Lahens v Town of Hempstead
2013 NY Slip Op 34028(U)
July 3, 2013
Supreme Court, Nassau County
Docket Number: 22200/10
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X **TRIAL/IAS PART 17**

JEAN ROBERT LAHENS and MARGARET LAHENS,

Plaintiffs,

- against -

THE TOWN OF HEMPSTEAD, COUNTY OF NASSAU and MARK BLACK,

Defendants.

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Index No. 22200/10
Mot. Seq. # 4, 5
Mot. Date 2.15.13, 2.22.13
Submit Date 4.29.13

XXX

The following papers were read on this motion:	Papers Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed	1,2
Answering Affidavit	3,4,5
Reply Affidavit	6,7,8
Memorandum of Law	9

Defendant Mark Black and defendant The Town of Hempstead (Town) each move for pursuant to CPLR Section 3212 for summary judgment dismissing the complaint as against them.

In this personal injury action plaintiff Jean Lahens allegedly tripped and fell on a raised flag of the sidewalk in front of 1004 Ditmars Avenue, Uniondale, New York on April 29, 2010. As a result of the fall, Mr. Lahens sustained an impacted fracture of his left femoral neck that required surgical pinning for fixation. Issue was joined by defendant Black on or about December 22, 2010, and by defendant Town on or about January 20, 2011. This court granted summary judgment dismissing the complaint as against defendant County of Nassau (Brown, J., Aug. 22, 2011).

In support of his motion defendant Mark Black submits his deposition testimony dated September 6, 2012. Mr. Black has lived at 1004 Ditmars Avenue, Uniondale since 1995. He testified that no one in the household had ever done construction, masonry, landscaping or arborist work. From 1995 through 2011 he never inspected the sidewalk in front of his house, but he walked on this sidewalk many times and cannot recall ever noticing a raised sidewalk.

In opposition, plaintiffs Lahens argue that defendant Black failed to prove that he did not create the dangerous condition. They also assert that defendant Black enjoyed a special use that contributed to the happening of the accident, namely the tree in front of the house.

In support of its motion defendant Town argues that pursuant to Town of Hempstead Code 181-11, it is the responsibility of the owner or occupant of a house to maintain and repair adjacent sidewalks. The Town further maintains that it had no prior written notice of the alleged sidewalk defect as required to institute an action against the Town pursuant to New York State Town Law 65-a, subdivision 2, and Chapter 6 of the Town of Hempstead Code. The Town argues that plaintiffs can point to no specific incidents of prior written notice being served upon the Town concerning a raised sidewalk slab adjacent to 1004 Ditmars Avenue, Uniondale, New York.

In opposition, plaintiffs Lahens argue that defendant Town's motion should be denied because the Town does not specifically state where they searched to determine that there was no record of prior written notice of the subject sidewalk defect. Moreover, they maintain that the Town failed to rule out its assumption of a special duty to repair the subject sidewalk.

Based on the foregoing, the decision of the court is as follows:

> "It is well settled that a the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*Sillman v Twentieth Century Fox,* 3 NY2d 395 [1957]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]; *Bhatti v Roche,* 140 AD2d 660 [2d Dept 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 [1979]). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation (CPLR § 3212 [b]; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]).
>
> "If a sufficient prima facie showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980], *supra*). It is incumbent upon the non-moving party to lay bare all of the facts which bear

> on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d 513 [2d Dept 1998]). Conclusory allegations are insufficient to defeat the application and the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Toth v Carver Street Associates,* 191 AD2d 631 [2d Dept 1993]). When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (*Sillman v Twentieth Century Fox*, 3 NY2d 395 [1957], *supra*)." *Recine v. Margolis,* 24 Misc. 3d 1244A; 901 N.Y.S.2d 902.

Where, as here, a municipality has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by an improperly maintained [sidewalk] unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies (*Leiserowitz v City of New York*, 81 AD3d 788 [2nd Dept. 2011]; *De La Reguera v City of New York*, 74 AD3d 1127 [2nd Dept. 2010]; *Schleif v City of New York*, 60 AD3d 926 [2nd Dept. 2009]; *Smith v Town of Brookhaven*, 45 AD3d 567 [2nd Dept. 2007]; *see, Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]; *Poirer v City of Schenectady*, 83 NY2d 310, 314-315 [1995]).

There are, however, two exceptions to this rule: (1) "where the locality created the defect or hazard through an affirmative act of negligence" which "immediately results" in the existence of a dangerous condition;" and (2) "where a 'special use' confers a special benefit upon the locality" (*see, Amabile v City of Buffalo*, *supra,* at p. 474; *see, San Marco v Village/Town of Mount Kisco*, 16 NY3d 111 [2010]; *Yarborough v City of New York*, 10 NY3d 726 [2008]; *Oboler v City of New York*, 8 NY3d 888, 890 [2007]; *Delgado v County of Suffolk*, 40 AD3d 575, 576; *see also, Pluchino v Village of Walden*, 63 AD3d 897; *Diaz v City of New York*, 56 AD3d 599 [2nd Dept. 2008]).

The Town has established its *prima facie* entitlement to judgment as a matter of law by submitting an affidavit of Sheila Dauscher which demonstrated that the Town did not have any prior written notice of the alleged defect (*Koehler v Inc. Village of Lindenhurst*, 42 AD3d 438 [2nd Dept. 2007]; *see, Selburn v City of Poughkeepsie*, 28 AD3d 468, 469 [2nd Dept. 2006]). Consequently, it is incumbent upon plaintiff to submit competent evidence that the municipality affirmatively created the alleged defect (*Koehler v Inc. Village of Lindenhurst, supra; Adams v City of Poughkeepsie*, 296 AD2d 468, 469 [2nd Dept. 2002]).

Here, in connection with an alleged sidewalk defect, "the affirmative negligence exception 'is limited to work by the [Town] that immediately results in the existence of a dangerous condition' " (*Yarborough v City of New York, supra,* quoting *Oboler v City of New York*, *supra*, [internal quotation marks omitted]; *see, Trinidad v City of Mount Vernon*, 51 AD3d 661, 662 [2nd Dept. 2008]; *cf. San Marco v Village/Town of Mount Kisco*, *supra*.)

Contrary to plaintiffs' contention, they have failed to raise an issue of fact as to whether the Town created the condition or whether an exception to the prior written notice condition exists here.

Under the circumstance, the defendant Town is entitled to judgment dismissing the complaint and any and all cross-claims as against it.

Next, as to defendant Mark Black's motion, "[l]iability may be imposed on the abutting landowner [in a sidewalk defect case] where the landowner either (a) created the defective condition, (b) voluntarily but negligently made repairs, (c) created the defect through special use, or (d) violated a statute or ordinance which expressly imposes liability on the abutting landowner for failure to repair." (*Ellman v. Vill. of Rhinebeck*, 41 AD3d 635 [2d Dept 2007]; *see also Fishelberg v Emmons Ave. Hospitality Corp.*, 26 AD3d 460 [2d Dept 2006]; *Nichilo v B.F.N. Realty Assoc., Inc.*, 19 AD3d666 [2d Dept 2005]). Defendant Mark Black set forth sufficient evidence showing that none of these bases for the imposition of liability applied to him. In opposition, plaintiff failed to raise a triable issue of fact. There are no facts to support the allegation that defendant Black created a defective condition on the sidewalk, made repairs or that such a defect occurred as a result of any special use or benefit that occurs from having a tree on a public sidewalk in front of a rental property. Moreover, the Town of Hempstead Code 181-11 states "[e]very owner or occupant of any house or other building . . . shall at all times keep such sidewalk in good and safe repair and maintain the same clean, free from filth, dirt, weeds or other obstructions or encumbrances." This code provision establishes a duty upon the homeowner to keep the sidewalk in good repair, but does not expressly impose tort liability. It is well settled that when a Town Code does not "expressly impose tort liability upon the landowner for injuries caused by a violation of that duty," the landlord is not subject to tort liability for any breach of that Code. (*Bloch v Potter*, 204 AD2d 672 [2d Dept 1994]).

Under these circumstances, defendant Mark Black is also entitled to judgment dismissing the complaint and any and all cross-claims as against him.

Accordingly it is,

ORDERED, that Defendant Marc Black's motion for summary judgment is **GRANTED**, and it is further

ORDERED, that Defendant Town of Hempstead motion for summary is **GRANTED.**

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
July 3, 2013

ENTER:

HON. JEFFREY S. BROWN
J.S.C.
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