Russo v Great S. Bay Dev. Corp.
2013 NY Slip Op 30919(U)
April 23, 2013
Sup Ct, Suffolk County
Docket Number: 11-24032
Judge: Joseph C. Pastoressa
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SHORT FORM ORDER

INDEX No. 11-24032

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq.# 001 - MD
002 - XMG

LAUREN RUSSO, Plaintiff, - against - GREAT SOUTH BAY DEVELOPMENT CORP., MITSUI JAPANESE RESTAURANT and TOWN OF ISLIP, Defendants.	GRUENBERG KELLY DELLA Attorney for Plaintiff 700 Koehler Avenue Ronkonkoma, New York 11779 MCCABE, COLLINS, MCGEOUGH, & FOWLER, LLP Attorney for Defendant Great South Bay 346 Westbury Avenue, P.O. Box 9000 Carle Place, New York 11514 TROMELLO MCDONNELL & KEHOE Attorney for Defendant Mitsui Japanese Restaurant P.O. Box 9038 Melville, New York 11747 JAKUBOWSKI, ROBERTSON, MAFFEI GOLDSMITH & TARTAGLIA, LLP Attorney for Defendant Town of Islip 969 Jericho Turnpike St. James, New York 11780

Upon the following papers numbered 1 to 44 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20, 21-31; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 32-34, 35-39; Replying Affidavits and supporting papers 40-41, 42-44; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by defendant Mitsui Japanese Restaurant (Mitsui) for summary judgment dismissing the complaint and all cross claims asserted against it is denied; and it is further

ORDERED that the cross-motion (#002) by the defendant Town of Islip (Town) for summary judgment dismissing plaintiff's complaint and all cross claims asserted against it is granted.

This is an action to recover damages from the defendants for injuries allegedly sustained by the plaintiff as a result of a slip and fall accident that occurred on February 4, 2011, on the sidewalk at or about Fourth Avenue and Main Street, Bay Shore, in the Town of Islip, due to ice and snow. It is alleged that the plaintiff's injuries were suffered as a result of the negligence of the named defendants in creating and/or failing to ameliorate a dangerous condition.

Defendant Mitsui Japanese Restaurant (Mitsui) now moves (#001) for summary judgment dismissing the complaint and all cross-claims against it. In support of the motion Mitsui submits, *inter alia*, its attorney's affirmation, the pleadings, the depositions of the plaintiff; Peter Kletchka, an employee of defendant Town of Islip; Steven Benkin on behalf of defendant Great South Bay Development Corp. (Great South Bay); John Sullivan, on behalf of defendant Great South Bay; Eric Yeh, as a witness for defendant Mitsui; and Steven Clarke, a non-party witness, a copy of the lease between defendant Mitsui and defendant Great South Bay, and the deposition of Juan E. Lagara, a non-party witness.

Defendant Town of Islip also moves (#002) for summary judgment dismissing the complaint and all cross-claims against it. In support of the motion defendant submits, *inter alia,* its attorney's affirmation, the pleadings, the verified bill of particulars, plaintiff's depositions, and the deposition of Peter Kletchka, an employee of defendant Town of Islip.

In opposition, the plaintiff submits her attorney's affirmation and the response to notice of discovery and inspection of defendant Great South Bay. Defendant Great South Bay, opposes both motions for summary judgment, and submits its attorney's affirmation, the deposition of Eric Yeh, as a witness for defendant Mitsui, a copy of the lease between defendant Mitsui and defendant Great South Bay, and the deposition of Peter Kletchka, an employee of defendant Town of Islip.

Plaintiff testified at two separate depositions. At the first she testified that the accident occurred on February 4, 2011, in Bay Shore. She went out to dinner with her friend Steve Clarke. They drove in Steve's car and parked on Fourth Avenue north of Main Street at about 8:30 p.m. They walked to a restaurant called the Nutty Irishman and had dinner. They left at about 9:30 p.m. and walked back toward the car. They crossed over the street at Fourth Avenue. She slipped on the ice but could not recall which foot slipped. She fell forward on the sidewalk and hit the ground with her jaw. The ice covered the entire sidewalk. She had no idea if the defendant Town had prior written notice about any ice problems on Fourth Avenue, north of Main Street. After she fell, Steve drove her to Good Samaritan Hospital. At her second deposition she additionally testified that they parked near Mitsui Japanese Restaurant. When they left the car it was a little bit slippery. When she walked she had to climb over a mound of snow to get to the sidewalk. The snow was right along the sidewalk, a few feet high. Steve did not climb over, he was going to the driver's side. He was not with her. There was ice and patches of snow. She lifted her leg and tried to climb over the snow pile. She fell forward. She was on the street going to the sidewalk. Her hands were in her pockets. She slipped on ice which was on the sidewalk and hit the ground with her chin. She could not get to the sidewalk without going over the snow. She did not remember if it appeared to have been plowed up onto the curb by a snow plow. She just

remembers it was icy and patchy. She did not complain to anyone about the condition of the sidewalk prior to the accident.

Peter Kletchka testified on behalf of defendant Town of Islip that he is the public works project supervisor. The department of Public Works is responsible for snow removal on roadways that are dedicated to and owned by the defendant Town. Main Street in Bay Shore is owned by the State of New York and the State is responsible for removing ice and snow from that roadway. Fourth Avenue in Bay Shore is a Town road and the Town is responsible for the removal of ice and snow. The Town is not responsible for the removal of snow and ice from the sidewalk which fronts Mitsui Restaurant on Fourth Avenue. The Town Code requires adjacent property owners to maintain sidewalks adjacent to their property. When snow is plowed, it is generally pushed to the right in the direction of travel. Any snow piled up in order to clear the travel lane is the responsibility of the adjacent property owner, the Town does not clean it up. A search was made by another Town employee, Noel Martin, as to whether there had been any complaints with regard to snow removal on Fourth Avenue where Mitsui is located prior to plaintiff's accident. The witness knew, personally, that Ms. Martin had found no such complaints.

Steven Clarke testified as a non-party witness. He witnessed plaintiff's fall on February 4, 2011, on Fourth Avenue, north of Main Street. He drove himself and the plaintiff to Bay Shore for dinner. They had to be careful walking because there was ice and snow on the sidewalk. They met friends for dinner at the Nutty Irishmen. After dinner they walked back to his car. They stepped over a mound of snow and ice, and "we kind of jumped over it a little bit." Not so much a leap as a larger than normal step. The mound was eight or ten inches high, maybe twenty inches high. There was a thin layer of ice where their feet landed. It was next to the restaurant (Matsui). He could not recall if the snow line was flush to the street. There had been a snowstorm four or five days previous to that night. They slipped together. They were arm in arm. They both fell. He put his hands out. He thought she had her hands in her pocket. The fall was on the sidewalk. Just before the fell they were talking. After the fall she was injured and bleeding from her face. He drove her to Good Samaritan Hospital. He made no complaints, written or otherwise, to the Town of Islip about snow or ice.

Steven Benkin testified on behalf of defendant Great South Bay, that he is the president and sole shareholder of Great South Bay. Great South Bay owned the property on Fourth Avenue in Bay Shore, including the portion leased to the defendant Mitsui. There are apartments on the second floor of the property. There is a lobby entrance to the apartments separated by about twenty or thirty feet from Mitsui. Under the lease agreement, it was the responsibility of Mitsui to remove snow and ice from the sidewalk surrounding the restaurant. A gentleman by the name of Juan removed snow from the building's parking lot in February of 2011. He could not remember Juan's last name. Juan also removed snow and ice from the sidewalk in front of the lobby entrance. He would call Juan as he needed him. He removed the snow from the sidewalk with a shovel. He was not sure if Juan put down ice melt or sand every time, but he assumed so. He did not recall seeing Juan removing snow and ice from the sidewalk surrounding the Mitsui restaurant. He did not recall seeing anyone from the Town removing snow and ice from the sidewalk surrounding the Mitsui. He could not remember if Juan would give him a bill or invoice. He thought that at the end of the season Juan would tell him how much it was. After learning of the accident he contacted Eric at Mitsui, but could not recall the specifics of the conversation. Sometimes Juan would have someone help him with the snow removal. He believed Juan

did snow removal as a "side" business. When asked if Juan might have cleared the whole sidewalk he replied that Juan may have gone " a little further in one direction or another." He could not recall if he ever talked to Juan about how far he would go removing snow on Fourth Avenue. He did not know of any complaints to the Town regarding the condition of the sidewalk prior to February of 2011.

John Sullivan testified as a witness on behalf of defendant Great South Bay. He is an employee of W. I. Equipment Corp., with offices at 2 Fourth Avenue, Bay Shore. Steve Benkin is the president of the corporation and the owner of the property. He does other work for Mr. Benkin, such as collecting rent checks from tenants on the property. He very rarely did any snow shoveling, salting and sanding. He might put rock sand outside the door, but that was it. When it snowed, Juan shoveled the area in front of the apartments. He never saw Juan shovel because he comes at night after Mr. Sullivan leaves work. He did not make any complaints to the Town regarding the snow and ice on the sidewalk

Eric Yeh testified as a witness for defendant Mitsui Restaurant. He is employed as the manager of the restaurant and held that position in February of 2011. He was "somewhat" familiar with the lease agreement between Mitsui and Great South Bay. He testified that under the lease Mitsui was responsible for maintaining the sidewalk outside of the restaurant, including snow and ice. It was his responsibility to make sure that snow and ice were removed from the sidewalk after a snowfall. He did not hire anyone to remove the snow and pile it onto the curb. Usually, by the time he got to the restaurant, the whole block was already done. He did not know who did the clearing. He saw people shoveling and assumed but did not know that they were from the Town. They put the snow on the curb, close to the street. He did, at times, clear a path on Main Street from the street to the front door of the restaurant. If snow continued during the day, he would have the snow removed and spread salt throughout the day. He inspected the sidewalk upon arrival a work at 11:00 a.m. and would monitor the snow throughout the day by looking out the windows. He did not know who cleared the snow and ice after it fell, only that it was done. He had only seen people clearing the parking lot in back of the building. No one from the restaurant had ever complained to the Town about the manner in which snow had been removed from the streets or the sidewalk prior to the accident. Whoever removed the snow also put down salt.

Juan Lagara, testified as a non-party witness. He is employed by Captain Bill's Marina. He also did work in February of 2011, for Steve Benkin to help him out by cleaning up snow when it snowed. He helped with his building on Main Street and Fourth Avenue. Mr. Benkin doesn't "hire" him, he helps out because Steve Benkin is a friend of his boss. He pays him with a check. He did not recall what name was on the check. He did not need to be called, he just came when it snowed. He brought his own shovel. Sometimes someone else from the Great South Bay building would do the shoveling. Mitsui was supposed to shovel the sidewalk in front of the restaurant, but sometimes the other person or he would shovel the entire sidewalk, including the portions in front of Mitsui. He never told Steve Benkin that he did this.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical***

Center, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557 [1980]).

Fundamental to recovery in a negligence action, a plaintiff must establish that the defendant owed the plaintiff a duty to use reasonable care, that defendant breached that duty, and the resulting injury was proximately caused by defendant's breach (*see* ***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49 [1986]). To establish a prima facie case of liability in a slip and fall accident involving snow and ice, a plaintiff must prove that the defendant created a dangerous condition or had actual or constructive notice of the defective condition (*see* ***Zabbia v Westwood, LLC***, 795 NYS2d 319 [2d Dept 2005]; ***Tsivitis v Sivan Associates, LLC***, 292 AD2d 594, 741 NYS2d 545 [2d Dept 2002]).

An owner or lessee of property abutting a public sidewalk is under no duty to pedestrians to remove snow and ice that naturally accumulates upon the sidewalk unless a statute or ordinance specifically imposes tort liability for failing to do so. The owner or lessee can be held liable for a tort only if he or she or someone on his or her behalf undertook snow and ice removal efforts which made naturally occurring conditions more hazardous (***Bruzzo v County of Nassau***, 50 AD3d 720, 854 NYS2d 774 [2d Dept 2008]; ***Cangemi v Burgan***, 81 AD3d 583, 916 NYS2d 135 [2d Dept 2011]). Town of Islip Code Section 47A-17 concerning snow and ice removal imposes the duty upon owners and occupants of properties to "keep the sidewalk in front of the lot or house free from obstruction by snow or icy conditions".

The defendant Mitsui has not established its entitlement to summary judgment. The manager of Mitsui testified that they did not hire anyone to shovel the sidewalks after a snowfall because they were shoveled overnight after a snow fall. He was not sure who actually did the shoveling. The only time anyone from Mitsui shoveled was if snow fell while the restaurant was open. Then they would shovel and put down salt. Mr. Yeh inspected the sidewalks each day when he came into the restaurant and periodically during the day he would check through the windows which overlooked both streets. Juan Legara testified that he sometimes, as a favor to Mr. Benkin, shoveled the sidewalks in front of the building. There was an employee of the building who also did snow shoveling. He testified that Mitsui was supposed to shovel the sidewalk in front of the restaurant, but sometimes the other person or he would shovel the entire sidewalk, including the portions in front of Mitsui. Mitsui failed to establish that it did not undertake any snow and ice removal efforts which made naturally occurring conditions more hazardous. Moreover, Mitsui failed to establish that it did not have actual or constructive notice of the ice on the sidewalk on which the plaintiff allegedly fell. Although plaintiff will bear the burden at trial of establishing that defendant Mitsui had actual or constructive notice of the dangerous condition, on a motion for summary judgement the defendant bears the burden of establishing lack of notice as a matter of law (***Carillo v PM Realty Group***, 16 AD3d 611, 793 NYS2d 69 [2d Dept 2005]; ***Totten v Cumberland Farms***. 57 AD3d 653, 871 NYS2d 179 [2d Dept 2008]). To meet its initial burden to show lack of constructive notice the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when plaintiff fell (***Braudy v Best Buy Co., Inc.***, 63

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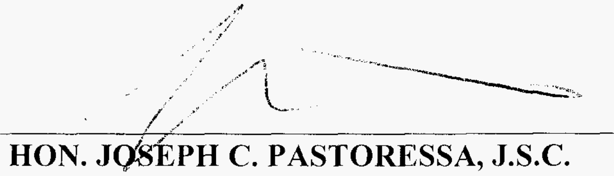
AD3d 1092, 883 NYS2d 90 [2d Dept 2009]; ***Pryzywalny v New York City Transit Authority***69 AD3d 598, NYS2d 181 [2d Dept 2010]). The testimony by Mitsui's manager as to his general method of inspecting the side walk was not sufficient to meet this burden (*see* ***Baines v G & D Ventures, Inc.***, 64 AD3d 528, 883 NYS2d 256 [2d Dept 2009]). Therefore, there is an issue of fact which precludes the granting of summary judgment with regard to the defendant Matsui.

Where a municipality has enacted a prior written notice statute, it cannot be held liable for a defect within the scope of the law, absent the requisite written notice, unless an exception to the requirement applies (***Forbes v City of New York***, 85 AD3d 1106, 926 NYS2d 309 [2d Dept 2011]; ***Albano v County of Suffolk***, 99 AD3d 741, 952 NYS2d 245 [2d Dept 2012]). The exceptions to the prior written notice statute apply only where the municipality affirmatively creates the defect by doing work that immediately results in the existence of a dangerous condition, or where the municipality makes special use of the property on which the defect is located resulting in a special benefit to the locality (***Yarborough v City of New York***, 10 NY3d 726, 853 NYS2d 261 [2008]; ***Amabile v City of Buffalo***, 93, NY2d 471, 693 NYS2d 77 [1999]; ***Marshall v City of New York***, 52 AD3d 586, 861 NYS2d 77 [2d Dept 2008]). Where a municipality that has a prior written notice statute establishes that it lacked prior written notice, the burden shifts to the plaintiff to demonstrate the applicability of one of the two recognized exceptions thereto (***Hanover Insurance Company v Town of Pawling***, 94 Ad3d 1055, 943 NYS2d 152 [2d Dept 2012]; ***Magee v Town of Brookhaven***, 95 AD3d 1179, 945 NYS2d 177 [2d Dept 2012]). It is further noted that a municipality may not be held liable for failure to remove all snow and ice from a particular area because such failure is not an affirmative act of negligence (***Wohlars v Town of Islip***, 71 AD3d 1007, 898 NYS2d 59 [2d Dept 2010]; ***Frullo v Incorporated Village of Rockville Center***, 274 AD2d 499, 711 NYS2d 185 [2d Dept 2000]; ***Alfano v City of New Rochelle***, 259 AD2d 645, 686 NYS2d 813 [2d Dept 1999]).

The defendant Town has established its entitlement to summary judgment. The Town has set forth its prior written notice statute (Chapter 47A-3 of the Code of the Town of Islip). The Town's witness testimony establishes that the Town had searched its records and that it had not received prior written notice of the alleged condition which caused the plaintiff's accident and injuries. Having done so, the burden shifts to the plaintiff to demonstrate the applicability of one of the two exceptions thereto. The plaintiff has failed to submit evidence in admissible form sufficient to raise an issue of fact. No claim is made of any special benefit to the Town. Furthermore, plaintiff has failed to proffer evidence in admissible form that the Town's alleged negligence caused or immediately resulted in the existence of a dangerous condition (*see* ***Yarborough v City of New York***, *supra*; ***Denio v City of New Rochelle***, 71 AD3d 717, 895 NYS2d 727 [2d Dept 2010]). The non-party witness Steven Clarke testified that the last snowfall was four or five days prior to the date of the accident. In fact, the plaintiff has offered no evidence at all to show that the defendant Town was in any way responsible for the creation of the patch of ice on which the plaintiff slipped. The defendant Great South Bay's theory that defendant Town's snow removal efforts created the icy condition is based on sheer speculation which is insufficient to defeat the defendant Town's prima facie showing (*see* ***Zabbia v Westwood, LLC***, 18 AD3d 542, 795 NYS2d 319 [2d Dept 2005]; *see also* ***Christal v Ramapo Cirque Homeowners Assn.***, 51 AD3d 846, 847, 857 NYS2d 729 [2d Dept 2008]). Therefore, the defendant Town is entitled to summary judgment dismissing the complaint and all cross claims.

Accordingly, the motion (#001) by defendant, Mitsui Japanese Restaurant (Mitsui) for summary judgment dismissing the complaint and all cross claims asserted against it is denied and the motion (#002) by the defendant Town, for summary judgment dismissing plaintiff's complaint and all cross claims asserted against it is granted.



Dated: April 23, 2013

HON. JOSEPH C. PASTORESSA, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**