dept 1991). However, such reliance is misplaced. The plaintiff in that matter failed to challenge the application of that Town's prior written notice ordinance to a basketball court, and opposed the summary judgment on other grounds. Three years later, the Court of Appeals in ***Walker v Town of Hempstead***, *supra*, found that a town may not require prior written notice of a defect in a paddle ball court surface, and, thus Ortsman is no longer carries any precedential value on that issue (*see* ***Cieszynski v Town of Clifton Park***, 124 AD3d 1039, 2 NYS3d 243 [3d Dept 2015] [grassy area did not create a general right of passage to the public]; ***Furnari v City of New York***, 89 AD3d 605, 933 NYS2d 248 [1st Dept 2011] [asphalt softball field]; ***Giarraffa v Town of Babylon***, 84 AD3d 1162, 923 NYS2d 697 [2d Dept 2011] [floating docks]; ***White v Incorporated Vil. of Hempstead***, 41 AD3d 709, 838 NYS2d 697 [2d Dept 2007] [playground equipment]). In light of the controlling case law, the Court finds that the Town's prior written notice statute does not apply to the rubberized mat and playground equipment which are the subject of this action and defendant is not entitled to summary judgment on this ground.

The Town further argues that it did not breach any duty owed to the infant plaintiff. "A municipality is under a duty to maintain its park and playground facilities in a reasonably safe condition" (***Marino v State of New York***, 16 AD3d 386, 790 NYS2d 553; *see* ***Nicholson v Board of Educ. of City of N.Y.***, 36 NY2d 798, 369 NYS2d 703 [1975]; ***Foreman v Town of Oyster Bay***, 140 AD3d 694, 30 NYS3d 895 [2d Dept 2016]; ***Engelhart v County of Orange***, 16 AD3d 369,790 NYS2d 704 [2d Dept 2005]). This duty "includes not only physical care of the property but also prevention of ultrahazardous and criminal activity of which it has knowledge" (***Benjamin v City of New York***, 64 NY2d 44, 484 NYS2d 525 [1984]; *see* ***Engelhart v County of Orange***, *supra*; ***Muzich v Bonomolo***, 209 AD2d 387, 618 NYS2d 437 [2d Dept 1994]). "A defendant who moves for summary judgment in a slip-and-fall or trip-and-fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition which allegedly caused the fall,

and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it" (***Campbell v New York City Tr. Auth.***, 109 AD3d 455, 456, 970 NYS2d 284 [2d Dept 2013]; *see* ***Levine v Amverserve Assn., Inc.***, 92 AD3d 728, 938 NYS2d 593 [2d Dept 2012]; ***Amendola v City of New York***, 89 AD3d 775, 932 NYS2d 172 [2d Dept 2011]). "In order to meet its burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall" (***Campbell v New York City Trans. Auth.***,*supra* at 456; *see* ***Levine v Amverserve Assn., Inc.***, *supra*; ***Tsekhanovskaya v Starrett City, Inc.***, 90 AD3d 909, 935 NYS2d 128 [2d Dept 2011]; ***Pryzywalny v New York City Trans. Auth.***, 69 AD3d 598, 892 NYS2d 181[2d Dept 2010]). The testimony of Town employee Leo Sottile establishes that there are no records kept of park inspections and there are no regularly scheduled inspections of the parks, including John Pape Memorial Park. The Town having failed to submit proof of when the accident site was last inspected, it cannot establish a lack of constructive notice, and, thus, defendant isnot entitled to summary judgment on this ground.

Finally, the Town argues that it is entitled to summary judgment because the proximate cause of the infant plaintiff's injuries is unknown. While proximate cause may be inferred from the facts and circumstances surrounding the injury, there must be sufficient proof in the record to permit a finding of proximate cause based not upon speculation, but upon the logical inferences to be drawn from the evidence (*see* ***Schneider v Kings Highway Hosp. Ctr.***, 67 NY2d 743, 500 NYS2d 95 [1986]; ***Hartman v Mountain Val. Brew Pub***, 301 AD2d 570, 754 NYS2d 31 [2d Dept 2003]; ***Babino v City of New York***, 234 AD2d 241, 650 NYS2d 778 [2d Dept 1996]). Infant plaintiff, who was two years old at the time of the accident and four years old at the time defendant attempted to depose him, was unable to give a description of his injuries occurred. However, the testimony of non-party witness and other submitted evidence provides sufficient proof in the record which might permit a jury finding of proximate cause based not upon speculation, but upon the logical inferences to be drawn from said evidence (*see* ***DePreter v City of New York***, 219 AD2d 561, 631 NYS2d 351 [1st Dept 1995] [wherein the infant's father's testimony that, while he did not see infant fall, he heard the infant screaming and turned immediately to see her standing next to playground equipment with blood streaming down her face, was sufficient to raise an issue of fact as to liability]; *see also* ***Johnson v New York City Trans. Auth.***, 88 A.D.3d 321 929 NYS2d 215 [1st Dept 2011]; ***Phipps v Michalak***, 57 AD3d 1374, 870 NYS2d 200 [4th Dept 2008]). Plaintiffs having raised an issue of fact as to whether the Town's negligence was the proximate cause of infant plaintiff's injuries, the motion for summary judgment must be denied.

As to the cross motion, plaintiffs have failed to establish their entitlement to summary judgment on the issue of liability. As discussed above, there are issues of fact with regard to liability which preclude summary judgment. The portion of plaintiffs' motion which seeks to amend the complaint to add a cause of action against Louis Barbato Landscaping, Inc., is also denied. The conclusory allegations contained therein are insufficient to a cause of action against the pproposed defendant (*see* ***Peterec-Tolino v Harap***, 68 AD3d 1083 [2d Dept 2009]; ***Mark Hampton, Inc.v Bergreen***, 173 AD2d 220, 570 NYS2d 799 [1st Dept 1991]). Furthermore, an examination of the related documents submitted by plaintiffs on the motion establishes that, in any event, this alleged cause of action would be time-barred (*see* CPLR 214). That portion of plaintiffs' motion which seeks to amend the complaint to omit allegations against the County of Suffolk and the Hamlet of West Babylon, however, is granted.

Accordingly, the motion by defendant Town of Babylon for summary judgment dismissing the complaint is denied. The cross motion by plaintiffs for summary judgment on the issue of liability, or, in the alternative, granting leave to supplement and amend their summons and complaint is granted only to the extent that plaintiffs may serve an amended complaint that omits the allegations against the County of Suffolk and the Hamlet of West Babylon, and is otherwise denied.

Dated: FEBRUARY 14, 2017
RIVERHEAD, N.Y.

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**