Sicard v Chavez
2017 NY Slip Op 33401(U)
November 28, 2017
Supreme Court, Nassau County
Docket Number: Index No. 608060/2016
Judge: Karen V. Murphy

Short Form Order

SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 8 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

CHERYL SICARD,

Plaintiff,

-against-

ROLANDO CHAVEZ, VILLAGE OF WESTBURY and THE TOWN OF HEMPSTEAD,

Defendant.

Index No. 608060/2016

Motion Submitted: 09/14/17
Motion Sequence: 001 MG

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....	XX
Answering Papers.....	XX
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Defendant Village of Westbury (VOW) moves this Court for an Order granting summary judgment in its favor, and dismissing the complaint and all cross-claims asserted against it on the ground that the incident giving rise to this action did not take place within the jurisdictional or geographical confines of the VOW. The VOW also contends that it does not maintain the sidewalk in question, and that it is not in receipt of any prior written notice concerning complaints about the alleged defective sidewalk.

Plaintiff opposes the requested relief. None of the other parties to this action have submitted any opposition to the VOW's motion for summary judgment.

Plaintiff alleges that she tripped and fell on an allegedly defective sidewalk adjacent to 180 Grant Street, Westbury, New York, on August 3, 2015, resulting in various injuries. The complaint alleges, *inter alia*, that the subject property is located within the VOW, that the VOW owned, operated, maintained, performed repairs, and controlled the subject sidewalk flags involved in the incident.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v Pomeroy,*** 35 NY2d 361 [l974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (***Makaj v Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

A party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact ***(Winegrad v New York Univ. Med. Center,*** 64 NY2d 851 [1985]; ***Zuckerman v City of New York,*** 49 NY2d 557 [1980]).

It is well settled that, "[i]n order to establish a *prima facie* case of negligence, a plaintiff must demonstrate (1) the existence of a duty on the defendant's part as to the plaintiff, (2) a breach of this duty, and (3) an injury to the plaintiff as a result thereof" (***Gaeta v City of New York***, 213 AD2d 509, 510 [2d Dept 1995], *citing* ***Akins v Glens Falls City School District***, 53 NY2d 325, 333 [1981]; *see also* ***Greenberg, Trager & Herbst, LLP v HSBC Bank USA***, 17 NY3d 565 [2011]; ***Kevin Kerveng Tung, P.C. v JP Morgan Chase & Co.***, 105 AD3d 709 [2d Dept 2013]).

"It is well established that before a defendant may be held liable for negligence, it must be shown that the defendant owes a duty to plaintiff (***Palsgraf v. Long Island Railroad Co., 248 NY 339, 342***). In the absence of duty, there can be no breach of duty and without a breach there is no liability" (***Purdy v Public Administrator of the County of Westchester***, 127 AD2d 285, 288 [2d Dept 1987]). Moreover, the determination of whether a defendant owed a duty to the plaintiff is a question of law (***Id.***). More specifically, a municipality will generally not incur liability for failure to maintain property in a reasonably safe condition when it does not own or control such property, unless it affirmatively undertakes such a duty (*see* ***Carlo v. Town of East Fishkill***, 19 AD3d 442 [2d Dept 2005]).

In support of its motion, the VOW submits the affidavit of its Village Clerk/Treasurer, Tadeus A. Blach. Mr. Blach's affidavit establishes that the location of the allegedly defective sidewalk is not within the Incorporated Village of Westbury. Although Mr. Blach refers to the VOW's boundary map and states that a copy thereof is annexed to his affidavit, the map is not attached. Nonetheless, his sworn statement that he checked those maps, which he states he maintains in his office, is sufficient to establish that the subject sidewalk is not within the jurisdiction of the VOW. Moreover, Mr. Blach attests that the VOW does not perform any maintenance or repairs upon the subject sidewalk, nor does the VOW have any maintenance responsibilities in connection

therewith. As to prior written notice, Mr. Blach states that here is no written notice file for the roadway known as Grant because it is not a VOW roadway.

Based upon the foregoing, the VOW has established its *prima facie* entitlement to summary judgment as a matter of law.

In opposition, plaintiff does not submit any evidence controverting Mr. Blach's statement that the subject sidewalk is not within the VOW boundaries, but merely points out that the boundary map is not annexed to Mr. Blach's affidavit. Plaintiff's claim is insufficient to defeat the instant motion as the affidavit is based upon Mr. Blach's familiarity with the geographic boundaries of the VOW, in addition to his review of the boundary map.

Upon the Court's own initiative, and in the interests of conserving the resources of the municipality and its tax payers, the parties were requested to submit supplemental papers in an effort to resolve this issue without protracted litigation.

Mr. Blach submitted a supplemental affidavit sworn to on August 23, 2017 annexing the boundary map referred to in his original affidavit, but which was not annexed thereto. The tax map bearing the raised seal of the VOW supports Mr. Blach's original and supplemental affidavits, which establish that the site of the subject sidewalk is not located within the VOW.

Plaintiff's supplemental affirmation in opposition contains a notice of claim apparently served upon Nassau County. Nassau County is not a party to this action. Plaintiff also attaches a letter, on Nassau County letterhead, stating that the County is not a proper party to the claim, and that the accident location "is under the jurisdiction of the Village of Westbury." This brief letter, dated October 9, 2015, is not signed by any individual, but merely bears the printed closing, "Very truly yours, CLAIMS MANAGEMENT BUREAU." The subject location is not mentioned in the letter, nor is any stated basis upon which the pronouncement is made, e.g., a review of applicable maps. Accordingly, the October 9, 2015 letter is not only inadmissible, but even if it were in evidentiary form, it is not sufficient to raise a triable issue of fact.

The VOW's summary judgment motion is granted, and the complaint and any and all cross-claims asserted against it are hereby dismissed.

The foregoing constitutes the Order of this Court.

Dated: November 28, 2017
Mineola, NY

Karen V. Murphy
J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE