Short Form Order

SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY

001

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

----------X

THOMAS MALONEY and PATRICIA MALONEY,

Plaintiffs,

-against-

FRANKLYN A. FARRIS, Suffolk County Public Administrator, as Administrator of the Estate of FREDERICK OLITA a/k/a FRED OLITA, Deceased and OLITA REAL ESTATE,

Defendants.

----------X

FRANKLYN A. FARRIS, Suffolk County Public Administrator, as Administrator of the Estate of FREDERICK OLITA a/k/a FRED OLITA, Deceased and OLITA REAL ESTATE,

Third-Party Plaintiff,

-against-

THE SUFFOLK COUNTY WATER AUTHORITY,

Third-Party Defendant.

----------X

INDEX NO.: 15503/2002
CALENDAR NO.: 200702469MV
MOTION DATE: 4/23/2012
MOTION SEQ. NO.: 006 CASEDISP

PLAINTIFFS' ATTORNEY:
DELL & LITTLE, LLP
5 Orville Drive, Suite 100
Bohemia, New York 11709

DEFENDANTS' ATTORNEYS:
RICHARD T. LAU & ASSOCIATES
300 Jericho Tpke., Suite 260
Jericho, New York 11753

FIEDELMAN & McGAW
Two Jericho Plaza, Suite 300
Jericho, New York 11753

Upon the following papers numbered 1 to 21 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-16 ; ~~Notice of Cross Motion and supporting papers~~ ___ ; Answering Affidavits and supporting papers___; Replying Affidavits and supporting papers ____; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendant/third party plaintiff Franklin A. Farris, Suffolk County Public Administrator, as Administrator of the Estate of Frederick Olita a/k/a Fred Olita, Deceased and Olita Real Estate (Olita) seeking an order pursuant to CPLR Section 3212 granting summary judgment dismissing plaintiffs' complaint or in the alternative granting judgment against third party defendant Suffolk County Water Authority (SCWA) with respect to the third party complaint is determined as follows:

On February 28, 2000 plaintiff Thomas Maloney (Maloney) claims to have sustained injuries as a result of falling on a public sidewalk outside premises owned by defendant Olita. Plaintiff Maloney claims that his foot became caught in a depression, described as a hole, in the concrete sidewalk. On November 8, 1999 and November 9, 1999 the third party defendant SCWA performed

excavation work on the sidewalk for the purpose of turning off the water service for a defunct business. SCWA workers used a jackhammer to create a 12' by 12' hole in the sidewalk where the curb box was accessed and replaced. The workers backfilled the hole with dirt that had been removed and tamped a cold (asphalt) patch flush with the surface of the sidewalk. Plaintiff claims that the cold patch became dislodged creating a hole above the curb box and that he stepped into the depression while he was walking towards his car.

Plaintiff's complaint alleges that defendant Olita failed to maintain the sidewalk area in a reasonably safe condition. Defendant/third party plaintiff's third party complaint seeks indemnification claiming that the third party defendant SCWA's negligent failure to maintain the sidewalk was a proximate cause of the injuries sustained by Maloney.

Defendant's motion seeks an order granting summary judgment dismissing plaintiff's complaint claiming that there is no evidence in the record to prove that Olita had prior actual or constructive notice of the alleged dangerous condition and defendant cannot therefore be found responsible for the injuries sustained by Maloney. Defendant claims that the alleged defect, alleged to have resulted from the cold patch becoming dislodged, was created by SCWA and that Olita had no notice of the sidewalk condition prior to Maloney's fall. It is the defendant's position that Smithtown Code does not impose any additional duty upon Olita under these circumstances since if, in fact, a defect existed, such defect was created by SCWA and Olita had no prior notice of it.

In opposition plaintiffs submit an attorney's affirmation and claim that substantial issues of fact exist concerning whether defendant derived a special use of the sidewalk which imposes an additional duty to maintain the sidewalk in a reasonably safe condition sufficient to require a plenary trial. Plaintiffs claim that factual issues exist concerning whether the excavation work performed by SCWA was done at the request of or for the benefit of Olita. Plaintiffs assert that Olita derived a special use from the curb box unrelated to the public's use of the sidewalk and therefore Olita had a duty to maintain the area so that pedestrians could safely use the sidewalk. Plaintiffs also claim that the Smithtown Code imposes a duty upon the landowner to inspect and maintain the sidewalk and argue that even though no witness has come forward to provide prior notice of the defect, circumstantial evidence exists to impugn constructive notice based upon the more than three month time period from the application of the cold patch to plaintiff's fall.

In partial opposition to defendant's motion, third party defendant SCWA submits an attorney's affirmation and joins in defendant's application to dismiss the complaint based upon the absence of prior notice of the alleged defect. However SCWA argues that if the summary judgment motion is not granted dismissing plaintiffs' complaint, no basis exists to grant judgment against SCWA on the third party complaint since there is no evidence submitted to prove that a defective condition existed and no evidence to indicate that SCWA had prior notice of any alleged defective condition which would impose a duty on SCWA to return to the area.

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 eliminate any material issues of fact from the action. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v. 20th Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 (1957)). The moving party has the initial burden of proving entitlement to summary

judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851, 487 NYS2d 316 (1985)). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v. NYU Medical Center, supra.; Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065, 416 NYS2d 790 (1979)). Once such proof has been offered the burden shifts to the opposing party, who, in order to defeat the motion for summary judgment must proffer evidence in admissible form and must "show facts sufficient to require a trial of any issue of fact" (CPLR Section 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 (1980)). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v. Aeroxon Products*, 148 AD2d 499, 538 NYS2d 843 (2nd Dept., 1979)) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v. Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 (2nd Dept., 1981)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law.

In order to establish tort liability the plaintiff must demonstrate the existence and breach of a duty owed to him by the defendant (*Palka v. Edelman*, 40 NY2d 781, 390 NYS2d 393 (1976); *Palsgraf v. LIRR, 248 NY 339* (1928); Prosser, *"Torts"*, 4th Edition Sections 30, 41-42 & 53)). He must further demonstrate that defendant's acts or omissions which constituted such breach were a proximate cause of plaintiff's injuries (*Sheehan v. City of New York*, 40 NY2d 496, 387 NYS2d 92 (1976)).

A landowner owes a duty to another on his land to keep it in a reasonably safe condition (*Basso v. Miller*, 40 NY2d 233, 241, 386 NYS2d 564 (1976); *Smith v. Taylor*, 279 AD2d 566, 719 NYS2d 686 (2nd Dept., 2001)). A party who possesses real property either as an owner or a tenant, is under a duty to exercise reasonable care to maintain that property in a safe condition, and this duty includes the undertaking of minimal precautions to protect members of the public from the reasonably foreseeable acts of third persons (*Martinez v. Santoro*, 273 AD2d 448, 710 NYS2d 374 (2nd Dept., 2000); *Sadler v. Town of Hurley*, 288 AD2d 805, 720 NYS2d 613 (3rd Dept., 2001)).

Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises. The existence of one or more of these elements is sufficient to give rise to a duty of care. Where none is present a party cannot be held liable for injury caused by the defective or dangerous condition on the property (*Balsam v. Delma Engineering Corp.*, 139 AD2d 292, 296-297, 532 NYS2d 105 (1st Dept., 1988); leave to appeal denied 78 NY2d 783 (1989); *Pappalardo v. NY Health & Racket Club*, 279 AD2d 134, 718 NYS2d 287 (1st Dept., 2000)).

It is well settled that the owner or occupier of land abutting a public sidewalk does not owe a duty to the public solely arising from the location of the premises, to maintain the sidewalk in a safe condition (*Nuesi v. City of New York*, 205 AD2d 370, 613 NYS2d 175 (1st Dept., 1994)). Liability arises only if the abutting owner or lessee created the defect or used the sidewalk for a special purpose (*Granville v. City of New York*, 211 AD2d 195, 627 NYS2d 4 (1st Dept., 1995)) such as when an appurtenance is installed for its benefit or at its request (*Kaufman v. Silver*, 90 NY2d 204, 659 NYS2d 250 (1997) which contemplates a purpose different from that of the general public (*Otero v. City of New York*, 213 AD2d 339, 624 NYS2d 157 (1st Dept., 1995)). Such special use then gives rise to maintenance responsibilities not otherwise imposed upon a landowner (*Santorelli v. City of New York*, 77 AD2d 825, 430 NYS2d 618 (1st Dept., 1980)).

Smithtown Town Code Section 245-5 provides:

> Owners, occupants, lessors, or persons in control of all buildings or structures used for commercial purposes and the owners or occupants of lands fronting or abutting on any street or highway in a business or industrial district shall maintain and repair the sidewalks adjoining their lands and shall keep such sidewalks free and clear of and from snow, ice and all other obstructions. Such owner, occupant or lessor, and each of them, shall be liable for any injury or damage by reason of omission, failure of negligence to maintain or repair such sidewalks or to remove snow, ice, or other obstructions therefrom.

In a slip and fall case a plaintiff may only recover when he is able to show that the defendant either created the condition which caused the accident or had actual or constructive notice of the condition (*Anderson v. Klein Foods*, 139 AD2d 904, 527 NYS2d 897 (4th Dept., 1988); affirmed 73 NY2d 835 (1989); *Moss v. JNK Capital*, 211 AD2d 769, 621 NYS2d 679 (2nd Dept., 1995)). Constructive notice may be inferred where the alleged defect was visible and apparent for a sufficient length of time prior to the accident so as to permit the defendant to discover and remedy it (*Fasolino v. Fashion Bug*, 77 NY2d 847, 567 NYS2d 640 (1991)).

The record reveals that on November 8th and 9th, 1999 SCWA workers excavated a portion of the sidewalk adjacent to defendant Olita's premises for the purpose of accessing a curb box to shut off water service for a defunct business. The evidence further reveals that on February 28, 2000 the plaintiff fell in the hole created as a result of the SCWA excavation when Maloney stepped into the depression where the cold patch of asphalt applied by SCWA workers had become dislodged. There is no evidence presented to establish that the defendant Olita had prior notice that the cold patch had become dislodged prior to plaintiff's fall. The only evidence submitted with respect to notice was the plaintiff Mahoney's deposition testimony in which he stated that he visited the area "once every three weeks" and had not observed the hole prior to falling down.

While generally the law imposes no duty upon an owner or occupier of land abutting a public sidewalk to maintain it, certain exceptions exist imposing a duty on the owner to maintain the sidewalk in a reasonably safe condition in instances where installation of an appurtenance is done for the benefit of the adjoining landowner (*see Santorelli v. City of New York, supra.; Thomas v. Triangle Realty Co.*, 255 AD2d 153, 679 NYS2d 394 (1st Dept., 1998)) or where a town code provision imposes a duty. Pursuant to either exception the landowner must have either actual notice of the dangerous condition or constructive notice of the defect.

In this case, even assuming that the defendant had maintenance responsibilities as a result of the "special duty" to maintain the public sidewalk (or pursuant to Smithtown Code Section 245-5), there is no evidence in this record to support plaintiff's claim that the defendant Olita had prior actual or constructive notice of the sidewalk defect prior to Mahoney's fall. Although the plaintiff concedes the absence of notice in the record, Mahoney argues Olita should have discovered the defect during the 14 week period between excavation and the fall and therefore the Court should charge defendant with constructive notice of the hole. Imposing such a duty is clearly beyond the evidence submitted by the parties which reveals no proof that the hole existed within a time period where the defendant could have reasonably discovered and fixed it. Accordingly absent proof of any prior notice of the claimed defective condition, no basis exists to sustain plaintiffs' claims against the

landowner and the defendant's motion for an order granting summary judgment dismissing plaintiffs' complaint must be granted. Accordingly it is

ORDERED that defendant's motion for an order pursuant to CPLR Section 3212 is granted. The complaint against the defendants is hereby dismissed; and it is further

ORDERED that the Court sua sponte hereby dismisses the third party complaint against third party defendant SCWA as the claims asserted against the third party defendant are derivative of the claims asserted in the main action which has been dismissed. The third party complaint is therefore also dismissed.

Dated: June 19, 2012

PAUL J. BAISLEY, JR.
J.S.C.