SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present:
Hon. Thomas Feinman
Justice

SUSAN LEONE and DEBORAH A. BERG, as Executors of the ESTATE OF EDNA C. DINNER and JEAN EDWIN DINNER,

Plaintiffs,

- against -

KOENIG'S RESTAURANT, KOENIG REALTY CORPORATION and INCORPORATED VILLAGE OF FLORAL PARK,

Defendants.

TRIAL/IAS PART 20
NASSAU COUNTY

INDEX NO. 7835/05

MOTION SUBMISSION
DATE: 10/22/08

MOTION SEQUENCE
NO. 1

The following papers read on this motion:

Notice of Motion and Affidavits.....	X
Affirmation in Opposition.....	X
Reply Affirmation.....	X

The defendant, the Incorporated Village of Floral Park, (hereinafter referred to as the "Village"), moves for an order pursuant to CPLR §3212 dismissing plaintiffs' complaint and any and all cross-claims asserted against the Village. The plaintiffs submit opposition. The defendants, Koenig's Restaurant and Koenig Realty Corporation, submit opposition adopting the recitations concerning the testimony of the witness on behalf of the Village, as outlined by plaintiff's counsel in opposition to the instant application. The Village submits a reply affirmation.

The plaintiff initiated this action for personal injuries sustained on March 22, 2004 as a result of stepping off an elevated portion of a curb in front of Koenig's Restaurant at or near 86 South Tyson Avenue, Floral Park, New York. Plaintiff essentially claims that the curb was "too high" above the street whereby the height differential caused her to fall. The plaintiff died on October 1, 2005, her death apparently unrelated to this accident. Plaintiff's daughters were appointed as Executors of plaintiff's estate. The plaintiff testified at a 50-h Hearing on August 20, 2004, prior to her death. The plaintiff testified that prior to her fall, she stepped down with her right foot on the grating and felt something rough or uneven. The plaintiff's Notice of Claim provides that the plaintiff "stepped off an elevated portion of the curb and stepped onto a depressed sewer drain in the street, thereby losing her balance and being precipitated to the ground. It is claimed that the curb was raised too high above the level of the street thereby creating a dangerous condition."

It is well-settled that in order to impose liability upon a municipality for damages, or injuries resulting from an alleged defective highway or sidewalk, the plaintiff must show that the municipality had prior written notice of the defect pursuant to the applicable Municipal Code. (*Hampton v. Town of North Hempstead*, 298 AD2d 556). A municipality which has enacted a prior written notice statute cannot be subject to liability for personal injuries unless it received written notice of the dangerous condition, its affirmative act of negligence caused the accident, or a special use confers a special benefit on the municipality. (*Amabile v. City of Buffalo*, 93 NY2d 471). Actual or constructive notice is insufficient to overcome the requirement of prior written notice. (*Id*). The courts have recognized two exceptions to the statutory rule requiring prior notice, namely, where the locality created the defect or hazzard through an affirmative act of negligence, and, where a "special use" confers a special benefit upon the locality. (*Id*).

Once the movant for summary judgment has met his or her burden, it is incumbent upon the party opposing said motion to produce evidentiary proof in admissible form sufficient to establish a material issue of fact which warrants a trial. (*Alvarez v. Prospect Hosp.*, 508 NYS2d 923). Though summary judgment is a drastic remedy, summary judgment is available in a negligent action where there is no genuine issue to be resolved at trial. (*Id*). A party opposing a motion for summary judgment is obligated "to lay bear his proofs" to sufficiently demonstrate, with admissible evidence, that a triable issue of fact will exist. (*LoBreglio v. Marks*, 105 AD2d 621, aff'd, 65 NY2d 620; *Friends of Animals, Inc. v. Associated For Manufacturers, Inc.*, 46 NY2d 1065). A shadowy semblance of an issue is not enough to defeat a motion for summary judgment. (*LoBreglio v. Marks*, 105 AD2d 621).

Here, the movant has met their burden of proof. Prior written notice statutes apply to situations involving storm drains and catch basins. (*Braunstein v. County of Nassau*, 294 AD2d 323, *Adam v. City of Poughkeepsie*, 296 AD2d 468). Here, the applicable prior written notice statute provides that no action shall be maintained against the Village for damages or injuries to a person sustained in consequence of any street, highway, bridge, culvert or sidewalk owned or maintained by the Village being defective, out or repair, unsafe, dangerous or obstructed unless "prior written notice of the existence of such condition relating to the particular place had, prior to the happening of the event causing such damage or injuries to person or property, actually been served upon the Village Clerk". The Village has submitted the affidavit of the Village Clerk which provides that the Village did not receive prior written notice of the conditions which plaintiff claims caused her to fall, including the claimed uneven or broken surface around the sewer grate, the grate itself, or the height differential in the curbing.

The plaintiff, in opposition, has failed to raise an issue of fact warranting the denial of defendant's motion for summary judgment. The plaintiff submits the affidavit of Richard E. Berkenfeld, PE, engineer, Mr. Berkenfeld avers that he inspected the sidewalk area in front of Koenig's Restaurant on April 18, 2005 and measured the distance from the top of the curb to the catch basin cover in the street to be eight and five-eighths (8 5/8") inches. Mr. Berkenfeld opines that said measurement exceeds the Village requirement under Chapter 81 of the Village Code which provides that the height of the curb should be six (6") inches, which, as per plaintiff's engineer, apparently comports with good and accepted engineering standards. Mr. Berkenfeld provides that this excessive height of the curb was not visible and therefore would be considered a hidden hazzard.

However, the ordinance that plaintiff's expert refers to under Chapter 81-5 of the Village Code, entitled "Curb Construction" provides that curbs be constructed "*no less than* a total of eighteen (18) inches, of which twelve (12) inches shall be underground and six (6) inches above ground. (Emphasis added.)" Therefore, the ordinance does not mandate that curbs may not exceed six (6) inches, but rather, that the ordinance requires a minimum height at curbs be at least six (6) inches above the ground.

In any event, the plaintiff has not submitted proof that the exceptions to the prior written notice statute apply. Plaintiff has not submitted proof that the Village created the alleged defective condition through an affirmative act of negligence or that its use of the property constituted a special use for the benefit of the Village. Plaintiff's contention that the Village's acts in providing the repair of the subject curb in 2002 by utilizing its own contractor and inspecting the repairs thereto, raise an issue of fact as to whether the Village should have had notice of the condition is unavailing. As already provided, there are only two recognized exceptions to the prior written notice law, *to wit*, whether the municipality created the defect, or where "special use" confers a special benefit upon the municipality. (*Amabile, supra*). Constructive notice of a sidewalk defect cannot satisfy the statutory requirement of written notice to a municipality. (*Id.*) Here, as in *Amabile*, the plaintiff argued for a third exception, that constructive notice applies when the defect was not known but the municipality should have known by the exercise of ordinary diligence and due care. The plaintiff in *Amabile*, and the instant plaintiff, cited *Giganti v. Town of Hempstead*, 186 AD2d 627 and *Blake v. City of Albany*, 48 NY2d 875. The Court of Appeals in *Amabile* reconciled that while they affirmed the order of the Appellate Division in *Blake, supra*, "of pivotal importance was the fact that, on the argument of the appeal, the City withdrew any reliance on the prior written notice law" and therefore, this Court was only presented with a common-law negligence action. (*Id.*) The Court in *Amabile, supra*, stated that the genesis of the exception taken in *Giganti, supra*, can be directly traced to the Court's opinion in *Blake, supra*. The Second Department has followed holding that the mere fact that a municipality may have inspected the sidewalk prior to the plaintiff's accident does not obviate the need for prior written notice. (*Cenname v. Town of Smithtown*, 303 AD2d 351), and where a municipality has enacted a prior written notice statute, actual notice does not obviate the need to comply with the prior written notice requirement. (*Granderson v. City of White Plains*, 29 AD3d 739).

In the case *sub judice*, the plaintiff has failed to submit admissible evidence indicating the defendant, the Village, created the defective condition, a curb that was allegedly excessively high, a condition which apparently existed for over thirty years. In order to establish that the creation exception applies, plaintiff needs to show that the dangerous condition complained of arose immediately after work and that repairs immediately created the hazardous condition that caused plaintiff's accident. (*Yarborough v. City of New York*, 10 NY3d 726; *Marshall v. City of New York*, 52 AD3d 586). The record herein is devoid of any such proof.

In light of the foregoing, the defendant's motion for summary judgment is granted and therefore, plaintiffs' complaint and any and all gross-claims, as and against the Village, are hereby dismissed.

J.S.C.

Dated: December 2, 2008

cc: Joachim, Frommer, Cerrato & Levine, LLP
Perez, Furey & Vavaro, Esqs.
Curtis, Vasile, Devine & McElhenny, LLP