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STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

JOAN REDDING,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 09-1550
RJI NO. 19-09-4716

HEART OF CATSKILL ASSOCIATION, INC.
and VILLAGE OF CATSKILL,

Defendants.

Supreme Court Greene County All Purpose Term, September 9, 2011
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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Todd Roberts, Esq.
Attorneys for Defendant Village of Catskill
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TERESI, J.:

On March 5, 2009, Plaintiff was standing in front of the Village of Catskill's (hereinafter "Catskill") Village Hall next to a cast iron planter. When an acquaintance of Plaintiff exited Village Hall and bumped the planter, it tipped onto Plaintiff's right foot and fractured her toes.

Plaintiff commenced this action seeking damages due to the injuries she sustained. Issue was joined by Catskill and Heart of Catskill Association, Inc. (hereinafter "HCA").[1] Discovery is complete and a trial date certain is set. Both Defendants now move for summary judgement and Plaintiff opposes both motions. Because both Defendants demonstrated their entitlement to judgment as a matter of law, and Plaintiff raised no issue of fact, both motions are granted.

As is well established "summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996], quoting Moskowitz v. Garlock, 23 AD2d 943 [3d Dept. 1965]).

The proponent of a summary judgment motion bears the "threshold burden of tendering evidentiary proof in admissible form establishing entitlement to judgment as a matter of law." (Chiarini ex rel. Chiarini v. County of Ulster, 9 AD3d 769 [3d Dept. 2004], Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; CPLR §3212). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Considering first HCA's motion, "liability for an injury caused by a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property and where none is present, a party cannot be held liable." (Rackowski v. Realty USA, 82 AD3d 1475, 1476 [3d Dept. 2011], quoting Gadani v. Dormitory Auth. of State of N.Y., 64 AD3d 1098 [3d Dept. 2009][internal brackets omitted]; Battaglia v. Town of

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[1] The Town of Catskill was previously a named Defendant in this action. However, by stipulation of all of the parties, the action was discontinued against it.

Bethlehem, 46 AD3d 1151 [3d Dept. 2007]; Turrisi v Ponderosa, Inc., 179 AD2d 956, 957 [3d Dept. 1992]; Long v Sage Estate Homeowners Assn., Inc., 16 AD3d 963 [3d Dept. 2005]).

Here, HCA sufficiently established its non - "ownership, occupancy, control or special use of the property." HCA's motion is supported by its Executive Director's affidavit. She alleges, upon her own knowledge, that the cast iron planter at issue was purchased, along with others, with State grant money obtained by HCA. Although HCA obtained the money for its purchase, the planter was delivered directly to Catskill's Department of Public Works and was never possessed by HCA. The planter was then placed on a Catskill sidewalk by "The Garden Club," who maintain it. With the above showing, HCA duly established its entitlement to judgment as a matter of law by demonstrating that it did not own, occupy, control or specially use this property.

With the burden shifted, Plaintiff failed to raise a triable issue of fact. Because Plaintiff's attorney's affirmation is not based upon "personal knowledge of the operative facts [it is of no]... probative value." (2 North Street Corp. v. Getty Saugerties Corp., 68 AD3d 1392, 1395 [3d Dept. 2009]; Groboski v. Godfroy, 74 AD3d 1524 [3d Dept. 2010]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). "Similarly, the [Plaintiff's attorney's] memorandum of law... [has] no evidentiary value." (Chiarini ex rel. Chiarini v. County of Ulster, supra at 770). Moreover, as Plaintiff's only other submission, her own affidavit, does not even address HCA's showing of non ownership, occupancy, control or special use she failed to raise a triable issue of fact.

Accordingly, HCA's motion for summary judgment is granted.

Turning to Catskill's motion, it is entitled to summary judgment because it demonstrated that it received no prior written notice of the allegedly dangerous condition.

Catskill's "Prior Notice Law" of 1987, similar to Village Law §6-628, states that: "[n]o civil action shall be maintained against the Village of Catskill for damages or injuries to person or property sustained by reason of any... sidewalk... being defective, out of repair, unsafe, dangerous or obstructed unless:... [w]ritten notice of such defective, unsafe, dangerous or obstructed condition was received by [the village clerk or] the Clerk of the Board of Trustees or the Village General Foreman of Highways; and... there was a f[a]ilure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of." Where the statutory prior notice is not filed and no exception applies, the action must be dismissed. (Gorman v. Town of Huntington, 12 NY3d 275 [2009]; Crespo v City of Kingston, 80 AD3d 1124 [3d Dept. 2011).

As is applicable here, Catskill has the "initial burden [of] presenting undisputed proof that it did not receive prior written notice." (Pagillo v. City of Oneonta, 25 AD3d 1044, 1044 [3d Dept 2006]; Groninger v. Village of Mamaroneck, 17 NY3d 125 [2011]; Amabile v. City of Buffalo, 93 NY2d 471 [1999]). Upon the burden shifting, "plaintiff[must] raise a question of fact concerning the applicability of an exception to the notice requirement." (Boice v. City of Kingston, 60 AD3d 1140 [3d Dept. 2009]; Groninger v. Village of Mamaroneck, supra).

On this record, Catskill sufficiently established that it received no prior written notice of the alleged defect/obstruction, i.e. the cast iron planter, that caused Plaintiff's injury. (Min Whan Ock v City of New York, 34 AD3d 542 [2d Dept. 2006]; Almodovar v City of New York, 240 AD2d 523 [2d Dept. 1997]). Catskill first submitted its Village Clerk's affidavit, who also acts as Clerk of the Board of Trustees. In accord with Village Law §6-628 and Catskill's "Prior Notice Law" of 1987, she alleged that she searched her Village Clerk's records and her Clerk of

the Board of Trustees' records. She unequivocally stated that Catskill had not received a prior written notice applicable to Plaintiff's claim. Catskill also offered the affidavit of its Village Highway Superintendent, who alleged that he is the "Village General Foreman of Highways." He too asserted that he searched his records and that Catskill did not receive the applicable prior written notice. The above duly established that Catskill did not received the necessary prior written notice and, consequently, demonstrated its prima facie entitlement to summary judgment.

With the burden shifted, Plaintiff failed to raise a triable issue of fact. Plaintiff does not contest the applicability of the prior written notice statute to this action, but rather argues that an exception applies. The "only two exceptions to prior written notice laws [are] -where the locality created the defect or hazard through an affirmative act of negligence and where a 'special use' confers a special benefit upon the locality. Further, the affirmative negligence exception ... [is] limited to work by the City that *immediately* results in the existence of a dangerous condition." (Oboler v. City of New York, 8 NY3d 888 [2007], quoting both Amabile v. City of Buffalo, 93 NY2d 471 [1999] and Bielecki v. City of New York, 14 AD3d 301 [1st Dept. 2005][emphasis added][quotation marks omitted]; Yarborough v. City of New York, 10 NY3d 726 [2008]).

On this record, Plaintiff does not rely on the "special use" exception and failed to demonstrate that Catskills' alleged affirmative negligence *immediately* resulted in the existence of a dangerous condition. Rather, it is uncontested that the planter which caused Plaintiff's injury was placed on Catskill's sidewalk almost one and a half years before Plaintiff's injury occurred. Thus, no immediacy was shown and no triable issue of fact was raised.

Accordingly, Catskill's motion for summary judgment is granted.

This Decision and Order is being returned to the attorneys for Catskill. A copy of this

Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: September 20, 2011
Albany, New York

Joseph C. Teresi
JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated August 12, 2011, Affirmation of Todd Roberts, dated August 12, 2011, with attached Exhibits A-O; Affidavit of Linda Overbaugh, dated August 25, 2011, with attached Exhibit A.
2. Notice of Motion, dated August 26, 2011, Affidavit of Scott Bush, dated August 26, 2011, with attached Exhibits 1-11.
3. Affirmation of John Rusk, dated September 2, 2011, with attached Exhibit A; Affidavit of Joan Redding, dated September 2, 2011, with attached Exhibit A.
4. Affirmation of Todd Roberts, dated September 8, 2011.
5. Affidavit of Scott Bush, dated September 7, 2011.