Thomason v Long Is. Power Auth.
2017 NY Slip Op 31084(U)
May 3, 2017
Supreme Court, Suffolk County
Docket Number: 12-36175
Judge: Denise F. Molia
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[* 1]

SHORT FORM ORDER

INDEX No. 12-36175
CAL. No. 16-01530OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 11-29-16 (001)
MOTION DATE 12-6-16 (002)
ADJ. DATE 1-6-17
Mot. Seq. # 001 - MG
002 - MG; CASEDISP

ROSEMARY W. THOMASON,

Plaintiff,

- against -

LONG ISLAND POWER AUTHORITY and THE TOWN OF BROOKHAVEN,

Defendants.

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Upon the following papers numbered 1 to 32 read on these motions summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-11, 12-18 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 19-30 ; Replying Affidavits and supporting papers 31-32 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for the purposes of this determination; and it is further

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ORDERED that the motion by defendant Long Island Power Authority for summary judgment dismissing the complaint and any and all cross claims against it is granted; and it is further

ORDERED that the unopposed motion by defendant Town of Brookhaven for summary judgment dismissing the complaint and any and all cross claims against it is granted.

This action arises from an accident which occurred on December 10, 2011, at approximately 6:00 p.m., on the east side of Union Avenue, approximately 175 feet south of Montauk Highway, Center Moriches, in the Town of Brookhaven. It is alleged that plaintiff tripped over a grommet (guy anchor) located four feet from a telephone pole at that location, and fell onto the sidewalk, resulting in personal injuries. It is further alleged that defendants were negligent in installing and leaving the guy anchor/grommet in the ground and failing to warn of the dangerous condition.

Defendant Long Island Power Authority ("LIPA") now moves for summary judgment dismissing the complaint and any and all cross claims against it. In support of the motion, it submits, *inter alia*, copies of the pleadings, a copy of the verified bill of particulars, copies of the deposition transcripts of plaintiff, John Oates, Marie Angelone, David Keller and James Gray, four photographs, and the affidavit of John Oates, dated October 25, 2016. Defendant Town of Islip ("Town") also moves (improperly designated as a cross motion) for summary judgment dismissing the complaint and any and all cross claims against it. In support of the motion, it submits a copy of the notice of claim, copies of the pleadings, a copy of the deposition transcript of plaintiff, and the affidavit of Linda Sullivan, dated December 7, 2016. Plaintiff, in opposition to LIPA's motion, submits portions of the deposition transcripts of John Oates, David Keller and James Gray, a copy of LIPA's response to plaintiff's combined discovery demands, and six photographs. Plaintiff has not filed opposition to the Town's motion.

Plaintiff testified that on December 10, 2011 she was intending to go to a Christmas parade, and, at approximately 6:00 p.m., she had parked her car in the parking lot at 2 Union Avenue. She testified that, after exiting her vehicle, she walked across Union Avenue, up onto the curb and onto a grassy strip between the curb and the sidewalk. Plaintiff testified that as she walked on the grass her foot caught on what she described as a "metal grommet" (guy anchor) and she tripped and fell onto the adjacent sidewalk. She testified that there was no wire attaching the grommet (guy anchor) to the nearby telephone pole.

John Oates testified he is employed Public Service Electric and Gas ("PSEG") as a senior engineer. He testified that a guy anchor is used to attach a guy wire to a telephone pole to prevent it from being pulled by the wires of facilities (LIPA, Verizon or Cablevision). He testified that all of the poles belong to either LIPA or Verizon, and there is a shared use agreement between the two companies. He testified that the subject pole is owned by LIPA. Mr. Oates testified that he went to the location of the accident in May of 2013, at which time the guy anchor had been removed. He testified that he inspected the pole to see if there were hooks or eye bolts or anything else on the pole to indicate that a guy wire had been attached and found none. He testified that the pole would not need to be guy anchored on the left from the electrical viewpoint unless it was the last in line with wires running or

pulling to the right, which this pole is not. He also testified that it was not typical practice for LIPA guy a pole to the side as was done here.

David Keller testified that he has been employed as a construction engineer by Verizon Communications for 26 years. He testified that he visited the accident site and determined that Verizon had no guy wire or anchor to the pole because Verizon's service wire did not stop at the pole but ran straight through. He testified that LIPA Verizon and Cablevision have a joint use agreement with regard to the utility poles. Upon being shown a photograph of the guy anchor over which plaintiff alleges she tripped, Mr. Keller testified that it was a Cablevision guy anchor, because the anchor is three-quarters of an inch and Verizon uses a one and one-quarter inch anchor. He further testified that LIPA uses the same guy anchor as Verizon.

Marie Angelone testified that she has been employed by the Town for eight years as a neighborhood aide in the Highway Department. She testified that her duties include searching records when any notice of claim comes in, to ascertain if the Town has prior written notice regarding the complaint. She testified that she searched the records of the Highway Department for five years back from the date of the plaintiff's alleged accident and found no prior written of any dangerous or defective condition at the accident site.

James Gray testified that he has been employed as a construction supervisor for Cablevision Long Island East ("Cablevision") for 32 years. He testified that he went to the accident site and determined that there were Cablevision, Verizon and PSEG lines on the pole. Upon being shown a photograph of the guy anchor in question, he testified that he could not determine whose guy anchor it was by looking at a picture. He testified that he believed it was a three-quarter inch guy anchor and that Cablevision uses that size.

The affidavit of Linda Sullivan, an employee in the Town Clerk's office, sets forth that her duties included the logging of litigation pleadings, which includes searches of the Town Clerk's logbook to determine whether the Town had prior written notice of defects at incident locations. She states that she searched the index record book and files maintained by her office for the five prior years to December 10, 2011, and found no written complaints with regard to any dangerous condition at on the east side of Union Avenue, approximately 175 feet south of Montauk Highway, the location where plaintiff's accident occurred.

The affidavit of John Oates states that he has attached a record of installation for the pole which is the subject of this action, and which is maintained by PSEG on behalf of LIPA, in the ordinary course of business. The record contains a list of equipment that was on or associated with this pole. The is an entry on the documents which reads "TEL CBLE CATV & ANC." He states that the entry means that there were telephone and cable wires installed in the ground near the pole by the telephone or cablevision companies to support their facilities. He further states that LIPA did not use three-quarter inch guy anchors on the day of plaintiff's accident or at any time prior thereto.

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 proffer 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]).

LIPA has established it prima facie entitlement to summary judgment herein. To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and that such breach was a proximate cause of injury to the plaintiff (***Conneally v Diocese of Rockville Ctr.***, 116 AD3d 905, 984 NYS2d 127 [2d Dept 2014]; ***Ortega v Liberty Holdings, LLC***, 111 AD3d 904, 976 NYS2d 147 [2d Dept 2013]; ***Nappi v Incorporated Vil. of Lynbrook***, 19 AD3d 565, 796 NYS2d 537 [2d Dept 2005]; *see also* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]). As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (*see* ***Nappi v Incorporated Vil. of Lynbrook***, *supra*; ***Dugue v 1818 Newkirk Mgt. Corp.***, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]; *see also* ***Ruggiero v City School Dist. of New Rochelle***, 109 AD3d 894, 972 NYS2d 606 [2d Dept 2013]; ***Butler v Rafferty***, 100 NY2d 265, 762 NYS2d 567 [2d Dept 2003]). Without evidence of ownership, occupancy, control, or special use of the property upon which the defect is situated, a defendant cannot be held liable for any injuries caused by the defect (*see* ***Ruggiero v City School Dist. of New Rochelle***, *supra*; ***Mitchell v Icolari***, 108 AD3d 600, 969 NYS2d 503 [2d Dept 2013]; ***Cerrato v Rapistan Demag Corp.***, 84 AD3d 714, 716, 921 NYS2d 648 [2d Dept 2011]). LIPA has submitted evidence in admissible form which establishes that it did not own, occupy or control the area where plaintiff's accident occurred, and no special use has been alleged. LIPA's witness, John Oates, testified that this is not the type of pole on which LIPA would install a guy wire; that he inspected the subject pole and found no evidence of the type of hardware that LIPA uses to install a guy wire. Further, Oates' affidavit states that LIPA does not, in fact, use the type of guy anchor which was the alleged cause of plaintiff's trip and fall. LIPA has, thus, established that it did not install the guy anchor at issue. In opposition, plaintiff has failed to raise any issue of fact.

The Town has also 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.

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, 529, 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, 1107, 926 NYS2d 309 [2d Dept 2011]).

The testimony of Marie Angelone, and the affidavit of 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 the Town ordinance. The affidavit of an official charged with the responsibility of keeping an indexed record of all notices of defective conditions received by a town is sufficient to establish that no prior written notice was filed (***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 866 [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, 752, 898 NYS2d 629 [2d Dept 2010]; ***Scafidi v Town of Islip***, 34 AD3d 669, 824 NYS2d 410 [2d Dept 2006]). The affidavit need only indicate that the official has caused a search of the department's records to be made and that no written notice of the defective condition was found (***Cruz v City of New York***, 218 AD2d 546, 630 NYS2d 523 [1st Dept 1995]; ***Goldberg v Town of Hempstead***, 156 AD2d 639, 733 NYS2d 691 [2d Dept 1989]; *see* ***Campisi v Bronx Water & Sewer Serv.***, 1 AD3d 166, 766 NYS2d 560 [1st Dept. 2003]; *see also* ***Kapilevich v City of New York***, 103 AD3d 548, 960 NYS2d 39 [1st Dept 2013]. 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* ***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, 784 NYS2d 702 [3d Dept 2004]). Similarly, neither constructive notice nor actual notice of a defect obviates the need for prior written notice to the Town (*see* ***Amabile v City of Buffalo***, *supra;* ***Wilkie v Town of Huntington***, *supra;* ***Cenname Town of Smithtown***, *supra*).

The Town 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]). Plaintiff, however, has not opposed this motion, and, therefore, the Town is entitled to summary judgment dismissing the complaint.

In light of the foregoing, the motion by defendant Long Island Power Authority for summary judgment dismissing the complaint and any and all cross claims against it is granted. The unopposed motion by defendant Town of Brookhaven for summary judgment dismissing the complaint and any and all cross claims against it is also granted.

Dated: 5-3-17

Hon. Denise F. Molia
A.J.S.C.

X FINAL DISPOSITION ____ NON-FINAL DISPOSITION