Senese v Village of Bronxville
2015 NY Slip Op 32981(U)
September 3, 2015
Supreme Court, Westchester County
Docket Number: 69168/12
Judge: David S. Zuckerman

Dispo Seq # 1

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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CONCETTA SENESE,

Plaintiff,

-against -

THE VILLAGE OF BRONXVILLE, BRONXVILLE REALTY ASSOCIATES, and "XYZ CORP", a fictitious entity that owned the premises located at 40 Pondfield Road, Bronxville, New York, on April 14, 2014,

Defendants.

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DECISION/ORDER

Index No. 69168/12

Motion Date: 06/26/15

ZUCKERMAN, J.

The following papers numbered 1 to 3 were considered in connection with this motion by Defendant Village of Bronxville for an ORDER granting summary judgment against Plaintiff and dismissing the complaint:

PAPERS	**NUMBERED**
NOTICE OF MOTION/MOTION/EXHIBITS	1
AFFIRMATION IN OPPOSITION/EXHIBITS	2
REPLY	3

In this personal injury action, Plaintiff Concetta Senese ("Plaintiff") alleges that, on April 17, 2014, she tripped and fell as she was walking on a sidewalk area located at 40 Pondfield Road ("the premises"), in Defendant Village of Bronxville, New York ("Village"). That location is adjacent to Defendant Bronxville Realty Associates ("Realty")'s and Defendant XYZ Corp ("XYZ")[1]'s premises. Plaintiff alleges that she tripped over an un-level portion of the pavement at the premises and fell, causing her

[1] XYZ has apparently not yet appeared in the action.

injuries. The Village waived its right to a GML §50-h hearing, and now moves to dismiss for a lack of prior written notice of the alleged defect.

In the Village's motion for summary judgment, it alleges that there is no evidence that they had notice of, nor caused or created, the allegedly dangerous condition where Plaintiff fell. Particularly, they assert that they received no written notice as required under Village Law §6-628. Thus, Defendant Village argues, having neither created nor received written notice of the allegedly dangerous condition, it is not liable for Plaintiff's injuries.

Village Law §6-628 provides

> No civil action shall be maintained against a Village for damages or injuries to person or property sustained in consequence of any street, highway...sidewalk or crosswalk or any other public place being defective, out of repair, unsafe, dangerous or obstructed...unless written notice of defective, unsafe, dangerous or obstructed condition..was actually given to the Village Clerk, and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger, or obstruction complained of or...the place otherwise made reasonably safe.

Upon a defendant's summary judgment motion, the movant bears the initial burden of presenting evidence, in competent and admissible form, establishing the absence of any material issues of fact. *Viviane Etienne Medical Care v Country-Wide Insurance Company*, 2015 NY Slip Op 04787 (June 10, 2015); *Winegrad v New York University Medical Center*, 64 NY2d 851(1985). In the event that initial burden is met, the non-moving party must come forward with proof, also in admissible form, that there are material issues of fact which require a trial of the action. *Alvarez v Prospect Hospital*, 68 NY2d 320 (1986).

In *Celardo v. Bell*, 222 AD2d 547 (2d Dept 1995), the court stated:

> It is axiomatic that summary judgment is a drastic remedy which should only be granted if it is clear that no material issues of fact have been presented. Issue finding, rather than issue determination, is the court's function (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957.) If there is any doubt about the existence of a triable issue of fact or if a material issue of fact is arguable, summary judgment

should be denied (*Museums at Stony Brook v Village of Pachogue Fire Dept.*, 146 AD2d 572 (1989) …

A municipality which has enacted a proper prior written notice statute may not be subject to liability for personal injuries from a defect in a public way unless it has received prior written notice of the condition or has affirmatively created it. *Amabile v City of Buffalo,* 93 NY2d 471 (1999); *Poirier v Schnectady,* 85 NY2d 310 (1995); *Wolin v Town of North Hempstead,* 129 AD3d 833 (2nd Dept 2015); *Devita v Town of Brookhaven, ,* 128 AD3d 759 (2nd Dept 2015); *Fryc-Canella v Town of North Hempstead,* 127 AD3d 1135 (2nd Dept 2015); *Agard v City of White Plains,* 127 AD3d 894 (2nd Dept 2015). When relying upon such a statute, a municipality establishes prima facie entitlement to judgment as a matter of law by submitting proof in admissible form of lack of any prior written notice. *Wolin, supra; Fryc-Canella, supra; Agard, supra.* Here, Defendant Village has submitted evidence from the Village Clerk that there was no prior written notice of any defect at the location of Plaintiff's fall, nor any repair work by the Village at that location. The burden then shifts to Plaintiff to demonstrate that there was prior written notice or one of the two exceptions to the prior written notice requirement; namely, that the municipality caused or created the defect through an affirmative act of negligence,[2] or a special use confers a special benefit upon the municipality. *Fryc-Canella, supra.*

In reviewing the responding papers, the court examines them in the light most favorable to Plaintiff and bestows the benefit of every reasonable inference to her. *Boyce v. Vasquez,* 249 AD2d 724, 726 (3d Dept 1998). In her opposing papers, however, Plaintiff failed to raise a triable issue of fact as to whether the Village received prior written notice of the alleged defect, created the condition immediately by work conducted at the location nor the existence of any special use which conferred a special benefit upon the Village. In her response, Plaintiff does no more that assert that summary judgment is premature, as sought well before discovery, and that the Village has failed to meet its burden on the motion. Instead, upon the Village having met its burden on the issue of lack of prior written notice, it is Plaintiff who has failed to come forward with evidence in admissible form that there was prior written notice, that the municipality caused or created the defect through some affirmative act of negligence, or that its special use at the premises conferred a special benefit upon the

[2]To constitute creation of the defect, work done by the municipality must have <u>immediately</u> resulted in the existence of the dangerous condition. *DeVita, supra.*

Village. *Fryc-Canella, supra.*

Upon the foregoing papers, it is

ORDERED, that the motion for summary judgment in favor of Defendant Village of Bronxville and against Plaintiff is granted and the Complaint is dismissed as to said Defendant.

The foregoing constitutes the Opinion, Decision & Order of the Court.

Dated: White Plains, New York
September 3, 2015

HON. DAVID S. ZUCKERMAN, A.J.S.C.

DONNA M. WHITE, ESQ.
Morris Duffy Alonso & Faley
Attorneys for Defendant
Village of Bronxville
Two Rector Street, 22nd Floor
New York, NY 10006

EUGENE RABINOVICH, ESQ.
Goidel & Siegel, LLP
Attorneys for Plaintiff
56 West 45th Street, 3rd Floor
New York, New York 10036