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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

VIMAGDA VALDNER,

Plaintiff,

- against -

COUNTY OF NASSAU, TOWN OF NORTH HEMPSTEAD, THOMAS CHACKO and ALEYAMMA CHACKO,

Defendants.

TRIAL / IAS PART 30
NASSAU COUNTY

Index No. 7692/11

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1
Answering Affidavits 2
Replying Affidavits . . . . . _____
Briefs: Plaintiff's / Petitioner's . . . . . _____
Defendant's / Respondent's . . . . . _____

The defendant County of Nassau moves for summary judgment regarding the verified complaint and any cross claims against it in this underlying personal injury action where the plaintiff claims tripping and falling on a sidewalk in front of 21 Fourth Avenue, Garden City Park on April 10, 2010. The plaintiff's contents the County was negligent in the ownership, maintenance and repair of an allegedly dangerous and defective sidewalk. The codefendants Thomas Chacko and Aleyamma Chacko oppose this motion.

The County asserts it does not have jurisdiction over the area of the alleged

causation. The County also alleges it did not receive prior written notice of the alleged defective condition. The County proffers the sworn statements of John Dempsey, a civil engineer with the County's Department of Public Works, in its construction management unit, and Veronica Cox, an employee in the Claims Management Bureau of the Office of the County Attorney of Nassau. Dempsey, who is familiar with Nassau County appurtenances, roadways and sidewalks investigated the plaintiff's claim by personally searching Department of Public Works contracts, sidewalk complaints and repair records of the incident site. Dempsey determined the subject location is not under the County's jurisdiction. Dempsey also searched prior written notice records maintained by the Department of Public Works for five years up to April 10, 2010. Dempsey found no prior written notice of the subject location, no contract for work at that site nor any repairs by the County there. The Claims Management Bureau maintains files containing notices of claim and prior written notices. Cox search those files to determine whether the Office of the County Attorney of Nassau received prior written notice or a notice of claim of a defective sidewalk condition at the subject location. Cox searched the files for five years up to April 10, 2010, and that search revealed no written notices nor notices of claim of a defective condition regarding that sidewalk.

The codefendants contend this motion is premature because they have not been provided with the opportunity to conduct depositions nor full and complete discovery of this matter. The codefendants maintain it is impossible to determine whether the County

is liable without depositions. The codefendants allege there is a question of fact regarding whether the County plowed the sidewalk which created the defective condition, and whether the County had a duty to repair the subject sidewalk. The codefendants argue the County failed to conclusively demonstrate it did not create any defective condition by its snow plowing the street. The codefendants assert the affidavits by Dempsey and Cox fail to indicate whether the County maintained any records pertaining to prior written notice, and whether a search of the records was conducted and the results of that search. The codefendants aver those affidavits are defective because the sworn statements fail to indicate the number of years the County maintained its records pertaining to prior written notice of defects, how those records are kept and organized in the normal course of business. The codefendants maintain those affidavits also fail to indicate whether records exist for the years greater than five years prior to the plaintiff's accident, and if those records were searched and the results of that search. The codefendants suggest those omissions raise serious questions about the County's method in ascertaining the existence of prior written notice and the County's representation no such notice exists. The codefendants contend the County fails to demonstrate *prima facie* entitlement to summary judgment.

This Court considered the parties' papers. The Second Department states: "In order to establish a prima facie case of negligence, the plaintiff must first demonstrate the existence of a duty owed by the town to the plaintiff (***see, Solomon v City of New York***,

66 NY2d 1026, 1027; ***Akins v Glens Falls City School Dist.***, 53 NY2d 325, 333, ***rearg denied*** 54 NY2d 831; Prosser and Keeton, Torts § 30 [5th ed])" (***Bauer v Town of Hempstead***, 143 A.D.2d 793, 794, 533 N.Y.S.2d 342 [2d Dept, 1988]). The Second Department holds:

> It is well settled that "liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property ... Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property" (***Turrisi v Ponderosa, Inc.***, 179 AD2d 956, 957; ***see, Minott v City of New York***, 230 AD2d 719; ***see also, Poirier v City of Schenectady***, 85 NY2d 310, 315)

Aversano v City of New York, 265 A.D.2d 437, 437-438, 696 N.Y.S.2d 233 [2d Dept, 1999.]

The Second Department also holds:

> A municipality that has adopted a prior written notice law cannot be held liable for a defect within the meaning of the law absent the requisite written notice, unless an exception to the requirement applies (***see Poirier v. City of Schenectady***, 85 N.Y.2d 310, 624 N.Y.S.2d 555, 648 N.E.2d 1318; ***Akcelik v. Town of Islip***, 38 A.D.3d 483, 831 N.Y.S.2d 491; ***Wilkie v. Town of Huntington***, 29 A.D.3d 898, 816 N.Y.S.2d 148; ***Katsoudas v. City of New York***, 29 A.D.3d 740, 741, 815 N.Y.S.2d 243). The only two exceptions recognized by the Court of Appeals are the municipality's affirmative creation of the defect and its special use of the property (***see Amabile v. City of Buffalo***, 93 N.Y.2d 471, 473, 693 N.Y.S.2d 77, 715 N.E.2d 104; ***Perrington v. City of Mount Vernon***, 37 A.D.3d 571, 829 N.Y.S.2d 667; ***Filaski-Fitzgerald v. Town of Huntington***, 18 A.D.3d 603, 604, 795 N.Y.S.2d 614)

Delgado v. County of Suffolk, 40 A.D.3d 575, 575-576, 835 N.Y.S.2d 379 [2 Dept.,2007].

The County shows it did not receive any complaints nor notices of claim regarding the alleged accident site by proffering evidence it performed searches of its records regarding

such (***see Foley v. County of Suffolk***, 80 A.D.3d 658, 915 N.Y.S.2d 157 [2d Dept, 2011]; ***Glaser v. City of New York***, 79 A.D.3d 600, 912 N.Y.S.2d 221 [1 Dept, 2010]). It is undisputed the County did not receive any such complaints nor notices for a period of five years up to the date of the alleged accident. (***see Vardoulias v. County of Nassau***, 84 A.D.3d 787, 923 N.Y.S.2d 577 [2d Dept, 2011]). The County demonstrates it neither created the defect nor exercised any control or supervision over the public sidewalk abutting the property, nor did it make a special use of the sidewalk. The County proffered evidence showing there is no duty on its part that sidewalk area. The County also submitted proof in admissible form that it did not perform any work on the public sidewalk before the plaintiff's accident. The County sufficiently shows the maintenance of records regarding complaints and written notices of claims, and this factual proffer was sufficient to discharge the County's summary judgment burden. This Court determines the County establishes a *prima facie* entitlement to summary judgment as a matter of law (***see Guzov v. Manor Lodge Holding Corp.***, 13 A.D.3d 482, 787 N.Y.S.2d 84 [2d Dept, 2004]). In opposition, the plaintiff's submission is insufficient to raise a triable issue of fact because the conclusions set forth by the plaintiff's attorney were not supported by proof in admissible form nor by anyone with personal knowledge of facts (***see*** CPLR 3212 [b]). Although written notice is not required if the County created the defective sidewalk condition by an affirmative act of negligence, the evidence submitted by the codefendants in opposition to the County's motion for summary judgment fails to raise a

triable issue of fact whether the County's alleged snow plowing immediately resulted in a defective sidewalk condition at the site of the injured plaintiff's alleged accident (***see Brown v. County of Suffolk***, 89 A.D.3d 661, 931 N.Y.S.2d 685 [2d Dept, 2011]). The plaintiff proffers only an affirmation by counsel speculating about snow plowing the street and its alleged effect on this sidewalk. The affirmation of the codefendants' attorney has "no probative weight" (***see Iacone v. Passanisi***, 89 A.D.3d 991, 933 N.Y.S.2d 373 [2d Dept, 2011]).

Accordingly, the motion is granted.

So ordered.

Dated: **January 6, 2012**

ENTER:

J. S. C.

NON FINAL DISPOSITION