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SHORT FORM ORDER

INDEX No. 08-38676
CAL. No. 10-00560-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 7-9-10
ADJ. DATE 8-10-10
Mot. Seq. # 002 - MG; CASEDISP

MARGIE SAURENMAN,	:	ALAN R. CHORNE, ESQ.
	:	Attorney for Plaintiff
Plaintiff,	:	150 Broadway, 14th Floor
	:	New York, New York 10038
- against -	:	
	:	DEVITT SPELLMAN BARRETT, LLP
VILLAGE OF SOUTHAMPTON,	:	Attorney for Defendant
	:	50 Route 111
Defendant.	:	Smithtown, New York 11787

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant , dated June 10, 2010, and supporting papers (including Memorandum of Law dated _____); (2)Affirmation in Opposition by the plaintiff, dated July 23, 2010, and supporting papers; (3) Reply Affirmation by the defendant, dated August 4, 2010, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion by defendant Village of Southampton seeking summary judgment dismissing plaintiff's complaint is granted.

Plaintiff Maggie Saurenman commenced this action against defendant Village of Southampton (hereinafter referred to as the "Village") to recover damages for injuries she allegedly sustained as a result of a trip and fall that occurred on May 2, 2008. Plaintiff, by her bill of particulars, alleges that she tripped and fell on an allegedly defective condition on the sidewalk located on Pond Lane in front of Veterans Memorial Hall and Levitas Center in the Village of Southampton, New York. Plaintiff alleges that her accident occurred on her way to a children's ballet performance, when her left foot came into contact with a raised concrete edge on the "transition from the walkway in front of Veterans Memorial to the curb between the walkway and driveway, in the area of a curb cut along the southerly side of Veterans Memorial Hall." The subject premises and sidewalk are owned by the Village.

The Village now moves for summary judgment on the basis that it did not have written notice of

the alleged defective condition prior to plaintiff's accident as required by § 95-25 of the Code of the Village of Southampton. The Village also argues, among other things, that the alleged sidewalk defect is trivial as a matter of law. In support of the motion, the Village submits a copy of the pleadings, photographs of the accident's site, plaintiff's deposition transcript, and the affidavit of the Village Administrator, Stephen Funsch. Plaintiff testified at her deposition that the pictures are a fair and accurate description of the way in which the sidewalk appeared on the day of her accident. Plaintiff opposes the instant motion on the ground that prior written notice of the alleged defective condition was not required, because the Village used the properties in a proprietary capacity and, therefore, is subject to the same principles of tort law as a private landlord. In opposition to the motion, plaintiff submits her own affidavit, the affidavit of Sara Strickland, a copy of defendant's deposition transcript, and photographs of the site of the accident.

On a motion for summary judgment the court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility; (*see* ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]; ***Tunison v D.J. Stapleton, Inc.***, 43 AD3d 910, 841 NYS2d 615 [2007]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2005]; ***Scott v Long Is. Power Auth.***, 294 AD2d 348, 741 NYS2d 708 [2002]). A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v New York***, 49 NYS2d 557, 427 NYS2d 595 [1980]). In considering the motion, the evidence must be construed in the light most favorable to the non-moving party (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 774 NYS2d 792 [2004]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***Mosheyev v Pilevsky***, 283 AD2d 469, 725 NYS2d 206 [2001]). The motion should not be granted where the facts are in dispute, where different inferences may be drawn from the evidence, or where the credibility of parties or witnesses is in question (***Szczerbiak v Pilat***, 90 NY2d 553, 556, 664 NYS2d 252 [1997]; *see* ***Forrest v Jewish Guild for the Blind***, 3 NY3d 295, 786 NYS2d 382 [2004]; ***Dykeman v Heht***, 52 AD3d 767, 861 NYS2d 732 [2008]; ***Cameron v City of Long Beach***, 297 AD2d 773, 748 NYS2d 26 [2002]). The failure of the moving party to make such a prima facie showing requires denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Sheppard- Mobley v King***, 10 AD3d 70, 778 NYS2d 98 [2004]; ***Celardo v Bell***, 222 AD2d 547, 635 NYS2d 85 [1995]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Zuckerman v City of New York***, *supra*). However, mere allegations, unsubstantiated conclusions, expressions of hope or assertions are insufficient to defeat a motion for summary judgment (*see* ***Zuckerman v City of New York***, *supra*; ***Blake v Guardino***, 35 AD2d 1022, 315 NYS2d 973 [1970]).

It is well established that a municipality is under a continuing duty to maintain its public walkways in a reasonably safe condition and that such duty is independent of its duty not to create a defective condition (*see* ***Kiernan v Thompson***, 73 NY2d 840, 537 NYS2d 122 [1988]). Thus, a municipality cannot be held liable for the negligent performance of a government function, unless the municipality created the defect or hazard through an affirmative act of negligence, or where there is a "special use" conferring a special benefit upon the locality (*see* ***Amabile v City of Buffalo***, 93 NY2d

471, 693 NYS2d 77 [1999]). Furthermore, since prior written notice laws serve to limit or reduce a municipality's duty, they are in derogation of the common law and are to be strictly construed (***Doremus v Incorporated Vil. of Lynbrook***, 18 NY2d 362, 365-366, 275 NYS2d 505 [1966]; *see* ***Gorman v Town of Huntington***, 12 NY3d 275, 879 NYS2d 379 [2009]; ***Poirier v City of Schenectady***, 85 NY2d 310, 624 NYS2d 55 [1995]). "However, that rule does not require that the words used be given an artificial, forced or unnatural meaning" (***Stratton v City of Beacon***, 91 AD2d 1018, 1019, 457 NYS2d 893 [1983]; *see* ***Englehardt v Town of Hempstead***, 141 AD2d 601, 529 NYS2d 601 [1988], *lv denied* 72 NY2d 808, 533 NYS2d 57 [1988]). The purpose of a prior written notice statute is to place a municipality on notice that there is a defective condition on a publicly owned property which, if left unattended, could cause injury (***Gorman v Town of Huntington***, *supra* at 279). Therefore, a written notice of a defect is a condition precedent that a plaintiff must plead and prove in order to maintain an action against a municipality for a defective condition on a publically owned sidewalk (*see* ***Katz v City of New York***, 87 NY2d 241, 638 NYS2d 593 [1995]; ***Misek-Falkoff v Village of Pleasantville***, 207 AD2d 332, 615 NYS2d 422 [1994]). But, when a municipality is acting in a proprietary capacity as a property owner or landowner, the municipality owes the same duty to maintain its property as a private landowner (*see* ***Miller v State of New York***, 62 NY2d 506, 478 NYS2d 829 [1984]; ***Dick v Town of Wappinger***, 63 AD3d 661, 880 NYS2d 180 [2009], *lv denied* 13 NY3d 834, 890 NYS2d 449 [2009]; ***Jackson v City of New York***, 55 AD3d 546, 865 NYS2d 613 [2008]). In its proprietary capacity, a municipality has a duty to "act as a reasonable person in maintaining its premises in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (***Preston v State of New York***, 59 NY2d 997, 998, 466 NYS2d 953 [1983] *quoting* ***Basso v Miller***, 40 NY2d 233, 241, 386 NYS2d 564 [1976]).

Section 95-25 of the Code of the Village of Southampton states, in relevant part, that "[n]o civil action shall be commenced against the Village of Southampton for damages or injuries to persons or property sustained by reason of the defective, out-of repair, unsafe, dangerous or obstructed condition of any highway, street, bridge, culvert, sidewalk or crosswalk....unless previous to the occurrence resulting in such damages or injuries, written notice of such defective, out-of repair, unsafe, dangerous or obstructed condition specifying the particular place and location, was actually given to the Village Clerk and that there was a failure or neglect within a reasonable time, after the giving of such notice, to repair or remove the defect, danger or obstruction complained of."

In the instant matter, the Village has established its prima facie burden that it did not have prior written notice of the alleged defective condition of the "transition from the pathway and/or sidewalk in front of Veterans Memorial Hall to the curb between the sidewalk and driveway along the southerly side of Veterans Memorial Hall" that allegedly caused plaintiff's injury (*see* ***LiFrieri v Town of Smithtown***, 72 AD3d 750, 898 NYS2d 629 [2010], *lv denied* 15 NY3d 706, 908 NYS2d 160 [2010]; ***Shannon v Village of Rockville Ctr.***, 39 AD3d 528, 834 NYS2d 537 [2007]; ***Gianna v Town of Islip***, 230 AD2d 824, 646 NYS2d 707 [1996]). Section 95-25 of the Code of the Village of Southampton expressly relates to sidewalks and, therefore, prior written notification of the alleged defective condition in the sidewalk is a condition precedent to plaintiff maintaining her personal injury action against the Village (*see* ***Englehardt v Town of Hempstead***, *supra*; ***Lazzari v Village of Bronxville***, 228 AD2d 652, 646 NYS2d 13 [1996]; ***Zigman v Town of Hempstead***, 120 AD2d 520, 501 NYS2d 718 [1986]). The Village has submitted the affidavit and deposition testimony of its Village Administrator, in which he

states that he maintains an index file of all written notices of defects filed with the Village Clerk's office, and that after searching said file he was unable to uncover any record of any written notice regarding the alleged defective condition. In addition, the Village has presented proof demonstrating that it did not lease or otherwise act as a landlord or in a proprietary capacity in its operations of Veterans Memorial Hall or Levitas Center (*see* ***Kadlecik v Endicott***, 174 AD2d 923, 571 NYS2d 619 [1991]; *cf.* ***Dick v Town of Wappinger***, *supra*). The Village Administrator attests in his affidavit that Veterans Memorial Hall is used for general civic purposes and that Levitas Center is used for cultural events, such as concerts, ballets, dance recitals, and the displaying of art exhibits.

In opposition to the Village's prima facie showing, plaintiff has failed to raise a triable issue of fact as to the applicability of the prior written notice requirement (*see* ***Rooney v Sterling Mets, L.P.***, 63 AD3d 1027, 881 NYS2d 171 [2009], *lv denied* 13 NY3d 714, 895 NYS2d 313 [2009]). Contrary to plaintiff's assertion, the fact that the Village charged a rental fee for the usage of its Levitas Center does not establish that the Village acted in a proprietary capacity with regards to the subject walkway where plaintiff's accident occurred, thereby, alleviating plaintiff's requirement to prove that the Village had prior written notice of the alleged defect that caused her injury (*see* ***Kadlecik v Endicott***, *supra*; *cf.* ***Dick v Town of Wappinger***, *supra*; ***Dobin v Town of Islip***, 11 AD3d 577, 783 NYS2d 64 [2004]; ***Vestal v County of Suffolk***, 7 AD3d 613, 776 NYS2d 491 [2004]). Plaintiff also failed to demonstrate that the municipality failed or neglected to remedy the alleged defect at the subject premises within a reasonable time after having received written notice of said defect (*see* ***Poirier v City of Schenectady***, *supra*; ***Abbatecola v Town of Islip***, 97 AD2d 780, 468 NYS2d 518 [1983]). In fact, plaintiff testified at her deposition that she was unaware of any complaints having been made to the Village about the alleged defect at the subject location and that she did not notice any defects or "unevenness about the walkway" prior to her incident. Additionally, plaintiff failed to demonstrate that the Village affirmatively created the defective condition, which would have obviated her need to establish such prior notice (*see* ***Gianna v Town of Islip***, *supra*; ***Rosenthal v Village of Quogue***, 205 AD2d 745, 613 NYS2d 684 [1994], *lv denied* 84 NY2d 810, 621 NYS2d 519 [1994]; ***Zawacki v Town of N. Hempstead***, 184 AD2d 697, 585 NYS2d 93 [1992]).

The Village further established a prima facie case that the alleged defective condition in the sidewalk was trivial in nature and, therefore, is not actionable (*see* ***Copley v Town of Riverhead***, 70 AD3d 623, 895 NYS2d 452 [2010]). A landowner has a duty to maintain his property "in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk" (*see* ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]). However, there is no duty to warn against an open and obvious condition which is not inherently dangerous (*see* ***Gagliardi v Walmart Stores, Inc.,*** 52 AD3d 777, 860 NYS2d 207 [2008]). "[T]he issue of whether a dangerous or defective condition exists so as to create liability depends on the peculiar facts and circumstances of each case, and is generally a question of fact for the jury" (***Trincere v County of Suffolk***, 90 NY2d 976, 977, 665 NYS2d 615 [1997]; *see* ***Velez v Institute of Design & Constr., Inc.***, 11 AD3d 453, 782 NYS2d 755 [2004]; ***Sanna v Wal-Mart Stores***, 271 AD2d 595, 706 NYS2d 156 [2000]). A property owner may not be held liable for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip (*see* ***Fairchild v J. Crew Group, Inc.***, 21 AD3d 523, 800 NYS2d 735 [2005]; ***Hagood v City of New York***, 13 AD3d 413, 785 NYS2d 924 [2004]). The court, in determining if the defect is trivial, is required to examine all

the facts presented, including the "width, depth, elevation and irregularity, and appearance of the defect along with the 'time, place and circumstance' of the injury" (***Trincere v County of Suffolk***, *supra* at 978; *see* ***Wasserman v Genovese Drug Stores***, 282 AD2d 447, 723 NYS2d 191 [2001]; ***Sanna v Wal-Mart Stores, Inc.***, *supra*).

Here, after taking into consideration the dimensions and appearance of the alleged defect, its location, and the circumstances of the accident, the Village has demonstrated that the alleged defective condition did not have any of the characteristics of a trap or snare, and was trivial as a matter of law (*see* ***Hawkins v Carter Community Hous. Dev. Fund Corp.***, 40 AD3d 812, 835 NYS2d 731 [2007]; ***Bekritsky v TACS-4, Inc.***, 27 AD3d 680, 815 NYS2d 587 [2006]; ***D'Arco v Pagano***, 21 AD3d 1050, 801 NYS2d 158 [2005]). The photographs that were submitted by the Village in support of its motion and that plaintiff testified were a fair and accurate description of the way the sidewalk appeared on the day of her accident, show that the height differential between the "transition from the walkway in front of Veterans Memorial to the curb between the walkway and driveway, in the area of a curb cut along the southerly side of Veterans Memorial Hall," is less than an inch in height (*see* ***Shiles v Carillon Nursing & Rehabilitation. Ctr., LLC***, 54 AD3d 746, 864 NYS2d 439 [2008]; ***Hawkins v Carter Community Hous. Dev. Fund Corp.***, *supra*; ***Dick v Gap, Inc.***, 16 AD3d 615, 792 NYS2d 194 [2005]). In addition, the adduced evidence established that the accident occurred while it still was light outside and that plaintiff had previously been to the same location without incident. Indeed, plaintiff testified that prior to her accident she was "looking generally ahead" while walking and that she "did not notice any defects or unevenness about the walkway." In opposition, plaintiff failed to raise a triable issue of fact and, thus, plaintiff's remaining contentions are without merit (*see* ***DiNapoli v Huntington Hosp.***, 303 AD2d 359, 755 NYS2d 655 [2004]; *see generally* ***Zuckerman v City of New York***, *supra*). Accordingly, the Village's motion for summary judgment is granted.

Dated: 11/26/10

Peter H. Mayer
PETER H. MAYER, J.S.C.