Becker v Town of Hempstead
2018 NY Slip Op 34140(U)
August 10, 2018
Supreme Court, Nassau County
Docket Number: Index No. 600751/18
Judge: Roy S. Mahon

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

KATHLEEN BECKER,	**TRIAL/IAS PART 3**
	INDEX NO. 600751/18
Plaintiff(s),	
	MOTION SEQUENCE NO. 2
- against -	
TOWN OF HEMPSTEAD, COUNTY OF NASSAU, NASSAU COUNTY DEPARTMENT OF PUBLIC WORKS	**MOTION SUBMISSION DATE: May 24, 2018**
Defendant(s).	

The following papers read on this motion:

Notice of Motion	**X**
Affirmation in Opposition	**X**
Reply Affirmation	**X**

Upon the foregoing papers, the motion by the defendants County of Nassau and Nassau County Department of Public Works (hereinafter referred to as Nassau County) for an Order pursuant to CPLR 3211(1) and (7), General Municipal Law §50-e and Nassau County Administrative Code 12-4.0(e) dismissing plaintiff's Verified Complaint and any and all cross-claims against defendant, County of Nassau, is determined as hereinafter provided:

This personal injury action arises out of a trip and fall accident by the plaintiff that occurred on May 9, 2017 at approximately 5:15 pm at the base of the curb in front of 2941 Eaton Road, Wantagh, NY.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc., 207 AD2d 880, 6I6 NYS2d 650, 65I (Second Dept., I994):**

> "It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 85I, 853, 487 N.Y.S.2d 3I6, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 7I8). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607,

467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York, supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

The Court initially observes that Nassau County contends that it never received any prior written notice of any defective condition at the location in issue. In support of this contention, the moving defendant submits an affidavit of Veronica Cox which sets forth:

"VERONICA COX, being duly sworn deposes and says:

1. Your deponent is assigned to the Bureau of Claims and Investigations in the Office of the Nassau County Attorney. As part of my job duties, I maintain the files containing notices of claim and notices of defect.

2. I was asked to conduct a search to determine whether the Office of the Nassau County Attorney received prior written notice of any dangerous of defective conditions in front of the premises known as 2941 Eaton Road E, Wantagh, New York, specifically the roadway located at in front of the premises.

3. In response to this request, I attest that I personally searched the Nassau County Notice of Claim Files and Notice of Defect Files, which are kept by date and location at the Office of the Nassau County Attorney located at One West Street, Mineola, New York 11501, for a period of six (6) years prior to and including May 9, 2017.

4. As a result of this search, I attest that there were no records of ay prior notices of claim or prior written complaints involving any dangerous or defective conditions at the Subject Location for a period of six (6) years prior to and including the date of loss. As such, the County of Nassau received no prior written notice of any defects or conditions at the Subject Location for six (6) years prior to and including the date of Plaintiff's alleged accident on May 9, 2017."

Nassau County additionally submits an affidavit from William Nimmo which provides:

"William Nimmo, being duly sworn deposes and says:

1. I am a Deputy Commissioner with the Nassau County Department of Public Works with an office located at 1194 Prospect Avenue, Westbury, New York.

2. In my capacity as Deputy Commissioner and by way of work experience and records maintained by the Nassau County Department of Public Works, I am familiar with appurtenances, roadways, and sidewalks under the jurisdiction of the County of Nassau.

3. I was asked to conduct an investigation by the Office of the County Attorney about Plaintiff's claim alleging an injury resulting from a trip and fall which occurred on May 9, 2017. The trip and fall occurred on a roadway located at 2941 Eaton Road E, Wantagh Town of Hempstead, in the County of Nassau, City and State of New York, hereinafter referred to as the "SUBJECT LOCATION".

4. In response to this request from the County Attorney's Office, I attest that I personally searched the records of the Nassau County Department of Public Works, which include contracts, permits, complaints, and repair records, which are kept at department offices located at 1194 Prospect Avenue, Westbury, New York.

5. A review of the records of the Department of Public Works shows that the COUNTY did not perform or contract for any work related to the subject location, nor did it make any repairs in the vicinity of where Plaintiff's accident occurred in the five (5) years prior to the Plaintiff's alleged accident of May 9, 2017."

In examining the issue of prior written notice, the Court in **Amabile v City of Buffalo**, 93 NY2d 471, 693 NYS2d 77 set forth:

"Prior notification laws are a valid exercise of legislative authority (*Fullerton v City of Schenectady, 285 App Div 545, affd 309 NY 701, appeal dismissed 350 US 980; Holt v County of Tioga, 56 NY2d 414*). Such laws reflect a legislative judgment to modify the duty of care owed by a locality in order to address "the vexing problem of municipal street and sidewalk liability" (*Barry v Niagara Frontier Tr. Sys., 35 NY2d 629, 633*). General Municipal Law §50-e(4), the authorizing statutory provision, "specifically allows for the enactment of prior notification statutes and requires compliance with laws [and] it must be read to apply alike to all laws enacted by any legislative body in this State" (*Holt v County of Tioga, 56 NY2d supra, at 419*). Thus, in derogation of the common law, a locality may avoid liability for injuries sustained as a result of defects or hazardous conditions on its sidewalks if it has not been notified in writing of the existence of the defect or hazard at a specific location (*see, Doremus v Incorporated Vil. of Lynbrook, 18 NY2d 362, 366*). 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, as the case may be" (*Poirier v City of Schenectady, 85 NY2d 310, 314*).

This Court has recognized only two exceptions to the statutory rule requiring prior written notice, namely, where the locality created the defect or hazard through, an affirmative act of negligence (*see, Kiernan v Thompson, 73 NY2d 840, 842*) and where a "special use" confers a special benefit upon the locality (*see, Poirier v City of Schenectady, supra at 314-315; D'Ambrosio v City of New York, 55 NY2d 454*). Here, plaintiffs argue for a third exception:

constructive notice when the defect was not known by the city but could have nor should have been known by the exercise of ordinary diligence and care on its part. Plaintiffs assert not only that this purported exception is firmly imbedded in the law of this State, as evidenced by its citation in various decisions of the Appellate Division (*Gogante v Town of Hempstead, 186 AD2d 627 [2d Dept]; Dobransky v City of Watertown, 168 AD2d 997 [4th Dept.]; Klimek v Ton of Ghent, 114 AD2d 614 [3d Dept],* but also that the genesis of such an exception can be directly traced to this Court's opinion in *Blake v City of Albany (48 NY2d 875).*

In *Blake*, plaintiff commenced an action against the City of Albany to recover damages for personal injuries suffered when the right front wheel of an automobile she was operating entered a depression or hole on Trinity Place. The City argues that liability could not attach because it had received no prior written notice of the defective condition, as required by Local Laws, 1953, No. 1 of the City of Albany, and because it did not have actual or constructive notice of the defect causing the accident. The Appellate Division rejected defendant's assertions *Blake v City of Albany, 63 AD2d 1975, 1076).* It noted that the undisputed evidence was that on the day of the accident, construction was underway at Trinity Place pursuant to a City permit, and a Department of Public Works field investigator testified that when such a permit was issued, a City worker inspected the project daily to ensure the safety of passerby.

The Court concluded that "[u]nder these circumstances, the city's inspectors should have discovered the defect long before plaintiff's mishap, and accordingly, the jury was justified in concluding that the city had, at minimum, constructive notice of the dangerous condition" (*Blake v City of Albany, 63 AD2d, supra at 1076).*

Although we affirmed the order of the Appellate Division in *Blake*, of pivotal importance was the fact that, on the argument of the appeal, the City withdrew any reliance on the prior written notice law, Local Law No. 1, as an impediment to recovery by the plaintiff. Thus, this Court was presented with only a common-law negligence action (*see, e.g., Taylor v New York City Tr. Auth., 48 NY2d 903).* We stated that while there was not direct proof of actual notice.

> "a negligent failure to discover a condition that should have been discovered can be no less a breach of due care than a failure to respond to actual notice (*19 McQuillin, Municipal Corporations, §54.109),* on the record here it was within the province of the jury in its general verdict to have found constructive notice on the part of the city on alternative theories" (*Blake v City of Albany, 48 NY2d, supra at 877).*

Moreover, in *Poirier v City of Schenectady (85 NY2d 310, supra),* a case similar to this, we affirmed the dismissal of the complaint by the Appellate Division on the ground that no written notice of a defective traffic sign post had been given. We noted the absence of an established exception to the

general rule of written notice, that is a defect created by the municipality or a special use.

We conclude that constructive notice of a defect may not override the statutory requirement of prior written notice of a sidewalk defect. The Legislature has made plain its judgment that the municipality should be protected from liability in these circumstances until it has received written notice of that defect or obstruction. As we have previously stated,

> "The state created the defendant as a political agency of government and the adjustment of fits powers and duties, and of the relative rights of citizens and municipality, was the province of the legislature. [Although the city charter's] requirement that a written notice shall have been given to the common council, as a condition precedent to the maintenance of an action, [may] be regarded as harsh, correction is not to be sought from the courts. The requirement is the expression of the legislative will" (*MacMullen v City of Middletown, 187 NY 37, 47).*

Judicial recognition of a constructive notice exception would contravene the plain language of the statute and serve only to undermine the rule."

In opposition to the Nassau County's requested relief, the plaintiff has not submitted any evidence that establishes prior notice to Nassau County or that said defendant created the condition in issue. As such, the defendant Nassau County's application for an Order pursuant to CPLR 3211(7), General Municipal Law §50-e and Nassau County Administrative Code 12-4.0(e) dismissing plaintiff's Verified Complaint and any and all cross-claims against defendant, County of Nassau, is **granted**.

SO ORDERED.

DATED: 8/10/2018

.....Roy S. Mahon.....
J.S.C.

ENTERED
AUG 13 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE