Bombard v Suffolk County
2018 NY Slip Op 30271(U)
January 18, 2018
Supreme Court, Suffolk County
Docket Number: 14-17368
Judge: Joseph Farneti

SHORT FORM ORDER

INDEX No. 14-17368
CAL. No. 17-00932OT

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

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 8-17-17 (002)
MOTION DATE 10-12-17 (003)
ADJ. DATE 12-14-17
Mot. Seq. # 002 - MG
003 - MG; CASEDISP

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RICHARD BOMBARD,

Plaintiff,

- against -

SUFFOLK COUNTY and TOWN OF BROOKHAVEN,

Defendants.

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Upon the following papers numbered 1 to 42 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 -11; 12 - 23 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 24 - 37 ; Replying Affidavits and supporting papers 38 - 40; 41 - 42 ; Other ___; it is,

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

ORDERED that the motion by defendant Suffolk County to dismiss the complaint asserted against it is granted; and it is further

ORDERED that the motion by defendant Town of Brookhaven to dismiss the complaint asserted against it is granted.

Plaintiff Richard Bombard commenced this action to recover damages for personal injuries he allegedly sustained when he fell from his bicycle on South Bicycle Path in Farmingville, New York on June 29, 2013. Plaintiff alleges that both the Suffolk County and the Town of Brookhaven were negligent in the ownership, operation, management, maintenance and control of a sidewalk over which a chain link fence protruded. Issue has been joined, discovery is complete and a note of issue has been filed.

Defendant Suffolk County now moves for summary judgment in its favor for an Order dismissing the complaint asserted against it, maintaining that it had no prior written notice of the alleged defective condition of the fence as required under Section C8-2A of the Suffolk County Charter. In support of the motion, Suffolk County submits, among other things, copies of the pleadings, portions of plaintiff's deposition transcript, and an affidavit of Jason A. Richberg.

Defendant Town of Brookhaven also moves for summary judgment in its favor for an Order dismissing the complaint asserted against it, maintaining that it does not own, operate, maintain, manage, control, supervise, inspect or repair the fence, property, or sidewalk where the accident allegedly occurred. In support of the motion, the Town of Brookhaven submits copies of the pleadings; the deposition transcript of plaintiff's 50-h hearing, and plaintiff's deposition transcript; the deposition transcripts of Paul Morano and Marie Agnelone; and an affidavit of Linda Sullivan.

In opposition to both motions, plaintiff submits his own affidavit; various complaint forms and police accident reports; photographs; and the deposition transcripts of Paul Morano and Marie Agnelone.

Plaintiff avers that on June 29, 2013, he decided to ride his bicycle to an outdoor music event at the amphitheater located on South Bicycle Path in the Town of Brookhaven. After the show, at approximately 6:00 p.m., he rode home on the sidewalk of South Bicycle Path and "a jagged portion of fence grabbed and gouged [his] leg, lower calf, causing [him] to fall onto the concrete sidewalk." Jason A. Richberg, the Clerk of the Suffolk County Legislature, avers that no written notice or written complaints concerning the alleged defective condition on the sidewalk or fence of South Bicycle Path were filed prior to the date of plaintiff's accident. Paul Morano testified that the County of Suffolk owned installed and maintained the fence and property in question. Marie Agnelone testified that the Town of Brookhaven did not own, control, operate or maintain the site of the accident. Linda Sullivan avers that the Town of Brookhaven had no prior notice of the alleged defect.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774

NYS2d 785 [2d Dept 2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, 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 Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

It is well-settled that where a municipal defendant has enacted a prior written notice statute it may not be subjected to liability for injuries caused by a dangerous or defective condition of a roadway or sidewalk unless it has received prior written notice of the condition complained of by the plaintiff or an exception to the prior written notice requirement applies (*see* ***Amabile v City of Buffalo***, 93 NY2d 471, 693 NYS2d 77 [1999]; ***Griesbeck v County of Suffolk***, 44 AD3d 618, 843 NYS2d 162 [2d Dept 2007]; ***Wilkie v Town of Huntington***, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006]). Prior written notice statutes require receipt of written notice of the particular condition about which the plaintiff complains (*see* ***Hampton v Town of North Hempstead***, 298 AD2d 556, 748 NYS2d 675 [2d Dept 2003]). The Court of Appeals has recognized only two exceptions to the statutory rule requiring prior written notice (***Amabile v City of Buffalo***, *supra*; ***Carlo v Town of Babylon***, 55 AD3d 769, 869 NYS2d 549 [2008]). The first exception applies in cases where the municipality caused or created the subject defect or hazard through an affirmative act of negligence (*see* ***Amabile v City of Buffalo***, *supra*). The second exception applies in cases where a special use confers a special benefit upon the municipality (*see* ***Amabile v City of Buffalo***, *supra*; ***Berner v Town of Huntington***, 304 AD2d 513, 757 NYS2d 585 [2d Dept 2003]).

Section C8-2A (2) (i) of the Suffolk County Charter provides that no civil action shall be maintained against Suffolk County for personal injuries due to, among other things, walkways, pathways, and fences under the County's jurisdiction allegedly being in a defective condition or unsafe or dangerous unless the County has received written notice within a reasonable time prior to said injury. Section C8-2A (2) (i) of the Suffolk County Charter also provides that the required notice must be in writing by certified or registered mail to the Clerk of the Suffolk County Legislature, who is to forward a copy to the County Attorney.

Here, defendant Suffolk County submits evidence demonstrating that there was no prior written notice or complaint regarding the subject sidewalk and fence prior to plaintiff's accident. Suffolk County has established its *prima facie* entitlement to summary judgment regarding liability in this action. The clerk of the legislature had not received prior written notice of the alleged defective condition, and neither of the two exceptions to the requirement of written notice apply. The *prima facie* showing which a defendant is required to make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings (***Miller v Village of E. Hampton***, 98 AD3d 1007, 951 NYS2d 171 [2d Dept 2012]; ***Braver v Village of Cedarhurst***, 94 AD3d 933, 942 NYS2d 178 [2d Dept 2012]). The plaintiff failed to allege any affirmative negligence in his complaint or bill of particulars, and he alleged only, in conclusory terms, that the defendants were "negligent in causing, creating, and permitting there to exist a dangerous and hazardous condition on the bicycle path in the form of a piece of metal protruding from and attached to a fence." The Court finds such generalized and unsubstantiated statements–amid a spate of boilerplate averments–insufficient to impose on Suffolk

County, as part of its *prima facie* showing, the burden of negating the applicability of the affirmative negligence exception to the prior written notice requirement (*see* ***Baker v Buckpitt***, 99 AD3d 1097, 952 NYS2d 666 [3d Dept 2012]; *see also* ***Foster v Herbert Slepoy Corp.***, 76 AD3d 210, 905 NYS2d 226 [2d Dept 2010]; *cf.* ***Braver v Village of Cedarhurst***, *supra*). In addition, the plaintiff does not make any allegations regarding the special use exception in the pleadings or his notice of claim.

In opposition to the motion by Suffolk County, plaintiff contends that a prior written notice was received on January 5, 2011, by the Town of Brookhaven that a "chain link fence was down." First, that notice indicates that the fence was repaired on September 6, 2012. More importantly, notice to the Town of Brookhaven is not notice to the County of Suffolk, and it is well-settled that the internal documents generated by a municipality are insufficient to satisfy the statutory requirement of written notice (*see* ***Wilkie v Town of Huntington***, *supra*; ***Dalton v City of Saratoga Springs***, 12 AD3d 899, 784 NYS2d 702 [3d Dept 2004]; ***Cenname v Town of Smithtown***, 303 AD2d 351, 755 NYS2d 651 [2d Dept 2003]). Plaintiff does not raise any triable issue of fact regarding the affirmative negligence of Suffolk County in creating the metal protrusion which he alleges was the cause of his accident. In addition, to excuse the requirement of written notice on the basis that the defendant created the condition, it must be shown that the defect is the product of the public corporation's active negligence, rather than its passive negligence or nonfeasance (***Monteleone v Incorporated Vil. of Floral Park***, 74 NY2d 917, 550 NYS2d 257 [1989]; ***Davidson v Town of Chili***, 35 AD3d 1246, 827 NYS2d 795 [4th Dept 2006]; ***Kotler v City of Long Beach***, 44 AD2d 679, 353 NYS2d 800 [2d Dept 1974] *affd* 36 NY2d 774, 368 NYS2d 842 [1975]). Here, it is determined that the County of Suffolk was neither actively nor passively negligent. Accordingly, the County of Suffolk's motion for summary judgment dismissing the complaint against it is granted.

The Town of Brookhaven has established, through the testimony of Paul Morano, as well as the County of Suffolk's response to notice to admit, that the Town of Brookhaven did not own or maintain the accident location. Morano specifically testified that defendant Suffolk County, not the Town of Brookhaven, installed and maintained the fence including the sidewalk, lot, fence, and property in issue. The Town of Brookhaven has also established it did not receive prior written notice of the alleged defective condition. Town of Brookhaven Code § 84-1 provides that "[n]o civil action shall be commenced against the Town of Brookhaven . . . for damages or injuries to persons or property sustained by reason of the defective, out-of-repair, unsafe, dangerous, or obstructed condition of any highway, street, bridge, culvert or crosswalk of the Town of Brookhaven, unless, previous to the occurrence resulting in such damage or injuries, written notice of such defective, out-of-repair, unsafe, dangerous, or obstructed condition, specifying the particular place and location was actually given to the Town Clerk or Town Superintendent of Highways."

Where, as here, a municipality has enacted a prior written notice statute pursuant to Town Law, Article 65, it may not be subjected to liability for personal injuries caused by an improperly maintained property unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies (***Wilkie v Town of Huntington***, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006], citing ***Amabile v City of Buffalo,*** 93 NY2d 471, 693 NYS2d 77 [1999]; *see also* ***Lopez v G&J Rudolph***, 20 AD3d 511, 799 NYS2d 254 [2d Dept 2005]; ***Gazenmuller v Incorporated Vil. of Port***

Jefferson, 18 AD3d 703, 795 NYS2d 744 [2d Dept 2005]). Actual or constructive notice of a defect does not satisfy this requirement (***Wilkie v Town of Huntington***, *supra*).

The Town of Brookhaven has also submitted the deposition testimony of Marie Agnelone, who is employed as a neighborhood aide in the Town's Highway Department. At her deposition, Agnelone testified that her duties include searching the Highway Department's records for claims submitted, and determining whether the Town is responsible for the maintenance of a given accident location. She explains that she contacts the engineering section of the Department and the Town Clerk's office to determine if there has been prior notice of a defect, then searches the computer for work orders and complaints. All written complaints, phone complaints, and notices of claim are entered into the computer database. Agnelone testified that her search did not reveal any written complaints or written notifications made to the Town of Brookhaven in regards to the subject location. She also testified that the Town of Brookhaven does not own, maintain, and exercise jurisdiction over said location, but does maintain the South Bicycle Path roadway.

In addition, the Town of Brookhaven has submitted an affidavit from Linda Sullivan, who is employed as a senior clerk typist by the Town in the Town Clerk's Office. She swears her duties include the "logging of litigation pleadings," and conducting searches of the Town Clerk log book to determine whether the Town had prior written notice "of defects at incident locations." Sullivan further swears that she has made a diligent search of the index book and records maintained by the Town Clerk of the Town of Brookhaven for five years prior regarding the location of this incident, and that said search did not reveal any prior written complaints.

The Town has established its *prima facie* entitlement to summary judgment regarding liability in this action. No only does the Town not own or maintain the area of the accident location, a municipality may rely upon an affidavit or other sworn testimony of an official charged with the responsibility of keeping an indexed record of all received notices of defective conditions to establish the absence of its receipt of prior written notice (*see* ***Spanos v Town of Clarkstown***, 81 AD3d 711, 916 NYS2d 181 [2d Dept 2011]; ***Scafidi v Town of Islip***, 34 AD3d 669, 824 NYS2d 410 [2d Dept 2006]; ***Campisi v Bronx Water & Sewer Service***, 1 AD3d 166, 766 NYS2d 560 [2d Dept 2003]).

In opposition to the Town of Brookhaven's motion, plaintiff alleges that the Town failed to forward a telephone complaint in 2011 to Suffolk County. Plaintiff has not established that any duty to do so exists. Even if such a duty existed, a written work order after a telephone complaint does not serve as written notice pursuant to Town of Brookhaven Code § 84-1. It is well-settled that a verbal or telephonic communication to a municipal body that is reduced to writing does not satisfy a prior written notice requirement (*see* ***Gorman v Town of Huntington***, 12 NY3d 275, 879 NYS2d 379 [2009]; ***Spanos v Town of Clarkstown***, *supra*; ***McCarthy v City of White Plains***, 54 AD3d 828, 863 NYS2d 500 [2d Dept 2008]; ***Khemraj v City of New York***, 37 AD3d 419, 829 NYS2d 621 [2d Dept 2007]). That is, internal documents generated by the Town are insufficient to satisfy the statutory requirement (*see* ***Wilkie v Town of Huntington***, *supra*; ***Dalton v City of Saratoga Springs***, 12 AD3d 899, 784 NYS2d 702 [3d Dept 2004]; ***Cenname v Town of Smithtown***, 303 AD2d 351, 755 NYS2d 651 [2d Dept 2003]; ***Roth v Town of North Hempstead***, 273 AD2d 215, 709 NYS2d 839 [2d Dept 2000]).

Finally, the evidence in the record does not demonstrate the existence of triable issues of fact as to whether the Town of Brookhaven or Suffolk County created the alleged defective condition through an affirmative act of negligence (***Yarborough v City of New York***, *supra*; ***Oboler v City of New York***, *supra*; ***Hirasawa v City of Long Beach***, 57 AD3d 846, 870 NYS2d 96 [2d Dept 2008]). Nor has the plaintiff alleged that the "special use" exception to the prior written notice requirement is an issue herein. Thus, the plaintiff has failed to establish that prior written notice was delivered to the Town of Brookhaven or to meet his burden to demonstrate the applicability of either of the two exceptions to the written notice requirement. Accordingly, the Town's motion for summary judgment dismissing the complaint is also granted.

In light of the Court's determination herein, the counterclaims are deemed academic and are dismissed.

Dated: January 18, 2018

Hon. Joseph Farneti
Acting Justice Supreme Court

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION