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SHORT FORM ORDER

INDEX No. 09-16848
CAL No. 11-02533OT

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

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 1-19-12 (#003)
MOTION DATE 2-16-12 (#004)
MOTION DATE 2-21-12 (#005)
ADJ. DATE 4-5-12
Mot. Seq. # 003 - MD
004 - MG
005 - MG

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MARY A. BOPP and HERMAN BOPP,

Plaintiffs,

- against -

VILLAGE OF LINDENHURST, LONG ISLAND POWER AUTHORITY, KENNETH ELLIOTT and KATHLEEN ELLIOTT, VERIZON COMMUNICATIONS, INC., and VERIZON NEW YORK, INC.,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant Verizon Communication, Inc. and Verizon New York Inc., dated 11-29-11 , and supporting papers (including Memorandum of Law dated 1-12); (2) Notice of Cross Motion (004) by the defendant Village of Lindenhurst, dated 1-17-12, supporting papers 13-37; (3) Notice of Cross Motion (005) by the Elliott defendants , dated 1-4-12, supporting papers 38-48; (4) Affirmation in Opposition by the plaintiffs Bopp, dated 3-14-12, and supporting papers 49-63; (4) Reply Affirmation by the Village of Lindenhurst, dated 3-19-12 , and supporting papers 64-65; (5) Reply Affirmation by Verizon defendants, dated 3-12-12, and supporting papers 66-67; (6) Reply Affirmation by Elliott defendants, dated 4-2-12 and supporting papers 68-69; and (7) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

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

ORDERED that motion (003) by the defendants Verizon Communications, Inc. and Verizon New York Inc. for summary judgment dismissing the complaint is denied; and it is further

ORDERED that motion (004) by the defendant Village of Lindenhurst, for summary judgment dismissing the complaint and any cross claims against it is granted with prejudice; and it is further

ORDERED that motion (005) by the defendants Kenneth Elliott and Kathleen Elliott for summary judgment dismissing the complaint and any cross claims asserted against them is granted with prejudice.

Mary A. Bopp seeks damages for personal injuries she alleges she sustained at or near 1 Knoll Street and Wellwood Avenue, Lindenhurst, New York on August 7, 2008, when she slipped and fell on a depression on the sidewalk. The plaintiff alleges that the depression was caused or created when a telephone/utility/power pole was moved from the depressed area, causing a dangerous, defective, trap-like condition. She alleges that the defendants had actual and constructive notice of the condition which was open and obvious, and existed for a lengthy period of time. Mary Bopp asserted separate causes of action setting forth the alleged negligence of the defendants Village of Lindenhurst (Lindenhurst), Long Island Power Authority (LIPA), and Kenneth Elliott and Kathleen Elliott (Elliott defendants), with derivative claims asserted against each defendant in separate causes of action by her spouse, Herman Bopp. A separate action was commenced under Index No. 10-34489 against defendants Verizon Communications Inc. and Verizon New York Inc. (Verizon defendants) asserting negligence, as well as derivative claims asserted by Herman Bopp against both of the Verizon defendants. By order of the undersigned dated January 5, 2011 (Mayer, J.), both actions were consolidated for all purposes under Index No. 09-16848. A stipulation dated November 16, 2010, discontinuing the action without prejudice as against Long Island Power Authority, was not signed by the Verizon defendants, and, it is noted that the Verizon defendants have not asserted a cross claim against any co-defendant.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case ***(Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

Mary Bopp testified to the extent that the accident occurred on August 7, 2008 at about 6:10 p.m. She was power walking in a northbound direction on the sidewalk of Wellwood Avenue, Lindenhurst, at 1 Knoll Street when the toes of her left foot went into a hole in the sidewalk, causing her to fall and injure her right hand. Her husband was walking to her right, and the street was on her husband's other side. To her left was grass. It was a beautiful day, and the sidewalk was dry. She last walked this route one week prior, but never noticed a hole in the area prior to her fall. She described the hole as semi-circular, coming from the grass, and being part of the sidewalk and to the left of the sidewalk. Prior to the accident, she did not notice any construction or repair work in the area of the sidewalk, and never noticed the hole. She never made any

complaints to the Village of Lindenhurst about the hole, and was unaware of any complaints having been made about the hole by anyone else.

Herman Bopp testified to the extent that on August 7, 2008, at about 6:00 or 6:30 p.m., he was walking and talking with his wife, Mary Bopp, traveling north on Wellwood Avenue, Lindenhurst, at 1 Knoll Street on the sidewalk. Wellwood Avenue was to his right and his wife was to his left. He was looking straight ahead when he saw his wife fall. When he asked her what happened, she looked back about six feet and said that she stepped where there was an indentation in the sidewalk and a depression in the ground. There was a semicircle about six inches onto the sidewalk, about ten or twelve inches in length. He thought the depression, if he put his finger in it, would probably go down four or five inches from the level of the sidewalk. He later testified that he had a knife and stuck the knife into the hole and it seemed to go down at least nine inches or so into the ground, which would make it about a foot below the level of the sidewalk. Although he had been at the site on prior occasions, he never noticed the indentation in the ground or the semicircle on the sidewalk, and did not notice it on the date of the accident. He was unaware of any complaints made prior to the accident about the alleged condition. He took photographs of the site a few days after the accident. He continued that there is a utility pole on the other side of the sidewalk almost directly across from where the indentation was. He was unaware of any notices, violations, or permits issued by the Village of Lindenhurst to the property owner. He continued that he believed the Village of Lindenhurst occasionally repaired the sidewalk and that homeowners are asked to keep the sidewalk free of debris, ice and snow. He did not know who maintained the strip of property next to the sidewalk. He did not measure to determine whether the remainder of the sidewalk at 1 Knoll Street was even with the grassy area, but thought it was not significantly higher.

Motion (003)

Verizon Communications Inc. and Verizon New York Inc. seek summary judgment dismissing the complaint on the bases that there is no evidence that they caused or created the alleged defective condition, had notice of the alleged condition, or benefitted from any special use of the sidewalk area where the plaintiff fell. They have submitted, inter alia, an attorney's affirmation; a copy of the summons and complaints, notice of claim, the answer served by the defendant Village of Lindenhurst with cross claims asserted against Long Island Power Authority and the Elliott defendants, the answer served by the Elliott defendants with cross claim against the Village of Lindenhurst, the answer served by the Verizon defendants; stipulation consolidating the actions pending under Index No. 09-16848 and 10-34489, so ordered January 5, 2011; plaintiffs' verified bill of particulars; photographs of the sidewalk; copy of the General Municipal Law 50-h hearing dated February 4, 2009 (unsigned but certified), copies of the transcripts of the examinations before trial of Mary A. Bopp dated May 12, 2011, Herman Bopp dated June 13, 2011, Kathleen Elliott, Kenneth Elliott, Thomas Schirmuhly, each dated June 13, 2011 and in admissible form; transcript of the examination before trial by Robert Compitello on behalf of Verizon, dated August 2, 2011 and non-party Thomas Brandt, dated October 19, 2011, on behalf of LIPA, (each fail to comport with 22 NYCRR 202.5(a)); illegible exhibit N which is not in admissible form; a drawing; a discovery response; affidavit of Thomas Brandt dated October 15, 2010; decisions in unrelated actions; and the affidavit of Jane A Schapker, dated December 12, 2011.

Jane A. Schapker set forth in her affidavit, submitted in support of motion (003) by the Verizon defendants, that she is the assistant corporate secretary of Verizon Communications Inc. and the executive director for Corporate Governance since July 2004. She has been employed by Verizon Corporate Resources Group LLC (or an affiliated company) for over fifteen years. She is familiar with the organization and activities of Verizon Communications Inc. and its predecessors in connection with her current position. She continued that Verizon Communications Inc. is incorporated in Delaware with its principal place of business in New York,

and that it is, and has always been, a holding company which does not offer goods or services to the public. As a holding company, Verizon Communications Inc. files periodic and other reports containing certain financial and other information with the Securities and Exchange Commission. It has never owned, operated or maintained any type of telephone facilities or equipment, or owned any real property in Suffolk County or in New York State, and does not own, operate, maintain, repair or control any real property or any telephone facilities or equipment, such as utility poles, manhole facilities, conduit or service cables in Lindenhurst, Suffolk County New York. It has never installed, owned or removed any utility poles located anywhere along South Wellwood Avenue or any other roadways in the County of Suffolk, or any telecommunication facilities or equipment with the State of New York.

Thomas Brandt set forth in his affidavit that he is employed by National Grid f/k/a Long Island Power Authority as a field supervisor. He conducted a site investigation at 1 Knoll Street, in the Village of Lindenhurst, and using the record center, identified the existing pole at the location as pole #14, a pole owned by Verizon, and not by Long Island Power Authority.

Even if the deposition transcript of Thomas Brandt, given on behalf of LIPA, submitted by the Verizon defendants, were in admissible form, it does not establish that there was no other pole at the location of the indent, or who owned that pole which was removed. Brant, an employee of LILCO for thirty eight years, is the overhead lines department field supervisor for LIPA. Several months prior to his deposition, he visited the site of the accident for the purpose of determining ownership of utility poles. When advised that there had been a pole on the westerly side of the sidewalk at 1 Knoll Street, he testified that if it were a LIPA pole that had been moved, that his records would show it, and he found no records indicating that a LIPA pole was moved to the east side of the sidewalk. If the pole were owned by someone else, and LIPA removed it, there would be a work order, and he did not find a work order. He continued that LIPA, LILCO and Verizon maintained utility poles at that location, but there could have also been poles for streetlights or traffic lights. He testified that the 35 foot pole #14 had been replaced with a new 40 foot pole, but he did not know when. His diagram did not show specifically where the 35 foot pole had been prior to being replaced, but stated that generally, the new pole is placed next to, or in a very close vicinity of the existing pole. If the pole is moved more than a few feet, it is indicated on the print. When he inspected the site, he found a semicircular indent in the sidewalk. The replacement pole was pretty close to where the original pole was, not directly in line with it, but opposite the indent on the other side of the sidewalk.

Brandt continued that LILCO or LIPA would not replace or remove a pole without a work order. The only utility pole he found during his searches was the New York Telephone pole #14. The historical overhead work order #061000[1] could go back to 1961, he stated. That work order, and purchase order 27636, indicate that pole number 14 was replaced by New York Telephone. He also testified that the original pole is removed by the last person completing the job. Normally, Verizon sets the poles and transfer their facilities. If they transferred after LIPA transferred, LIPA would remove the old pole. If Verizon or AT&T set the pole, and LIPA did their work, and Verizon or AT&T came back to transfer, LIPA would cut the pole down and remove it. He continued that there was no way to know which entity was last at pole #14. He had no records which indicated who installed the pole, who cut it down, or who removed it from the semicircular area. LIPA replaces a pole in the same location unless the pole was in the wrong location to begin with. He did not know if LIPA ever maintained a pole on the west side of the sidewalk. He could not tell if Verizon ever maintained such a

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[1] The copy submitted to his court by the Verizon defendants is not legible or in admissible form.

pole. Thus, Brandt's testimony does not establish whether there was a pole on the west side of the sidewalk, or who owned the subject pole.

Even if the transcript by Robert Compitello were in admissible form, it does not establish that the Verizon defendants did not own or remove the subject pole on the west side of the sidewalk at 1 Knoll Street, Lindenhurst. Compitello, employed by Verizon for twelve years, is the right-of-way manager. He handles the property owner's complaint line and is in charge of easements and emergency permits. He continued that Verizon has a data base which goes back to 1940 or 1950 demonstrating pole placement by Verizon, including the history for pole #14. Pole #14 was placed on the southwest corner of Knoll and Wellwood east of the curb in the utility strip in a line with all other utility poles on that street in 1975. He had no record for an installation of a pole at that location prior to 1975. He was not sure how Verizon provided services for its customers in the vicinity of South Wellwood Avenue prior to the installation of that pole in 1975.

Compitello testified that there would have been a separate work order other than number 80390 if the installation of this pole required the removal of a pre-existing pole. This work order would have listed if a pole were replaced, and he did not know if work order 80390 still existed. He continued that the subject pole which had been found by the homeowners in a cut-down condition when the bushes were removed, would have been in his record. The absence of such a record is indicative that New York Telephone did not own a pole at the accident site, on the opposite side of the sidewalk from pole #14. Since there were homes in the area for eighty years, he did not know how Verizon would have provided phone service to homeowners along South Wellwood Avenue before the installation of pole #14. He did not know if New York telephone maintained any poles along South Wellwood Avenue prior to 1975. He was unsure how to determine where other utility poles were located.

Compitello continued that there is no search he could perform utilizing Verizon records or databases to determine whether a New York Telephone pole ever existed at the location. He could not conclusively state that they did not place a pole prior to pole #14 in that area. It would be impossible for him to search the database to determine if a New York Telephone pole ever existed there. In the absence of an identification number, he is unable to search the database to determine if the semicircle that appears on Exhibit L dated May 12, 2011, was formed by a New York Telephone pole. Only if that unidentified pole were designated as pole # 14 would he be able to search the database to determine if New York Telephone removed it. He then testified that there are plat numbers that reference jobs which might indicate any jobs prior to 1975 in that area. He did not search the records to determine if there were other utility poles that may have existed that were owned or maintained by New York Telephone along South Wellwood Avenue prior to the installation of pole #14 in 1975.

Based upon the foregoing, Verizon Communications Inc. has not demonstrated its relationship with defendant Verizon New York Inc. to establish that one is not a subsidiary of the other, or that it does not direct, manage or control Verizon New York. The Verizon defendants have not established prima facie that they did not install or remove, or cause to be installed and removed, the subject pole to the westerly side of the sidewalk at 1 Knoll Street, Village of Lindenhurst. Compitello testified that he could not state that they did not place a pole prior to #14 in that area. He also testified that Verizon did provide phone service prior to 1975 in that area. He did not search the records to determine if there were other utility poles that may have existed that were owned or maintained by New York Telephone along South Wellwood Avenue prior to the installation of pole #14 in 1975. Accordingly, the Verizon defendants have not established prima facie entitlement to summary judgment dismissing the complaint and any cross claims asserted against them.

Accordingly, motion (003) by the Verizon defendants for summary judgment dismissing the complaint is denied.

Motion (004)

The Village of Lindenhurst seeks summary judgment dismissing the complaint on the bases that it did not have prior written notice of the alleged defective condition. In support of motion (004), they have submitted, inter alia, an attorney's affirmation; notice of claim, photographs; signed and certified copies of the transcript of the hearing conducted pursuant to General Municipal Law 50-h of Mary Bopp dated February 4, 2009; summons and complaint, the answers submitted by the Village of Lindenhurst with cross claim against the Elliott defendants and LIPA, by LIPA with a cross claim against the Village of Lindenhurst and the Elliott defendants, and by the Elliott defendants with a cross claim against the Village of Lindenhurst and LIPA; stipulation consolidating both actions; stipulation discontinuing without prejudice the action against Long Island Power Authority dated November 16, 2010, which is not signed by the Verizon defendants and does not comport with CPLR 3117; plaintiffs' verified bill of particulars; signed transcripts of the examination before trial of Mary A. Bopp dated May 12, 2011, Herman Bopp dated June 13, 2011, Thomas Schirmuhly on behalf of the Village of Lindenhurst dated June 13, 2011, Robert Compitello on behalf of the Verizon defendants dated August 23, 2011, and Thomas Brandt on behalf of LIPA dated October 19, 2011; unsigned but certified copies of the transcripts of the examinations before trial of Kenneth Elliott and Kathleen Elliott both dated June 13, 2011; photographs; and affidavits on behalf of the Village of Lindenhurst by Shawn S. Cullinane and Douglas Madlon both dated December 9, 2011, and Maryann Weckerle, Kevin McCaffrey, and Thomas Brennan each dated December 20, 2011.

Village Law § 6-628 requires that the Village be provided prior written notice of an alleged defect in a sidewalk as a condition precedent to commencing an action against a Village (***Sloan v Village of Hempstead***, 223 AD2d 632, 636 NYS2d 852 [2d Dept 1996]; ***Strauss v Incorporated Village of Ocean Beach***, 213 AD2d 626, 624 NYS2d 940 [2d Dept 1005]; ***Tyschak v Incorporated Village of Westbury***, 193 AD2d 670, 597 NYS2d 474 [2d Dept 1993]); ***Zubli v 36 Middle Neck Road, Inc.***, 2010 NY Slip Op 31455U [Sup. Ct. Nassau County]. No prior written notice is necessary where there has been an affirmative act of negligence by the Village. In a slip and fall context, where a municipality establishes that it has not received the requisite written notice, it is incumbent upon the plaintiff to submit competent evidence that the municipality affirmatively created the defect (***Koehler v Incorporated Village of Lindenhurst***, 42 AD3d 438, 839 NYS2d 539 [2d Dept 2007]). It has not been established that the Village of Lindenhurst installed the sidewalk prior to 1975, though they performed subsequent repairs due to the sidewalk lifting from tree roots. The defect claimed herein is that the sidewalk had an indent in which grass was growing, causing the margin of the sidewalk abutting the Elliott's property to be uneven. Within that area of indentation, there had been a pole which was removed, allegedly leaving an impression in the abutting grassy area upon which the plaintiff slipped and fell. Here, there is no evidence that the Village of Lindenhurst placed or removed a pole, that they owned it, that they had prior written notice of the alleged defect, or that they caused or created the alleged defect in the abutting grassy area. The plaintiffs' contention that the irregular sidewalk margin and the defect along the sidewalk, was caused or created by the Village is without any evidentiary foundation and is purely speculative. Thus, it is insufficient to raise a triable issue of fact. The Village of Lindenhurst has also established prima facie that it did not have prior written notice of the claimed defect in the sidewalk.

Shawn S. Cullinane has averred that he is the Village Clerk/Treasurer for the Village of Lindenhurst and that he personally inspected the records and files and did not find any prior written complaints or notices of any defects or prior accidents or occurrences regarding the sidewalk at the corner of Wellwood Avenue and Knoll Street (in front of the premises known as 1 Knoll Street) in the Village of Lindenhurst, prior to August 7, 2008.

The Village of Lindenhurst has established via the affidavit of Douglas A. Madlon, deputy administrator for the Village of Lindenhurst, that he personally inspected the records and files and did not find any prior written complaints or notices of any defects or prior accidents or occurrences regarding the sidewalk at the corner of Wellwood Avenue and Knoll Street (in front of the premises known as 1 Knoll Street) in the Village of Lindenhurst, prior to August 7, 2008. The affidavits of Maryann Weckerle, Michael A. Lavorta, Jodi Caravella, Trustees on the Board of Trustees for the Village of Lindenhurst, establish that they did not receive any prior written complaints or notices of any defects or prior accidents or occurrences regarding the sidewalk in the subject area prior to August 7, 2008. The affidavits of Kevin McCaffrey, Deputy Mayor for the Village of Lindenhurst and Thomas A. Brennan, Mayor for the Village of Lindenhurst, establish that they did not receive any prior written complaints or notices of any defects or prior accidents or occurrences regarding the sidewalk in the subject area prior to August 7, 2008.

Thomas Schirmuhly testified on behalf of the Village of Lindenhurst to the extent that he is employed by the Incorporated Village of Lindenhurst as the highway crew leader overseeing the highway, sanitation, and parks departments, and investigating claims of falls due to alleged sidewalk defects. He became aware of the incident involving the plaintiff when her husband contacted him in 2010, and advised him that his wife fell. He drove by the site and saw an indentation, but he did not get out of his car. The indentation in the sidewalk caused the boundaries of the sidewalk to be uneven. Prior to August 2008, the Village of Lindenhurst did not receive any complaints about the sidewalk. He was unaware of a permit requirement for the installation of, or for a location change of utility poles. He was unaware of a utility pole having been on the opposite side of the sidewalk from where the pole is currently located. He was unaware of any violations having been issued to anyone in connection with the sidewalk adjacent to 1 Knoll Street. He was unaware of any complaints about the site, or other accidents concerning the indentation. He was unaware of what object, if any, occupied the space at the indentation. Mr. Schirmuhly testified that the Village replaces sidewalks, and that the highway department maintains the records for sidewalk replacement. He was unaware if the Village installed the subject sidewalk. Mr. Schirmuhly testified that when he saw the indentation, he did not believe it posed a hazard. He later testified that he did not believe the indentation was a Village problem as it was on the resident's property. He continued that Mr. Bopp has been a friend of his for fifty-five years and that they socialize both in and out of work.

Accordingly, motion (004) by the Village of Lindenhurst for summary dismissal of the complaint and cross claims against it is granted with prejudice.

Motion (005)

Kenneth Elliott and Kathleen Elliott seek summary judgment dismissing the complaint on the bases that they bear no liability for the accident; they did not place the subject pole; they did not know of its existence until they removed the pre-existing hedge; they did not cause the pole to be cut down; they did not know who cut it down; and they had no actual or constructive notice of the alleged defective condition. In support of motion (005), they have submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, their answer with cross claim and demands, the answers and demands served by co-defendants with cross claims; plaintiff's verified bill of particulars; unsigned but certified copies of the Elliott defendants transcripts of their examinations before trial (***Ashif v Won Ok Lee,*** 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]).

The owner or lessee of land abutting a public sidewalk owes no duty to keep the sidewalk in a safe condition. Liability may only be imposed on the abutting owner or lessee where it either creates the defective condition, voluntarily, negligently makes repairs, causes the condition to occur because of some special use, or

violates a statute or ordinance placing upon the owner or lessee the obligation to maintain the sidewalk and imposes liability for injuries caused by a violation of that duty (see ***Lowenthal v Heidrich Realty Corp.***, 304 AD2d 725, 759 NYS2d 497 [2d Dept 2003]).

The Elliott defendants have established prima facie entitlement to judgment as a matter of law by demonstrating that they did not create the allegedly defective condition at issue, negligently make repairs, cause the condition to occur, did not make special use of the sidewalk, and did not violate a statute or ordinance placing upon them the obligation to maintain the sidewalk which then imposes liability upon them for injuries caused by a violation of that duty.

Kathleen Elliott testified to the extent that she has lived with her husband Kenneth at 1 Knoll Street, Lindenhurst since 1974. Their property abuts the sidewalk running along the westerly side of South Wellwood Avenue. When they purchased the property, there were barberry bushes along South Wellwood Avenue, the entire length of the property, but they had the bushes removed about twenty years ago. At the site where the bushes were removed, there was a wooden pole with some spikes in it. The pole had been cut off to about three feet above grade level and was covered by the bushes, so she did not know it was there until the bushes were removed. The pole had been situated so that part of the pole encroached upon the paved portion of the sidewalk. She testified that the pole has not been there for about fifteen years and that she did not know how or when it was removed. Since the removal of the pole, she did not modify the sidewalk surface; and the sidewalk has remained the same for the last fifteen years. There is a pole, inscribed with "New York NYT," situated on the other side of the sidewalk since she moved into her home. It was replaced after a car downed the pole, however, she did not know who replaced it. She never noticed the indentation of the sidewalk until she was sued, despite having walked her dogs in that area for years. When she and her husband looked at the site, she did not think it was "like much of anything that somebody would have fallen over." She was unaware of any complaints about the site. She testified that the dirt surface was level with the sidewalk when she inspected the site. There was no differentiation between the surface of the paved sidewalk and the ground. No one has performed work at the site since the hedges were removed, and she did no remediation work. However, she noticed that on at least three occasions during a six month period, beginning August or September 2009, someone dug the grass out of the area, leaving just dirt. She did not see who did it. About ten or twelve years ago, the sidewalk was raised from a tree, so it was filled with tar, then, the section of sidewalk was removed and repaired. The rest of the sidewalk has remained as it existed when they first moved into the house in 1974.

Kenneth Elliott testified that before the two or three foot pole which was in the grassy area was removed about twelve or fifteen years ago, it did not obstruct the sidewalk as one walked on it. He continued that there had been two accidents at the site. He stated that the pole was taken out and the sidewalk was re-paved a second time as there had been two accidents: once when the utility pole was struck, and once when one of the town's trees was taken out by a car. The tree was replaced and four slabs of the sidewalk were re-paved, he believed, by the Village of Lindenhurst. He mowed the area abutting the sidewalk and never noticed a depression. If he had, he would have filled it in because that is where he walks to mow the lawn. He never added top soil, grass seed, mulch, or any garden material to the area. He had no difficulty mowing the lawn in that area, and never received any complaints about it. He testified that the area was flat and level with the sidewalk and he never had any shift with his ankle when stepping on the area.

Unlike the facts in ***Brandes v Incorporated Village of Lindenhurst***, 8 AD3d 315, 777 NYS2d 720 [2d Dept 2004], wherein defendant property owner's construction vehicles created a defect in the abutting sidewalk, it has not been established that the Elliott defendants caused or created the alleged defective condition. The defendants observed no defects or conditions that they believed required repairing, and felt the area was safe

based upon their maintaining and mowing the grass alongside the sidewalk. They did not make special use of the sidewalk or change its condition. Despite the photographs of the sidewalk and abutting property submitted by the plaintiffs, it is determined that they have not raised a factual issue to preclude summary judgment. It is further determined that it would be unreasonable for a jury to infer that there was something that the Elliott defendants did or did not do which made the sidewalk unsafe, or that they created the alleged defect.

Accordingly, motion (005) for summary judgment is granted as to defendants Kenneth Elliott and Kathleen Elliott and the complaint and cross claims asserted against them are dismissed with prejudice.

Dated: 6/29/12

PETER H. MAYER, J.S.C.