McQuade v Village of Northport
2016 NY Slip Op 30303(U)
February 24, 2016
Supreme Court, Suffolk County
Docket Number: 601295/2015
Judge: Paul J. Baisley

SHORT FORM ORDER **INDEX NO. 601295/2015**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

E-FILE

PRESENT:
Hon. Paul J. Baisley, Jr.

CAROLYN MCQUADE,

Plaintiff,

-against-

THE VILLAGE OF NORTHPORT, NORTHPORT-EAST NORTHPORT UNION FREE SCHOOL DISTRICT AND THE TOWN OF HUNTINGTON,

Defendants.

ORIG. RETURN DATE: October 21, 2015
FINAL RETURN DATE: December 21, 2015
MOT. SEQ. #: 003- MG
004- MG

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DEFT'S ATTORNEY for Town of Huntington:
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Upon the following papers read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers dated September 21, 2015, September 21, 2015 ; Notice of Cross Motion and supporting papers ___ ___; Answering Affidavits and supporting papers dated November 18, 2015 ; Replying Affidavits and supporting papers dated November 20, 2015 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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

ORDERED that the motion by defendant Village of Northport ("Village") for an order pursuant to the CPLR 3212 granting summary judgment dismissing the complaint and all cross-claims is granted, and the action is severed and judgment can be entered dismissing the complaint as against it; and it is further

ORDERED that the motion by defendant Town of Huntington ("Town") for an order pursuant to the CPLR 3212 granting summary judgment dismissing the complaint and all cross-claims is granted, and the action is severed and judgment can be entered dismissing the complaint as against it; and it is further

ORDERED that the remaining parties' attorneys are directed to appear on February 25, 2016 at 10:00 a.m. at the DCM-J Part of the Supreme Court, 1 Court Street, Riverhead, New York for a preliminary conference.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff, Carolyn McQuade, on November 27, 2013, at approximately 6:15 a.m., when it is alleged that she was caused to slip and fall on a wooden staircase leading from the athletic field of the Laurel Avenue School, located in the Village of Northport, Town of Huntington, causing her to sustain personal injuries. It is alleged that the accident occurred due to the negligence of the defendants with regard to the construction, maintenance, upkeep and control of the staircase.

Defendant Village now moves for summary judgment dismissing the complaint and all cross-claims on the ground that plaintiff's causes of action are without merit and co-defendants have failed to establish a prima facie case against said defendant. In support of the motion, it submits, *inter alia*, its attorney's affirmation, the pleadings, the transcript of the plaintiff's 50-h hearing, and the affidavit of Donna Koch, sworn to on June 9, 2015. The Town also moves for summary judgment dismissing the complaint and all cross-claims. In support of the motion, it submits, *inter alia*, its attorney's affirmation, the pleadings, plaintiff's notice of claim, and the affidavit of Jeanine Furco, sworn to on June 25, 2015. Plaintiff has submitted her attorney's affirmation in opposition to the motions.

At her deposition, pursuant to General Municipal Law §50-h, plaintiff testified that she was involved in an accident on November 27, 2013. The weather was misty and warm. It had rained heavily the night before. Plaintiff was walking from a field located behind Laurel Avenue School and was proceeding back to her house, which was located across the street. She would go to the field every day to walk her dog. She did not know who owned the field. To get to the field plaintiff would walk up stairs which were made of what appeared to be thin railroad ties and dirt. She did not know when the stairs were constructed or who constructed them. She had used these stairs to get to the field, in order to walk her dog, since 2006. Plaintiff never made any complaints with regard to the stairs, nor was she aware of anyone else making complaints with regard to the stairs. Within a six month period prior to the accident, plaintiff had no difficulty using the stairs. On the date of the accident, plaintiff left her house at 6:00 a.m. to go to the field. She did not have any difficulty seeing the ground or the stairs. She did not have any trouble ascending the stairs. Plaintiff believed that the steps were saturated with water. She did not observe any pools of water on the stairs. The steps were not slippery. Plaintiff walked her dog for approximately ten minutes. As she descended the steps she put her right foot on the edge of the wooden part of the step of the stairs, it slipped out from underneath her. Her left foot also slipped out as well. She fell, landing on the step below. Plaintiff believed the accident was caused by the steps being saturated with water. Plaintiff's bill of particulars alleges that the defendants were negligent in the operation, maintenance, upkeep and control of the property and the staircase.

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 issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d

Dept 1987]). 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, supra*; *O'Neill v Fishkill, supra*).

Defendant Village moves for summary judgment on two separate grounds. The first contention is that it did not own, control, maintain, or manage the subject staircase. The second is that it did not receive prior written notice of the allegedly defective staircase.

It is axiomatic that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff (*see Engelhart v County of Orange*, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005]; *Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]). As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (*see Nappi v Incorporated Vil. of Lynbrook*, 19 AD3d 565, 566 (2d Dept 2005]; *Dugue v 1818 Newkirk Mgt. Corp.*, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]; *see also Ruggiero v City School Dist. of New Rochelle*, 109 AD3d 894, 972 NYS2d 606 [2d Dept 2013]; *Butler v Rafferty*, 100 NY2d 265, 762 NYS2d 567 [2d Dept 2003]). Without evidence of ownership, occupancy, control, or special use of the property upon which the defect is situated, a defendant cannot be held liable for any injuries caused by the defect (*see Ruggiero v City School Dist. of New Rochelle, supra*; *Mitchell v Icolari*, 108 AD3d 600, 601, 969 NYS2d 503 [2d Dept 3013]; *Cerrato v Rapistan Demag Corp.*, 84 AD3d 714, 716, 921 NYS2d 648 [2d Dept 2011]).

In support of the motion defendant Village submits the affidavit of Donna Koch the Village Clerk. She sets forth that the Village did not own the subject staircase, control, manage or maintain the subject staircase on the date of the accident. The Village did not construct nor was it responsible for the construction of the staircase, was not responsible for repairing the staircase, and did not cause or create any condition on the staircase. The Village has, thus, established its prima facie entitlement to summary judgment. Plaintiff has failed to raise any issue of fact with regard to this branch of the motion.

The Village also contends that there was a lack of prior written notice of any alleged defect in the subject staircase. Where a municipality has enacted or is protected by a prior written notice law, it may not be held liable (*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]).

CPLR 9804 provides:

> No civil action shall be maintained against the village for damages or injuries to person or property sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out of repair, unsafe, dangerous or obstructed... unless written notice of the defective, unsafe, dangerous or obstructive condition,... relating to the particular place, 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 to cause the place to be otherwise made reasonably safe.

While prior notification requirements which limit common law duties of care, are read strictly (*see Gorman v Town of Huntington*, 12 NY3d 275, 879 NYS2d 379 [2009]), the courts have consistently found that municipalities, are not prohibited from requiring prior written notice of defects for areas over which the public has a general right of passage, which are the functional equivalent of a sidewalk or highway (*see Scoville v Town of Amherst*, 277 AD2d 1038, 1039, 716 NYS2d 186 [4th Dept 2000] (bike path); *Bacon v Mussaw*, 167 AD2d 741, 744, 563 NYS2d 854 (paved bike path which was public right of way); *Schneid v City of White Plains*, 150 AD2d 549, 541 NYS2d 234 [2d Dept 1989] (paved pedestrian walkway); *Oprisko v Royal Jobbers, Inc.*, 551 NYS2d 670, 670, 158 AD2d 875, 875 [3d Dept 1990] (right of way used as public walkway). Thus, the subject stairway is the functional equivalent of a sidewalk, and, thus, subject to the prior written notice requirement. Here, the Village established its prima facie entitlement to judgment as a matter of law, as it is undisputed that it did not receive prior written notice of the alleged defect as required by the applicable prior written notice statutes (*see* Village Law § 6–628; CPLR 9804; *Sola v Village of Great Neck*, 115 AD3d 661, 981 NYS2d 545 [2d Dept 2014]; *Cebron v Tuncoglu*, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]). Plaintiff has also failed to raise any issue of fact with regard to this branch of the motion.

Plaintiff alleges that summary judgment is premature because further discovery is needed. "A party's mere hope that further discovery will reveal the existence of triable issues of fact is insufficient to delay determination on the issue of summary judgment" (*Lambert v Bracco*, 18 AD3d 619, 620, 795 NYS2d 662 [2d Dept 2005]; *see Peluso v Red Rose Rest., Inc.*, 106 AD3d 972, 965 NYS2d 603 [2d Dept 2013]. The plaintiff's contention that the motion for summary judgment was premature because she had not fully completed discovery is without merit. The plaintiff failed to indicate the existence of any material fact which would show that the defendants' in any way contributed to the happening of the plaintiff's accident and would thereby justify denial of the motion. Thus, the plaintiff failed to demonstrate the need for additional discovery (*Tillem v Cablevision Sys. Corp.*, 38 AD3d 878, 832 N.Y.S.2d 296 [2d Dept 2008]).

Defendant Town also moves for summary judgment on the grounds that it did not own, control, maintain, or manage the subject staircase. It submits the affidavit of Jeanine Furco, the liability claims manager for the Town. She states that she conducted a search of the records maintained by the Town to ascertain if Huntington owned, operated, maintained or controlled the accident location. Her search revealed that the Town does not own, maintain or control the property where the subject staircase is located. It has thus been shown that defendant Town owed no duty to the plaintiff, and, therefore has established its prima facie entitlement to summary judgment herein.

Once again, plaintiff alleges that summary judgment is premature because further discovery is needed. However, plaintiff again has failed to indicate the existence of any material fact which would show that defendant Town in any way contributed to the happening of the plaintiff's accident and would thereby justify denial of the defendant's motion. Thus, the plaintiff failed to demonstrate the need for additional discovery (*see Tillem v Cablevision Sys. Corp.*, supra).

Accordingly, defendant Village of Northport's motion for summary judgment dismissing the complaint and all cross-claims is granted, and the action is severed and judgment can be entered dismissing the complaint as against it. Defendant Town of Huntington's motion for summary judgment

dismissing the complaint and all cross-claims is also granted, and the action is severed and judgment can be entered dismissing the complaint as against it.

Dated: 2/24/16

HON. PAUL J. BAISLEY, JR

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