

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D33574
O/kmb

_____AD3d_____

Argued - December 9, 2011

THOMAS A. DICKERSON, J.P.
L. PRISCILLA HALL
JEFFREY A. COHEN
ROBERT J. MILLER, JJ.

2011-00285

DECISION & ORDER

Regina Wiley, plaintiff-respondent, v Incorporated Village of Garden City, defendant third-party plaintiff-appellant-respondent; Scal-Pratt Paving Corp., et al., third-party defendants, Scatt Materials, Inc., third-party defendant-respondent-appellant.

(Index No. 13920/05)

Andrea G. Sawyers, Melville, N.Y. (Dominic P. Zafonte of counsel), for defendant third-party plaintiff-appellant-respondent.

Conway, Farrell, Curtin & Kelly, P.C., New York, N.Y. (Jonathan T. Uejio of counsel), for third-party defendant-respondent-appellant.

Joseph C. Andruzzi, Plainview, N.Y., for plaintiff-respondent.

In an action to recover damages for personal injuries, the defendant third-party plaintiff appeals from so much of an order of the Supreme Court, Nassau County (Parga, J.), entered November 29, 2010, as denied its motion for summary judgment dismissing the complaint, and the third-party defendant Scatt Materials, Inc., cross-appeals from so much of the same order as denied its cross motion for summary judgment dismissing the third-party complaint insofar as asserted against it.

ORDERED that the order is reversed, on the law, with one bill of costs to the defendant third-party plaintiff payable by the plaintiff, and one bill of costs to the third-party defendant Scatt Materials, Inc., payable by the defendant third-party plaintiff, the motion of the defendant third-party plaintiff for summary judgment dismissing the complaint is granted, and the

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cross motion of the third-party defendant Scatt Materials, Inc., for summary judgment dismissing the third-party complaint insofar as asserted against it is granted.

The plaintiff allegedly was injured when she stumbled and fell in a parking lot owned by the defendant, the Incorporated Village of Garden City (hereinafter the Village), as a result of stepping into a pothole. The plaintiff commenced this action against the Village, and the Village commenced a third-party action against, among others, Scatt Materials, Inc. (hereinafter Scatt Materials), the corporation that allegedly installed the asphalt in the subject parking lot in 1984. The Village moved for summary judgment dismissing the complaint and Scatt Materials cross-moved for summary judgment dismissing the third-party complaint insofar as asserted against it.

On its motion for summary judgment dismissing the complaint, the Village made a prima facie showing of entitlement to judgment as a matter of law by providing evidence that it lacked prior written notice of the allegedly dangerous condition, as required by Garden City Village Code § 132-2 (*see Jason v Town of N. Hempstead*, 61 AD3d 936; *Smith v Village of Rockville Ctr.*, 57 AD3d 649, 650). In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff's contention that the Village failed to maintain indexed records of notices received, in violation of Village Law § 4-402(g), is unavailing. When presented with such a failure, the burden shifts to the municipality to show that it made a diligent and good-faith search of its internal records (*see Caramanica v City of New Rochelle*, 268 AD2d 496; *Mollahan v Village of Port Washington N.*, 153 AD2d 881, 885). Here, the municipality made a diligent effort and good-faith search of its records and found no prior written notice.

Regarding the plaintiff's contention as to the applicability of the affirmative negligence exception to the statutory rule requiring prior written notice, she failed to provide any evidence tending to show that repairs performed by the Village immediately resulted in a pothole or any other surface defect in the area in question (*Yarborough v City of New York*, 10 NY3d 726, 728; *see Oboler v City of New York*, 8 NY3d 888, 889; *Richards v Incorporated Vil. of Rockville Ctr.*, 80 AD3d 594, 594; *cf. San Marco v Village/Town of Mount Kisco*, 16 NY3d 111). Accordingly, the Supreme Court should have granted the Village's motion for summary judgment dismissing the complaint.

Moreover, the Supreme Court should have granted the cross motion of Scatt Materials for summary judgment dismissing the third-party complaint insofar as asserted against it. Scatt Materials made a prima facie showing of entitlement to judgment as a matter of law, and the Village failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320).

DICKERSON, J.P., HALL, COHEN and MILLER, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court