SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice

x

TRIAL/IAS, PART 27
NASSAU COUNTY

EDDIE EASON and HILDA EASON,

Plaintiff(s),

Index No.: 605187/14

-against-

Motion Seq. No.: 005 & 006
Motion Submitted: 4/7/17

INCORPORATED VILLAGE OF WESTBURY and WESTBURY FISH CO, INC. ,

Defendant(s).

x

The following papers read on this motion:

Notices of Motion/Supporting Exhibits.....XX
Affirmations in Opposition/Supporting Exhibits.....XX
Reply Affirmations.....XX

Defendants, the Incorporated Village of Westbury (the Village) and Westbury Fish Co., Inc (WFC), separately move this court for an Order, pursuant to CPLR § 3212, granting them summary judgment and dismissing Plaintiffs' complaint. Plaintiffs, Eddie Eason (Eddie) and Hilda Eason (Hilda) oppose the motion.

On or about October 21, 2013, Eddie was walking on Drexel Avenue in Westbury, County of Nassau. He had parked his car in a municipal parking lot and was walking to his office. He was on the sidewalk and as he passed in front of the driveway to Co-

Defendant WFC at 349 Drexel Avenue, he tripped and fell. An WFC employee helped Eddie get up and he then walked back to his car unassisted. Eddie claims he suffered serious injuries as a result of his fall.

Plaintiffs commenced this action by summons and complaint dated October 3, 2014. Issue was joined by service of an answer by the Village dated November 25, 2014. WFC interposed an answer with cross claims dated February 19, 2015. The case certified ready for trial on August 18, 2016 and a note of issue was filed on November 22, 2016. Both Defendants now move for summary judgment, claiming they bear no liability for Eddie's injuries.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez V. Prospect Hospital,* 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center,* 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in

admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v. City of New York,* 49 NY2d 5557 [1980], *supra*).

Within the context of a summary judgment motion that seeks dismissal of a personal injury action the court must give the plaintiff the benefit of every favorable inference which can reasonably be drawn from the evidence (*see Anderson v. Bee Line*, 1 N Y 2d 169 [1956]). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.,* 180 AD2d 579 (1st Dept 1992), and it should only be granted when there are no triable issues of fact (*see also Andre v. Pomeroy,* 35 NY2d 361 [1974]).

"A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature, and the burden of avoiding the risk" (*Giulini v. Union free School Dist. # 1*, 70 AD3d 632 [2d Dept. 2010]; *Basso v Miller*, 40 NY2d 233, 241 [1976]). "To impose liability upon a defendant landowner for a plaintiff's injuries, there must be evidence showing the existence of a dangerous or defective condition, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time" (*Morrison v. Apolistic Faith Mission of Portland*, 111 AD3d 684 [2d Dept 2013]; *see Winder v. Executive Cleaning Servs., LLC*, 91 AD3d 865 [2d Dept 2012]; *Gonzalez v.*

Natick N.Y. Freeport Realty Corp., 91 AD3d 597 [2d Dept 2012]).

A defendant who moves for summary judgment in a slip-and-fall-action has the initial burden of making a prime facie demonstration that it neither created the dangerous condition, nor had actual or constructive notice of its existence (*see Manning v. Americold Logistics, LLC*, 33 AD3d 427 [1st Dept 2006].

WFC's MOTION

Eddie claims a defect in the sidewalk caused his fall. The sidewalk in front of WFC's driveway showed certain cracks, as evidenced from pictures. It was these cracks that Eddie believes tripped him.

In general, liability for injuries caused by a defective sidewalk rests with the municipality and not the abutting landowner. (*Brennan v. Town of N. Hempstead*, 122 A.D.3d 892 [2nd Dept. 2014]). For the abutting landowner to be liable for a defective sidewalk, it must be established that the landowner created the defect, caused the defect to occur through a special use or violated a local ordinance imposing an obligation on the landowner to maintain the sidewalk. (*Id*; *Kilfoyle v. Town of North Hempstead*, 138 A.D.3d 292 [2nd Dept. 2016]). The local ordinance must state both that it is the landowner's duty to maintain the sidewalk and that failure to do so will result in the landowner being liable to those who are injured. *Id.*

However, a driveway can constitute a special use of a sidewalk. (*Rodriguez v City*

of Yonkers, 106 A.D.3d 802 [2nd Dept. 2013], citing *Katz v. City of New York.*, 18 A.D.3d 818 [2nd Dept. 2005]). If the defect is in the portion of the sidewalk used as a driveway "the abutting landowner on a motion for summary judgment, bears the burden of establishing that he or she did 'nothing to either create the defective condition or cause the condition through' the special use of the property as a driveway." (*Id* at 819 *quoting Breger v. City of New York*, 297 A.D.2d 770, 771 [1st Dept. 2002]). If use of the driveway by vehicles could have caused the defect(s), then summary judgment should be denied. (*Katz v. City of New York, supra*).

In support of their motion, WFC offers, *inter alia*, the deposition transcript of Richard Scores, who was the owner of WFC at the time Eddie fell, but has since sold the business. According to Mr. Scores, WFC owned 5 vans and a number of box trucks. While the box trucks did not use the driveway which was attached to the sidewalk upon which Eddie fell, the vans would traverse that driveway two times a day each, for total of 10 times. Aside from the vans, various delivery trucks would use that driveway as well as an occasional forklift. Mr. Scores seemed to remember that he or one of his workers patched up the sidewalk, but then after conferring with his attorney he changed his answer to first that they might have patched up the sidewalk, and then to "I don't remember". Upon looking at pictures depicting cracks in the sidewalk where Eddie fell, Mr. Scores indicated it was possible he had seen the cracks prior to Eddie's fall.

The court finds WFC has failed to establish entitlement to summary judgment as a

matter of law. It was WFC's burden to show it did nothing to create the defective condition. WFC failed to meet this burden. The admissible evidence presented indicates that the driveway, and therefore the sidewalk that abuts the driveway, was used regularly by vans, delivery trucks and possibly other vehicles. Mr. Scores indicated it was possible he was aware of the cracks in the sidewalk prior to the accident, and that it was possible WFC employees attempted to patch the cracks in the sidewalk. Contrary to proving it did nothing to create the defective condition, Mr. Scores' testimony indicates that is it very possible his use of the sidewalk did indeed cause the cracks. For these reasons, WFC's motion for summary judgment will be denied regardless of the sufficiency of the opposition papers. *(Winegard v. New York University Medical Center, supra.)*.

THE VILLAGE'S MOTION

In support of their motion, the Village cites to CPLR §9840 and Village Code §215-3. CPLR §9804 states:

> No civil action shall be maintained against the village for damages or injuries to person or property sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out of repair, unsafe, dangerous or obstructed or for damages or injuries to persons or property sustained solely in consequence of the existence of snow or ice upon any sidewalk, crosswalk, street, highway, bridge or culvert unless written notice of the defective, unsafe, dangerous or obstructive condition, or of the existence of the snow or ice, relating to the particular place, was actually given to the village clerk and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of or to cause the snow or ice to be removed, or the place

otherwise made reasonably safe.

Village of Westbury Code (VWC) 215-3 contains a similar provision.

It is undisputed that state and village law require written notice to the village to impose liability on the Village for an alleged defective condition. Herein, Mr. Scores actually provided the Village written notice of his concerns with the sidewalk, but this notice was given more than 10 years before the accident and it is not clear, from the evidence presented, exactly what Mr. Scores was referring to in the letter. He testified it had to with water buildup and that he was not sure if the Village ever addressed it. Ted Blach, Village Clerk and treasurer testified at his deposition in this matter that the Village did receive Mr. Scores' letter in 2003, but that the letter referenced a different area of sidewalk, and that the Village fixed the issue soon thereafter. Aside from the 2003 letter, there is no other written notice of the alleged defect in the sidewalk in front of 249 Drexel Avenue.

The Village also argues that the defect was open and obvious and not inherently dangerous. Whether a condition is open and obvious is generally left to the trier of fact, but can be determined as a matter of law where there is undisputed evidence of such. (*Capasso v. Village of Goshen*, 84 A.D. 3d 998 [2nd Dept. 2011]). Herein, the court is unable to determine whether the sidewalk cracks were open and obvious and not inherently dangerous. While there are pictures of the cracks, no party has offered proof as to length, width and/or depth of the cracks. There is no proof as to whether the cracks caused an uneven surface in addition to there being holes in the surface.

The court finds the Village is entitled to summary judgment as a matter of law on the issue of no prior written notice. Even if it could be reasonably argued that Mr. Scores' 2003 letter put the Village on notice of the defect that caused Eddie to fall, and court believes it cannot, that letter was too remote in time to provide proper notice. (*Martens v. County of Suffolk*, 100 A.D.3d 839 [2nd Dept. 2012]). The burden shifts to Plaintiffs to raise a material issue of fact requiring a trial of the action.

To overcome lack of written notice, Plaintiffs must establish that at least one of two exceptions apply. Plaintiffs must prove that the Village either affirmatively created the defect and/or (2) the defect was created by the municipality's special use of the property. (*Hanover Insurance Company v. Town of Pawling*, 94 A.D.3d 1055 [2nd Dept. 2012]). Herein, Plaintiffs argue that the Village created the defect. This is based upon Mr. Scores' 2003 letter and the fact that Mr. Blach stated the repair work was performed. Further, Plaintiffs submit the affirmation of their expert who concludes, based upon a review of pictures, that the work performed in 2003 must have been incorrectly done based upon the manner in which the sidewalk had since cracked.

The court finds both Plaintiffs' argument and their expert's conclusions are based upon speculation. It is unclear what portion of the sidewalk Mr. Scores was referencing in his 2003 letter, and there is no testimony or other admissible evidence that is sufficient enough to point to the work being performed on the spot where Eddie fell, or that work was incorrectly performed. In essence, the expert claims because the cracks are there, the sidewalk was poorly constructed. He further adds that the situation was exacerbated by

the sidewalk being traversed by vehicles in its partial use as a driveway. The court finds these conclusions conclusory and unsupported by the admissible evidence.

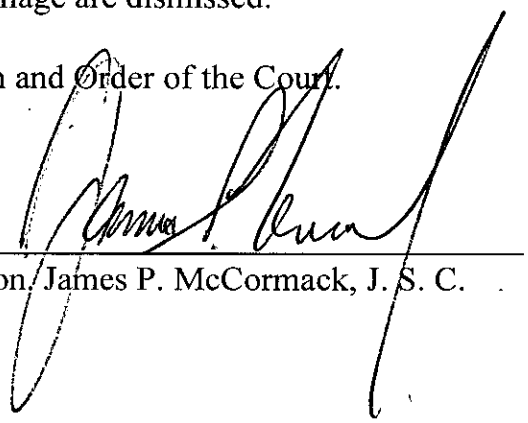
Accordingly, it is hereby

ORDERED, that WPC's motion for summary judgment is DENIED; and it is further

ORDERED, that the Village's motion for summary judgment is GRANTED. The complaint and any cross claims against the Village are dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: June 12, 2017
Mineola, N.Y.



Hon. James P. McCormack, J. S. C.

ENTERED

JUN 15 2017

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