DeSimone v Town of Brookhaven
2017 NY Slip Op 30505(U)
February 28, 2017
Supreme Court, Suffolk County
Docket Number: 11-07796
Judge: Peter H. Mayer
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SHORT FORM ORDER

INDEX No. 11-07796
CAL. No. 15-02336OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 5-20-16
ADJ. DATE 9-9-16
Mot. Seq. # 001-MG; CASEDISP

---X

TRACEY DESIMONE,

Plaintiff,

- against -

TOWN OF BROOKHAVEN,

Defendant.

---X

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant, dated April 6, 2016 , and supporting papers; (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the plaintiff, dated August 17, 2016, and supporting papers; (4) Reply Affirmation by the defendant , dated September 1, 2016, and supporting papers; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by defendant Town of Brookhaven for summary judgment dismissing the complaint is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Tracy DeSimone on May 10, 2010, at approximately 9:15 p.m., as a result of a trip and fall suffered while walking on Gnarled Oak Drive at its intersection with Musket Drive, Setauket, in the Town of Brookhaven, County of Suffolk. It is alleged that the Town of Brookhaven ("Town") was negligent in causing, allowing and permitting the area where plaintiff fell to be and remain in a dangerous condition, resulting in the plaintiff's trip and fall in a pothole.

Defendant Town of Brookhaven ("Town") now moves for summary judgment dismissing the complaint due to lack of prior written notice. In support of the motion, it submits, *inter alia*, copies of the pleadings, the transcripts of the 50-h hearing and deposition of plaintiff, the transcript of the deposition of Marie Angelone, and the affidavits of Linda Sullivan, dated April 7, 2016, and Marie Angelone dated April 5, 2016. Plaintiff, in opposition to the motion, submits, *inter alia*, copies of the pleadings, and the transcripts of her 50-h hearing and deposition testimony.

Plaintiff testified that on May 1, 2010, at approximately 9:15 p.m., she was walking her dog along with her daughter and her husband, who was holding the dog's leash. She testified that it was dark and the weather was clear. She testified that the light from the nearest street light was "dim." Plaintiff testified that as she reached the southwest corner of Gnarled Oak Drive and Musket Drive, she tripped and fell as a result of stepping into a pothole in the roadway. Plaint testified that she had previously observed defects in the roadway "every day," that there is a "patched area" where there are potholes, and that the area is "kind of a mess." She further testified that the Town had performed work in the intersection in the last year, and that the Town had been "patching it on and off." Plaintiff testified that she had seen a Town truck working in the area a month or two prior to her fall, and further indicated that she observed repair work being done in the area where she fell approximately one year earlier. Plaintiff testified that from the time of that repair work until the time she fell she saw potholes developing, and that the pothole she fell into was there for weeks before her accident. Plaintiff testified that she had not complained to the Town, but that some of her neighbors had done so.

Marie Angelone was deposed as a witness for the defendant Town. She testified that she has been employed for nine years in the Town's Highway Department, currently as a neighborhood aide. It is part of her job to establish whether or not the Town had prior written notice of the defect or condition which the plaintiff alleges was the cause of her injuries. She testified that she searched the records maintained by the Town after plaintiff filed her notice of claim. Ms. Angelone testified that she had found records regarding two Highway Department work orders involving the general area where plaintiff fell. She testified that the first was made on August 12, 2008 pursuant to a complaint, which requested the resurfacing of the road in the vicinity of 8 Gnarled Oak Drive, with the nearest cross street being Somerset Drive. Ms. Angelone testified that the second work order was generated on August 13, 2008, for the intersection of Gnarled Oak Drive and Musket Drive as a result of a telephone complaint requesting the resurfacing for Gnarled Oak fro Somerset to the "dead end." Ms. Angelone testified that the area was repaired on August 18, 2008. Ms. Angelone testified that her search revealed no written notice of any defect with regard to the subject location.

In her affidavit, Marie Angelone reiterates that her search of the records of the Town's Highway Department for the five years prior revealed no written notice of any defect with regard to the subject location. The affidavit of Linda Sullivan, an employee in the Town Clerk's office, set forth that she had searched the index book and files maintained by her office for the five prior years and found no written complaints with regard to the subject location.

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 made a prima facie showing of its entitlement to judgment as a matter of law by demonstrating that it lacked prior written notice of the allegedly defective condition that caused the plaintiff's accident. Section 84.1 A of the Brookhaven Town Code states as follows:

> Prior written notice required. No civil action shall be commenced against the Town of Brookhaven or the Superintendent of Highways for damages or injuries to persons or property sustained by reason of the defective, out-of-repair, unsafe, dangerous or obstructed condition of any highway, street, ...of the Town of Brookhaven, unless, previous to the occurrence resulting in such damages or injuries, written notice of such defective, out-of-repair, unsafe, dangerous or obstructed condition, specifying the particular place and location was actually given to the Town Clerk or Town Superintendent of Highways and there was a failure or neglect within a reasonable time, after the giving of such notice, to repair or remove the defect, danger or obstruction complained of. No such civil action shall be maintained for damages or injuries to person or property sustained solely in consequence of the existence of snow or ice upon any highway, street, ... unless written notice thereof specifying the particular place and location, was actually given to the Town Clerk or the Town Superintendent of Highways and there was a failure or neglect to cause such snow or ice to be removed, or to make the place otherwise reasonably safe within a reasonable time after receipt of such notice.

Section 84.1 B of the Brookhaven Town Code states as follows:

> In the absence of written notice as required above, no civil claim shall be maintained against the Town of Brookhaven; nor shall any civil claim be maintained based on an allegation that such defect, danger or obstruction existed for so long a period of time that the same should have been discovered and remedied in the exercise of reasonable care and diligence; nor a claim that any Town employee possessed actual notice of such defect, danger or obstruction unless written notice is filed with the Town Clerk as required above.

[* 4]

Where, as here, a municipality has enacted a prior written notice statute pursuant to Town Law Article 65, it may not be subjected to liability for personal injuries caused by an improperly maintained sidewalk unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies (***Barnes v Incorporated Vil. of Port Jefferson***, 120 AD3d 528, 990 NYS2d 841 [2d Dept 2014]; ***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]; ***Ganzenmuller v Incorporated Vil. of Port Jefferson,*** 18 AD3d 703, 795 NYS2d 744 [2d Dept 2005]). "The only two recognized exceptions to a prior written notice requirement are the municipality's affirmative creation of a defect or where the defect is created by the municipality's special use of the property" (***Gonzalez v Town of Hempstead***, 124 AD3d 719, 2 NYS3d 527 [2d Dept 2015]; ***Forbes v City of New York***, 85 AD3d 1106, 926 NYS2d 309 [2d Dept 2011]).

The testimony of Marie Angelone and the affidavits of Marie Angelone and Linda Sullivan establish that there was no prior written notice filed with either the Town Clerk's office or with the highway department, as required by Town ordinance (*see* ***Velho v Village of Sleepy Hollow***, 119 AD3d 551, 987 NYS2d 879 [2d Dept 2014]; ***Petrillo v Town of Hempstead***, 85 AD3d 996, 925 NYS2d 660 [2d Dept 2011] ***Pagano v Town of Smithtown***, 74 AD3d 1304, 904 NYS2d 729 [2d Dept 2010]; ***LiFrieri v Town of Smithtown***, 72 AD3d 750, 898 NYS2d 629 [2d Dept 2010]). Defendant having established the lack of prior written notice, the burden shifts to plaintiff to proffer evidence that one of the claimed exceptions to the written notice requirement applies (*see* ***Gagnon v City of Saratoga Springs***, 51 AD3d 1096, 858 NYS2d 797 [3d Dept 2008]; ***Betzold v Town of Babylon***, 18 AD3d 787, 796 NYS2d 680 [2d Dept 2005]; ***Brooks v Village of Horseheads***, 14 AD3d 756, 788 NYS2d 437 [3d Dept 2005]). The evidence submitted by plaintiff with regard to telephone complaints and work orders is insufficient to raise an issue of fact. Any verbal complaints or other internal documents generated by the Town are insufficient to satisfy the statutory requirement (*see* ***Wilkie v Town of Huntington***, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006]; ***Cenname v Town of Smithtown***, 303 AD2d 351, 755 NYS2d 651 [2d Dept 2003]). A verbal complaint reduced to writing by a municipality does not constitute prior written notice (*see* ***Tortorici v City of New York***, 131 AD3d 959, 16 NYS3d 572 [2 Dept 2015]; ***McCarthy v City of White Plains***, 54 AD3d 828, 863 NYS2d 500 [2d Dept 2008]; ***Akcelik v Town of Islip***, 38 AD3d 483, 831 NYS2d 491[2d Dept 2007]; ***Cenname v Town of Smithtown***, *supra*). Prior written repair orders do not constitute prior written notice of prior defects (***Lopez v Gonzalez***, 44 AD3d 1012, 845 NYS2d 91 [2d Dept 2007]; ***McCarthy v City of White Plains***, *supra*; ***Dalton v City of Saratoga Springs***, 12 AD3d 899, 901, 784 NYS2d 702 [3d Dept 2004]).

The affirmative negligence exception is limited to work by the municipality that immediately results in the existence of a dangerous condition (*see* ***Yarborough v City of New York***, 10 NY3d 726 853 NYS2d 261 [2008], ***Sola v Village of Great Neck Plaza***, 115 AD3d 661, 981 NYS2d 545 [2d Dept 2014]). Plaintiff's contention that the Town affirmatively created a dangerous condition is without support in the record, and speculative in any event (*see* ***Gonzalez v Town of Hempstead***, *supra;* ***Smith v City of Mount Vernon***, 101 AD3d 847, 955 NYS2d 635 [2d Dept 2012]; ***Weinberg v City of New York***, 96 AD3d 736, 945 NYS2d 758 [2d Dept 2012]). Plaintiff having failed to raise an issue of fact, the

Town is entitled to summary judgment (*see* ***Gonzalez v Town of Hempstead***, *supra;* ***Forbes v City of New York***, *supra*).

In light of the foregoing, the motion by defendant Town of Brookhaven for summary judgment dismissing the complaint is granted.

Dated: February 28, 2017

PETER H. MAYER, J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION