Werthman v Town of N. Hempstead
2018 NY Slip Op 32207(U)
January 12, 2018
Supreme Court, Nassau County
Docket Number: 601944/15
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

TRIAL/IAS PART 12

JOAN C. WERTHMAN,

Plaintiff(s),

-against-

TOWN OF NORTH HEMPSTEAD, VILLAGE OF SADDLE ROCK and COUNTY OF NASSAU,

Defendant(s).

INDEX # 601944/15
Mot. Seq. 3, 4, 5
Mot. Date 10.13 / 10.5 / & 10.16.17
Submit Date 12.4.17

The following papers were read on this motion:	E File Docs Numbered
Notices of Motion, Affidavits (Affirmations), Exhibits Annexed	54, 60, 76
Answering Affidavit	94, 96, 98
Reply Affidavit	105

Motions by the Town of North Hempstead (Town), the Village of Saddle Rock (Village), and the County of Nassau (County) pursuant to CPLR 3212 for an order dismissing the complaint as against each of them.

In this action, plaintiff alleges that she sustained personal injuries when she tripped and fell due to a defective condition existing on a sidewalk on Bayview Avenue at its intersection with Bluebird Drive in Great Neck, New York. By her bill of particulars, plaintiff alleged that she was caused to slip, trip and fall as a result of the obstructed, cracked, uneven, raised, depressed, missing and/or deteriorated pedestrian sidewalk area resulting in severe personal and permanent injuries. In addition, plaintiff alleges that the defendants were negligent in the ownership of the subject property in that they failed to repair or replace the cracked, missing, deteriorated, broken and uneven concrete, failed to take any necessary and appropriate steps to remedy or eradicate the dangerous and defective conditions complained of and failed to provide warnings thereof.

Each defendant contends that they have no jurisdiction over the subject sidewalk and, in any event, did not receive the requisite written notice of defect.

On August 25, 2015, this court denied the County's motion to dismiss pursuant to CPLR 3211 (a)(7) on the ground that the affidavit submitted in support of the County's motion did not provide sufficient information concerning the search of the County's records and what records were actually searched.

In support of the instant motion, the Town of North Hempstead relies on the deposition testimony of Nunzio Vetrano, a Highway Maintenance Supervisor I with the Department of Public Works, who testified that he oversees a sidewalk crew that does sidewalk inspections and repairs on a daily basis. He further stated that the location of the accident was not within the jurisdiction of the Town because it is within an incorporated village, i.e. the Village of Saddle Rock.

In addition, the Town relies on the affidavit of Joseph Geraci, Acting Superintendent of Highways for the Town. As Acting Superintendent of Highways of the Town, his responsibilities include the maintenance and repair of the roadways within the Town's jurisdiction. He is also authorized to accept service of written notice properly served upon his office regarding defects described in Section 26-1 of the Code of the Town. His affidavit is based on the official maps, books, papers and other public records in the file maintained by his office. Mr. Geraci states that a thorough search of the records of his office, for the time period January 2009 up to and including January 12, 2014, the date of the accident, discloses that (a) the accident location is not within the unincorporated area of the Town of North Hempstead; (b) the Town Highway Department did no construction, repair or alteration to the sidewalk located on Bayview Avenue at its intersection with Bluebird Drive; (c) the Town Highway Department did not issue any permits, contracts or easements for any construction, repair or alteration to the sidewalk located on Bayview Avenue at its intersection with Bluebird Drive, Great Neck, New York.

The Town also relies on the affidavit of Wayne H. Wink, the Town Clerk of the Town of North Hempstead. His affidavit is based on the official maps, books, papers and other public records in the file maintained by his office. As Town Clerk, Mr. Wink states that he is authorized to accept service of written notices properly served upon his office regarding defects described in Section 26-1 of the Code of the Town. Like Mr. Geraci, Mr. Wink avers that a thorough search of the records in his office, for the time period January 2009 up to and including January 12, 2014, the date of the accident, disclosed that (a) the accident location is not within the unincorporated area of the Town of North Hempstead, (b) his office did not receive any written complaints about the sidewalk located on Bayview Avenue at its intersection with Bluebird Drive, and (c) his office did not receive any notices of claim about the sidewalk located on Bayview Avenue at its intersection with Bluebird Drive, Great Neck, New York.

Finally, the Town relies on the affidavit of Jillian Guiney, a Civil Engineer III for the Department of Public Works and former Deputy Commissioner thereof. Her affidavit is based upon the official maps, books, papers and other public records in the file maintained by her office. Ms. Guiney explains that the Town of North Hempstead has a Sidewalk District, which is a division of Public Works. One of her duties as Deputy Commissioner was to supervise the operations of the Sidewalk District. The Sidewalk District maintains a file for sidewalk complaints/notices of defects. Ms. Guiney states that upon a thorough search of the records in her office for the time period of January 2009 up to and including January 2014, the date of the accident: (a) the accident location is not within the unincorporated area of the Town of North Hempstead, (b) her office did not receive any written complaints about the sidewalk in question, (c) the Department of Public Works of the Town did not perform maintenance on the sidewalk, and (d) the Department of Public Works of the Town did not issue any permits, contracts, or easements for any construction, repair or alteration to the subject sidewalk.

In support of its motion, the Village of Saddle Rock relies on, among other things, the affidavit of Hinda Goldman the Village Clerk/Treasurer of the Village of Saddle Rock. She states that as the Village Clerk/Treasurer, her duties and job description include, among other things, preparing and maintaining official village records, accounts, and claims, and receiving and distributing correspondence from citizens and other governmental agencies. She further states that she is familiar with the geography of the Village based upon her job as the Village Clerk. Ms. Goldman states that the Village does not and did not in 2014 own, operate, manage, maintain, control, renovate, or repair any portion of the sidewalk abutting Bayview Avenue. She states that shortly after receiving the plaintiff's notice of claim, she had a conversation with an employee of co-defendant Nassau County who indicated that the County was responsible for the removal of a tree with overgrown roots on the subject sidewalk, which caused a portion of the sidewalk to become raised. He advised that the tree would be removed, and approximately two weeks later, it was. Ms. Goldman states that the Village did not arrange for or incur any expense associated with the tree removal.

The Village also relies on the testimony of Dan Levy, the Mayor of Saddle Rock and Michael Davis, a deponent on behalf of the County of Nassau. Mayor Levy testified that the Village of Saddle Rock is an incorporated village. It does not own or control the subject sidewalk, rather, that sidewalk is outside of the Village. He testified that the Town of North Hempstead and the County of Nassau were responsible for maintaining the subject sidewalk and would, pursuant to phone calls, repair and perform snow removal on the sidewalk. In addition, the Town and the County trimmed the weeds and the area and cleaned up leaves, branches and other debris to ensure that the sidewalk was properly maintained. In fact, according to Mayor Levy, the Village does not technically have any sidewalks, is not responsible for maintaining the subject sidewalk, and never performed an inspection of the area prior to plaintiff's accident.

Further, Mayor Levy testified that to his knowledge, the Village of Saddle Rock did not receive prior written notice of the alleged defect and that had such a notice been received, there "probably" would have been a folder for it. He found no folder. He further testified that he asked the former clerk, Hinda Goldman, if there were any complaints and her answer was no.

The County relies on, among other things, the deposition testimony of Anthony Esposito and Michael Davis, as well as the affidavits of William Nimmo, Anthony Esposito, and Veronica Cox, all of whom are County employees.

By his testimony, Mr. Esposito stated that he is a Landscape Architect II with the Nassau County Department of Public Works. He testified that the County is not responsible for maintaining the sidewalk at issue in this action and his files contained no notice of any type of defect in the sidewalk. By his affidavit, Mr. Esposito states that he personally searched records of the Nassau County Department of Public Works, which records include contracts, sidewalk complaints and repair records. He attests that the subject location is not under the jurisdiction, responsibility or control of the County. Although Bayview Avenue is a roadway under the County's jurisdiction, the "sidewalk adjacent to the roadway is not under the jurisdiction of the County, but is instead under the jurisdiction of the Village of Saddle Rock." In addition, Mr. Esposito avers that a search of the records maintained by his office revealed no records of repair to the sidewalk.

At deposition, Mr. Davis testified that he works in the road maintenance division of the Nassau County Department of Public Works. Contrary to the statement of Ms. Goldman, Mr. Davis testified that the area in question is not within the County's jurisdiction and trees growing in the area were not the County's responsibility.

By his affidavit, Mr. Nimmo states that he is the Deputy Commissioner of the Department of Public Works. He was asked to conduct a search of the records relating to the location at issue in this matter. He attests that the County turned over all AIM work records relating to this matter and no additional records were located.

By her affidavit, Ms. Cox states that she is assigned to the Bureau of Claims and Investigations in the Office of the Nassau County Attorney. As such, she maintains files containing the notices of claim and notices of defect. She searched the notice of claim files and notice of defect files for a period of five years prior to and including January 12, 2014. As a result of her search, she states that there are no records of any prior written notice of claim or prior written complaints.

> "It is well settled that a the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*Sillman v Twentieth Century Fox,* 3 NY2d 395 [1957]; *Alvarez v Prospect*

> *Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Bhatti v Roche*, 140 AD2d 660 [2d Dept 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 [1979]). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation (CPLR § 3212 [b]; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]).
>
> "If a sufficient prima facie showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980], *supra*). It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d 513 [2d Dept 1998]). Conclusory allegations are insufficient to defeat the application and the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Toth v Carver Street Associates*, 191 AD2d 631 [2d Dept 1993]). When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (*Sillman v Twentieth Century Fox*, 3 NY2d 395 [1957], *supra*)."

(*Recine v. Margolis*, 24 Misc. 3d 1244A; 901 N.Y.S.2d 902 [Sup. Ct. Nassau County 2009]).

"Where a local government has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by an improperly maintained street or sidewalk unless it has received prior written notice of the defect, or an exception to the written notice requirement applies (*see Amabile v. City of Buffalo*, 93 NY2d 471, 473–474 [1999]; *Abreu–Lopez v. Incorporated Vil. of Freeport*, 142 AD3d 515 [2016]; *Kelley v. Incorporated Vil. of Hempstead*, 138 AD3d 931, 933 [2016]; *Williams v. Town of Smithtown*, 135 AD3d 854 [2016])." (*Walker v. County of Nassau*, 147 AD3d 806 [2d Dept 2017]). Because suits against a municipality are allowed only by legislative act of the state, statutory preconditions to suit are strictly construed. (*Amabile*, 93 NY2d at 476).

There are two exceptions to the prior written notice rule: (1) "where the locality created the defect or hazard through an affirmative act of negligence" which "immediately results" in the existence of a dangerous condition; and (2) "where a 'special use' confers a special benefit upon the locality" (*see, Amabile* at p. 474; *see, San Marco v Village/Town of Mount Kisco*, 16 NY3d

111 [2010]; *Yarborough v City of New York*, 10 NY3d 726 [2008]; *Oboler v City of New York*, 8 NY3d 888, 890 [2007]; *Delgado v County of Suffolk*, 40 AD3d 575, 576; *see also, Pluchino v Village of Walden*, 63 AD3d 897; *Diaz v City of New York*, 56 AD3d 599 [2d Dept 2008]).

General Municipal Law 50-e[4] provides, in relevant part, that

> "No other or further notice, no other or further service, filing or delivery of the notice of claim, and no notice of intention to commence an action or special proceeding, shall be required as a condition to the commencement of an action or special proceeding for the enforcement of the claim; provided, however, that nothing herein contained shall be deemed to dispense with the requirement of notice of the defective, unsafe, dangerous or obstructed condition of any street, highway, bridge, culvert, sidewalk or crosswalk, or of the existence of snow or ice thereon, where such notice now is, or hereafter may be, required by law, as a condition precedent to liability for damages or injuries to person or property alleged to have been caused by such condition, and the failure or negligence to repair or remove the same after the receipt of such notice."

Each of the municipal defendants here has enacted a prior written notice statute as a prerequisite to liability.

The County argues that by operation of Nassau County Administrative Code § 12-4.0 [c], Nassau County has no jurisdiction over sidewalks in incorporated villages. Rather, under Nassau County Administrative Code § 12-4.0[c][2], such jurisdiction is maintained solely by the village, unless in accordance with the provisions of the village law, the abutting property owners are responsible. Both the County and the Town provided witness statements confirming that neither is responsible for the relevant section of sidewalk along Bayview Avenue. However, the Village's Mayor testified that it is the Town and/or the County that is responsible for the section of sidewalk on Bayview Avenue and that it is these entities who maintain the sidewalk and surrounding area. Based on the conflicting testimony of the parties, the court finds that issues of fact exist concerning which entity had jurisdiction and control over the subject sidewalk.

Next, the court must determine whether the defendants have *prima facie* established that they lacked the requisite written notice of defect. In this case, the Town and the County have each *prima facie* established their entitlement to judgment as a matter of law by submitting the affidavits of municipal employees, who indicated that they conducted reasonable searches of the relevant records and files and that no written notice of any dangerous or defective condition at

the accident site were located. (*Walker*, 147 AD3d at 807). However, the testimony advanced by the Village is insufficient to satisfy its threshold burden. Mayor Levy testified simply that his office did not have a file containing any notices regarding the defect, but he did not conduct the search of the Village clerk's files and did not indicate which files were searched or how. Nor did the former clerk so indicate in her affidavit. On this record, the court cannot conclude that the Village conducted a reasonable search of its files for notice of the defect.

Finally, to establish that a defendant municipality created the alleged defect, the plaintiff must show that the defect was the result of an affirmative act of negligence. (*See gen. Amabile*, 93 NY2d 471). "To fall within the exception, the repair must immediately result in a dangerous condition (*see Oboler v City of New York*, 8 NY3d 888, 889 [2007]; *Laracuente v City of New York*, 104 AD3d 822 [2013]), which made the defective condition more dangerous than it was before any efforts were made to repair it *(see Kushner v City of Albany*, 7 NY3d 726 [2006]; *Perrington v City of Mount Vernon*, 37 AD3d 571, 572 [2007]; *Padula v City of Long Beach*, 20 AD3d 555 [2005])." (*Wilson v. Inc. Vill. of Hempstead*, 120 AD3d 665, 666–67 [2d Dept 2014]). Here, plaintiff contends that there is a question of fact regarding whether these County created the alleged defective condition by planting a tree in the area. However, "failure to control the roots of trees, or placing a sidewalk atop tree roots which could heave and create an uneven sidewalk, are not affirmative acts of negligence. (*See Arkin v. Vill. of Owego*, 55 Misc. 3d 1219(A) [Sup. Ct. Tioga County, May 16, 2017]). Accordingly, even if the sidewalk defect was caused by overgrowth of tree roots, liability cannot attach absent a written notice of the defect. *Monaco v. Hodosky*, 127 AD3d 705, 706 [2d Dept 2015], cited by the plaintiff is distinguishable because in that case the evidence established that the municipality had done construction work in the area of the sidewalk one year before the accident and the condition had not changed but contained, according to the plaintiff, a six inch height differential between slabs. Accordingly, the plaintiff has not adduced evidence sufficient to overcome the prima facie showing of either the County or the Town that no prior written notice of defect was received.

For the foregoing reasons, it is hereby

ORDERED, that the motion for summary judgment by the Town of North Hempstead (Mot. Seq. 3) is **granted**; and it is further

ORDERED, that the motion for summary judgment by the Village of Saddle Rock (Mot. Seq. 4) is **denied**; and it is further

ORDERED, that the motion for summary judgment by the County of Nassau (Mot. Seq. 5) is **granted**.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
January 12 , 2018

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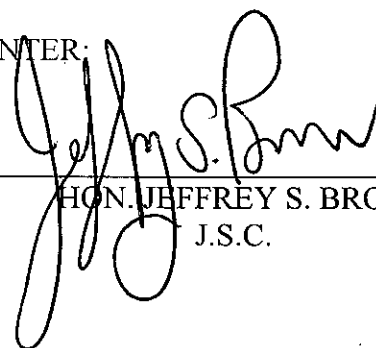

HON. JEFFREY S. BROWN
J.S.C.

ENTERED
JAN 16 2018
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COUNTY CLERK'S OFFICE

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