Galvez-Romero v Huntington Union Free Sch. Dist.
2018 NY Slip Op 31832(U)
July 31, 2018
Supreme Court, Suffolk County
Docket Number: 13-5386
Judge: David T. Reilly
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SHORT FORM ORDER

INDEX No. 13-5386
CAL. No. 17-1270OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 11-20-17
ADJ. DATE 1-17-18
Mot. Seq. # 001 - MD
002 - MG

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BETIS MARLENE GALVEZ-ROMERO,

Plaintiff,

- against -

HUNTINGTON UNION FREE SCHOOL DISTRICT and TOWN OF HUNTINGTON,

Defendants.

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Upon the following papers numbered 1 to 49 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers by defendant Huntington Union Free School District 1-20 ; Notice of Motion/ Order to Show Cause and supporting papers by defendant Town of Huntington 25-49 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by plaintiff 21-23 ; Replying Affidavits and supporting papers by defendant Huntington Union Free School District 24 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Huntington Union Free School District, and the motion by defendant Town of Huntington, are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Huntington Union Free School District (Mot Seq. 001) for summary judgment in its favor is denied; and it is further

ORDERED that the motion by defendant Town of Huntington (Mot. Seq. 002) for summary judgment in its favor is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Betis Marlene Galvez-Romero, on December 13, 2011, when she tripped and fell at the Southdown Primary School located at 125 Browns Road in Huntington, New York. The premises is owned by defendant Huntington Union Free School District (UFSD). By her bill of particulars, plaintiff alleges that a nail was protruding from the roadway, creating a dangerous condition on the premises, and that defendants were negligent, among other things, in failing to maintain and repair the roadway.

UFSD now moves for summary judgment in its favor on the basis that plaintiff could not identify what caused her to fall, that it had no notice of the alleged dangerous condition, and that any such condition was trivial. In support of the motion, UFSD submits, *inter alia*, copies of the pleadings, photographs of the premises, the transcripts of plaintiff's testimony at the General Municipal Law § 50-h hearing and at her deposition, and the transcripts of the deposition testimony of Yesenia Cortes, George Austin, and Faustino Bonilla. In opposition, plaintiff argues that UFSD has not met its burden of proof, and that there are issues of fact concerning whether the subject walkway was maintained in a reasonably safe condition, and whether defendant had notice of the alleged dangerous condition. In opposition, plaintiff submits, among other things, an expert report prepared by Harold Krogelb, P.E.

The Town of Huntington also moves for summary judgment in its favor dismissing the complaint against it. The Town moves on the basis that it lacked prior written notice of the alleged dangerous condition on the premises as mandated by Town Law §65-a and Huntington Town Code §174-3 before plaintiff was injured. In support, the Town provides, among other things, copies of the pleadings, an affidavit from Richard Scheffler, highway construction coordinator, and an affidavit from Diana Esposito, principal clerk in the Town Clerk's office.

It is well settled that the proponent of a summary judgment motion bears the initial burden of establishing his or her entitlement to judgment, as a matter of law, in his or her favor by offering admissible evidence sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of any opposition thereto (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once the movant has made the requisite showing, the burden then shifts to the opposing party, requiring him or her to present admissible evidence and facts sufficient to require a trial on any issue of fact (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*). On such a motion, the Court is charged with determining whether issues of fact exist while viewing any evidence in a light most favorable to the nonmoving party; the Court is not responsible for resolving issues of fact or determining matters of credibility (*see* ***Chimbo v Bolivar***, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; ***Pearson v Dix McBride, LLC***, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the

evidence, or where there are issues of credibility (*see* ***Chimbo v Bolivar***, *supra*; ***Benetatos v Comerford***, 78 AD3d 730, 911 NYS2d 155 [2d Dept 2010]).

"Although a jury determines whether and to what extent a particular duty was breached, it is for the court to first determine whether any duty exists, taking into consideration the reasonable expectations of the parties and society generally" (***Cupo v Karfunkel***, 1 AD3d 48, 51, 767 NYS2d 40 [2d Dept 2003], quoting ***Tagle v Jakob***, 97 NY2d 165, 168, 737 NYS2d 331 [2001]). A landowner must maintain his or her property in a reasonably safe condition considering all of the circumstances, such as the likelihood and seriousness of injury to others and the inconvenience of avoiding the risk (***Cupo v Karfunkel***, *supra*; *see* ***Basso v Miller***, 40 NY2d 233, 241, 386 NYS2d 564 [1976]). Whether a dangerous condition exists on real property generally is an issue to be determined by the jury based on the unique facts of each case (***DeLaRosa v City of New York***, 61 AD3d 813, 877 NYS2d 439 [2d Dept 2009]; *see* ***Trincere v County of Suffolk***, 90 NY2d 976, 977, 655 NYS2d 615 [1997]).

"[A]n owner of premises cannot be held liable for injuries caused by an allegedly defective condition unless the plaintiff establishes that the owner either created or had actual or constructive notice of the condition" (***Bolloli v Waldbaum, Inc.***, 71 AD3d 618, 619, 896 NYS2d 400 [2d Dept 2010], quoting ***Curiale v Sharrotts Woods, Inc.***, 9 AD3d 473, 474-475, 781 NYS2d 47 [2d Dept 2004]). Constructive notice requires "[the] condition must be visible and apparent, and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it" (***Bolloli v Waldbaum, Inc.***, *supra* at 619, quoting ***Deveau v CF Galleria at White Plains, LP***, 18 AD3d 695, 695, 769 NYS2d 119 [2d Dept 2005]; *see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]). "A photograph may be used to prove constructive notice of an alleged defect shown in the photograph if it was taken reasonably close to the time of the accident and there is testimony that the condition at the time of the accident was substantially as shown in the photographs" (***Bolloli v Waldbaum, Inc.***, *supra* at 619, quoting ***Lustenring v 98-100 Realty***, 1 AD3d 547, 577, 768 NYS2d 20 [2d Dept 2003]). A defendant seeking summary judgment in a trip-and-fall case bears the burden of establishing, prima facie, that he or she neither created nor had actual or constructive notice of the alleged defective condition (*see* ***Mandarano v PND, LLC***, 2018 NY Slip Op 00133 [2d Dept 2018]; ***Jackson v Jamaica First Parking, LLC***, 91 AD3d 602, 936 NYS2d 278 [2d Dept 2012]).

In addition, "injuries resulting from trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip, are not actionable" (***Grundstrom v Papadopoulos***, 117 AD3d 788, 788, 986 NYS2d 167 [2d Dept 2014]; *see* ***Trincere v County of Suffolk***, *supra*; ***Rogers v 575 Broadway Assoc., LP***, 92 AD3d 857, 939 NYS2d 517 [2d Dept 2012]; ***DeLaRosa v City of New York***, *supra*). "[T]here is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (***Grundstrom v Papadopoulos***, *supra* at 788; *see* ***Trincere v County of Suffolk***, *supra*). A defendant must provide evidence to show the defect is trivial, and the court will examine all of the facts, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstances of the injury (***Grundstrom v Papadopoulos***, *supra*; *see* ***Trincere v County of Suffolk***, *supra*; ***Nagin v K.E.M. Enters., Inc.***, 111 AD3d 901, 975 NYS2d 753 [2d Dept 2013]).

Here, the Court finds that UFSD failed to established its prima facie entitlement to summary judgment. The evidence submitted, including the deposition testimony and photographs, was insufficient to demonstrate, as a matter of law, that plaintiff could not identify the cause of her fall, that UFSD had no constructive notice of the alleged dangerous condition, or that any such condition was trivial. Plaintiff clearly testified at both a hearing pursuant to General Municipal Law § 50-h and at her deposition that a "piece of metal" caused her to trip and fall. George Austin, operations manager for UFSD, confirmed such a piece of metal was "sticking out of the asphalt" in the location where plaintiff fell. UFSD failed to establish, prima facie, that it did not have constructive notice of the allegedly dangerous condition, since Austin failed to unequivocally establish when the subject area was inspected in relation to the time of plaintiff's accident. Reference to his general plowing practices does not establish when, prior to the accident, Austin last inspected the subject location (*see* ***Schwartz v Gold Coast Restaurant Corp.***, 139 AD3d 696, 31 NYS3d 535 [2d Dept 2016]; ***Schiano v Mijul, Inc.***, 79 AD3d 726, 912 NYS2d 134 [2d Dept 2010]). Therefore, a material issue of fact remains regarding UFSD's constructive notice of the alleged dangerous condition (*see* ***Lombardo v Kimco Cent. Islip Venture, LLC***, 153 AD3d 1340, 60 NYS3d 497 [2d Dept 2017]; ***Schwartz v Gold Coast Restaurant Corp.***, *supra*; ***Schiano v Mijul, Inc.***, *supra*). The photographs submitted by UFSD depict a piece of metal rising above the asphalt in the roadway, and there is no evidence that the condition did not exist for a sufficient period of time to allow it to be discovered and remedied (*see* ***Bolloli v Waldbaum, Inc.***, *supra*). UFSD failed to eliminate triable issues of fact regarding the dimensions of the condition, and that the condition was physically insignificant and trivial (*see* ***Craig v Meadowbrook Pointe Homeowner's Assn., Inc.***, 158 AD3d 601, 70 NYS3d 557 [2d Dept 2018]; ***Torres v City of New York***, 109 AD3d 862, 972 NYS2d 582 [2d Dept 2013]; ***Rogers v 575 Broadway Associates, LP***, *supra*). Accordingly, the motion for summary judgment by Huntington Union Free School District is denied.

With respect to the motion by the Town of Huntington, "[A] municipality that has adopted a 'prior written notice law' cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies" (***Forbes v City of New York***, 85 AD3d 1106, 1107, 926 NYS2d 309 [2d Dept 2011]). Prior written notice laws must be strictly construed (***Lagrasta v Town of Oyster Bay***, 88 AD3d 658, 930 NYS2d 254 [2d Dept 2011]). "A verbal or telephonic communication to a municipal body, even if reduced to writing, cannot satisfy the prior written notice requirement" (***Tortorici v City of New York***, 131 AD3d 959, 960, 16 NYS3d 572 [2d Dept 2015]; *see* ***Gorman v Town of Huntington***, 12 NY3d 275, 280, 879 NYS2d 379 [2009]). Writings prepared by Town employees as a result of verbal complaints do not satisfy the prior written notice requirement (*see* ***Wolin v Town of North Hempstead***, 129 AD3d 833, 11 NYS3d 627 [2d Dept 2015]). Prior written repair orders also do not satisfy the statutory requirement (*see* ***Lopez v Gonzalez***, 44 AD3d 1012, 845 NYS2d 91 [2d Dept 2007]; ***Dalton v City of Saratoga Springs***, 12 AD3d 899, 784 NYS2d 702 [3d Dept 2004]). Actual or constructive notice of the defective condition are both insufficient to satisfy the prior written notice requirement (***Groninger v Village of Mamaroneck***, 67 AD3d 733, 888 NYS2d 205 [2d Dept 2009]).

However, "[r]ecognized exceptions to the 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" (***Morreale v Town of Smithtown***, 153 AD3d 917, 918, 61 NYS3d 269 [2d Dept 2017], quoting ***Miller v Village of E. Hampton***, 98 AD3d 1007, 1008, 951 NYS2d 171 [2d Dept 2012]). Any affirmative negligence must immediately result in the existence of the dangerous condition

(***Yarborough v City of New York***, 10 NY3d 726, 853 NYS2d 261 [2008]; ***Trela v City of Long Beach***, 157 AD3d 747, 69 NYS3d 58 [2d Dept 2018]).

The Town has demonstrated that it had no prior written notice of the alleged defective roadway condition (*see* ***Betz v Town of Huntington***, 106 AD3d 1041, 966 NYS2d 471 [2d Dept 2013]). Pursuant to Section 174-3 of the Huntington Town Code and Section 65-a of the Town Law, the Town will not be liable for a defective or dangerous condition on a roadway unless written notice of the defective condition is actually given to the Town Clerk or Superintendent of Highways. The affidavit of Diana Esposito establishes that a search of the Town Clerk's records revealed that no written complaints were received by the Clerk's office concerning any dangerous condition on the subject roadway for a period of time dating back at least 5 year prior to the date of plaintiff's accident (*see* ***Fisher v Town of North Hampstead***, 134 AD3d 670, 20 NYS3d 167 [2d Dept 2015]). The affidavit of Richard Scheffler establishes that a search of the Highway Superintendent's office revealed that no written complaints were received by that office concerning any dangerous conditions on the subject roadway for a period of time dating back at least 5 years prior to the date of plaintiff's accident (*see* ***Fisher v Town of North Hempstead***, *supra*). Scheffler's affidavit also establishes that the Town did not create the alleged dangerous condition, as it did not perform any work at the subject location during that time period (*see* ***Abreu-Lopez v Inc. Vil. of Freeport***, 142 AD3d 515, 36 NYS3d 492 [2d Dept 2016]). Plaintiff has not provided any evidence raising a triable issue of fact as to whether the Town had prior written notice or created or exacerbated the alleged dangerous condition prior to her accident (*see* ***Mollahan v Village of Port Washington North***, 153 AD2d 881, 545 NYS2d 601 [2d Dept 1989]). Accordingly, the motion by the Town of Huntington for summary judgment dismissing the complaint against it is granted.

This shall constitute the decision and Order of the Court.

Dated: July 31, 2018

J.S.C.
HON. DAVID T. REILLY

____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION