

**Cortis v Town of Hempstead**

2011 NY Slip Op 32898(U)

October 27, 2011

Sup Ct, Nassau County

Docket Number: 15591/06

Judge: Thomas P. Phelan

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,  
Justice.

TRIAL/IAS PART 2  
NASSAU COUNTY  
ORIGINAL RETURN DATE: 07/15/11  
SUBMISSION DATE: 09/08/11  
MOTION SEQUENCE ##004, 005, 006

EDWARD CORTIS & GERTRUDE L. CORTIS,

Plaintiff,

Index No. 15591/06

-against-

THE TOWN OF HEMPSTEAD and THE VILLAGE  
OF HEMPSTEAD,

Defendants.

THE TOWN OF HEMPSTEAD,

Third-Party Plaintiff,

-against-

WATER AUTHORITY OF WESTERN NASSAU  
COUNTY,

Third-Party Defendant.

WATER AUTHORITY OF WESTERN NASSAU  
COUNTY,

Fourth-Party Plaintiff,

-against-

STASI BROS. ASPHALT CORP.,

Fourth-Party Defendant.

The following papers read on this motion:

|                              |      |
|------------------------------|------|
| Notice of Motion.....        | 1    |
| Notices of Cross-Motion..... | 2, 3 |

Third-party defendant (the “Water Authority”) moves (motion sequence #004), pursuant to CPLR 3212, seeking an order granting summary judgment dismissing third-party plaintiff’s complaint. Fourth-party defendant (“Stasi Bros.”) cross-moves (motion sequence #005), pursuant to CPLR 3212, seeking an order granting summary judgment dismissing fourth-party plaintiff’s complaint. Defendant, Town of Hempstead (the “Town”), also cross moves (motion sequence #006) for an ordering granting summary judgment dismissing the complaint and all cross-claims against it. The motions are unopposed.

At the outset the court notes that the record indicates that the action was discontinued against the Incorporated Village of Hempstead s/h/a THE VILLAGE OF HEMPSTEAD by Stipulation of Discontinuance dated December 26, 2006 (Ex. C).

It is well settled that on a motion for summary judgment movant must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the lack of any material issues of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). If such a showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require resolution at trial (*Alvarez*, 68 NY2d at 324).

This action was brought by plaintiffs to recover damages for personal injuries allegedly sustained by Edward Cortis as a result of an accident which occurred on or about November 18, 2005, when he was caused to fall while riding his bicycle on the roadway in front of premises known as 36 Elzey Avenue, Elmont, New York.

Defendant Water Authority argues that the underlying action against the Town must be dismissed as the Town did not receive prior written notice of any roadway

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defect and did not create the condition or make special use of the roadway. Moreover, Water Authority submits that it did not direct or control the patch work performed by its independent contractor Stasi Bros. In support of its arguments, Water Authority submits the transcripts of the deposition testimony of the parties.

Bruce Machen, a distribution inspector, testified on behalf of Water Authority. Mr. Machen testified that the Water Authority applied to the Town of Hempstead in 2002 for a permit to open the roadway for new water service at 33 Elzey Avenue. The record indicates that the work would have been done in house and the restoration was done by Stasi Bros.

On or about April 23, 2001, Stasi Bros. and the Water Authority entered into a contract whereby Stasi Bros. agreed to "perform all work necessary in connection with the paving of street and sidewalk openings" (Ex. T). Diane Posillico testified on behalf of Stasi Bros. Ms. Posillico stated that it was the practice of Stasi Bros. to cut out the temporary patch and install a new permanent patch.

Stasi Bros. reiterates the argument of the Water Authority that since the Town did not receive prior written notice of any roadway defect and did not create the condition or make special use of the roadway, there can be no liability against the Town. Moreover, it is submitted that there is no evidence of negligence on the part of Stasi Bros.

Defendant Town alleges that it did not have prior written notice of the alleged dangerous or defective condition prior to the occurrence as required by Town Code §§6-1 and 6-4 as a condition precedent for liability against it and by extension to the Water Authority and Stasi Bros.

In support of its position, the Town has provided transcripts of the deposition testimony of Peter Rizzo, a highway inspector for the Town, and Sheila Dauscher, who is employed by the Town's Highway Department as Clerk Three and the Records Access Officer. Mr. Rizzo testified that to his knowledge no work was done in the area during the six months before September 28, 2005.

Ms. Dauscher testified as to the Town's procedure with regard to written complaints. If a notice of claim is received, Ms. Dauscher would do a search of

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Town records. In the instant matter a search was made of the records in her office revealing no prior written notice for the roadway in front of 36 Elzey Avenue, Elmont, New York. Plaintiff, Edward Cortis, testified at his deposition that he never made any complaints prior to the accident.

The Town has made its prima facie showing of entitlement to judgment as a matter of law by proffering sufficient evidence that it had not been provided with prior written notice of the alleged defective condition as required under Town Code §§6-1 and 6.4. (See, Lopez v. Gonzalez, 44 AD3d 101 [2d Dept. 2007]). Once this initial burden has been met by the Town, the burden then shifts to plaintiff to submit evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial to resolve. (Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). This the plaintiffs have failed to do in that they did not submit any papers in opposition to the motions. Accordingly, the Town's cross-motion for summary judgment is granted.

Water Authority and Stasi Bros. have also made prima facie showings of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the lack of any material issues of fact. (Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). Accordingly, the Water Authority's motion for summary judgment and Stasi Bros.' cross-motion are granted.

According, the actions are dismissed, without costs.

This decision constitutes the order of the court.

Dated: 10-27-11

HON THOMAS P. PHELAN  
THOMAS P. PHELAN, J.S.C.

**ENTERED**  
OCT 31 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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