

**Vishnick v Botesazan**

2011 NY Slip Op 33174(U)

December 5, 2011

Supreme Court, Nassau County

Docket Number: 11104/08

Judge: Anthony L. Parga

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SCAN

SHORT FORM ORDER  
SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

-----X  
SHERRI VISHNICK,

Plaintiff,

-against-

FRED BOTESAZAN,

Defendant.

PART 8

MOD

11/04/08

INDEX NO. ~~1139/11~~

XXX

MOTION DATE: 10/20/11

SEQUENCE NO: 005

-----X	
Notice of Motion, Affs. & Exs.....	<u>1</u>
Affidavit in Opposition, Aff & Exs .....	<u>2</u>
Reply Affirmation.....	<u>3</u>

Upon the foregoing papers, it is ordered that the motion by plaintiff to vacate the order of dismissal, dated April 8, 2011, which was granted on default without opposition, is granted to the extent that the order of April 8, 2011 is hereby vacated and superceded by this Order, and defendant's motion for summary judgment, annexed as Exhibit A to defendant's Affidavit in Opposition, is hereby restored and considered together with the parties' submissions herein. Upon all of the submissions before this Court, defendant's motion for summary judgment is granted and plaintiff's action is hereby dismissed.

In this action, plaintiffs seek to recover money damages for injuries allegedly sustained on August 4, 2007 when plaintiff Sheri Vishnick tripped and fell on the sidewalk abutting 55 Middle Neck Road in Great Neck, New York.

The action was previously dismissed against defendant Village of Great Neck Plaza, and defendant Fred Botesazan voluntarily discontinued his cross-claims against the Village of Great Neck Plaza. Defendant Botesazan is the owner of the single family residence located at 55 South Middle Neck Road in the Village of Great Neck Plaza. Said premises is on a triangular shaped

lot which abuts both Schenck Avenue and Middle Neck Road. Plaintiffs allege that defendant Fred Botesazan caused, created and/or permitted an unsafe condition to exist and allowed the sidewalk to become and remain in a broken, uneven, depressed, dangerous and defective condition. Plaintiff further alleges that the defendant Fred Botesazan violated Section 185-35 and 185-1 of the Village Code of the Village of Great Neck Plaza (hereinafter referred to as "Village Code").

Defendant Fred Botesazan moved for summary judgment on liability grounds, by prior motion dated February 4, 2011. Plaintiff failed to submit opposition to same and defendant's motion for summary judgment was granted, without opposition, by order dated April 8, 2011. Plaintiff moves herein to vacate said order, as counsel for plaintiff affirms that his firm never received the motion papers in the mail. Counsel affirms that his office moved locations and submits evidence that after notifying defense counsel of the new address, several items of mail were incorrectly sent by defense counsel to plaintiff's counsel's former address. In light of same, the April 8, 2011 order by the undersigned is hereby vacated and defendant's initial motion for summary judgment, annexed to his opposition papers as Exhibit A, is hereby restored and considered together with the parties submissions herein.

In support of defendant Botesazan's motion for summary judgment, he submits, among other evidence, an affidavit wherein he attests that he is the owner of the property which abuts the sidewalk where the plaintiff fell. He attests that he had no notice of the alleged defective condition on the sidewalk and that neither he, nor anyone on his behalf, ever performed any repair to the sidewalk at issue. He also attests that he did not use the sidewalk for any "special use." Further, at his deposition, defendant Fred Botesazan testified that he has never resided at the property, but instead has always rented the property. He also testified that no one had rented the property since 2005. In accordance with same, defendant Botesazan submits an additional, nearly identical, affidavit in opposition to plaintiff's application herein in which he states that he has "never owned or been in control of the portion of sidewalk were plaintiff alleges to have sustained injuries due to a fall." As such, defendant Botesazan argues that he had no notice of the condition at issue, did not cause or create the condition, and is entitled to summary judgment.

Defendant Botesazan has established a prima facie showing of entitlement to summary judgment. 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 demonstrate the absence of any material issues of fact.” (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)).

Plaintiff argues that there are questions of fact that warrant the denial of the defendant’s motion, including statutory violations of the Village Code pertaining to the abutting landowner’s responsibility for the maintenance of sidewalks. Village Code Section 185-1 states that an owner “shall at all times keep such sidewalk in good and safe repair...” and Village Code Section 185-35 states that the “Superintendent of Public Works shall have the power to require the owner or occupant to construct and/or repair, wholly or partly at his expense, sidewalks...adjoining said owner’s or occupant’s land.” Plaintiff contends that regardless of whether the defendant “owned” the sidewalks abutting his property, he had a statutory duty to maintain and repair said sidewalks. Plaintiff argues that a question of fact exists as to whether defendant Botesazan’s property was in violation of the statutory requirement and whether such violation was a competent producing cause of the plaintiff’s injuries.

Plaintiff further contends that defendant Botesazan repaired the sidewalk at issue prior to the happening of this accident. A review of defendant Botesazan’s deposition transcript and affidavits, however, indicate that defendant Botesazan testified that he repaired the sidewalk abutting Schenck Avenue after being notified by the Village to do so in 2005, due to a tree which “brought up” the sidewalk. Defendant Botesazan testified that he was not notified to fix or make repairs to any portion of the sidewalk abutting Middle Neck Road. He similarly attests that neither he, nor anyone on his behalf, made repairs and/or replacements to the sidewalk abutting the premises on Middle Neck Road, where the plaintiff alleges that she fell. Furthermore, defendant Botesazan testified that he did not reside at the home, but collected rent from the tenants who lived there prior to 2005. He also testified that the tenants were responsible for

maintaining the grass surrounding the premises and on both sides of the sidewalk, and when the premises were unoccupied, someone would mow the grass on his behalf.

Plaintiff Sherri Vishnick testified that she had seen the defect that allegedly caused her fall on prior occasions for several months before her accident and Bernard Vishnick testified that the alleged defect was there for ten months. As such, plaintiff argues that defendant Botesazan had constructive notice of the defect for a sufficient length of time to discover and remedy it.

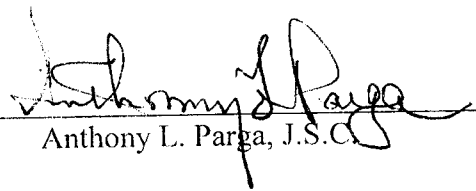
An abutting landowner will not be liable to a pedestrian injured as a result of a defect on a public sidewalk unless the landowner created the defective condition or caused the defect to occur because of some special use of the sidewalk, or if a local ordinance or statute specifically charges the abutting landowner with a duty to maintain and repair the sidewalks and imposes liability for injuries resulting from a breach of that duty. (*Jacobs v. Village of Rockville Centre*, 41 A.D.3d 539, 838 N.Y.S.2d 597 (2d Dept. 2007); *Felshberg v. Emmons Ave. Hospitality Corp.*, 26 A.D.3d 460, 810 N.Y.S.2d 502 (2d Dept. 2006); *Hausser v. Guinta*, 88 N.Y.2d 449, 669 N.E.2d 470 (1996); *Diaz v. Vieni*, 303 A.D.2d 713, 758 N.Y.S.2d 98 (2d Dept. 2003); *see also*, *Dufrane v. Robideau*, 214 A.D.2d 913, 626 N.Y.S.2d 292 (3d Dept. 1995)(an exception to the prohibition against liability upon an abutting landowner may be incurred where a statute specifically charges an abutting landowner with a duty to maintain and repair the sidewalk and provides that a breach of that duty will result in liability). Where a local ordinance imposes upon the landowner a duty to maintain the sidewalk, but does not expressly impose tort liability upon the landowner for a violation of that duty, the landowner owes no duty to the plaintiff to keep the sidewalk in good repair and cannot be subject to tort liability for any alleged breach of such a duty, where the landowner neither created the condition nor caused the defect to occur by some special use of the sidewalk. (*Forelli v. Rugino*, 139 A.D.2d 489, 526 N.Y.S.2d 847 (2d Dept. 1988); *See also*, *Lodato v. Town of Oyster Bay*, 69 A.D.2d 904, 414 N.Y.S.2d 214 (2d Dept. 1979)).

In the instant matter, the Village Code for the Village of Great Neck Plaza places does not impose tort liability on adjoining landowners for claims for damages or injuries that arise from defects in the sidewalk. (*See, Marx v. Great Neck Park District*, 29 Misc.3d 1217(A), 2010 WL 4273810 (Sup. Ct. Nassau Cty. 2010). As the Village Code does not place tort liability upon

abutting landowners, the abutting landowner may only be held liable for injuries to pedestrians if it can be established that the landowner caused or created the defective condition in the sidewalk or caused the condition through a special use of the sidewalk. (*Id.*, see also, *Felshberg v. Emmons Ave. Hospitality Corp.*, 26 A.D.3d 460, 810 N.Y.S.2d 502 (2d Dept. 2006)). There is no evidence in the submissions before this Court that defendant Botesazan caused or created the alleged defective condition in the sidewalk at issue or caused the condition through a special use of the sidewalk. Accordingly, defendant Botesazan cannot be held liable for the plaintiff's accident or injuries herein.

As such, defendant's motion for summary judgment is granted in its entirety, and the plaintiff's action is hereby dismissed.

Dated: November 30, 2011

  
Anthony L. Parga, J.S.C.

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**ENTERED**  
**DEC 05 2011**  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**