D'Alauro v Town of Huntington
2013 NY Slip Op 32257(U)
August 30, 2013
Sup Ct, Suffolk County
Docket Number: 09-44015
Judge: Joseph Farneti

SHORT FORM ORDER

INDEX No. 09-44015

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 4-18-13
ADJ. DATE 6-20-13
Mot. Seq. # 001 - MG; CASEDISP
002 - MG

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THOMAS D'ALAURO,

Plaintiff,

- against -

TOWN OF HUNTINGTON and LONG ISLAND POWER AUTHORITY,

Defendants.

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Upon the following papers numbered 1 to 35 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-13, 14-18; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 19-31; Replying Affidavits and supporting papers 32-33, 34-35; Other __; it is,

ORDERED that these motions are consolidated for purposes of this determination; and it is further

ORDERED that this motion by defendant Long Island Power Authority ("LIPA"), for an Order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint and all cross-claims is granted; and it is further

ORDERED that the motion by defendant Town of Huntington ("Town") for an Order, pursuant to CPLR 3212, granting summary judgment dismissing all cross-claims against it is granted.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff Thomas D'Alauro ("D'Alauro") on November 7, 2008, when he was walking on the sidewalk on New

York Avenue at or near its intersection with Elm Street in the Town of Huntington. D'Alauro alleges while he was walking he stepped on a metal plate in the sidewalk marked "LILCO," and received an electric shock as a result of stray voltage passing through the metal plate and into his body, causing personal injuries.

LIPA now moves for summary judgment dismissing the complaint. In support of the motion, LIPA submits, *inter alia*, its attorney's affirmation, the pleadings, the transcript of the deposition of D'Alauro pursuant to General Municipal Law § 50 (h), the transcript of deposition of D'Alauro, the deposition of Paul Raemdonck as a witness for LIPA, and Michael Kaplan as witnesses for the Town. The Town also moves for summary judgment dismissing all cross-claims against it. In support of the motion, the Town submits its attorney's affirmation, the affidavit of Luann Eldridge, sworn to on April 4, 2013, and incorporates by reference all of the exhibits attached to the LIPA motion. In opposition, D'Alauro submits, *inter alia*, his attorney's affirmation, the pleadings, the transcripts of the depositions of D'Alauro, the transcript of the deposition of Paul Raemdonck, photographs, and medical records of D'Alauro.

D'Alauro testified at his 50-h hearing that the alleged accident occurred on November 7, 2008. D'Alauro was walking on the sidewalk on New York Avenue in the Town of Huntington at or near its intersection with Elm Street. He testified that it was raining and the ground was wet. D'Alauro was shown photographs of the area, and stated that these photographs accurately depicted the place where his accident took place. D'Alauro was shown a photograph which shows two metal plates, one round and one square. D'Alauro identified the square plate, marked "NYS Light" as the one involved in his accident. He alleged that when he stepped on the square plate, he received an electric shock. He was allegedly told by his then fiancé, who was walking beside him, that his body went up in the air about a foot and then he began to have a seizure. He was admitted to Huntington Hospital and released the next day, with seizure medication. D'Alauro also provided sworn testimony at a deposition on May 12, 2011, where he testified that on November 7, 2008, at approximately 7:00 p.m., while walking with his then fiancé, he stepped on a grate embedded in the sidewalk and then felt his body "hiccup." He described the metal plate as circular, with the words " LILCO" inscribed on it. He testified that his fiancé told him that his body hiccupped and began to seize, shake and foam at the mouth. He testified that since the incident he has had many seizures, sometimes several a day. He also testified that he had been diagnosed with epilepsy.

Paul Raemdonck testified as a witness for LIPA. He has held the title of foreman in electrical service for 17 years, and in this capacity supervises personnel in the field, handles customer complaints, and responds to emergency calls. A call came into the LIPA call center on November 12, 2008, with regard to an allegation that someone had stepped on a metal box embedded in the sidewalk on New York Avenue, at or near its intersection with Elm Street, and received a shock. In response, he visited the subject location the same day. When he arrived, he confirmed that there were two metal covers, one round and one square, embedded in the sidewalk. The area was not roped off and people were walking over the covers. LIPA owned and maintained the round metal cover and the box beneath it containing wires that provide electrical service to stores in the area. LIPA does not maintain the electrical box underneath the square metal cover. He believed that the wires in that box provided power to the street lights. He further testified that LIPA had not received any prior complaints about stray voltage at this

location. He then tested the two metal covers for voltage, using two voltmeters. He placed a probe between the bricks of the sidewalk and another on the metal covers. The test revealed no stray voltage on either of the covers or the surrounding area. He then removed the covers and inspected the wiring therein. There were no wires touching the covers and everything appeared normal.

Michael Kaplan appeared as a witness for the Town and testified that he has held the position of projects manager with the Town highway department for the past six years. He searched his department's records with regard to the area on New York Avenue, at or near its intersection with Elm Street, for prior written notice of any complaints and found none. He further testified that the Town maintains Elm Street, and New York State owns and maintains New York Avenue and its sidewalks. Upon being shown a picture of the scene of the alleged accident and the two metal covers, he stated that the State of New York owned and maintained the rectangular cover and the box thereunder, which holds the wiring for the street lights.

The affidavit of Luann Eldridge states that she is deputy town clerk for the Town. Her office is designated by law to receive written notice of defects and complaints from all departments. She caused and conducted a search of the records of the Clerk's office for any written complaints received by the Town regarding any defective, dangerous, hazardous or other condition at the subject location, for five years prior to November 7, 2008. She found no prior written notice of any complaints during that period at that location.

Medical records for D'Alauro were also submitted. The records from his initial treatment indicate that he had a seizure and was treated (and still is being treated) for seizures. It also notes that "his fiancé states that 'they were walking down the street when he suddenly stopped & was staring off, & then had jerky body movements.' " Again, there is nothing about plaintiff being electrically shocked. There is also a report from Dr. Alan Ettinger, the director of the North Shore LIJ Comprehensive Epilepsy Center. In his report he states "[m]y feeling is that an electrical shock inducing individualized convulsion in the absence of burn injuries or cardiac complications would be very unusual and I doubt this occurred."

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 case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Med. Ctr.***, 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 N.Y.U. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then 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 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and

all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

To prove a *prima facie* case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept], *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]). Proving that an accident occurred, or that the conditions existed for such an accident, is insufficient to establish negligence. " 'Proof of negligence in the air, so to speak, will not do' " (***Martin v Herzog***, 228 NY 164, 170, 126 NE 814 [1920], quoting Pollock, Torts [10 th Ed.], p. 472). While proximate cause generally is a matter for the jury, a plaintiff who brings a negligence action must establish *prima facie* that the defendant's negligence was a substantial cause of the event which produced his or her injury (***Derdiarian v Felix Contr. Corp.***, 51 NY2d 308, 315, 434 NYS2d 166 [1980]; *see* ***Maheshwari v City of New York***, 2 NY3d 288, 778 NYS2d 442 [2004]; ***Forman v City of White Plains***, 5 AD3d 434, 773 NYS2d 102 [2d Dept 2004]). Further, while proximate cause may be inferred from the facts and circumstances surrounding the injury, there must be sufficient proof in the record to permit a finding of proximate cause based, not upon speculation, but upon the logical inferences to be drawn from the evidence (*see* ***Schneider v Kings Highway Hosp. Ctr.***, 67 NY2d 743, 500 NYS2d 95 [1986]; ***Hartman v Mountain Val. Brew Pub***, 301 AD2d 570, 754 NYS2d 31 [2d Dept 2003]; ***Babino v City of New York***, 234 AD2d 241, 650 NYS2d 778 [2d Dept 1996]).

It is noted that D'Alauro discontinued his action against the Town pursuant to a stipulation signed on May 18, 2011. The Town is now moving to dismiss the cross-claims of LIPA. The Town has established its entitlement to summary judgement by submitting evidence that it does not own, maintain or control either of the metal covers at the subject site. In addition, it has established that the Town had no prior written notice of the alleged dangerous condition at the subject site.

Where a municipality has enacted a prior written notice law, it may not be subjected to liability for injuries caused by a defect which comes within the ambit of the law unless it has received prior written notice of the alleged defect, or an exception to the prior written notice requirement applies (*see* ***Conner v City of New York***, 104 AD3d 637, 960 NYS2d 204 [2d Dept 2013]; ***Masotto v Village of Lindenhurst***, 100 AD3d 718, 954 NYS2d 557 [2d Dept 2012]; ***Braver v Village of Cedarhurst***, 94 AD3d 933, 942 NYS2d 178 [2d Dept 2012]). The Court of Appeals has recognized only two exceptions to the prior written notice requirement, namely, where the municipality created the defect through an affirmative act of negligence, or a special use confers a special benefit upon the municipality (*see* ***Yarborough v City of New York***, 10 NY3d 726, 853NYS2d 261 [2008]; ***Amabile v City of Buffalo***, 93 NY2d 471, 693 NYS2d 77 [1999]; ***Carlucci v Village of Scarsdale***, 104 AD3d 797, 961 NYS2d 318 [2d Dept 2013]).

Huntington Town Code § 174-3 (A) provides:

> No civil action shall be maintained against . . . the Town of Huntington, its elected officials, public officers, agents, servants and/or employees . . . for damages or injuries to person or property sustained by reason of any highway, bridge, culvert, street, sidewalk

> or crosswalk owned, operated or maintained by the town or owned, operated or maintained by any improvement or special district therein being defective, out of repair, unsafe, dangerous or obstructed unless written notice of the specific location and nature of such defective, unsafe, out of repair, dangerous or obstructed condition by a person with first-hand knowledge was actually given to the Town Clerk or the Town Superintendent of Highways in accordance with § 174-5 hereof and there was thereafter a failure or neglect within a reasonable time to repair or remove the defect, danger or obstruction complained of. In no event shall . . . the Town of Huntington, its elected officials, public officers, agents, servants and/or employees . . . be liable for damage or injury to persons or property in the absence of such prior written notice. Constructive notice shall not be applicable or valid.

The Town has submitted proof that no prior written notice had been received by either the highway department or the office of the Town Clerk, and no evidence has been introduced to show that either of the exceptions apply.

In light of the submitted evidence, and the lack of any opposing evidence, the Town is entitled to summary judgment dismissing all cross-claims.

Turning to the motion by LIPA, it is initially noted that D'Alauro's claim that the deposition transcripts submitted by LIPA are inadmissible as a matter of fact and law.

CPLR 3116 (a) states:

> The deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination.

LIPA has submitted proof of compliance with this section with regard to the deposition transcripts of D'Alauro and the Town's witness, Alan Kaplan, and thus, they are admissible. The deposition transcript of LIPA's witness, Paul Raemdonck, has been duly executed and, therefore, is admissible. D'Alauro's 50-h transcript is certified, and can be properly considered in support of the defendants motions since the excerpts thereof included in the record are not challenged as inaccurate *(see* ***Ventrano v J. Kokolakis Contracting, Inc.***, 100 AD3d 984, 954 NYS2d 646 [2d Dept 2012]; ***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Bennett v Berger***, 283 A.D.2d 374, 726 N.Y.S.2d 22 [1st Dept 2001]). In fact, D'Alauro himself has submitted his own, unsigned, 50-h and deposition transcripts in opposition to the motions.

LIPA has submitted proof sufficient to establish its right to summary judgment. A defendant moving for summary judgment in a personal injury action has the burden of establishing that it did not create the defective condition or have actual or constructive notice of its existence for a sufficient length of time to discover and repair it (*see* ***Gill v Town of North Hempstead***, 83 AD3d 777, 921 NYS2d 135 [2d Dept 2011]; ***Ciavarelli v Town of Islip***, 67 AD3d 623, 888 NYS2d 172 [2d Dept 2009]; ***Starling v Suffolk County Water Auth.***, 63 AD3d 822, 823, 881 NYS2d 149 [2d Dept 2009]). In order to constitute constructive notice a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to discover and remedy it (***Applegate v Long Island Power Authority***, 53 AD3d 515, 862 NYS2d [2d Dept 2008]; *see also* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]). Here, the proof submitted not only establishes that LIPA did not have actual or constructive notice of the alleged dangerous condition, it has also proffered proof that the metal covers and the boxes underneath had been tested and that no defective condition actually existed. The medical records submitted show that D'Alauro suffered a seizure and contain no evidence to the contrary. In fact, statements taken at the hospital on the day of the accident only refer to him having a seizure. D'Alauro failed to submit any admissible evidence to overcome LIPA's evidentiary showing, setting forth only his unsupported claims, and hearsay statements of non-parties.

In light of these facts and the applicable law, LIPA is entitled to summary judgment dismissing the complaint.

Dated: August 30, 2013

Hon. Joseph Farneti
Acting Justice Supreme Court

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION