SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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KEVIN KINCAID

Plaintiff,

-against-

TOWN OF HEMPSTEAD, COUNTY OF NASSAU
RALPH SCHERILLO and DIANE SCHERILLO,

Defendants.

----------x

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 16
Index No.: 7985/06
Motion Seq. No.: 02, 03

DECISION AND ORDER

Papers Read on this Motion:

1. Defendant's Motion for Summary Judgment.....02
2. Plaintiff's Affirmation in Opposition for Both.....xx
3. Defendant's Reply Affirmation.....xx
4. Defendant's Motion for Summary Judgment.....03
5. Defendant's Reply Affirmation.....xx

In motion sequence number 02, Defendants, Ralph and Diane Scherillo (hereinafter "Scherillos"), move by Notice of Motion for an order granting Summary Judgment dismissing Plaintiff's Complaint and all cross-claims against them. In motion sequence number 03, Defendant, Town of Hempstead (hereinafter "Town"), moves by Notice of Cross-Motion for an order granting Summary Judgment in their favor and dismissing Plaintiff's Complaint and all cross-claims against them.

This action to recover for personal injuries was commenced by Plaintiff via Summons and Verified Complaint dated April 27, 2006, and served on Defendants on or about May 18, 2006. Issue was joined by service of an Answer with cross-claims by the County of Nassau on May 23, 2006, and by the Town of Hempstead on May 25, 2006. Issue was joined on behalf of the Scherillos on or about July 24, 2006. Plaintiff served a Bill of Particulars on March 15, 2007 and was deposed on July 10, 2007.

Plaintiff allegedly sustained injuries on July 10, 2005, when he fell off his bicycle due to an alleged defect on the public sidewalk located in front of 98 Oakley Avenue, Hempstead, New

York, caused by the growth of a tree root in front of the property.

I. Defendants Scherillos' Motion for Summary Judgment

Defendants Scherillos maintain that no act or omission on their part was the proximate cause of the Plaintiff's injuries and as such, they are entitled to judgment as a matter of law. The Scherillos maintain that the Town of Hempstead is responsible for the maintenance and repair of the subject sidewalk in front of 98 Oakley Avenue and that the Scherillos had not received any complaints regarding the sidewalk prior to the accident. Further, the Scherillos maintain that they made no repairs to the sidewalk, or any special use of the sidewalk. The Scherillos also maintain that there is no statute imposing an obligation on them as abutting landowners to maintain or repair the subject sidewalk or imposing liability for injuries to pedestrians as a result of the failure to maintain or repair the subject sidewalk.

In opposition to the Scherillos motion for Summary Judgment, the Plaintiff maintains that there is a material question of fact concerning whether the Scherillos had actually performed work at 98 Oakley Street, New York during the course of the tree's root growth. Plaintiff also maintains that there is a question of fact as to whether the Scherillos derived a special use from the tree located on this rental property as the monetary benefit derived from rental property is enhanced by a tree such as the one on the subject property. Further, the Code of the Town of Hempstead § 181-11, obligates the abutting landowner to keep the sidewalk in good repair or face penalties or imprisonment.

In Reply, the Scherillos maintain that there is no evidence in the record to support the allegation that the Scherillos, or anyone on their behalf, made any repairs to the subject sidewalk prior to the Plaintiff's accident and Mr. Scherillo unequivocally testified that he had not made any repairs. The Scherillos argue the Plaintiff's assumption that repairs made to the sidewalk may have "slipped Mr. Scherillo's mind" simply because Mr. Scherillo testified that he did not recall being at the subject property in the six months prior to the accident, is without merit or evidentiary support. Further, the Scherillos maintain that the allegations that they derived a special use from the tree is speculation as to the property value and even so, abutting landowners are not responsible for damage caused to a sidewalk by the roots of a tree. Also, the Scherillos maintain that the

Hempstead Code does not impose tort liability on an abutting landowner in the event of injury on a public sidewalk.

Generally, "[a]n abutting landowner will not be liable to a pedestrian injured as a result of a defect on a public sidewalk unless the landowner created the defective condition or caused the defect to occur because of some special use of the sidewalk, or if 'a local ordinance or statute specifically charges [the] landowner with a duty to maintain and repair the sidewalks and imposes liability for injuries resulting from the breach of that duty." *Fishelberg v Emmons Ave. Hospitality Corp.*, 26 AD3d 460 (2d Dept 2006).

In the instant case, based on Defendant Ralph Scherillo's testimony, there are no facts to support allegations that the Scherillos may have created a defective condition on the public sidewalk or that such a defect occurred as a result of any special use or benefit that may occur from having a tree on a public sidewalk in front of rental property. Allegations that the Scherillos may have forgotten any repairs that they may have made on the property, or that the location of tree on rental premises equates to a special benefit, without any facts to prove the same, are purely speculative and without merit. Thus, no liability can be imposed on the Scherillos on these grounds.

Next, in relevant part, the Code of the Town of Hempstead § 181-11 states that "[e]very owner or occupant of any house or other building . . . in the Town of Hempstead . . . shall at all times keep such sidewalk in good and safe repair and maintain the same clean, free from filth, dirt, weeds or other obstructions or encumbrances." However, it is well settled that when a Town Code does not "expressly impose tort liability upon the landowner for injuries caused by a violation of that duty," then such a landowner is not subject to tort liability for any alleged breach of the Code. *Bloch v Potter*, 204 AD2d 672 (2d Dept 1994).

Here, even assuming that it can be proved that the Scherillos breached their duty to maintain the public sidewalk in good repair, the Code does not impose any direct tort liability on a landowner for injuries caused by a violation of this provision of the Code. Thus, no tort liability can be imposed on the Scherillos based on this ground. On the contrary, section 6-4 of the Code of the Town of Hempstead allows a party to bring a civil action against the Town of Hempstead for "injuries or damages to persons or property sustained by reason of any defect or obstruction

whatsoever in its traffic signs, sidewalks, walkways, footpaths, bicycle paths . . ." so long as such action is served upon the Town Clerk or Town Commissioner of Highways. Therefore, summary judgment in favor of Defendants Ralph Scherillo and Diane Scherillo is proper as there are no triable issues of fact with regards to their potential liability.

II. Defendant Town of Hempstead's Motion for Summary Judgment

Defendant Town moves for Summary Judgment against the Plaintiff as he failed to raise a triable issue of fact that would warrant a denial of the within motion. Further, pursuant to the Code of the Town of Hempstead § 6-3 and § 65-2 of the Town law of the State of New York, receipt of prior written notice is a condition precedent to the maintenance of a civil action against the Town for injuries arising from a defective sidewalk. Defendant Town maintains that because the Plaintiff failed to submit any proof indicating the existence of prior written notice of any alleged sidewalk defects at the subject accident location, the complaint should be dismissed and summary judgment should be granted. In addition, Defendant Town maintains that the Plaintiff has failed to submit any admissible proof that the Town in any way created the alleged sidewalk defect.

In opposition to the Town of Hempstead's motion for Summary Judgment, the Plaintiff maintains that the Town has been silent with regards to salient facts which would require denial and are in the Town's sole possession, and as such, the Plaintiff is entitled to discovery. Plaintiff alleges that pursuant to the Code of the Town of Hempstead §§ 6-3, 6-4, the Town Clerk or Town Commissioner of Highways is the party upon whom prior written notice of defective conditions must be served. Thus, the Plaintiff alleges that he is entitled to the deposition of either the Town Clerk, the Town Commissioner of Highways or an employee of either of those parties to see if prior written notice exists.

As stated earlier, pursuant to the Code of the Town of Hempstead, a party may bring a civil action against the Town of Hempstead for "injuries sustained by reason of any defect or obstruction in its sidewalks if such an action is served upon the Town Clerk or Town Commissioner of Highways in accordance with § 6-4. Specifically, provision § 6-4 of the Code requires written notice by a witness to the condition or defect, identifying with particularity, the specific nature and location of each condition, defect or obstruction complained of, and served unto

the Town or officers specified herein.

In the instant case, the Court agrees with the Defendant Town of Hempstead's contention that prior written notice of the defective condition alleged . . . is a condition precedent to maintaining the instant action. *LaRosa v Town of Hempstead*, 237 AD2d 579 (2d Dept 1997). Further, "the affidavit of an official charged with the responsibility of keeping an indexed record of all notices of defective conditions received by [a town] is sufficient to establish that no prior written notice was filed." *Scafidi v Town of Islip*, 34 AD3d 669 (2d Dept 2006). As an exception to this general rule, a Plaintiff's submissions as to whether the City or Town created the defect through an affirmative act of negligence, is sufficient to raise a triable issue of fact that would preclude summary judgment. *Yarborough v City of New York*, 28 AD3d 650 (2d Dept 2006).

Here, it is clear that the requirement of prior written notice to sustain the action was not met as the Plaintiff did not assert that such notice was filed with the Town pursuant to the above provisions of the Code and the Town provided an affidavit from the Town record keeper indicating that the no prior notice of the defect was ever filed. Next, the Plaintiff has also failed to raise sufficient triable issues of fact that could lead a fact finder to believe that the Town may have created the defect through an affirmative act of negligence. Thus, summary judgment in favor of the Town is proper.

As such, it is hereby

ORDERED, that Defendants Ralph Scherillo and Diane Scherillo's, motion for Summary Judgment, sequence number 02, against the Plaintiff Kevin Kincaid is **GRANTED.** It is further,

ORDERED, that Defendant the Town of Hempstead's motion for Summary Judgment, sequence number 03, against the Plaintiff Kevin Kincaid is also **GRANTED**.

Any relief not specifically granted herein is **denied**.

This constitutes the **DECISION** and **ORDER** of this Court.

DATED: June 16, 2008
Mineola, N.Y.

ENTER:

HON. MICHELE M. WOODARD
J.S.C.