Scuderi v Town of Brookhaven
2013 NY Slip Op 32926(U)
October 30, 2013
Sup Ct, Suffolk County
Docket Number: 10-21479
Judge: Jerry Garguilo

[* 1]

COPY

SHORT FORM ORDER

INDEX No. 10-21479
CAL No. 13-00385OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 7-11-13
ADJ. DATE 10-30-13
Mot. Seq. # 002 - MG; CASEDISP

CAROL SCUDERI and CHRISTOPHER SCUDERI,

Plaintiffs,

- against -

TOWN OF BROOKHAVEN,

Defendant.

CAROL L. SCHLITT, ESQ.
Attorney for Plaintiffs
79 Wall Street
Huntington, New York 11743

ANNETTE EADERESTO
BROOKHAVEN TOWN ATTORNEY
By: John J. Burke, Assistant Town Attorney
Attorney for Defendant
One Independence Hill
Farmingville, New York 11738

Upon the following papers numbered 1 to 23 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 11 - 18 ; Replying Affidavits and supporting papers 19 - 23 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted.

The instant action seeks to recover damages for personal injuries allegedly sustained by the plaintiff Carol Scuderi (Scuderi) on February 28, 2010 while she was a passenger in a motor vehicle operated by her husband, the plaintiff Christopher Scuderi. In their complaint, the plaintiffs allege that they were traveling on Echo Avenue in Mount Sinai, New York, when their vehicle struck a pothole, causing Scuderi to violently impact the interior of their vehicle. The plaintiffs further allege that the defendant Town of Brookhaven (Town) is liable for Scuderi's injuries based on its negligence in failing to properly inspect, maintain, and repair the roadway.

The Town now moves for summary judgment on the ground that it cannot be held liable unless the plaintiff establishes that the Town received prior written notice of the alleged defective condition. In its answer, the Town pleads as its fourth affirmative defense, Town Law § 65-a, and as its third affirmative defense, Town of Brookhaven Code § 84-1. The latter statute provides that "[n]o civil action shall be commenced against the Town of Brookhaven ... for damages or injuries to persons or property

sustained by reason of the defective, out-of-repair, unsafe, dangerous, or obstructed condition of any highway, street, bridge, culvert or crosswalk of the Town of Brookhaven, unless, previous to the occurrence resulting in such damage or injuries, written notice of such defective, out-of-repair, unsafe, dangerous, or obstructed condition, specifying the particular place and location was actually given to the Town Clerk or Town Superintendent of Highways." In essence, Town Law § 65-a provides for the same procedure before a municipality can be found liable for a defective condition.

Where, as here, a municipality has enacted a prior written notice statute pursuant to Town Law, Article 65, it may not be subjected to liability for personal injuries caused by an improperly maintained roadway unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies (***Wilkie v Town of Huntington***, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006], citing ***Amabile v City of Buffalo,*** 93 NY2d 471, 693 NYS2d 77 [1999]; *see also* ***Lopez v G&J Rudolph***, 20 AD3d 511, 799 NYS2d 254 [2d Dept 2005]; ***Gazenmuller v Incorporated Vil. of Port Jefferson***, 18 AD3d 703, 795 NYS2d 744 [2d Dept 2005]). Actual or constructive notice of a defect does not satisfy this requirement (***Wilkie v Town of Huntington***, *supra).*

In support of its motion, the Town has submitted, among other things, the pleadings, the transcript of the plaintiffs' testimony at a municipal hearing, the depositions of Scuderi and a Town employee, and the affidavits of two Town employees. Initially, it is noted that the transcript of the plaintiffs' testimony at the municipal hearing is unsigned and uncertified. In addition, Scuderi's deposition is certified but unsigned, and the Town has failed to submit proof that the transcript was forwarded to Scuderi for her review (*see* CPLR 3116 [a]). Nonetheless, the unsigned transcripts of the plaintiffs' testimony may be considered herein as they have been expressly incorporated into their opposition to the Town's motion, and they have been adopted by the party deponents (***Carey v Five Bros., Inc.***, 106 AD3d 938, 966 NYS2d 153 [2d Dept 2013]; ***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Ashif v Won Ok Lee***, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]; ***Wojtas v Fifth Ave. Coach Corp.***, 23 AD2d 685, 257 NYS2d 404 [2d Dept 1965]).

Scuderi testified at a 50-h municipal hearing on July 13, 2010, and she was deposed on June 8, 2012. Her testimony was essentially the same at both proceedings and can be summarized as follows: On February 28, 2010, she was a passenger in a motor vehicle operated by her husband. At approximately 7:30 p.m., they were traveling on Echo Avenue towards Route 25A. It was dark outside, the vehicle's headlights were on, and she was wearing her seat belt. As they were proceeding at approximately 30 miles per hour, their vehicle struck a pothole. Scuderi further testified that she had traveled on Echo Avenue one month prior to this accident, that she did not recall seeing any defects in the roadway, and that she had not made any complaints about the condition of the roadway to the Town. She indicated that after this accident her nephew came to the scene, and that she saw him standing in the pothole which was more than three feet wide and deep enough to come up to his knees.

At the municipal hearing, Christopher Scuderi testified to many of the same facts as his wife. He indicated that the accident happened on Echo Avenue approximately 500 feet from Route 25A, and that Echo Avenue runs in a northeasterly/southwesterly direction. He stated that he last remembered driving on Echo Avenue in the summer of 2009, and that he did not recall anything about the condition of the

roadway. Christopher Scuderi further testified that he did not see the pothole before his vehicle hit it, that his vehicle's headlights were on, and that the roadway was illuminated by street lights.

The Town has submitted the deposition testimony of, and an affidavit by, Marie Angelone (Angelone), who is employed as a neighborhood aide in the Town's Highway Department (Department). At her deposition, Angelone testified that her duties include searching the Department's records for claims submitted, and determining whether the Town is responsible for the maintenance of a given accident location. She contacts the engineering section of the Department and the Town Clerk's office to determine if there has been prior notice of a defect, then searches the computer for work orders and complaints. All written complaints, phone complaints, and notices of claim are entered into the computer database. Angelone further testified that she believes that a work order is automatically created for every complaint, that some events are considered emergencies and get an immediate "call out," and that these emergencies can include a "tree down, potholes, sinking drain." She indicated that after the plaintiffs filed the notice of claim regarding this incident she did a search of the computer going back ten years and found five complaints or work orders which reference Echo Avenue, all submitted by telephone. She stated that telephone complaints are maintained in the Department computer only, and that copies of written notices are attached to completed work orders and maintained in a file cabinet at the Department.

In her affidavit, Angelone swears that she is employed as a neighborhood aide in Department, that her duties include investigating allegations in claims against the Town by searching the official records of the Department, and that she made a diligent search of those records for the location of this accident. She states that the Town does own, maintain, and exercise jurisdiction over said location, and that she searched the records for that location "for five (5) years prior." Angelone further swears that her search "did not reveal any written complaints or written notifications made to the Town of Brookhaven in regards to the subject location."

In addition, the Town has submitted an affidavit from Linda Sullivan (Sullivan), who is employed as a senior clerk typist by the Town in the Town Clerk's Office. She swears her duties include the "logging of litigation pleadings," and conducting searches of the Town Clerk log book to determine whether the Town had prior written notice "of defects at incident locations." Sullivan further swears that she has made a diligent search of the index book and records maintained by the Town Clerk of the Town of Brookhaven for five (5) years prior regarding the location of this incident, and that said search did not reveal any prior written complaints.

The Town has established its prima facie entitlement to summary judgment regarding liability in this action. A municipality may rely upon an affidavit or other sworn testimony of an official charged with the responsibility of keeping an indexed record of all received notices of defective conditions to establish the absence of its receipt of prior written notice (*see* ***Spanos v Town of Clarkstown***, 81 AD3d 711, 916 NYS2d 181 [2d Dept 2011]; ***Scafidi v Town of Islip***, 34 AD3d 669, 824 NYS2d 410 [2d Dept 2006]; ***Campisi v Bronx Water & Sewer Service***, 1 AD3d 166, 766 NYS2d 560 [2d Dept 2003])

Once a defendant has demonstrated a prima facie showing that it did not have prior written notice of a defect, the burden shifts to the plaintiff to demonstrate the applicability of either of the two

exceptions to the written notice requirement (*see* ***Yarborough v City of New York***, 10 NY3d 726, 853 NYS2d 261 [2008]; ***Amabile v City of Buffalo***, *supra*; ***Marshall v City of New York***, 52 AD3d 586, 861 NYS2d 77 [2d Dept 2008]). The Court of Appeals has recognized only two exceptions to this rule, "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" (***Amabile v City of Buffalo***, 93 NY2d at 474, 693 NYS2d at 79; ***Oboler v City of New York***, 8 NY3d 888, 832 NYS2d 871 [2007];

In opposition to the Town's motion, the plaintiffs incorporate the exhibits submitted by the Town in its motion, and they submit the affirmation of their attorney, their amended bill of particulars, the deposition of Anthony Gonzalez (Gonzalez), a Town employee, a page of a work log/diary created by Gonzalez, the sworn statement of a nonparty, copies of the five work orders discovered by Angelone in her search of the Town records, and an unauthenticated copy of the police accident report, Form MV-104A, regarding this incident. Although plainly inadmissible (*see* CPLR 4518 [c]; ***Cover v Cohen***, 61 NY2d 261, 473 NYS2d 378 [1984]; ***Cheul Soo Kang v Violante***, 60 AD3d 991, 877 NYS2d 354 [2d Dept 2009]), the police accident report will be considered herein for the limited purpose of addressing the issue raised by the plaintiffs by its submission. In addition, the unsigned but certified deposition of Gonzalez will be considered as the parties have not raised any challenges to its accuracy (***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]; *see also* ***Bennet v Berger***, 283 AD2d 374, 726 NYS2d 22 [1st Dept 2001]; ***Zabari v City of New York***, 242 AD2d 15, 672 NYS2d 332 [1st Dept 1998]).

In her affirmation, counsel for the plaintiffs contends, among other things, that the Town had actual notice of the subject pothole two days before the plaintiffs' accident. In support of this contention, the plaintiffs submit the sworn statement of nonparty Luigi Belcastro (Belcastro) dated August 3, 2012, wherein he swears that, on February 26, 2010, he "hit into a large pothole" at the same location as the plaintiffs had their accident. He states that he called 911, and that the police responded to the scene and completed an accident report. Belcastro further swears that he "contacted the Town of Brookhaven to see if I could be reimbursed for the damage to my car." It is well settled that actual notice or constructive notice of a defect does not satisfy the requirement that a town receive prior written notice (***Wilkie v Town of Huntington***, *supra*). In addition, Belcastro does not indicate the date that he contacted the Town, nor the manner of his communication. That is, whether it was written or oral. Moreover, in its reply the Town submits a copy of Belcastro's notice of claim regarding his accident dated March 3, 2010. It is noted that this written notice was mailed on March 25, 2010, after the plaintiffs' accident, and a review of his statement therein indicates that his accident did not happen at the same location as that of the plaintiffs.[1]

The plaintiffs further contend that the Town's motion must be denied as it has failed to produce the written work orders regarding the Belcastro accident and the plaintiffs' accident. The plaintiffs do

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[1] The submission of evidence in a reply to rebut a fact raised in opposition to a motion for summary judgement is appropriate (*see* ***Bayly v Broomfield***, 93 AD3d 909, 939 NYS2d 634 [3d Dept 2012]; ***Whale Telecom Ltd. v Qualcomm Inc.***, 41 AD3d 348, 839 NYS2d 726 [1st Dept 2007]; ***Allstate Ins. Co. v Raguzin***, 12 AD3d 468, 784 NYS2d 644 [2d Dept 2004]; ***Barbuto v Winthrop Univ. Hosp.***, 305 AD2d 623, 760 NYS2d 199 [2d Dept 2003]).

not submit any authority for the proposition that the alleged failure to disclose said documents or to include them in its motion is grounds to deny said motion. More importantly, it is noted that the Town's obligation is to search for and disclose prior written notices, not those which were received after the incident in question. In addition, the plaintiffs point out that the police reports for the Belcastro accident and the plaintiffs' accident indicate that the Town was notified about the respective potholes. Here, it has been established that the pothole that Belcastro encountered was not the same as that which the plaintiffs hit, and any notification by the police officers that responded to the plaintiffs' accident was, by definition, after said incident.

Finally, the plaintiffs contend that the Town's production of written work orders after it receives a telephone complaint serves as written notice pursuant to Town of Brookhaven Code § 84-1. However, it is well settled that a verbal or telephonic communication to a municipal body that is reduced to writing does not satisfy a prior written notice requirement (*see* ***Gorman v Town of Huntington***, 12 NY3d 275, 879 NYS2d 379 [2009]; ***Spanos v Town of Clarkstown***, *supra*; ***McCarthy v City of White Plains***, 54 AD3d 828, 863 NYS2d 500 [2d Dept 2008]; ***Khemraj v City of New York***, 37 AD3d 419, 829 NYS2d 621 [2d Dept 2007]). That is, internal documents generated by the Town are insufficient to satisfy the statutory requirement (*see* ***Wilkie v Town of Huntington***, *supra*; ***Dalton v City of Saratoga Springs***, 12 AD3d 899, 784 NYS2d 702 [3d Dept 2004]; ***Cenname v Town of Smithtown***, 303 AD2d 351, 755 NYS2d 651 [2d Dept 2003]; ***Roth v Town of North Hempstead***, 273 AD2d 215, 709 NYS2d 839 [2d Dept 2000]).

In addition, the evidence in the record does not demonstrate the existence of triable issues of fact as to whether the Town created the alleged defective condition through an affirmative act of negligence (***Yarborough v City of New York***, *supra*; ***Oboler v City of New York***, *supra*; ***Hirasawa v City of Long Beach***, 57 AD3d 846, 870 NYS2d 96 [2d Dept 2008]). The Gonzalez deposition merely establishes the undisputed fact that the subject pothole was repaired late in the evening after the plaintiffs' accident. Nor have the plaintiffs alleged that the "special use" exception to the prior written notice requirement is an issue herein. Thus, the plaintiffs have failed to establish that prior written notice was delivered to the Town or to meet their burden to demonstrate the applicability of either of the two exceptions to the written notice requirement. Accordingly, the Town's motion for summary judgment dismissing the complaint is hereby granted.

In light of the Court's determination herein, the Town's counterclaim against Christopher Scuderi is deemed academic and it is hereby dismissed.

Dated: 10/30/13

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION