

DeCaro v Village of Valley Stream

2011 NY Slip Op 33733(U)

May 2, 2011

Supreme Court, New York County

Docket Number: 012729/10

Judge: Thomas P. Phelan

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

TRIAL/IAS PART 2
NASSAU COUNTY

CARMEN DECARO,

Plaintiff,

-against-

VILLAGE OF VALLEY STREAM, COUNTY OF
NASSAU, MONICA GUTIERREZ AND JAIRO
DUQUE,

Defendants.

ORIGINAL RETURN DATE: 04/29/11
SUBMISSION DATE: 04/29/11
INDEX NO. 012729/10

MOTION SEQUENCE #2

The following papers read on this motion:

Notice of Motion..... 1

Defendant, County of Nassau, (the "County"), moves, pursuant to CPLR 3212, seeking an order granting summary judgment dismissing plaintiff's complaint and any and all cross claims against it.

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 (*Id.* at 324).

Where, as here, defendant moves for summary judgment in a trip and fall type of action based upon defendant's lack of written notice of the alleged dangerous condition, "defendant is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law (citations omitted)" (*Beltram v. Metropolitan Life Ins. Co.*, 259 AD2d 456, 457 [2d Dept. 1999]).

This action was brought by plaintiff to recover damages for personal injuries allegedly sustained by plaintiff on January 27, 2010, when she tripped and fell on the public sidewalk in front of premises known as 271 Wheeler Avenue, Village of Valley Stream, County of Nassau and State of New York.

The County submits that the sidewalk where the accident occurred is not under the jurisdiction of the County but rather it is under the jurisdiction of the Village of Valley Stream. According to the affidavit of John Dempsey, a Civil Engineer II employed by the Nassau County Department of Public Works in the Construction Management Unit, he searched the Department of Public Works records. He submits that Section-4.0 subdivision (c) of the Nassau County Administrative Code provides, as follows:

“The Board of Trustees of villages and the city councils of cities through which county roads as defined in this title or constructed under article six at the highway law pass shall have sole jurisdiction:

1. Over the sidewalk area, which for such purpose is defined as the area on each side of the road from the property line to the curb line or if there is a curb to the far side of the curb, except as provided in subdivision b of this section” (Ex. D).

Subdivision b provides that: “The jurisdiction of the County over all county roads including those constructed under article six of the, [sic] highway law shall include but shall not be limited to: 1. The location of curb lines and curbs and the regulation of cuts in curbs for any purpose” (Id.)

In light of the foregoing, the County maintains that it cannot be held liable for injuries caused by the allegedly dangerous condition.

The County also alleges that it did not receive prior written notice of the alleged dangerous or defective condition of the sidewalk prior to the occurrence as a condition precedent for liability. The County cites to Section 12-4.0 subdivision (e) of the Administrative Code of Nassau County.

John Dempsey avers that he searched prior written notice records maintained by the Department of Public Works for a period of five (5) years prior to the date of the accident and found no prior written notice. Veronica Cox, an employee in the Claims Management Bureau in the Office of the County Attorney of Nassau County, avers that she also made a search of the written notice files for a five-year period through the date of plaintiff's accident, which search revealed no written notices of a defective condition regarding the sidewalk.

The County contends that it, therefore, has made a *prima facie* showing of entitlement to judgment as a matter of law by proffering sufficient evidence that it has not been provided with prior written notice of the alleged defective condition as required under law (*See, Lopez v. Gonzalez*, 44 AD3d 1012 [2d Dept. 2007]). Once the initial burden has been met, 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 plaintiff has failed to do.

Two exceptions exist to the prior written notice rule: the creation of the dangerous or defective condition by the municipality and when a benefit is conferred upon the municipality by a special

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use (see, Lopez v. Town of Hempstead, 854 N.Y.S.2d 750, 2008 WL 893918 [2d Dept. 2008]). Plaintiff has failed to argue or demonstrate the applicability of either of the above exceptions to the prior written notice requirement (see, McCarthy v. City of White Plains, 54 AD3d at 830). Therefore, an issue of fact does not exist with regard to the exceptions to the prior written notice rule.

Based upon all of the foregoing, defendant the County's motion to dismiss is granted, and the complaint and any and all cross claims as against it are dismissed.

Accordingly, the caption is amended to read as follows:

"CARMEN DECARO,

Plaintiff,

-against-

VILLAGE OF VALLEY STREAM,
MONICA GUTIERREZ AND JAIRO
DUQUE

Defendants."

This decision constitutes the order of the court.

Dated: 5-2-11

HON THOMAS P. PHELAN
[Signature]
THOMAS P. PHELAN, J.S.C.

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ENTERED

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**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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