Calvacca v Town of Babylon
2019 NY Slip Op 33661(U)
December 13, 2019
Supreme Court, Suffolk County
Docket Number: 16-6350
Judge: Denise F. Molia
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SHORT FORM ORDER

COPY

INDEX No. 16-6350

CAL. No. 18-02237OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 5-1-19
ADJ. DATE 6-14-19
Mot. Seq. # 001 - MD

---X

KATHERINE CALVACCA,

Plaintiff,

- against -

TOWN OF BABYLON,

Defendant.

---X

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Upon the following papers numbered 1 to 56 read on this motion for summary judgment: Notice of Motion/Order to Show Cause and supporting papers 1 - 51 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 52 - 54 ; Replying Affidavits and supporting papers 55 - 56 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Town of Babylon for summary judgment dismissing the complaint is denied.

Plaintiff Katherine Calvacca commenced this action to recover for personal injuries she allegedly sustained at approximately 6:45 p.m. on September 8, 2015. The accidently allegedly occurred when plaintiff tripped and fell on a raised screw in a boardwalk located in Tanner Park, which is located within defendant Town of Babylon. Plaintiff alleges that the Town was negligent in, among other things, maintaining and repairing the subject boardwalk.

The Town now moves for summary judgment in its favor. The Town argues that it never received prior written notice of the alleged defective condition pursuant to Town Law § 65-a, or Town of Babylon Code § 158-2, and that it neither affirmatively created the alleged defect nor derived a special use of the

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subject premises. In support of its motion, the Town submits, among other things, the testimony from plaintiff's hearing held pursuant to General Municipal Law § 50-h and deposition, Leo Sottile's deposition testimony, and the affidavits of Jennifer Taus and Thomas Stay. In opposition, plaintiff argues that there are triable issues of fact as to whether the Town affirmatively created the alleged defect. She contends, among other things, that the subject screw was inappropriate for outdoor use. In support of her opposition, she submits the affidavit of Stanley Fein.

According to plaintiff's statutory hearing and deposition testimony, on the date of the accident, she was walking on the subject boardwalk for 1½ minutes before the accident occurred. Plaintiff testified that at the time of the accident, she was walking with two friends, and her husband was walking ahead of them. Plaintiff allegedly walked past the Beach Hut, which was located to her left, and the Senior Center, which was located to her right, prior to the accident. When asked to describe the accident, plaintiff stated that her sneaker became caught on a screw, causing her to fall. Plaintiff's husband allegedly returned to the location where plaintiff fell after hearing one of her friends scream. Plaintiff explained that she did not observe the subject screw at the time of the accident, and that her husband identified it to her. She further explained that at least a month after the accident, she returned to the accident, at which time she observed that the subject screw was raised 1½ inches above the boardwalk.

Plaintiff testified that she fell approximately two feet away from a lamppost, which was to her right and past the Senior Center. Although plaintiff first stated that the Senior Center was approximately 100 feet from the accident site, she later stated that the Senior Center was approximately 200 feet from the subject lamppost, and that she was "not good with distance." She testified that from the accident site, she was able to observe the Beach Hut and the Senior Center. Plaintiff allegedly had walked on the portion of the boardwalk where the accident occurred approximately three or four times per week prior to the accident. She allegedly never made a written complaint to anyone at the Town concerning the subject screw prior to the accident.

Leo Sottile stated that he has been employed as the Town's Public Works Coordinator for approximately ten years. He testified that he was responsible for overseeing the skilled trades in the Buildings and Grounds Departments, which included Tanner Park. Sottile testified that the boardwalk in the vicinity of Beach Hut Concession was not damaged by Hurricane Sandy. Sottile testified that this particular boardwalk was installed by Town employees and outside contractors approximately ten years ago.

Sottile testified that the subject boardwalk was not routinely inspected for raised screws. According to Sottile's testimony, his laborers would visit that particular boardwalk on an irregular basis. Sottile further testified that the frequency of such a visit could vary, and that his laborers could visit this particular boardwalk weekly, monthly, or every other month. When Sottile's laborers visited this particular boardwalk, they allegedly would fix raised screws using a screw gun at time of their visit, or they allegedly would report raised screws to him to be fixed at a later time. Sottile explained that he generally would be made aware of the existence of raised screws, as workers would report to him whether one existed or whether it needed to be repaired. He stated that his supervisor, the Town's Commissioner of Public Works, would give him information regarding complaints of raised screws. According to his testimony, he was not aware of any complaints regarding any raised screws prior to the accident.

Jennifer Taus avers that she is employed as a clerk-typist in the Town Clerk's Office. She states that the Town Clerk's Office is responsible for keeping and maintaining records of all complaints and written notices of sidewalk or roadway defects received by the Town. She further states that her responsibilities include the intake and the logging in of complaints made to the Town regarding the property it owns, including its parks. Taus avers that she has conducted a search of the records contained in the Town Clerk's Office for any verbal or written complaints, or written notices of defect regarding a dangerous or defective boardwalk condition at Tanner Park in the vicinity of the Beach Hut Concession and the Senior Center for the years prior to September 8, 2015. She states that based on her search, the records of the Town Clerk's Office contain no prior complaints or written notices regarding a dangerous or defective boardwalk condition at Tanner Park in the vicinity of the Beach Hut Concession and the Senior Center for any of the years prior to September 8, 2015.

Thomas Stay avers that he is employed as the Town's Commissioner of Public Works. He states that as the Town's Commissioner of Public Works, his responsibilities include overseeing the construction, maintenance, and repair of all properties, including buildings, structures, appurtenances, sidewalks, and roadways, owned by the Town. He also states that he has conducted a through search of the records of the Department of Public Works for any verbal or written complaints, or written notices regarding a dangerous or defective boardwalk condition at Tanner Park in the vicinity of the Beach Hut Concession and the Senior Center for the years prior to September 8, 2015. Stay concludes that based on his search, the records of the Town's Department of Public Works contain no prior complaints or written notices regarding a dangerous or defective boardwalk condition at Tanner Park in the vicinity of the Beach Hut Concession and the Senior Center for any of the years prior to September 8, 2015.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form 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, 87 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once the movant demonstrates a prima facie entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557; 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]). The failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*). In deciding the motion, the court must view all evidence in the light most favorable to the nonmoving party (*see* ***Matter of New York City Asbestos Litig.***, 33 NY3d 20, 99 NYS3d 734 [2019]; ***Vega v Restani Constr. Corp.***, *supra*).

Town of Babylon Code § 158-2 provides, in pertinent part, that no civil action shall be maintained against the Town for personal injuries sustained "by reason of any defective, dangerous, unsafe, out-of-repair or obstructed sidewalks of the Town . . . . unless written notice thereof, specifying the particular place, was actually given to the Town Clerk of the Town." Although this section does not expressly refer to boardwalks, courts have recognized that a boardwalk constitutes a sidewalk within the meaning of General

Municipal Law § 50–e [4] (*see* ***Guiliano v Town of Brookhaven***, 34 AD3d 734, 826 NYS2d 100 [2d Dept 2006]; *cf.* ***Ferris v County of Suffolk***, 174 AD2d 70, 579 NYS2d 436 [2d Dept 1992]; ***Kotler v City of Long Beach***, 44 AD2d 679, 353 NYS2d 800 [2d Dept 1974], *affd* 36 NY2d 774, 368 NYS2d 842 [1976]; ***Goldstein v City of Long Beach***, 28 AD2d 558, 280 NYS2d 272 [2d Dept 1967]). Thus, the subject boardwalk comes within the purview of Town of Babylon Code § 158-2.

A municipality that has enacted a prior written notice provision may not be held liable for alleged injuries caused by a dangerous condition which come within ambit of such a law unless it has received prior written notice of the alleged dangerous condition, or an exception to the prior written notice requirement applies (*see* ***Kabia v Town of Yorktown***, 175 AD3d 1395, 108 NYS3d 178 [2d Dept 2019]; ***Osman v Town of Smithtown***, 175 AD3d 1313, 108 NYS3d 146 [2d Dept 2019]; ***Gutierrez-Contreras v Village of Port Chester***, 172 AD3d 1333, 101 NYS3d 149 [2d Dept 2019]). The prior written notice requirement does not apply where (1) the municipality affirmatively created the alleged dangerous condition through an act of negligence, or (2) a special use resulted in a special benefit to the locality (*see* ***Yarborough v City of New York***, 10 NY3d 726, 853 NYS2d 261 [2008]; ***Liverpool v City of New York***, 163 AD3d 790, 83 NYS3d 64 [2d Dept 2018]; ***Trela v City of Long Beach***, 157 AD3d 747, 69 NYS3d 58 [2d Dept 2018]). The affirmative negligence exception is limited to work performed by the municipality that immediately resulted in the existence of a dangerous condition (*see* ***Yarborough v City of New York***, *supra*; ***Gutierrez-Contreras v Village of Port Chester***, *supra*; ***Liverpool v City of New York***, *supra*; ***Trela v City of Long Beach***, *supra*).

The prima facie showing which a defendant must make a motion for summary judgment is governed by the allegations made by the plaintiff in the pleadings (*see* ***Kabia v Town of Yorktown***, *supra*; ***Osman v Town of Smithtown***, *supra*; ***Gutierrez-Contreras v Village of Port Chester***, *supra*). By the pleadings, plaintiff alleges, among other things, that the Town was negligent in making a repair of prior storm damage, and that it affirmatively created the defect. Thus, to establish its prima facie entitlement to judgment as a matter of law dismissing the complaint, the Town was required to demonstrate, prima facie, that it neither had prior written notice of the alleged dangerous condition nor created such a condition (*see* ***Gutierrez-Contreras v Village of Port Chester***, *supra*; ***Trela v City of Long Beach***, *supra*; ***Beiner v Village of Scarsdale***, 149 AD3d 679, 51 NYS3d 578 [2d Dept 2017]).

Here, the Town demonstrated, prima facie, that the Town Clerk did not receive prior written notice of the alleged dangerous condition (*see* ***Osman v Town of Smithtown***, *supra*; ***Cruzate v Town of Islip***, 162 AD3d 853, 80 NYS3d 305 [2d Dept 2018]; ***Beiner v Village of Scarsdale***, *supra*). In support of its motion, the Town submitted Taus' affidavit, which indicates that she conducted a search of the records contained in the Town Clerk's Office and found no prior written notice of a dangerous condition at Tanner Park in the vicinity of the Beach Hut Concession and the Senior Center (*see* ***Cruzate v Town of Islip***, *supra*; ***Beiner v Village of Scarsdale***, *supra*; ***Factor v Town of Islip***, 134 AD3d 984, 22 NYS3d 230 [2d Dept 2015]). Nonetheless, the Town failed to establish its prima facie entitlement to summary judgment dismissing the complaint by failing to eliminate triable issues of fact as to whether it created the alleged dangerous condition which caused plaintiff's fall through an affirmative act of negligence (*see* ***Trela v City of Long Beach***, *supra*; ***Toscano v Town of Huntington***, 156 AD3d 837, 68 NYS3d 81 [2d Dept 2017]; ***Lewak v Town of Hempstead***, 147 AD3d 919, 47 NYS3d 412 [2d Dept 2017]; ***Creutzberger v County of Suffolk***, 140 AD3d 915, 33 NYS3d 438 [2d Dept 2016]; ***Joyce v Village of Saltaire***, 126 AD3d 760, 5 NYS3d 490

[2d Dept 2015]; ***Carlucci vVillage of Scarsdale***, 104 AD3d 797, 961 NYS2d 318 [2d Dept 2013]). The Town's submissions were devoid of evidence as to whether it repaired the subject portion of the boardwalk prior to plaintiff's accident, and if such a repair immediately left the subject screw in a condition that was dangerous to pedestrians (*see* ***Trela v City of Long Beach***, *supra*).

Accordingly, the Town's motion for summary judgement is denied.

Dated: 12-13-19

Hon. Denise F. Molia
A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION