

Zar v Maslavi

2016 NY Slip Op 33193(U)

December 1, 2016

Supreme Court, Nassau County

Docket Number: Index No. 607422/15

Judge: Edward A. Maron

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. EDWARD A. MARON, J.S.C.

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FRANCIS ZAR,

Plaintiff

-against-

**SAUL MASLAVI, ORLY MASLAVI, TOWN OF
NORTH HEMPSTEAD, VILLAGE OF KINGS
POINT and COUNTY OF NASSAU,**

Defendant.

-----X

**Trial/IAS Part 14
Index No.: 607422/15**

**Motion Seq.: 004
Submission Date: 10/4/16**

Papers Submitted

Notice of Motion, Affirmation of Jeffrey B. Siler, Esq., Affidavit of Gomie Persaud,
Exhibits AnnexedX
Affirmation in Opposition, Exhibits AnnexedX
Reply AffirmationX

Defendant, Village of Kings Point (hereinafter referred to as the "Village") moves by Notice of Motion dated August 29, 2016 seeking an Order granting its motion to dismiss the Plaintiff's complaint, pursuant to CPLR §3212 and Village Law §6-628.

BACKGROUND

Plaintiff commenced this action on or about November 13, 2015 by the purchase of an index number and service of a Summons and Complaint. Issue was joined by the Village by the service of a Verified Answer on or about December 10, 2015. The Plaintiff was deposed pursuant to General Municipal Law §50-h, which took place on December 30, 2014. At the 50-h hearing, Plaintiff testified in detail as to the exact location of the accident, as well as the circumstances surrounding the accident.

The instant action arises out of an alleged accident which occurred on or about August 30, 2014. According to the Plaintiff's Notice of Claim dated November 18, 2014, Plaintiff alleges that while walking in front of 28 Shore Drive in the County of Nassau, State of New York (the

“Premises”), Plaintiff was allegedly caused to trip and fall on a defective condition and sustained severe and permanent injuries. Plaintiff further alleges that the Village had notice of the defective condition and failed to repair such defective condition, and the Village was negligent in its ownership, operation, management, maintenance and control of the sidewalk adjacent to the Premises resulting in the section of the sidewalk to remain in a dangerous and defective condition and causing the Plaintiff’s injuries.

By Short Form Order dated March 9, 2016, this Court dismissed all claims by the Plaintiff as against the County of Nassau on the grounds that the roadway/sidewalk at issue in this action is not under the jurisdiction of the County, and that moreover, the County had established that it had not received prior written notice of the defective condition of the roadway on the Premises.

The arguments put forth by the Village in this application are similar to those of the County.

The Village argues that it does not have jurisdiction over the roadway/sidewalk at issue in this action, and that even if, *arguendo*, such roadway/sidewalk was under the Village’s jurisdiction, it did not have prior written notice of the alleged defect as is required pursuant to New York State Village Law § 6-628.

In support of its position that the roadway/sidewalk at issue in this action does not fall under its jurisdiction, the Village submits the affidavit of Gomie Persaud, Village Administrator, affirming that in her capacity as a Village Administrator, as well as based upon her work experience and records maintained by the Village, she is familiar with the roadways and sidewalk under the jurisdiction of the Village, and that the roadway/sidewalk at issue in this action is not under the jurisdiction of the Village, but rather it is a privately owned roadway.

Ms. Persaud’s Affidavit is further submitted in support of the Village’s argument that the Village did not have prior written notice of the alleged defect at or on the roadway/sidewalk at issue in this action prior to the date of the accident. She affirms that in her capacity as Village Administrator, she maintains the files containing notices of claims and notices of defect. She further affirms that she conducted a search of the Village’s Notice of Claim files and Notice of Defect files which are kept at the Village Clerk’s Office to determine whether the Village any prior written notice of any dangerous or defective conditions at or on the roadway/sidewalk at issue in this action , and that she reviewed the prior notice book which revealed that there were no prior complaints filed with the Village concerning any defect at or on the roadway/sidewalk at issue in this action prior to Plaintiff’s accident on August 30, 2014, and specifically, the Village received no prior written notice

of any defect at or on the roadway/sidewalk at issue in this action as alleged by the Plaintiff's Notice of Claim at any time prior to August 30, 2014.

The Village moved before this Court previously by Notice of Motion dated April 5, 2016 also seeking summary judgment in its favor, and this Court denied the application without prejudice to renew upon proper papers on the grounds that the Affidavit of Gomie Persaud was unqualified, incomplete, fatally deficient and legally insufficient to justify granting summary judgment at this time. The Court has review the Affidavit of Ms. Persaud submitted in support of the instant application and finds that it is sufficient.

DECISION AND ORDER

“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” (*Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*see, Sillman v. Twentieth Century-Fox Film Corporation*, 3 NY2d 395[1957]).

In opposition to the application, Plaintiff argues that this motion must be denied as it is premature as discovery is still lacking, citing *Gardner v. Cason, Inc.* (82 A.D.3d 930 (2nd Dept. 2011)), however the Court finds that the facts in *Garnder* are distinguishable from those in case at bar as the parties here have had a reasonable opportunity for disclosure prior to the making this application, and in this instance the Plaintiff submitted to a full 50-h hearing, and further there are no discrepancies pertaining as to how or where the accident occurred such that a material and triable issue of fact is raised so as to bar granting the Village's application for summary judgment.

It is widely held by the courts of the State of New York that “in order to establish a *prima facie* case of negligence, a plaintiff must first demonstrate the existence of a duty owed by the defendant to the plaintiff” (*Murray v. Wolff*, 242 A.D.2d 265, 660 N.Y.S.2d 732 [2d Dept. 1997]). The courts have further held that a municipality may establish a *prima facie* defense to liability where it has demonstrated that it does not have jurisdiction over the location of the plaintiff's accident (*see, Schulman v. City of New York*, 190 A.D.2d 663, 593 N.Y.S.2d 286 [2d Dept. 1993] *citing, Solomon v. City of New York*, 66 N.Y.2d 1026 [1985]). Here, the Court finds that the Village has established upon competent evidence that it does not have jurisdiction over the roadway/sidewalk at issue in this action, and that the Plaintiff has failed to submit any competent documentary evidence that would create any triable issue of fact as to the Village's lack or jurisdiction over such roadway/sidewalk. Accordingly, the Court is satisfied that on this basis, the application by the Village for summary judgment must be **GRANTED**, and any and all claims as against the Village are hereby dismissed.

Now, even if, *arguendo*, there did exist an issue of material fact as to the Village's jurisdiction over the Premises, and it was found that the Village did in fact have jurisdiction of Premises, the Village would still be entitled to summary judgment as the Court finds that there was no prior written notice of the defect provided to the Village with respect to the Premises, as required by Village Law §6-628, provides as follows, in pertinent part: "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 ... *unless written notice* of the defective, unsafe, dangerous or obstructed 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 snow or ice to be removed, or the place otherwise made reasonably safe."

Accordingly, it is hereby

ORDERED that the claims against the Defendant, Village of Kings Point, in this action are hereby **DISMISSED** with prejudice.

All matters not decided or requests for relief not granted herein are hereby **DENIED**.

This constitutes the decision and order of this Court.

Dated: December 1, 2016
Mineola, New York

ENTER:



EDWARD A. MARON, J.S.C.

ENTERED

DEC 06 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE