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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

PHYLLIS TOSCANO,

Plaintiff,

-against-

THE CITY OF GLEN COVE,

Defendant.

Motion Sequence #1
Submitted October 19, 2009

INDEX NO: 7039/08

The following papers were read on this motion:

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

Requested Relief

Defendant, THE CITY OF GLEN COVE (hereinafter referred to as the "CITY"), moves for an order, pursuant to CPLR §3212, granting it summary judgment dismissing the complaint on the ground that it did not receive prior written notice of the alleged defect, as required by both the CITY Charter §C4-4 and General Municipal Law §50-e(4). Counsel for plaintiff, PHYLLIS TOSCANO, opposes the motion, which is determined as follows:

Background

This action is to recover damages for personal injuries allegedly sustained by the plaintiff, on March 18, 2007, when she slipped and fell on the third floor stairway of the Brewster Street Garage in the CITY. Plaintiff commenced the action in April 2008, and after joinder of issue, served a bill of particulars in which she alleged that the CITY negligently failed to properly remove ice and/or snow from the stairway of the outdoor garage; failed to sand and/or salt the stairway, failed to inspect the stairway to determine hazards, and failed to maintain the area.

At her deposition, plaintiff testified that she and her boyfriend went to GLEN COVE to watch a St. Patrick's Day Parade and, when arriving at 1:00 P.M. and finding no parking on the street, plaintiff parked her car on the third level of the Brewster Street Garage. Plaintiff stated that the stairway was located on the exterior of the garage, with a landing or walkway on each floor that is not covered and is open to the elements on all sides. Plaintiff testified that she observed 2-3 inches of snow and ice on the walkway and that she and her boyfriend used a partially cleared and shoveled pathway and that she observed white ice going towards the stairs. Plaintiff testified that she believed it had last snowed on Saturday, March 17, the day before the accident, and that she observed snow and ice on the stairs. She testified that she descended the stairs without incident but, when the parade ended about 3:00 P.M., she and her boyfriend returned to the parking garage and walked along the same "partially" shoveled pathway, and after approximately four (4) steps she slipped. She stated that she slipped on thick, white ice.

In support of the motion for summary judgment, counsel for the CITY 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 CITY, and because plaintiff has failed to established that defendant created the defective condition. Counsel for the CITY states that Thomas Glynn, its Building Manager and Supervisor, testified at his deposition as a witness for the CITY that, although payroll records indicate that CITY employees performed snow removal for the CITY on March 16, and March 17, 2007, there are no records that demonstrate that snow removal was performed at the Brewster Street Garage, and Mr. Glynn had no recollection of snow removal being performed at the accident site on March 16, or March 17, 2007. Elizabeth Mestres, the Clerk of the Director of Public Works for the CITY, submits an affidavit that claims that the CITY did not receive any prior written notice of the alleged icy condition on which the plaintiff claims she was injured. Counsel for the CITY urges that it is entitled to summary judgment because plaintiff has not satisfied the condition precedent to imposing liability– that the CITY 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 employees of the CITY, charged with the duty of performing and supervising snow removal from the subject garage, negligently performed their work when they performed snow removal shortly before plaintiff's accident. Counsel for plaintiff contends that it is conceded that the supervisor for the CITY actually inspected the work the day prior to the accident, though he could not recall and had no documentation of what the inspection revealed. He acknowledged that part of the inspection would have been to see that snow and ice was removed from the pavement, which obviously was not done. Counsel for plaintiff argues that the CITY is not entitled to summary judgment because it failed to establish that it did not create a hazardous condition through its actions and, at

the very least, issues of fact exist mandating denial of the motion.

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 (2) 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

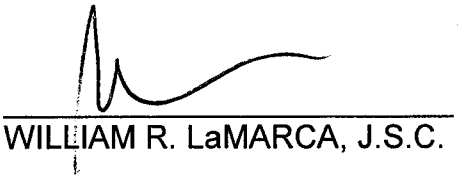
After a careful reading of the submissions herein, it is the judgment of the Court that the CITY has established a *prima facie* right to judgment as a matter of law by establishing that it never received written notice of the alleged defect at the subject location. However, it is the further judgment of the Court that the plaintiff has raised questions of fact as to whether the CITY's affirmative negligence caused the icy condition at the Brewster Street Garage, by clearing away snow but leaving white ice remaining on the walkways leading to the parking garage. Based on the foregoing, and giving the plaintiff every favorable inference, the CITY's motion for summary judgment must be denied. Accordingly, its is hereby

ORDERED, that the CITY OF GLEN COVE'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: December 21, 2009



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