Herms v Chili's Grill & Bar Rest.
2020 NY Slip Op 34734(U)
October 30, 2020
Supreme Court, Nassau County
Docket Number: Index No. 615289/18
Judge: James P. McCormack
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SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Justice

_____X

CYNTHIA HERMS,

Plaintiff(s),

-against-

CHILI'S GRILL & BAR RESTAURANT, CASKROW II REALTY LLC, BRINKER RESTAURANT CORPORATION, BRINKER SERVICES CORPORATION, COUNTY OF NASSAU,

Defendant(s).

_____X

TRIAL/IAS, PART 18
NASSAU COUNTY

Index No. 615289/18

Motion Seq. No.: 001 & 002

Motion Submitted: 8/28/2020

The following papers read on this motion:

Notices of Motion/Supporting Exhibits.....XX
Affirmations in Opposition.....XX
Reply Affirmation.....X

Defendants, Chili's Grill & Bar Restaurant, Caskrow II Realty LLC, Brinker Restaurant Corporation, Brinker Services Corporation (collectively "Chili's"), move this court (Motion Seq. 001),for an order vacating the note of issue due to outstanding discovery. The motion is unopposed. Defendant, the County of Nassau (the County)

moves this court (Motion Seq. 002) pursuant to CPLR §3212 for an order granting it summary judgment and dismissing the complaint and all cross claims against it. Plaintiff, Cynthia Herms (Herms), and Chili's oppose the motions.

Herms commenced this trip and fall action by service of a summons and complaint dated November 13, 2018, and then by amended complaint dated December 14, 2018. Issue was joined by service of an answer with cross claims to the amended complaint by the County dated February 1, 2019. Chili's served an answer with cross claims dated February 20, 2019. The case certified ready for trial on December 11, 2019, and a note of issue was filed on June 10, 2020.

CHILI'S MOTION TO VACATE THE NOTE OF ISSUE (MOTION SEQ. 001)

Before a motion relating to discovery or bill of particulars can be brought, the movant is required to submit an affirmation of good faith indicating "that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." 22 NYCRR 202.7(a). The affirmation of good faith is supposed to indicate that the parties consulted over the discovery issues and the "time, place and nature of the consultation and the issues discussed...", or that such conferral would be futile. 22 NYCRR 202.7(c). The parties are to make a diligent effort to resolve the discovery dispute. (*Deutsch v. Grunwald*, 110 A.D.3d 949 [2nd Dept. 2013]; *Murphy v. County of Suffolk*, 115 A.D.3d 820 [2nd Dept. 2014]; *Chichilnisky v. Trustees of Columbia University in City of New York*, 45 A.D.3d 393 [1st Dept. 2007]). Chili's fails to submit an affirmation of good faith or to discuss good faith efforts in the affirmation in support.

The absence of any indication of good faith efforts renders the motion defective. The court notes that Chili's states that, "due to the pandemic", they have been "unable to contact" Independent Medical Examination (IME) providers to determine if Herms attended IMEs scheduled for January, 2020 and February, 2020. No other details are provided. The court is not sure if counsel was unable to reach out, or if the IME providers were not responding, or some other issue. Nor does counsel indicate if she asked Herms' counsel to confirm Herms attended the IMEs.

Further, counsel indicates that there may be a significant amount of discovery outstanding. However, this matter certified ready for trial on December 11, 2019, and on that date the parties entered into a stipulation regarding all outstanding discovery. The stipulation references some post-deposition demands, the two IMEs and dates for Defendants to appear for depositions. Counsel's affirmation does not address the so-ordered stipulation or if it had been complied with, nor why none of the other purported outstanding discovery was not addressed at that time.

The motion will be denied without prejudice. However, the court expects full compliance with 22 NYCRR 202.7 before the motion is brought again. Further, the court will expect details as to what is still outstanding and an explanation why discovery that was due prior to March 16, 2020, when the court's pause" order was instituted, was not completed, if that is the case.

THE COUNTY'S MOTION FOR SUMMARY JUDGMENT (MOTION SEQ 002)

According to the complaint, Herms alleges she tripped and fell over a defective sidewalk. The County now move for summary judgment, arguing they had no prior written notice of any alleged defective condition, and no exceptions apply to the prior written notice rule.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.,* 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.,* 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez V. Prospect Hospital,* 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center,* 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment 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 Zuckerman v. City of New York,* 49 NY2d 5557 [1980], *supra*).

