[* 1]

ORIGINAL

STATE OF NEW YORK

SUPREME COURT COUNTY OF SARATOGA

WILLIAM GROZZO,

Plaintiff,

-against-

DECISION AND ORDER
RJI No. 45-1-2010-1980
Index No. 20083689

CITY OF MECHANICVILLE,

Defendant.

PRESENT: **HON. THOMAS D. NOLAN, JR.**
Supreme Court Justice

APPEARANCES: EDWARD P. RYAN
Attorneys for Plaintiff
38 Eagle Street
Albany, New York 12207

SMITH, SOVIK, KENDRICK & SUGNET, P.C.
Attorneys for Defendant
250 South Clinton Street, Suite 600
Syracuse, New York 13202-1252

SARATOGA COUNTY CLERK'S OFFICE BALLSTON SPA, NY

FILED 2011 NOV 21 AM 10: 12

On September 26, 2007 at 6:30 p.m., plaintiff was injured when he tripped and fell near the southwest intersection of North Main Street and Hill Street in the City of Mechanicville.

In this action, plaintiff alleges the City was negligent in maintaining the streets and curb. According to plaintiff, he walked a few steps beyond the sewer catch basin and metal grate located on Hill Street, and when he stepped onto the curb, his right foot struck the edge of the curb and caused him to fall and fracture his right leg. Discovery has been completed, and a trial date is set. Defendant moves for summary judgment dismissing plaintiff's complaint on the assertion that the lack of prior written notice of the alleged dangerous condition, required by

Section 91 (A) of the City Charter, constitutes a complete bar to plaintiff's action. Defendant's motion is supported by affidavits from the City's current Commissioner of Public Works and Building Inspector who state, in substance, that relevant City records and files were searched and that the City had received no written complaint, or for that matter, any other complaint about defective conditions existing at or near the southwest corner of the intersection of Hill Street and North Main Street prior to plaintiff's accident. In further support of its motion, the defendant offers plaintiff's deposition and the deposition of the City's Public Works Commissioner in office when the fall took place, and a copy of the section 91 (A) of the City Charter in effect since 1955, certified by the City Clerk.[1]

In opposition, plaintiff concedes the lack of prior written notice but contends that plaintiff's action remains viable because 1) the City's catch basin constitutes a "special use" of the curb and sidewalk and 2) that the City had prior actual notice of the alleged defect.

The purpose of prior written notice statutes is "precisely to release municipalities from the 'vexing problem of municipal street and sidewalk liability' (citation omitted) when they have no reasonable opportunity to remedy the problem (citation omitted)". SanMarco v Village/Town of Mount Kisco, 16 NY2d 111, 116 (2010). To prevail, written notice must have been given to the municipality of the alleged dangerous condition, unless the plaintiff can demonstrate a question of fact whether one of two recognized exceptions applies, Crespo v City of Kingston, 80

[1] "No civil action shall be maintained against the city for damages or injury to person or property sustained in consequence of any street, sidewalk, being defective, out of repair, unsafe, dangerous or obstructive unless it appears that written notice of the defective, dangerous, unsafe or obstructive condition of such street, sidewalk was actually given to the Commissioner of Public Works and there was a failure or neglect within a reasonable time after giving of such notice to remedy, repair or remove the defect, danger or obstruction complained of".

AD3d 1124 (3rd Dept 2011), namely whether the municipality "created the defect or hazard through an affirmative act of negligence [or] a 'special use' confers a special benefit upon the locality". Amabile v City of Buffalo, 93 NY2d 471 (1999); Stride v City of Schenectady, 85 AD3d 1409 (3rd Dept 2011). Establishing an exception is a "formidable" task. Miller v County of Sullivan, 36 AD3d 994, 996-997 (3rd Dept 2007). And even if the defendant municipality had "actual" notice of a defect or hazard, dismissal will not be avoided. Stride v City of Schenectady, supra.

Here, plaintiff's argument that the City of Mechanicville had actual notice of the hazard which allegedly caused plaintiff's trip and fall lacks merit. The viability of plaintiff's complaint stands or falls on his argument that, at a minimum, a triable issue exists whether the "special use" exception applies and in arguing that it does, plaintiff relies exclusively upon Stapleton v City of Troy, 144 AD2d 781 (3rd Dept 1988). First, in Stapleton, the Third Department's holding was that plaintiffs "arguably" raised an issue over whether a "special use" was made of a sidewalk because a catch basin cover was located in it. In that case, plaintiffs indeed demonstrated a triable issue whether the City of Troy had affirmatively created a depression in the sidewalk between where the catch basin was located and an abutting flagstone.

"The special use exception 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". Poirier v City of Schenectady, 85 NY2d 310, 315 (1995). Recent precedent expressly holds that municipal catch basins do not qualify as a "special use". Ramos v City of New York, 55 AD3d 896 (2nd Dept 2008). Moreover, here it is undisputed that plaintiff did not trip over the catch basin; rather he testified at his deposition that he walked "a couple of steps"

past the catch basin when he then tripped on the curb and fell down onto the adjacent sidewalk. In Bradley v City of New York, 38 AD3d 581 (2nd Dept 2007), the plaintiff stepped into a hole caused by missing paving stones located adjacent to a metal grate and fell. The Court held that even if the grate were considered a special use, plaintiff did not trip over the grate, but rather fell because of the alleged defect near the grate and thus the special use exception did not apply. In this case, plaintiff's testimony establishes that his trip and fall did not occur because of any defect in the catch basin. Thus, even assuming that the catch basin qualifies as a "special use" by the City, there is no nexus between the "special use" and the defect in the nearby curb and sidewalk which allegedly precipitated the plaintiff's fall.

Defendant's motion is granted and plaintiff's complaint is dismissed, all without costs.

This constitutes the decision and order of the court. The original decision and order is forwarded to counsel for defendant. All original motion papers are delivered to the Supreme Court Clerk/County Clerk for filing. Counsel for defendant is not relieved from the applicable provisions of CPLR 2220 relating to filing, entry and notice of entry of the decision and order.

So Ordered.

DATED: November 9, 2011
Ballston Spa, New York

HON. THOMAS D. NOLAN, JR.
Supreme Court Justice

ENTERED
Kathleen A Marchione
Saratoga County Clerk

SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

2011 NOV 21 AM 10:12

ENTERED