Dejesus v Melendez
2019 NY Slip Op 34230(U)
May 13, 2019
Supreme Court, Nassau County
Docket Number: 600130/19
Judge: Randy Sue Marber

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 8

_____X

SAMUEL DEJESUS,

Plaintiff,

-against-

Index No.: 600130/19
Motion Sequence...01
Motion Date...03/15/19

GEORGE MELENDEZ, MILAGROS GUADALUPE, ADAMINA GUADALUPE, THE TOWN OF HEMPSTEAD and THE COUNTY OF NASSAU,

Defendants.

_____X

Papers Submitted:
Notice of Motion x

Upon the foregoing papers, the unopposed motion by the Defendant, COUNTY OF NASSAU (hereinafter "COUNTY"), seeking an Order, pursuant to CPLR §§ 3211 (a)(1) and (a)(7), or in the alternative, pursuant to CPLR § 3211(c), for conversion of the instant application to summary judgment, granting it summary judgment and dismissing the Plaintiff's Complaint and all cross-claims asserted against it, is decided as hereinafter provided.

In the instant action, the Plaintiff, SAMUEL DEJESUS (hereinafter "DEJESUS"), seeks to recover damages from the Defendants, for personal injuries allegedly sustained on November 1, 2017 when he tripped and fell on a sidewalk adjacent to 76 Oakley Avenue, Elmont, New York, situated in the Town of Hempstead

(*See* Notice of Claim, annexed to Motion as Exhibit "A"). The Plaintiff alleges that the Defendants were negligent in their ownership, maintenance and control of said sidewalk in causing it to become and remain raised, broken, uneven and cracked creating a dangerous and hazardous condition (*Id.*). The Plaintiff further alleges that the COUNTY had actual and/or written notice of the subject defect prior to the date of the alleged incident (*Id.*).

The Defendant, COUNTY, now moves for summary judgment on the grounds that: 1) the location of the alleged incident is not within the jurisdiction of the COUNTY; and 2) the COUNTY did not receive written notice regarding the alleged defect prior to the Plaintiff's alleged incident. The COUNTY submits the Nassau County roadway jurisdictional map to establish the location of the alleged incident was not on a COUNTY owned roadway (*See* Map, annexed to Motion as Exhibit "E"; *see also*, Land Record Lookup, annexed to Motion as Exhibit "D"). To this end, the COUNTY relies upon the Town of Hempstead Code, Part VII, Chapter 181, which provides that, "an obligation is imposed on the abutting landowner to repair sidewalks… at the landowner's expense."

In support of its motion, the COUNTY submits the Affidavit of Veronica Cox, employed by the COUNTY in the Bureau of Claims and Investigations in the Office of the Nassau County Attorney (*See* Veronica Cox's Affidavit at ¶ 1, annexed to Motion as Exhibit "F"). Based on a search personally conducted of the Nassau County Notice of Claim Files and Notice of Defect Files, Ms. Cox attests that the COUNTY

received no prior written notice involving the subject location of the incident within the past six (6) years, including the date of the Plaintiff's alleged trip-and-fall.

No opposition has been submitted by any party to the COUNTY's motion.

A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to summary judgment as a matter of law (*See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter, but to determine whether or not there exists a genuine issue for trial (*See Miller v. Journal-News*, 211 A.D.2d 626 [2d Dept. 1995]). When seeking summary judgment, the moving party's burden is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to establish the absence of a material issue of fact (*See Ayotte v. Gervasio*, 81 N.Y.2d 1062 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of the opposing papers (*See Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra*; *Miceli v. Purex*, 84 A.D.2d 562 [2d Dept. 1981]).

A landowner has a duty to maintain his/her property in a reasonably safe condition to prevent foreseeable injuries (*See Basso v. Miller*, 40 N.Y.2d 233, 241 [1976]). Whether a dangerous condition exists on a property so as to create liability on the part of a landowner depends on the particular circumstances of each case and is generally a question of fact for the jury (*See, Quintero v. Wilner*, 74 A.D.3d 1042, 1043

[2d Dept. 2010]; *Shalamayeva v. Park 83rd Street Corp.*, 32 A.D.3d 387, 388 [2d Dept. 2006]).

It is well settled that a municipality that has enacted a prior written notice statute may not be subjected to liability for injuries caused by a defective condition in a sidewalk unless it either has received written notice of the defect or an exception to the written notice requirement applies (*See, Wolin v. Town of N. Hempstead*, 129 A.D.3d 833, 834 [2d Dept. 2015], quoting *Monaco v. Hodosky*, 127 A.D.3d 705, 706 [2d Dept. 2015] (citations omitted); *Amabile v. City of Buffalo,* 93 N.Y.2d 471, 474 [1999]). "Prior written notice statutes are strictly construed and only two exceptions are recognized, 'namely, where the locality created the defect or hazard through an affirmative act of negligence and where a special use confers a special benefit upon the locality'" (*Chirco v. City of Long Beach*, 106 A.D.3d 941, 942 [2d Dept. 2013], quoting *Amabile v City of Buffalo*, 93 N.Y.2d at 474 [citation and internal quotation marks omitted]; *see also, Wolin*, 129 A.D.3d at 834, *supra*).

A claim for negligence requires the pleading of facts that impose a duty of care upon the defendant in favor of the plaintiff, a breach of that duty, and that the breach of such duty was a proximate cause of the plaintiff's injuries (*See, Pulka v. Edelman*, 40 N.Y.2d 781 [1976]; *Akins v. Glens Falls School Dist.*, 53 N.Y.2d 325, 333 [1981]). Absent a duty of care, there is no breach, and without breach there can be no liability (*See, Pulka v. Edelman*, *supra*; *Gordon v. Muchnick*, 180 A.D.2d 715 [2d Dept. 1992]). Preliminarily, however, whether a duty of care is imposed upon the defendant

in favor of the plaintiff under the circumstances alleged is an issue of law for the court to decide (*See, Church v. Callanan Indus.*, 99 N.Y.2d 104 [2002]).

Here, the COUNTY jurisdictional map establishes that the COUNTY does not own, control or maintain the subject sidewalk. Moreover, no evidence has been proffered by any party to demonstrate that the COUNTY received written notice of the defect prior to the alleged incident. Further, the COUNTY established, via the affidavit of Ms. Cox that it did not have prior written notice of the alleged defective condition.

Accordingly, it is hereby

ORDERED, that the motion by the Defendant, COUNTY OF NASSAU, seeking an Order, pursuant to CPLR §§ 3211 (a)(1) and (a)(7), dismissing the Plaintiff's Complaint and all cross-claims asserted against it, is **GRANTED**; and it is further

ORDERED, that the remaining parties are reminded to appear for the previously scheduled Compliance Conference on **August 29, 2019 at 9:30 a.m.**

This constitutes the decision and Order of this Court.

DATED: Mineola, New York
May 13, 2019

Hon. Randy Sue Marber, J.S.C.