STATE OF NEW YORK
SUPREME COURT COUNTY OF ULSTER

MARIE A. RIEDENER and JOSEF RIEDENER,

Plaintiffs,

-against-

Index No.: 05-4155
RJI No.: 55-06-00351

CITY OF KINGSTON and STOCKADE BUSINESS PARK, LLC,

Defendants.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding

Appearances:

ERIC SCHNEIDER, ESQ.
Attorney for Plaintiffs
P.O. Box 3936
Kingston, New York 12402

COOK, NETTER, CLOONAN, KURTZ & MURPHY, P.C.
Attorneys for Defendant City of Kingston
(Michael T. Cook, Esq. of Counsel)
P.O. Box 3939
Kingston, New York 12402

SANABRIA AND MANSON
Attorneys for Defendant Stockade Business Park
(David B. Manson, Esq. of Counsel)
90 Crystal Run Road, Suite 405
Middletown, New York 10941

DECISION/ORDER

George B. Ceresia, Jr., Justice

Plaintiffs commenced this action seeking to recover for serious injuries sustained by Marie A. Riedener (hereinafter plaintiff) in a fall upon an allegedly defective public

sidewalk in front of premises owned by defendant Stockade Business Park (hereinafter defendant Stockade) and located in the City of Kingston (hereinafter defendant City). Defendant Stockade has moved for summary judgment on the ground that as a mere abutting landowner it is not liable for plaintiff's injuries. Defendant City has cross-moved for summary judgment dismissing the complaint on the grounds that the City did not receive prior written notice of any defect in the sidewalk as required by the Kingston City Charter before an action for injuries caused by such a defect may be maintained.

Summary judgment is a drastic remedy which should only be granted when it is clear that there are no triable issues of fact (see Andre v Pomeroy, 35 NY2d 361, 364 [1974]). "[T]he 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 demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see also Bush v St. Clare's Hosp., 82 NY2d 738, 739 [1993]). In order to meet this burden when seeking dismissal of a cause of action, a party must submit evidence which negates any meritorious cause of action encompassed by the pleadings (Franceschi v Consolidated Rail Corp., 142 AD2d 915 [3d Dept 1988]; see also Hirsh v Bert's Bikes and Sports, 227 AD2d 956 [4th Dept 1996]; Wilder v Rensselaer Polytechnic Inst., 175 AD2d 534 [3d Dept 1991]). The motion is not a vehicle to challenge the opposition to prove its case. It is only when the movant has established a right to judgment as a matter of law that the burden shifts to the opponent of the motion to

establish, by admissible proof, the existence of genuine issues of material fact (see Zuckerman v City of New York, 49 NY2d 557 [1980]). In general, the Court will then view the evidence in a light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact (see Boyce v Vazquez, 249 AD2d 724, 726 [3d Dept 1998]; Martin v Briggs, 235 AD2d 192, 196 [1st Dept 1997]; Simpson v Simpson, 222 AD2d 984, 986 [3d Dept 1995]).

With respect to the motion by defendant Stockade,

> "'[i]t is well settled that an owner or occupier of property will not be liable solely because his [or her] property abuts a public sidewalk where an injury occurred ***' (Brady v Maloney, 161 AD2d 879, 880 [citations omitted]; see, Hausser v Giunta, 88 NY2d 449, 452-453; Ishkanian v City of Troy, 175 AD2d 464). Rather, in order for liability to be imposed upon an abutting landowner, one of the following circumstances must exist: (1) the landowner actually created the defective condition which caused the accident, (2) the sidewalk was constructed in a special manner for the benefit of the landowner, (3) the landowner negligently constructed or repaired the sidewalk, or (4) a statute or ordinance specifically charged the landowner with a duty to maintain and repair the sidewalk and imposed liability for injuries occurring as the result of the breach of that duty (see, Hausser v Giunta, supra, at 453; Ishkanian v City of Troy, supra, at 464-465; Brady v Maloney, supra, at 880)." (Tutrone v Limongello, 245 AD2d 696, 697, [Third Dept., 1997].)

In order to meet its burden on a motion for summary judgment dismissing such an action, the abutting landowner bears the initial burden of showing that it did not cause or create the defective condition, did not negligently construct or repair the sidewalk and that the sidewalk was not constructed in a special manner (see Murnan v Town of Tonawanda, 34 AD3d 1296 [4th Dept 2006]; Nilsen v City of New York, 28 AD3d 625 [2d Dept 2006];

Kreimer v Rockefeller Group, Inc., 2 AD3d 407 [2d Dept 2003]).

Defendant Stockade has submitted only an attorney's affirmation annexing the pleadings and transcripts of examinations before trial of defendants and plaintiff's General Municipal Law § 50-h examination. Such submissions fail to address whether defendant Stockade caused or created the allegedly defective condition, negligently repaired or constructed the sidewalk or whether the sidewalk was constructed in a special manner. Rather, defendant Stockade merely contends that plaintiff can not prove her cause of action.

By reply, defendant Stockade submitted an attorney's affirmation annexing certain pictures of a sidewalk purporting to show that Stockade did not repair or construct the area where plaintiff fell. The pictures also indicate that the sidewalk was not constructed in a special manner. However, defendant Stockade has not provided any foundation for the pictures by a person with knowledge of the facts (see Beckmann v 71 Speeder Road, LLC., 28 AD3d 1053 [3d Dept 2006]; Fallsburg Fishing & Boating Club v Spiegel, 9 AD3d 765, 766 [3d Dept 2004]; Bronson v Algonquin Lodge Assn., 295 AD2d 681, 682 [3d Dept 2003]) nor is there any sufficient basis in the record for the Court to determine where on the sidewalk as depicted in the pictures the plaintiff fell. As such, defendant Stockade has failed to meet its burden on the instant motion. Therefore the motion shall be denied.

Defendant City has submitted an affidavit from its City Clerk indicating that the

City retains and files all written notices of defects in sidewalks that it receives. She also stated that the City did not receive any written notice of any defects in the subject sidewalk at any time prior to plaintiff's accident. Kingston City Charter § C17-1 (A) provides that no civil action may be maintained against the City for injuries sustained as a result of defects in a sidewalk in the absence of prior written notice. There is no provision in the charter to allow actual or constructive notice to suffice. Under such circumstances, plaintiff must prove that prior written notice of the defect was given. She may not rely upon actual or constructive notice (see Amabile v City of Buffalo, 93 NY2d 471, 473-474 [1999]; Braun v Village of New Sq., 3 AD3d 513 [2d Dept 2004]; Berner v Town of Huntington, 304 AD2d 513 [2d Dept 2003]; Berlowitz v Town of Brighton, 259 AD2d 983 [4th Dept 1999]). Defendant City has met its burden by establishing the prior written notice law and the fact that no prior written notice was received (see Guadagno v City of Niagara Falls, 38 AD3d 1310 [4th Dept 2007]; see also Lifer v City of Kingston, 295 AD2d 695, 696 [3d Dept 2002]).

Plaintiff contends that the fact that defendant Stockade communicated with the City concerning rebuilding a portion of the sidewalk fifteen years prior to plaintiff's fall shows some prior notice. However, plaintiff has failed to submit any evidence showing that prior written notice of the specific defect which caused her fall was given. Actual notice that repairs were made to some portion of the sidewalk fifteen years earlier does not constitute prior written notice of the defect. The only exceptions to the prior written

notice rule are if the City caused or created the defect or made some special use of the sidewalk (see Amabile v City of Buffalo, 93 NY2d at 474; Lifer v City of Kingston, 295 AD2d at 696). Plaintiff has not offered any evidence that the City created the condition or that the City made some special use of the sidewalk. Therefore, the cross-motion for summary judgment dismissing the action against the defendant City shall be granted.

Accordingly it is

ORDERED that defendant Stockade's motion for summary judgment dismissing the action is hereby denied without prejudice to renew upon proper proof, and it is further

ORDERED that defendant City's cross-motion for summary judgment dismissing the complaint is hereby granted.

This shall constitute the Decision and Order of the Court. All papers are returned to the attorneys for defendant City, who are directed to enter this Decision/Order without notice and to serve all remaining counsel with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York
May 14, 2007

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

Notice of Motion dated January 18, 2007; Affirmation of David Manson, Esq. dated January 18, 2007 with Exhibits A-F annexed;
Memorandum of Law dated January 18, 2007;

Notice of Cross-Motion dated February 8, 2007; Affidavit of Michael T. Cook, Esq. sworn to February 8, 2007 with Exhibits A-G annexed; Affidavit of Kathy Janeczek sworn to February 8, 2007;

Affirmation of Eric Schneider, Esq. dated February 22, 2007 with Exhibit A annexed; Affidavit of Marie A. Riedener sworn to February 22, 2007;

Reply Affirmation of David Manson, Esq. dated February 26, 2007 with Exhibits A-C annexed.