SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

**JUSTICE** TRIAL/IAS PART 23

X

ROBIN ROSENBERG,

Plaintiff,

Index No.: 019383/07
Motion Sequence...02
Motion Date...04/01/09
**XXX**

-against-

THE CITY OF LONG BEACH

Defendants.

X

Papers Submitted:
Notice of Motion.....x
Affirmation in Opposition.....x
Replying Affirmation.....x

Upon the foregoing papers, the motion by the Defendant, THE CITY OF LONG BEACH, for an order granting summary judgment pursuant to CPLR §3212 is **GRANTED**.

In the instant action, the Plaintiff alleges that she tripped and fell on November 8, 2006, while she was "walking in a northerly direction along the westerly side of Long Beach Road at or near its intersection with East Pine Street, near the Long Beach City Bus Garage" (see Plaintiff's Notice of Claim attached as Exhibit A in Defendant's Notice of Motion) in the City of Long Beach, County of Nassau. The Plaintiff, ROBIN ROSENBERG,

alleges that the occurrence was due to a defective condition in the public street and/or adjacent curb. The Plaintiff's Notice of Claim describes the location as "the end of the decline in the sidewalk and/or curb which appears to be the end of a ramp".

It is undisputed that at the time of the accident, the Defendant, The City of Long Beach, owned, operated and maintained the street surface, public sidewalk and/or adjacent curb located on East Pine Street at or near the intersection of Long Beach Boulevard, in the City of Long Beach, County of Nassau, State of New York. It is also undisputed that at that time of the alleged occurrence, the Defendant had a duty to maintain said property. It is also undisputed that on November 8, 2006, the Defendant was the owner of the City Garage located at the alleged accident location and that the Defendant had a duty to keep and maintain the ramp and/or driveway and the adjacent street surface located at this garage.

The Plaintiff served her Notice of Claim on or about February 5, 2007 and commenced this action on or about October 29, 2007, by serving and filing a Summons and Complaint. The Defendant now moves for summary judgment alleging that the Plaintiff's complaint should be dismissed as a matter of law, based on the ground that no prior written notice of the defect, pursuant to Section 256A(1) of the City of Long Beach Charter, was ever received. Section 256A(1) of the City of Long Beach Charter provides, in pertinent part:

> No civil action shall be maintained against the City for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk, or any part or portion of any of the

> foregoing including any encumbrance thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless at least 48 hours before prior to the occurrence resulting in such damage, injuries or death, written notice of the defective, unsafe, dangerous or obstructed condition of such street, highway, bridge, culvert, sidewalk or crosswalk shall have been filed in the office of the commissioner of Public Works of the City, and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonable safe.

Prior written notice of an alleged defect is a necessary prerequisite to imposing liability upon a municipality for an allegedly defective and/or dangerous sidewalk condition (*Frullo v. Incorporated Village of Rockville Centre*, 274 AD2d 499, 711 NYS2d 185 (2 Dept. 2000); *Brooks v. Village of Babylon*,251 AD2d 526, 674 NYS2d 726 (2 Dept. 1998)). 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. General Municipal Law, § 50-e(4), the authorizing statutory provision, 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 sidewalk 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.

Inasmuch as there is no dispute that the Defendant did not have prior written notice, inquiry must be made as to whether the Defendant caused the alleged defect through an affirmative act of negligence and whether there was a "special use" which conferred a special benefit upon the Defendant. The Plaintiff argues that there is a third exception to the prior written notice requirement, namely that the Defendant had actual notice sufficient to satisfy the "prior written notice" provisions.

In support of the Plaintiff's theory that the Defendant created the defect through an affirmative act of negligence, the Plaintiff's counsel argues that photographs submitted by the Plaintiff prove that the defect she alleges caused her to fall was created by an affirmative act of negligence on the part of the Defendant. To support this conclusion, the Plaintiff submits a copy of an affidavit of Stanley H. Fein, P.E., sworn to on February 12, 2009. Mr. Fein, who states he is a licensed, professional engineer, contends that the subject driveway was not properly constructed in that he believed the driveway and curb area where the Plaintiff was injured "appears to a reasonable degree of certainty to have been constructed without 6 inches of cement and without reinforced steel". He further contends that the use of the curb and driveway by the Defendant to fuel its vehicles, including heavy commercial trucks, required that the curb and driveway be constructed with 6 inches of cement with reinforced steel. The Plaintiff alleges that the sidewalk and adjoining driveway

was constructed with 3½ inch cement with reinforced mesh. This, the Plaintiff's counsel argues, establishes that the Defendant's construction of the sidewalk and curb using insufficient materials was an affirmative act of negligence. The Plaintiff's counsel further argues that the facts presented raises a triable issue of fact as to whether the Defendant's failure to properly construct the sidewalk and curb in light of its use, was an affirmative act of negligence.

Regarding the exception to the prior written notice requirement as it relates to "special use", the Plaintiff's counsel argues that the driveway and curb where the Plaintiff alleges she fell is used by the Defendant as a fueling station for its many vehicles. As such, the Plaintiff's counsel argues, the Defendant created the condition complained of by virtue of its special use of the area.

The Plaintiff's counsel contends that the Defendant had actual notice of the existence of the defects alleged to have caused the Plaintiff's injuries. He submits copies of records produced during discovery that he claims establishes that there is a question as to whether the Defendant knew about the defective condition of the area where the Plaintiff alleges she fell.

The Defendant's counsel, responding to the Plaintiff's arguments that there are three exceptions to the prior written notice requirement, argues that the Plaintiff has failed to present any evidentiary proof to support the existence of any recognized exception. The Defendant's counsel argues that the opinion of Stanley Fein, who did not visit or inspect the location, did not support his opinion with any empirical data or support his conclusions with

any construction standards, is "pure speculation".

The Defendant's counsel alleges that the Plaintiff has given contradictory testimony as to the exact location of her fall. At her 50-h Hearing, the Defendant alleges the Plaintiff testified under oath that she stepped into a puddle onto a rock or uneven surface. He alleges that the Plaintiff could only guess where she fell. Additionally, the Defendant's counsel alleges that the Plaintiff testified that she was not even on the "ramp" area when she fell. As such, the Defendant's counsel argues, the Plaintiff cannot establish that any use of the ramp area by the Defendant had any relation to her accident.

Regarding the Plaintiff's contention that the Defendant had actual notice of the defect, the Defendant's counsel argues that the Plaintiff's speculation that the Defendant gained actual notice of the alleged defective condition based on emails, computer printouts, etc., which note work performed in the general area, is insufficient. Additionally, the Defendant's counsel contends that actual and/or constructive notice are not exceptions to the prior written notice statute. The Defendant's counsel distinguishes the case cited by the Plaintiff's counsel, *Bruni v. City of New York*, 2 N.Y. 3d 319 (2004) from the instant matter, in that the *Bruni* decision involved the application of the City of New York's "Pothole Law". The City of New York's "Pothole Law" contains an alternative prerequisite to maintaining an action against the City of "written acknowledgment from the city of the defective, unsafe, dangerous or obstructed condition". The Defendant's statute, Section 256A(1) of the City of Long Beach Charter, contains no such alternative. As such, the Defendant argues, the Plaintiff has failed to raise a question of fact as to the Defendant having actual knowledge

of the alleged defect.

The special use exception to prior written notice is reserved for situations where a landowner whose property abuts a public street or sidewalk derives a special benefit from that property unrelated to the public use, and is therefore required to maintain a portion of that property *(see, Kiernan v Thompson,* 137 AD2d 957, 958).

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).

Summary judgment is a drastic remedy and should only be granted where there are no triable issues of fact. *Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 (1974). The goal of summary judgment is issue finding, rather than issue determination. *Hantz v. Fleishman*, 155 A.D.2d 415, 457 N.Y.S.2d 350 (2d Dept. 1998). It is uncontroverted that the Defendant, The City of Long Beach, did not receive prior written notice of the alleged dangerous condition, which is required by the statute. Contrary to the Plaintiff's contention, there is no competent evidence submitted by the Plaintiff that the Defendant created the defect or hazard through an affirmative act of negligence nor that any "special use" which conferred a special benefit upon the locality was the cause of the Plaintiff's fall. Lastly, the Plaintiff's argument that the Defendant had actual notice of the condition alleged to have caused the Plaintiff's fall is not supported by any competent evidence which imposes such actual notice on the Defendant.

Accordingly, it is hereby

**ORDERED**, that the Defendant's motion for an order granting summary judgment pursuant to CPLR § 3212 is **GRANTED** and the complaint is dismissed without costs.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
April 20, 2009

**Hon. Randy Sue Marber, J.S.C.**
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