Within the context of a summary judgment motion that seeks dismissal of a personal injury action the court must give the plaintiff the benefit of every favorable inference which can reasonably be drawn from the evidence (*see Anderson v. Bee Line*, 1 N Y 2d 169 [1956]). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.,* 180 AD2d 579 (1st Dept 1992), and it should only be granted when there are no triable issues of fact (*see also Andre v. Pomeroy,* 35 NY2d 361 [1974]).

"A landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature, and the burden of avoiding the risk" (*Giulini v. Union free School Dist. # 1*, 70 AD3d 632 [2d Dept. 2010]; *Basso v Miller*, 40 NY2d 233, 241 [1976]). "To impose liability upon a defendant landowner for a plaintiff's injuries, there must be evidence showing the existence of a dangerous or defective condition, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time" (*Morrison v. Apolistic Faith Mission of Portland*, 111 AD3d 684 [2d Dept 2013]; *see Winder v. Executive Cleaning Servs., LLC*, 91 AD3d 865 [2d Dept 2012]; *Gonzalez v. Natick N.Y. Freeport Realty Corp.*, 91 AD3d 597 [2d Dept 2012]).

"Where, as here, a municipality has enacted a prior written notice law, it may not be subject to liability for injuries caused by a dangerous roadway condition unless it has

received prior written notice of the dangerous condition, or an exception to the prior written notice requirement applies" (*Wald v City of New York*, 115 AD3d 939 [2d Dept 2014]; *Phillips v City of New York*, 107 AD3d 774, [2d Dept 2013]; *see Martinez v City of New York*, 105 AD3d 1013, 1014 [2d Dept 2013]). "The only recognized exceptions to the statutory prior written notice requirement involve situations in which the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a benefit upon the municipality" (*Wald v City of New York, supra; Long v City at Mount Vernon*, 107 AD3d 765 [2d Dept 2013]; *Oboler v City of New York*, 8 NY3d 888, 889-890 [2007]; *Miller v Village of E. Hampton*, 98 AD3d 1007, 1008 [2d Dept 2012]). In addition, "the affirmative negligence exception is limited to work by the [municipality] that immediately results in the existence of a dangerous condition" (*Wald v City of New York, supra*, quoting *Yarborough v City of New York*, 10 NY3d 726, 728 [2007], quoting *Oboler v City of New York, supra* at 889).

Furthermore, neither actual nor constructive notice of a given defect is sufficient to overcome the requirement of prior written notice (*Amabile v City of Buffalo,* 93 NY2d 471, 474 [1998]; *Caramancia v City of New Rochelle*, 268 AD2d 496 [2d Dept 2000]). In order for a municipality to be held liable for a condition where no prior written notice was given, a plaintiff must set forth competent evidence that the municipality affirmatively created the alleged offending condition in issue (*see Walker v Incorporated Village of*

Northport, 304 AD2d 823 [2d Dept 2003]; *Monteleone v Incorporated Village of Floral Park*, 74 NY2d 917 [1989]).

In support of the motion, the County references Nassau County Administrative Code (NCAC) §12-4(e), and submits the affidavit of Robert S. Dujardin. NCAC §12-4(e) states that the County must be given written notice of an alleged defect to, *inter alia*, a sidewalk, and that said notice must be made to the Office of the County Attorney. Mr. Dujardin is employed by the Nassau County Attorneys Office, Litigation and Appeals Bureau, and part of his job duties include maintaining files for notices of claim and notices of defect. Mr. Dujardin states he researched the subject area going back for a period of six years prior to the accident. As a result of his search, Mr. Dujardin found no record of any defect at the subject location.

What is missing from the County's submissions is an affidavit from a person with firsthand knowledge establishing that the County did not create the alleged defective condition. The County's counsel claims the County did not create the defective condition, but counsel does not indicate he has firsthand knowledge. Where a plaintiff's complaint alleges affirmative negligence on a municipality's part, the plaintiff does not have to plead or prove prior written notice. (*Humes v. Town of Hempstead*, 166 AD2d 503 [2d Dept 1990]). Herein, there is no admissible evidence establishing that the County did not affirmatively create the alleged hazardous condition. As such, the motion will be denied regardless of the sufficiency of the opposition papers.

Accordingly, it is hereby

ORDERED, that Chili's motion (Motion Seq. .001) to vacate the note of issue is DENIED, without prejudice, for failure to provide an affirmation of good faith pursuant to 22 NYCRR 202.7; and it is further

ORDERED, that the County's motion (Motion Seq. 002) for summary judgment is DENIED.

This constitutes the decision and order of the court.

Dated: October 30, 2020
Mineola, New York

ENTERED
Nov 02 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Hon. James P. McCormack, J. S. C.