SHORT FORM ORDER

INDEX No. 05-6340
CAL. No. 06-01656-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 11-15-06
ADJ. DATE 2-13-07
Mot. Seq. # 001 - MG; CASEDISP

JOHN STARACE,	:	KEEGAN & KEEGAN, et al.
	:	Attorneys for Plaintiff
Plaintiff,	:	147 North Ocean Avenue, P.O. Box 918
	:	Patchogue, New York 11772-0918
- against -	:	
	:	SOBEL & SEIDELL, LLP
TOWN OF SMITHTOWN,	:	Attorneys for Defendant
	:	811 West Jericho Turnpike,
Defendant.	:	

Upon the following papers numbered 1 to 22 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 - 20; Replying Affidavits and supporting papers 21 - 22; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by the defendant for summary judgment dismissing the complaint, pursuant to CPLR 3212, is granted.

The summons and verified complaint in this action were filed on or about March 31, 2005 and issue was joined by the filing of defendant's answer on or about April 14, 2005. Discovery has been completed, and the note of issue was filed on or about July 12, 2006.

This is an action for personal injuries allegedly sustained by plaintiff John Starace (Starace) on or about March 16, 2004 at approximately 7:30 p.m., when he tripped and fell on a raised portion of a sidewalk located adjacent to 19 Ann Court, Kings Park, Suffolk County, New York. Plaintiff alleges in his verified complaint that the defendant Town of Smithtown (Smithtown) failed to properly maintain said sidewalk and negligently allowed a dangerous condition to exist which caused plaintiff to fall and suffer permanent serious physical injury.

Defendant Smithtown now moves for summary judgment dismissing the complaint, pursuant to CPLR 3212, on the grounds that the plaintiff failed to state a cause of action and further that it did not

have prior written notice of the defective condition pursuant to New York Town Law § 65-a and pursuant to Smithtown Town Code §§ 245-13, 245-14 and 245-14.1. In support of its motion Smithtown submits, *inter alia,* an affirmation of counsel, copies of the pleadings and verified bill of particulars, copies of the deposition transcripts of John Starace dated September 1, 2004 and September 27, 2005 and an affidavit from Vincent Puleo, Town Clerk for the Town of Smithtown.

Plaintiff opposes the motion on the grounds that he did state a cause of action, that there is a triable issue of fact regarding prior written notice to Smithtown and further that Smithtown created the condition which caused the sidewalk to become raised. Plaintiff submits in opposition, *inter alia*, an affirmation of counsel, an affidavit of John Starace, copies of letters to the Town of Smithtown Parks Department and Smithtown Town Clerk dated, respectively, March 11, 2004 and July 6, 2003, an uncertified copy of a Town of Smithtown sidewalk complaint memorandum and photocopies of four photographs allegedly depicting the area where plaintiff tripped and fell.

New York State Town Law §65-a requires that "[n]o civil action shall be maintained against any town . . . unless written notice of such defective . . . condition . . . was actually given to the town clerk or town superintendent of highways . . . ." In addition, Smithtown Town Code Chapter 245, Article III, Sections 13 - 14.2, enacted pursuant to its authority under the New York Municipal Home Rule Law and General Municipal Law, requires that

> No civil action shall be maintained against the Town of Smithtown for damages or injuries to person or property sustained by reason of any . . . sidewalk, . . . being defective, out of repair, unsafe, dangerous or obstructed . . . unless written notice of such defective, unsafe, dangerous or obstructed condition shall be filed with the Town Clerk 15 calendar days prior to the event giving rise to the alleged claim (Smithtown Town Code § 245-13).
>
> In the absence of written notice that is required above, no civil claim shall be maintained against the Town of Smithtown, nor shall any civil claim be maintained based on an allegation that such defect, danger or obstruction existed for so long a period of time that the same should have been discovered and remedied in the exercise of reasonable care and diligence, nor a claim that any Town employee possessed actual knowledge of such defect, danger or obstruction, unless written notice is filed with the Town Clerk as required above (Smithtown Town Code § 245-14 [A]).
>
> Nothing herein contained shall be construed to relieve a claimant of the obligation to serve a notice of claim on the Town of Smithtown as provided in § 50-e of the General Municipal Law (Smithtown Town Code § 245-14 [B]).
>
> The written notice required by this section shall state the exact location of the alleged defect, danger or obstruction and shall specifically state the condition complained of. If this requirement is not met, such notice shall be void (Smithtown Town Code § 245-14.1).

As a condition precedent to commencement of a personal injury action, a municipality may require prior written notice of the specific defect that allegedly caused the injury to the plaintiff (*see,* ***Oswald v City of Niagara Falls,*** 13 AD3d 1155, 787 NYS2d 757 [2004]). Therefore, prior written notice of a defective or unsafe sidewalk condition must be given to the Smithtown Town Clerk before a civil action may be maintained against the Town of Smithtown to recover damages for plaintiff's personal injuries (*see,* ***Filaski- Fitzgerald v Town of Huntington,*** 18 AD3d 603, 795 NYS2d 614 [2005]; ***Ganzenmuller v Incorp. Village of Port Jefferson,*** 18 AD3d 703; 795 NYS2d 744 [2005]). Notice to any other entity within the town is insufficient since prior written notice statutes, enacted in derogation of common law, are to be strictly construed (*see,* ***Poirier v City of Schenectady,*** 85 NY2d 310, 624 NYS2d 555 [1995]***; Monteleone v Incorp. Village of Floral Park,*** 74 NY2d 917, 550 NYS2d 257 [1989]). Where a municipality has enacted a prior written notice statute, it may not be subjected to liability for personal injuries caused by such defective condition unless it received prior written notice of the defect or an exception to the written notice requirement applies (***Ganzenmuller v Incorp. Village of Port Jefferson,*** 18 AD3d at 704; 795 NYS2d at 745). The New York Court of Appeals has recognized only two exceptions to the prior written notice rule, namely, where the locality created the defect or hazard through an affirmative act of negligence or where a "special use" confers a special benefit upon the locality (*id.*). In this case neither of the exceptions is applicable.

Defendant Smithtown has submitted admissible evidence that Smithtown did not receive prior written notice of the defective sidewalk adjacent to 19 Ann Court prior to plaintiff's accident. Smithtown submitted an affidavit from the Smithtown Town Clerk, Vincent Puleo, establishing that a review of the Town Clerk's records for the area located in the vicinity of 19 Ann Court did not reveal any complaints or notifications concerning the sidewalk defect, which plaintiff alleges caused him to fall, to the Smithtown Town Clerk prior to the date of plaintiff's accident. Plaintiff does not claim that he notified Smithtown of the defect prior to his injury but relies instead on a general complaint, made by a non-party neighbor residing at 11 Ann Court, who on July 6, 2003 sent a letter of complaint concerning the sidewalk in front of his residence to the Smithtown Town Clerk and thereafter on March 11, 2004 sent a letter of complaint to the Town of Smithtown Parks Department complaining about the sidewalks. Both of these letters are insufficient to satisfy the prior written notice requirement. The first letter is sent approximately eight months prior to plaintiff's accident, it addresses only the sidewalk in front of 11 Ann Court and it does not make any reference to the sidewalk at 19 Ann Court. The second letter is sent to the Smithtown Parks Department and only makes reference to the sidewalks in front of Mr. Kunz's property at 11 Ann Court. Both of these letters speak only in general terms regarding the condition of the sidewalk and are therefore insufficient.

A generalized complaint about a defective condition is insufficient to constitute prior written notice of a specific defect (*see generally,* ***Acheson v City of Mount Vernon,*** 6 AD3d 468; 774 NYS2d 432 [2004] [complaint concerning poor condition of roadway did not constitute prior written notice of the particular defect]; ***Curci v City of New York,*** 209 AD2d 574, 619 NYS2d 98 [1994][noticed defects were isolated from and not part of the defective condition which allegedly caused the accident in question]; ***O'Rourke v Town of Smithtown,*** 129 AD2d 570, 514 NYS2d 68 [1987][reported areas did not create an awareness of the defect which is at the center of this controversy]; ***Holt v County of Tioga,*** 95 AD2d 934, 464 NYS2d 278 [1983][notice at the very least should bring the defective condition to the attention of the authorities]; ***Galassi v County of Nassau,*** 6 Misc3d 136A, 800 NYS2d 346 [2005] [a generalized complaint about the condition of the roadway is insufficient to constitute prior written

notice of a specific defect]). Thus, based on the evidence submitted, the defendant established, prima facie, that it did not receive prior written notice of the alleged defect (*see,* ***Winegrad v New York Univ. Med. Ctr.,*** 64 NY2d 851, 853, 487 NYS2d 316 [1985]).

In opposition, plaintiff also argues that an exception to notice applies since he claims that Smithtown affirmatively created the defect when it planted a tree next to the sidewalk and allowed the roots of the tree to uproot the sidewalk. Plaintiff however, submitted no proof to establish that Smithtown planted the tree. Even assuming that Smithtown had planted the tree, this exception to the statutory written notice requirement would not apply. The exception exists only where the municipality acted affirmatively to create a dangerous condition through its own negligence (*see,* ***Amabile v City of Buffalo,*** 93 NY2d 41, 693 NYS2d 77 [1999]; ***Nixdorf v East Islip School District***, 276 AD2d 759, 715 NYS2d 432 [2000]) and the mere planting of a curbside tree does not constitute affirmative negligence (*see,* ***Zawacki v Town of N. Hempstead***, 184 AD2d 697, 585 NYS2d 93 [1992]; ***Zizzo v City of New York,*** 176 AD2d 722, 574 NYS2d 966 [1991]; ***Monteleone v Incorporated Vil. of Floral Park,*** *supra*). The planting of the tree and failure to control the roots of the tree, would at most constitute nonfeasance, not affirmative negligence (*see,* ***Lowenthal v Heidrich Realty Corp.,*** 304 AD2d 725, 759 NYS2d 497 [2003]; ***Michela v County of Nassau,*** 176 AD2d 707, 574 NYS2d 965 [1991]).

The defendant has established its *prima facie* entitlement to summary judgment as a matter of law (*see,* ***Alvarez v Prospect Hosp.,*** 68 NY2d 320, 508 NYS2d 923 [1985]). In opposition hereto plaintiff has failed to raise a triable issue of fact (***Zuckerman v City of New York,*** 49 NY2d 557; 427 NYS2d 595 [1980]).

Accordingly, defendant's motion for summary judgment is granted.

Dated: MAY 14 2007

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION