SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack

Justice

TRIAL/IAS, PART 12
NASSAU COUNTY

MARK De FAZIO,

Plaintiff(s),

Index No.: 603731/19

-against-

TOWN OF NORTH HEMPSTEAD, KEYSPAN GAS EAST CORPORATION d/b/a NATIONAL GRID , KEYSPAN CORPORATION, PORT WASHINGTON WATER POLLUTION CONTROL DISTRICT and ASPLUNDH CONSTRUCTION COMPANY,

Motion Seq. No.: 002 & 003

Motions Submitted: 9/22/21

Defendant(s).

The following papers read on this motion:

Notices of Motion/Supporting Exhibits/Supporting Exhibits.....XX
Affirmations in Opposition/Memoranda of Law.....XX
Reply Affirmations.....XX

Defendant, Port Washington Water Pollution Control District (the District), moves this court (Motion Seq. 002) for an order, pursuant to CPLR §3212, granting it summary judgment and dismissing the complaint against it. Defendant, Town of North Hempstead (the Town), moves this court (Motion Seq. 003) for summary judgment dismissing the complaint against it. Plaintiff, Mark De Fazio (De Fazio) opposes the motions.

De Fazio commenced this negligence action by summons and complaint dated March 15, 2019. Issue was joined by service of an answer with cross claims by the Town dated May 10, 2019. The District interposed an answer with a cross claim dated May 22, 2019. Defendants, Keyspan Gas East Corporation d/b/a as National Grid and Keyspan Corporation (Keyspan), served an answer with a cross claim dated July 12, 2019. De Fazio then served an amended complaint, which added Asplundh Construction Corp. (Asplundh) as a defendant. The District served an answer to the amended complaint with a cross claim dated September 23, 2020. Keyspan, together with Asplundh, interposed an answer with a cross claim to the amended complaint dated September 25, 2020. The Town served an answer with a cross claim to the amended complaint dated October 2, 2020. The case certified ready for trial on March 9, 2021, and a note of issue was filed on April 9, 2021.

De Fazio alleges that on June 14, 2018 he was riding his bicycle on Main Street in Port Washington, County of Nassau when a cut out in the road caused him to lose control of his bicycle and fall to the ground, causing him serious injuries. The District and the Town now both move for summary judgment. The District alleges it was not liable and that it had no prior written notice, and the Town argues no prior written notice and that De Fazio assumed the risk of his injuries.

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 Films 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 action. (*see Zuckerman v. City of New York,* 49 NY2d 557 [1980], *supra).* The primary purpose of a summary judgment motion is issue finding not issue determination, (*see 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 Andre v. Pomeroy*, 35 NY2d 361 [1974]).

One cannot be held liable for a dangerous or defective condition on property unless ownership, occupancy, control or special use of the property has been established. *(Ruggiero v. City School District of New Rochelle*, 109 A.D.3d 894 [2nd Dept 2013]*; Soto v. City of New York*, 244 A.D.2d 544 [2nd Dept. 1997]; *James v. Stark*, 183 A.D.2d 873 [2nd Dept. 1982]). Further, "[w]here, 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]).

THE DISTRICT'S MOTION FOR SUMMARY JUDGMENT (MOTION 002)

In support of its motion, the District submits, *inter alia*, the deposition transcript of the parties including that of Windsor J. Kinney, Superintendent of District Operations at the Port Washington Water Pollution Control District. According to Mr. Kinney, the District's purpose is to collect wastewater from residences and businesses in Port Washington. This is done through underground pipes. While the District has pipes that run beneath Main Street, those pipes are between six to eight feet below the surface. At the date and time of the accident, the District was not performing any work in the area where the accident occurred, and had not done so for at least a year prior to the accident. Further Mr. Kinney denied that the District requested any permits, or entered into any contractors to perform work at the area of the accident. Finally, Mr. Kinney denied that the District received any written complaints regarding the area of the accident.

Based upon Mr. Kinney's deposition testimony, the court finds the District has established entitlement to summary judgment as a matter of law. The burden shifts to De Fazio and the co-Defendants to raise a material issue of fact requiring a trial of the action.

In opposition, De Fazio makes the argument that the District makes a special use of the area of the accident because there is a manhole cover nearby that the District uses to access its pipes below the surface. De Fazio does not explain how use of the manhole

results in a special use, and does not explain how the existence of the manhole cover plays into how the accident occurred. While pictures of the area of the accident show the manhole cover near-by, its mere existence s proof of nothing. As such, De Fazio is unable to raise an issue of fact.

THE TOWN'S MOTION FOR SUMMARY JUDGMENT (MOTION SEQ. 003)

In support of its motion, the Town submits the affidavits of Wayne Wink, Town Clerk, and Harry Weed, the Town's Superintendent of Highways. Mr. Wink states that, after reviewing the notice of claim, he searched the Town's records, dating back to October, 2009 and up until the date of the accident, for any written complaints about the area where the accident occurred. He states none exist. Similarly, Mr. Weed researched the Highway Department's records and found no written complaints about the subject area prior to the incident. Mr. Weed determined that the Highway Department performed some work in the area three years prior to the accident and that permits were issued to Keyspan to perform work in the area in November, 2017. A permit was issued to the District in May, 2018 to perform work in the vicinity of where the accident occurred. Based upon the affidavits of Mr. Wink and Mr. Weed, the court finds the Town has established entitlement to summary judgment as a matter of law. The burden shifts to De Fazio and the co-Defendants to raise a material issue of fact requiring a trial of the action.

In opposition, De Fazio focuses on the deposition testimony of Brian Waterson, Highway Maintenance Supervisor for the Town. During his deposition, Mr. Waterson

acknowledged seeing the area where De Fazio's accident occurred, and claims he called Keyspan on a couple of occasions about areas of the road Keyspan dug up and that needed repair. Based on this testimony, De Fazio argues that the Town had actual notice of the defective condition. Even if that were true, and it is not clear from Mr. Waterson's testimony that it is, actual notice does not replace written notice when there is a prior written notice law as there is in this case. As such, De Fazio is unable to raise an issue of fact.

Accordingly, it is hereby,

ORDERED, that the District's motion for summary judgment (Motion Seq. 002) is GRANTED in it entirety. The complaint and all cross claims are dismissed against the District. As the court finds the District cannot be liable, the District's cross claims are dismissed as moot; and it is further

ORDERED, that the Town's motion for summary judgment (Motion Seq. 003) is GRANTED in its entirety. The complaint and all cross claims are dismissed against the Town. As the court finds the Town cannot be liable, the Town's cross claims are dismissed as moot.

The foregoing constitutes the Decision and Order of the Court.

Dated: November 26, 2021
Mineola, N.Y.

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

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