S

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

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

REMY HANNIBAL,

Plaintiff,

- against -

INCORPORATED VILLAGE OF HEMPSTEAD, TOWN OF HEMPSTEAD and COUNTY OF NASSAU,

Defendant.

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 25921/09

Motion Sequence No. 003

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1
Answering Affidavits 2
Replying Affidavits 3
Briefs: Plaintiff's / Petitioner's .....
Defendant's / Respondent's .....

The defendant County of Nassau moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross claim. The County asserts it did not receive a prior written notice of the alleged defective condition as required by General Municipal Law § 50-e and Nassau County Administrative Code § 12-4.0(e). The County that condition did not possess the characteristics of a trap, snare nor nuisance and it is too trivial to be actionable.

The plaintiff opposes the motion. The plaintiff contends the County possessed

prior written notice of that condition and recurring problems at the accident location because the County produced 10 repair tickets for defective and hazardous conditions there in response to a discovery notice. The plaintiff notes Veronica Cox, who is assigned to the Bureau of Claims and Investigations of the Nassau County Attorney, states there were no reports of the dangerous condition or defects upon the brick walkway in a January 5, 2012 affidavit. The plaintiff maintains nevertheless prior written notice is not required because the condition conferred some special use or benefit to the County, and the condition was affirmatively created by the County. The plaintiff points out the Village of Hempstead Code §§ 116-1 and 116-2 impose liability on the County which is the adjacent owner.

The County replies there have never been any allegations by the plaintiff that loose bricks in the area caused the alleged incident. The County retorts the work orders do not provide the legally required prior written notice to the County.

The plaintiff alleges he tripped and fell on January 20, 2009 on the brick walkway on the south side of Jackson Street, in Hempstead, New York, just east of the entrance to the First District Court of Nassau County. The plaintiff claims the area consists of and is adjacent to a cap with the denotation of "CF-B water" contained within the walkway.

> The Village established its entitlement to summary judgment by submitting the affidavits of the Village Clerk and the Superintendent of Highways indicating that the Village had never received prior written notice of the alleged defective sidewalk (***see, West v Village of Mamaroneck***, 172 AD2d 827; ***Feiner v Incorporated Vil. of Farmingdale***, 168 AD2d 418; ***Goldberg v Town of Hempstead***, 156 AD2d 639)

Greenberg v McLaughlin, 242 A.D.2d 603, 662 N.Y.S.2d 100 [2d Dept, 1997]. Moreover, the Court of Appeals "conclude[d] that constructive notice of a defect may not override the statutory requirement of prior written notice of a sidewalk defect. The Legislature has made plain its judgment that the 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 N.Y.2d 471, 475-476, 715 N.E.2d 104 [1999]).

The Court determines the County establishes its *prima facie* entitlement to judgment as a matter of law, as it is undisputed the County never received prior written notice of the alleged defect or hazardous condition on which the subject accident occurred, as required by General Municipal Law § 50-e and Nassau County Administrative Code § 12-4.0(e). The Cox affidavit submitted by the County clearly shows the County never receive the required notice (***see DiLeo v. Town/Village of Harrison***, 55 A.D.3d 867, 866 N.Y.S.2d 742 [2d Dept, 2008]). So, the burden is upon the plaintiff to show an exception to the prior written notice requirement, and the Court of Appeals stated:

> We have recognized only two exceptions to prior written notice laws—"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" (***Amabile v. City of Buffalo***, 93 N.Y.2d 471, 474, 693 N.Y.S.2d 77, 715 N.E.2d 104 [1999] [citations omitted]). Further, "the affirmative negligence exception ... [is] limited to work by the City that immediately results in the existence of a dangerous condition" (***Bielecki v. City of New York***, 14 A.D.3d 301, 788 N.Y.S.2d 67 [1st Dept.2005]

[emphasis added])
Oboler v. City of New York, 8 N.Y.3d 888, 890, 864 N.E.2d 1270 [2007].

In opposition, the plaintiff fails to show an established exception to the general rule of written notice as required by law.

> "The principle of special use, a narrow exception to the general rule, imposes an obligation on the abutting landowner, where he puts part of a public way to a special use for his own benefit and the part used is subject to his control, to maintain the part so used in a reasonably safe condition to avoid injury to others" (***Balsam v Delma Eng'g Corp., supra***, at 298; ***see also, Granville v City of New York***, 211 AD2d 195, 197; ***Curtis v City of New York***, 179 AD2d 432). Special use cases generally involve the installation of an object in the street or on the sidewalk, such as an oil cap or a runway, for the benefit of a private landowner (***see, Balsam v Delma Eng'g Corp., supra***, at 298). "The common thread in each of these cases was an installation 'exclusively for the accommodation of the owner of the premises which he was "bound to repair in consideration of private advantage " ' " (***Balsam v Delma Eng'g Corp., supra***, at 298, ***quoting Nickelsburg v City of New York***, 263 App Div 625, 626; ***see, Granville v City of New York, supra***, at 197). The special use is a use different from the normal intended use of the public way, and thus, "[t]he 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)

Minott v City of New York, 230 A.D.2d 719, 720, 645 N.Y.S.2d 879 [2d Dept, 1996].

The County offered evidence in admissible form, to wit the July 22, 2011 deposition testimony of Thomas Reardon, the County did not own, maintain, or make a special use of the cap with the denotation of "CF-B water" contained within the walkway. The County points to the FOIL requests from the Village Attorney for the Village of Hempstead, and adds the County responded it has no knowledge of who placed the "CF-B water" cap there, and the County is responsible only for the sidewalk maintenance not

that cap (***see generally Ruffino v. New York City Transit Authority***, 55 A.D.3d 817, 865 N.Y.S.2d 667 2d Dept, 2008]). The County also notes its Senior Deputy Commissioner of Public Works concluded the "CF-B water" cap was under the jurisdiction of the local water company. In opposition, the plaintiff submitted no proof as to the alleged special use of the the "CF-B water" cap, let alone what special benefit the County derived from it (***see Amabile v. City of Buffalo***, 93 NY2d, ***supra***).

> The affirmative negligence exception is limited to work by the [defendant] that immediately results in the existence of a dangerous condition (***Oboler v. City of New York***, 8 N.Y.3d 888, 889, 832 N.Y.S.2d 871, 864 N.E.2d 1270 [internal quotation marks omitted]; ***see Yarborough v. City of New York***, 10 N.Y.3d at 728, 853 N.Y.S.2d 261, 882 N.E.2d 873; ***Marshall v. City of New York***, 52 A.D.3d 586, 861 N.Y.S.2d 77; ***Bielecki v. City of New York***, 14 A.D.3d 301, 788 N.Y.S.2d 67). Even if a municipality performs negligent pothole repair, where the defect develops over time with environmental wear and tear, the affirmative negligence exception is inapplicable (***see Yarborough v. City of New York***, 10 N.Y.3d at 728, 853 N.Y.S.2d 261, 882 N.E.2d 873)" (***Diaz v. City of New York***, 56 A.D.3d 599, 600–601, 868 N.Y.S.2d 229)

Schleif v. City of New York, 60 A.D.3d 926, 875 N.Y.S.2d 259 2d Dept, 2009].

In addition, the plaintiff proffers no evidence to support its contention the County is exempt from the prior written notice requirement because the County affirmatively created the condition. There is no evidence the County did any work in that area in and around the "CF-B water" cap. There is no mention of the "CF-B water" cap in the 10 repair tickets, and most the work orders refer to loose or missing bricks just outside of the north door of the courthouse while the plaintiff alleged the accident occurred somewhere to the left of a door depicted in a picture submitted as a defense exhibit. Moreover, there

is no indiction any work by the County immediately resulted in the condition which caused the alleged accident.

Accordingly, the motion is granted.

So ordered.

Dated: **June 13, 2012**

ENTER:

J. S. C.

FINAL DISPOSITION