Benitez v Village of Lake Grove
2017 NY Slip Op 32795(U)
December 19, 2017
Supreme Court, Suffolk County
Docket Number: 06319/2016
Judge: William G. Ford

SHORT FORM ORDER **INDEX NO.: 06319/2016**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE of the SUPREME COURT

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MARIA BENITEZ & CELSO LEDEZMA,

Plaintiff,

-against-

VILLAGE OF LAKE GROVE,

Defendant.

---x

Motion Submit Date: 06/29/17
Motion Seq #: 001 MG; CASE DISP

PLAINTIFF'S COUNSEL:
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DEFENDANT'S COUNSEL:
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Upon the following papers read on defendant's motion for summary judgment pursuant to CPLR 3212; Notice of Motion; Affirmation in Support and supporting papers dated June 5, 2017; Plaintiff's Affirmation in Opposition and supporting papers dated June 21, 2017; Defendant's Reply Affirmation in Further Support dated June 26, 2017; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendant Village of Lake Grove's motion for summary judgment pursuant to CPLR 3212 dismissing plaintiff's complaint for negligence due to premises liability against them having been duly and fully considered is **granted** for the reasons appearing below.

Plaintiff Maria Benitez and her husband Celso Ledezma ("plaintiff" or "Benitez") brought this premises liability negligence action against defendant the Village of Lake Grove ("defendant" or "the Village") seeking monetary damages for injuries Benitez alleges she sustained. More specifically, Benitez alleges that she sustained a right shoulder rotator cuff which required surgical intervention and repair because of a fall incident on property kept or maintained by the Village.

On a sunny and dry Tuesday, November 24, 2015, between 9:00 and 9:30 a.m., Benitez, a Lake Grove resident, had decided to walk to a local neighborhood park located on Pond Path Road. In so doing, Benitez walked down her street, Stony Brook Road, which intersected Pond Path and State Street, where the park was located. Plaintiff used the sidewalk located on Stony Brook Road as her path of travel. As she walked down the street, she observed that a portion of the sidewalk was covered by leaves. To avoid walking through the leaves, Benitez stepped to her right with her right foot and inadvertently landed in a hole located between the sidewalk curb line and the blacktop road.

Benitez testified both at her municipal examination pursuant to General Municipal Law § 50-h on April 5, 2016, and her examination before trial held on March 1, 2017, that the hole was deeper than 6 inches, was circular or round and at least 1 foot wide or 15 inches by 15 inches. Plaintiff explained that despite being aware of the hole, having seen it at least once before a month prior, she was unable to discern its presence on the date of the incident as it was obscured by the presence of leaves covering it. Because she stepped into the hole, Benitez fell to her right side, with her right hand and right shoulder impacting the ground. Plaintiff's fall was unwitnessed. She called 911 immediately after the incident, but Suffolk County Police did not make contact until much later, sometime in March 2016, when they prepared an incident report at her home. Benitez walked home, reported the incident to her husband and reported to Stony Brook Hospital's Emergency Room with complaints of pain. An X-Ray examination was conducted finding no evidence of fracture. Plaintiff was then referred to follow up with an orthopedist. Benitez was then examined by doctors at Stony Brook Orthopedist Associates where she was diagnosed after ultrasound and MRI with a right shoulder rotator cuff tear. She underwent surgery on March 29, 2016 and underwent physical therapy thereafter.

As pled in her complaint and amplified in her verified bill of, plaintiff has sought recovery of special damages as well as lost earnings and pain and suffering arising from the incident.

Benitez began litigating her claim against the Village, first complying with the statutory condition precedent required by General Municipal Law § 50-i by serving her notice of claim on February 16, 2016. Plaintiff then commenced this action serving her summons and complaint against the Village on June 28, 2016. Defendant joined issue serving its answer to the complaint on July 19, 2016. Plaintiff amplified the pleadings serving her Verified Bill of Particulars on August 15, 2016. Discovery in this matter began with the parties entering into a Preliminary Conference Order on October 4, 2016. Discovery concluded with the parties certifying this matter ready for trial on July 5, 2017. Plaintiff filed a Note of Issue demanding trial by jury on April 6, 2017.

During discovery, the Village produced the Superintendent of its Department of Public Works, David Lea for a deposition held on March 1, 2017. He testified that as superintendent, his regular and routine job duties included supervision of the maintenance of the Village's highways and roads. Lea also testified that he was familiar with the area comprising the site of plaintiff's incident, having driven by it on a weekly basis. He however was not generally aware of the last time work was done by the Village on the sidewalk in question, nor did he know whether the Village kept or maintained records such as plans, drawings or schematics for the area in question. However, Lea did confirm that the Village did maintain curbing, sidewalks and roadways such as the incident site.

Before the Court is defendant's motion for summary judgment. In support of their application, the Village has submitted copies of the pleadings, the transcripts of plaintiff's 50-h

hearing, deposition, Lea's deposition transcript, and affidavits from the Village's deputy clerk, mayor, and planning board chair.

It is well settled that summary judgment is a drastic remedy which should not be granted when there is doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter (*see* ***Zuckerman v. City of New York,*** 49 NY2d 557, 562 [1980]). The evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see* ***Goldstein v. Monroe County,*** 77 AD2d 232, 236 [1980]).

The proponent on a motion of summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851 [1985];]; ***Zuckerman v City of New York***, 49 NY2d 557 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see* ***Zuckerman***, *supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman,*** 121 AD2d 295 [1st Dept. 1986]).

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***, 289AD2d 557 [2d Dept. 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600 [2d Dept. 1991]; ***O'Neill v Fishkill***, 134 AD2d 487 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636 [2d Dept. 1988]).

An affirmation by counsel lacking direct firsthand and personal knowledge of the relevant and material facts underlying the controversy are insufficient to raise a triable issue of fact to defeat summary judgment (*see e.g.* ***Prince v Accardo***, 54 AD3d 837, 838 [2d Dept 2008]; ***Sanabria v Paduch***, 61 AD3d 839, 840, 876 NYS2d 874 [2d Dept 2009]).

Having reviewed the motion record and the arguments submitted for and against the motion by the parties, a few things merit attention mention.

First, it is undisputed that plaintiff did not give the Village any prior written notice of the existence of the alleged dangerous condition at issue here: the hole she fell in. This fact is corroborated by defendant's proffer of the affidavit testimony by Deputy Village Clerk Linda Howell, that despite a diligent search of the Villages record book for receipt of prior written notice, no such notice was received by the Village concerning the hole where plaintiff fell on the date of the incident, November 24, 2015. Further, Howell testified in somewhat conclusory fashion that no special use was put to or any worked was conducted by the Village of that area on Pond Path Road near State Street and Stony Brook Road in Lake Grove.

Secondly, by plaintiff's own sworn admission at her examinations under oath, plaintiff stated that the hole she fell into was located on the sidewalk of Pond Path Road. Benitez was not aware of how or who created the hole or how long the hole existed other than observing it 1 month prior to her fall.

Given these two points, the Village seeks dismissal of this action arguing that plaintiff cannot prove a *prima facie* case of premises liability against it a municipality without proof of prior written notice pursuant to Village Law § 6-628. Moreover, assuming arguendo, defendant maintains that no exception to the prior written notice rule exists here where plaintiff admits that she is unaware of the nature and circumstances of the hole's creation, duration, and further where the Village has submitted in admissible form sworn denials of special use or municipal work near or in proximity to the alleged dangerous condition.

It is well settled New York law that pursuant to Village Law § 6–628, a municipality cannot be liable as a matter of law "unless written notice of the defective, unsafe, dangerous or obstructed condition or of the existence of the snow or ice, relating to the particular place, was actually given to the village clerk." (***San Marco v Vil./Town of Mount Kisco***, 16 NY3d 111, 115 [2010]; ***Morzello v Vil. of Briarcliff Manor***, 260 AD2d 611, 612 [2d Dept 1999]). The policy consideration adopted by the Court of Appeals behind this rule "comports with the reality that municipal officials are not aware of every dangerous condition on its streets and public walkways, yet imposes responsibility for repair once the municipality has been served with written notice of an obstruction or other defect, or liability for the consequences of its nonfeasance " (***Amabile v City of Buffalo***, 93 NY2d 471, 474 [1999]).

Within the Second Department, the only recognized exceptions to the municipal prior written notice requirement exist where the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a special benefit upon it" (***Palka v Vil. of Ossining***, 120 AD3d 641, 641–42 [2d Dept 2014]).

By her counsel's affirmation in opposition to defendant's motion, plaintiff argues against the grant of summary judgment characterizing the area that she fell in as the "ribbon", a dirt unpaved area between the blacktop roadway and the sidewalk terminating with the curb line. Relying on the ordinary meaning, plain and express text of the Village Law, plaintiff thus argues

that the Village is entitled to prior written notice for the allegation of dangerous conditions pertaining to streets, highways, or sidewalks, as relevant here. Therefore, plaintiff argues that defendant's motion should be denied in its entirety as it is premised upon a lack of requisite statutory notice. Plaintiff's effort must be unsuccessful as it is contrary to established Second Department law in at least two respects.

As noted above, an attorney's affirmation alone is insufficient to raise a triable question of fact. Plaintiff's counsel's statutory construction arguments, being legal in nature, cannot raise relevant and material triable questions of fact requiring resolution by the factfinder to defeat summary judgment. More importantly, this Court's review of the motion record indicates that counsel's arguments are belied by plaintiff's own sworn testimony. Benitez testified at deposition that the dangerous condition, the hole she fell into was beside the concrete sidewalk, but not on the blacktop roadway of Pond Path Road. Plaintiff further stated under oath that the hole itself was on the sidewalk of Pond Path Road.

As argued by the Village in reply and further support of its motion, the Second Department has previously determined that "the strip of grass between the sidewalk and roadway is part of the sidewalk." (***Malone v Town of Southold***, 303 AD2d 651, 652 [2d Dept 2003]; ***Zizzo v City of New York***, 176 AD2d 722 [2d Dept 1991][grassy area adjacent to the curb line where the plaintiff fell is part of the sidewalk]). This interpretation finds support in statute since the Vehicle & Traffic Law explicitly defines "sidewalk" as that "portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, intended for the use of pedestrians." N.Y. Veh. & Traf. L. § 144 [McKinney's 2017].

Thus, this Court determines that plaintiff's opposition to defendant's motion is unavailing. This being the case, the Court next turns to examine whether defendant has adduced sufficient proof in admissible form to entitle it to judgment as matter of law on the question of lack of notice to warrant an award of summary judgment dismissing plaintiff's complaint. To establish *prima facie* entitlement to judgment as a matter of law, the Village is obligated to show not only that it did not receive prior written notice of the dangerous condition, but that it did not create that condition through an affirmative act of negligence (***Moncrieffe v City of White Plains***, 115 AD3d 915, 916–17 [2d Dept 2014]; ***Keating v Town of Oyster Bay***, 111 AD3d 604, 605 [2d Dept 2013]; ***Walker v Inc. Vil. of Freeport***, 52 AD3d 697, 697 [2d Dept 2008][municipality established entitlement to judgment as a matter of law with submission of proof that a search of the its records revealed no prior written notice of dangerous condition prior to the subject accident]).

Here, the Village has submitted sworn testimony by both deposition and affidavit of Village officials demonstrating that plaintiff did not provide notice of the underlying dangerous condition as required by statute, and further, that the Village did not cause or contribute to the existence of the condition by special use or work within the vicinity of the area.

Given this demonstration, this Court determines that defendant the Village of Lake Grove has submitted sufficient proof *prima facie* entitling it to judgment as a matter of law dismissing plaintiffs Maria Benitez and Celso Ledezma's complaint for lack of statutory required notice.

Plaintiff has not submitted sufficient proof in admissible form to contradict defendant's proof of lack of notice, or alternatively, evidence that the Village caused or contributed to the existence of the dangerous condition by special use or municipal work in, near or at the incident site.

Therefore, it is accordingly

ORDERED that defendant Village of Lake Grove's motion pursuant to CPLR 3212 for summary judgment dismissing plaintiffs Maria Benitez and Celso Ledezma's complaint as a matter of law is hereby **granted**; and it is further

ORDERED that the plaintiffs Maria Benitez and Celso Ledezma complaint is hereby **dismissed**; and it is further

ORDERED movant is hereby directed to serve a copy of this decision with notice of entry on the plaintiffs forthwith.

The foregoing constitutes the decision and order of this Court.

Dated: December 19, 2017
Riverhead, New York

WILLIAM G. FORD, J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**