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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

Present: HON. WILLIAM R. LaMARCA
Justice

PATRICIA DE LA ROSA,

Plaintiff,

-against-

THE INCORPORATED VILLAGE OF MINEOLA, WINTHROP UNIVERSITY HOSPITAL ASSOCIATION d/b/a WINTHROP UNIVERSITY HOSPITAL and WINTHROP SOUTH NASSAU UNIVERSITY HEALTH SYSTEM, INC.,

Defendants.

Motion Sequence #8
Submitted June 19, 2008

INDEX NO: 6999/06

The following papers were read on this motion:

Notice of Cross-Motion.....1
Memorandum of Law in Support.....2
Plaintiff's Affirmation in Opposition.....3
Reply Affirmation.....4
Sur-Reply.....5

Requested Relief

Initially the Court notes that the Court granted the prior motions of former named defendants, THE TOWN OF NORTH HEMPSTEAD and KEYSPAN CORPORATION and KEYSPAN ENERGY DELIVERY LONG ISLAND) (Sequence #6 and #7) for dismissal of the action as against them, on the grounds that the subject location of the accident was not within the jurisdiction of the TOWN and no prior written notice of the alleged road defect

was given to the town, and because the permits given to KEYSPAN did not cover the subject location and it did not cause the alleged road defect. The instant motion (#8) by defendant, THE INCORPORATED VILLAGE OF MINEOLA (hereinafter referred to as the "VILLAGE"), though delineated as a cross-motion to said motions, is being considered on its own as a separate motion. In said motion, the VILLAGE seeks an order, pursuant to CPLR §3212, granting it summary judgment dismissing the complaint and all cross-claims, on the ground that it did not receive prior written notice of the alleged defect, as required by both VILLAGE Law §6-628 and VILLAGE Code §9.3. An Affidavit of Service reflects that all parties were served with the instant motion and memorandum of law in support, on March 7, 2008, but only counsel for plaintiff, PATRICIA DE LA ROSA, submits opposing papers to the motion, which is determined as follows

Background

This action is to recover damages for personal injuries allegedly sustained by the plaintiff, on April 15, 2005, when she tripped and fell in the cross-walk located at Third Avenue and Second Street, Mineola, New York. Plaintiff commenced the action with the filing of the summons and verified complaint, on June 29, 2006, and named various defendants, including the VILLAGE. Plaintiff alleged, in essence, that the VILLAGE was the owner of the public street, roadway and intersection where the accident took place, and was negligent in its management, control and maintenance of said intersection and in the work and repairs performed to the subject roadway. Additionally, plaintiff alleged that the VILLAGE had more than fifteen (15) days written notice of the defective road condition alleged herein and cannot be protected or shielded by the "Prior Written Notice Law" by virtue of the VILLAGE having conducted prior inspections at the accident site. Plaintiff

alleged that she was injured as a result of the negligence, carelessness and recklessness of the VILLAGE.

In support of the motion for summary judgment, counsel for the VILLAGE asserts that it is entitled to summary judgment because it did not receive prior written notice of the alleged defect, a condition precedent to the imposition of liability against the VILLAGE, and because plaintiff has failed to establish that a defective condition existed at the subject location on April 15, 2005, that the VILLAGE performed work at the subject location immediately resulting in a defective condition, or that the VILLAGE created a defect through its own affirmative acts of negligence. Counsel for the VILLAGE states that, on or about June 26, 2006, the VILLAGE's Clerk Joseph Sealero, performed a search of the records maintained by the VILLAGE for any written complaints received prior to April 15, 2006 concerning any defect at the intersection of Third Avenue and Second Street in MINEOLA, and determined that no such complaints were received.

Counsel for the VILLAGE points out that, at the depositions of the parties and their witnesses, the plaintiff testified and identified a three (3) by three (3) foot roadway patch in a photograph of the subject location as the cause of her accident. She stated that she was unable to pinpoint the specific defect that caused her accident but she stated that she "fell into a hole". The VILLAGE witness, Assistant Superintendent of Public Works, Ronald Ciesinski, testified that the VILLAGE performs pothole repairs on a scheduled basis through the Department of Public Works, that are logged into a VILLAGE computer. He stated that a search of same did not reveal any logs concerning patch work at the subject location. Moreover, he claimed that he performed a search of the VILLAGE records for any repair at the subject location and found a repair to a pot hole at said intersection nine

(9) years prior to plaintiff's accident, on February 13, 1996. Another VILLAGE witness, the Supervisor of Water Plant Operations, Fredrick Booher, testified that his department maintains work orders concerning Water Department assignments. He stated that he performed a search of the work orders dating back to 1988 and that no work orders were issued by the Water Department at the subject location. Additionally a search of work order cards back to 2000 and memos generated by the Water Department back to 1995 and electronically maintained, revealed no records with respect to the subject location or final restoration of roadway openings at the intersection. A third witness for the VILLAGE, the Superintendent of Public Works, Thomas Rini, acknowledged that the 1996 Public Works Log Book indicated that, on February 13, 1996, the VILLAGE performed repairs and patching of pot holes at the subject intersection, but testified that he was unaware of any other documents evidencing any other repairs performed by the VILLAGE at the subject location.

Counsel for the VILLAGE urges that it is entitled to summary judgment because plaintiff has not satisfied the condition precedent to imposing liability– that the VILLAGE receive prior written notice of the alleged defect.

In opposition to the motion, counsel for plaintiff asserts that questions of fact exist as to whether the VILLAGE had actual or constructive notice of the alleged defect, and whether the VILLAGE caused or created the dangerous condition that caused plaintiff to fall and sustain serious injuries. Counsel points out that the testimony of the VILLAGE witnesses raises questions of fact because Mr. Ciesinski acknowledged that the log of pot hole repairs kept by the VILLAGE was derived from entries made from "scribble on a piece of paper, the location" and that, just because it was not logged did not mean it was not

repaired, and the fact that it was not on the list could be an error. Moreover, Mr. Ciesninski testified, after being shown photographs of the subject location, that if that was the final repair, it would not be acceptable pursuant to VILLAGE requirements. However, he acknowledged that when a permit holder is finished with a repair, the VILLAGE does not inspect the work. Counsel for plaintiff argues that a reasonable juror could find that the VILLAGE was negligent in failing to make sure that a pothole was properly filled.

Indeed, Thomas Rini testified that there was no procedure for inspecting potholes, and that the VILLAGE only began maintaining a pothole repair log in 2006, and that there would be no written records of pothole repairs prior to that time. Instead, it would be a daily log, written down on a scrap of paper. Additionally, he stated that, after viewing the photographs, he could tell that the subject location was patched more than once from the different colors of the fill. Counsel for plaintiff argues that patches of different ages indicates that the VILLAGE created the condition and that the motion must be denied. Even Mr. Booher from the Water Department admitted that he had not found the KEY SPAN request for a road opening and a permit application in his search of the Water Department Records. It appears that the VILLAGE'S record keeping may not be reliable.

In further opposition to the motion, counsel for plaintiff submits the affidavit of its expert, Stanley H. Fein P.E., a professional engineer with twenty-five (25) years experience. He opined, after his investigation and a review of the deposition transcripts, that the subject defect occurred due to an improper patch and repair of a defective pothole. He stated that there were clearly two (2) patches made at two (2) different times, and that the patches were superficial and caused by the negligence of the VILLAGE in making improper pothole repairs that exacerbated the defect rather than repaired it. He stated that

the VILLAGE made improper pothole repairs by installing a superficial amount of repair material which would immediately begin to come loose and create a tripping hazard.

The Law

Prior written notice of an alleged defect is a necessary prerequisite to imposing liability upon a municipality for an allegedly defective and/or dangerous road condition. *Ferris v County of Suffolk*, 174 AD2d 70, 579 NYS2d 436 (2nd Dept. 1992); *White v Incorporated Village of Hempstead,* 13 Misc.3d 471, 819 NYS2d 463 (Sup. Nassau Co. 2006). General Municipal Law (GML) §50-e(4) provides that liability may not be imposed against a municipality by an individual due to a dangerous condition on municipal streets, highways, bridges, culverts, sidewalks or cross-walks, unless the municipality previously received written notice of those defects.

Prior notification laws are a valid exercise of legislative authority. Such laws reflect a legislative judgment to modify the duty of care owed by a locality in order to address the vexing problem of municipal street and sidewalk liability. GML§ 50-e(4), specifically allows for the enactment of prior notification statutes and requires compliance with such laws. Thus a locality may avoid liability for injuries sustained as a result of defects or hazardous conditions on its sidewalks if it has not been notified in writing of the existence of the defect or hazard at a specific location. Neither actual nor constructive notice may override the statutory requirement of prior written notice of a side walk defect. The legislature has made plain its judgment that a municipality should be protected from liability in these circumstances until it has received written notice of the defect or obstruction. *Amabile v City of Buffalo*, 93 NY2d 471, 693 NYS2d 77, 715 NE2d 104 (C.A. 1999). There are only

two exceptions to the statutory rule requiring prior written notice, 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. *Amabile v City of Buffalo, supra*.

In sum, neither actual nor constructive notice of a given defect is sufficient to overcome the requirement of prior written notice (*Amabile v City of Buffalo, supra*; *Caramanica v City of New Rochelle*, 268 AD2d 496, 702 NYS2d 351 [2nd Dept. 2000]). In order for a municipality to be liable for a condition where no prior written notice was given, a plaintiff must set forth competent evidence that the municipality affirmatively created the alleged offending condition in issue (*Walker v Incorporated Village of Northport*, 304 AD2d 823, 757 NYS2d 801 [2nd Dept. 2003]; *Monteleone v Incorporated Village of Floral Park*, 74 NY2d 917, 550 NYS2d 257, 549 NE2d 459 [C.A. 1989]). A municipality makes a *prima facie* showing of its entitlement to judgment as a matter of law by establishing that it neither received the requisite prior written notice of the alleged defect, nor bore responsibility for the creation of the alleged defect (*Amabile v City of Buffalo*, *supra*). When a municipal employee states by affidavit that a thorough search was conducted and that no prior written notice of the defect was found, there is a *prima facie* showing of entitlement to judgment, as a matter of law. *Dabbs v City of Peekskill*, 178 AD2d 577, 577 NYS2d 658 (2nd Dept. 1991).

It is well settled on a motion for summary judgment that, after movant has made a *prima facie* showing that they are entitled to judgment as a matter of law, the other party must establish the existence of material facts of sufficient import to create a triable issue of fact. *See, Hellinger v Law Capital, Inc.,* 124 AD2d 182, 509 NYS2d 50 (2nd Dept. 1986);

Shaw v Time-Life Records, 38 NY2d 201, 379 NYS2d 390, 341 NE2d 817 (C.A. 1975).

Conclusion

After a careful reading of the submissions herein, it is the judgment of the Court that the VILLAGE has established a *prima facie* right to judgment as a matter of law by establishing that it never received written notice of the alleged defect at the subject location. However, it is the further judgment of the Court that the plaintiff has raised question of fact as to the reliability of the VILLAGE's records keeping, as well as a question of fact as to whether the VILLAGE's affirmative negligence caused the road defect by making faulty pothole repairs and in failing to inspect the repair after the work was done. Based on the foregoing, and giving the plaintiff every favorable inference, the VILLAGE's motion for summary judgment must be denied. Accordingly, its is hereby

. **ORDERED**, that the VILLAGE OF MINEOLA's motion for summary judgment is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: September 15, 2008

WILLIAM R. LaMARCA, J.S.C.

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