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SHORT FORM ORDER

INDEX No. 12-17367

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 3-4-13
ADJ. DATE 3-27-13
Mot. Seq. # 001 - MG

CATERINA PASSANANTE and GIUSEPPE PASSANANTE, Plaintiffs, - against - TOWN OF BROOKHAVEN, THE COUNTY OF SUFFOLK, and THE SUFFOLK COUNTY DEPARTMENT OF PUBLIC WORKS, Defendants.	PASTERNACK TILKER NAPOLI BERN, LLP Attorney for Plaintiffs 350 Fifth Avenue, Suite 7413 New York, New York 10118 ROBERT F. QUINLAN, ESQ. Attorney for Defendant Town of Brookhaven One Independence Hill Farmingville, New York 11738 PAUL J. MARGIOTTA, ESQ. Attorney for Defendants Suffolk County 100 Veterans Memorial Highway Hauppauge, New York 11787

Upon the following papers numbered 1 to 18 read on this motion to dismiss ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 14 - 18; Replying Affidavits and supporting papers ____; Other memorandum of law 13 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants County of Suffolk and Suffolk County Department of Public Works for an order pursuant to CPLR 3211 (a) (7), CPLR 3211 (c) and CPLR 3212 dismissing the complaint against them is deemed a motion for summary judgment pursuant to CPLR 3212 and is granted.

This action arises out of a personal injury claim by the plaintiff Caterina Passanante (plaintiff) for injuries she allegedly sustained on May 27, 2011 as a result of a trip and fall accident that occurred on the sidewalk in front of 560 Port Jefferson-Westhampton Road (also known as County Road 111), located in the Town of Brookhaven, County of Suffolk, New York. In her complaint, the plaintiff alleges, among other things, that the defendants failed to properly operate, manage, control, inspect, repair, and maintain the sidewalk, allowed a portion of the sidewalk to become raised, defective, broken, and uneven, causing a dangerous and defective condition to exist, resulting in her injuries.

JH

The defendants County of Suffolk and Suffolk County Department of Public Works (DPW) (collectively the County) move for an order dismissing the complaint pursuant to CPLR 3211 (a) (7), CPLR 3211 (c) and CPLR 3212 on the ground that the plaintiffs failed to comply with its demand for examination pursuant to GML 50-h, that the County owed no duty to the plaintiff because it had no duty to maintain the situs of the accident, and that the plaintiff's failed to plead or prove compliance with the appropriate written notice statute. Initially, the Court notes that the County has served its answer. Because issue has been joined, and a motion to dismiss for failure to state a cause of action is one of the permissible grounds for a post-answer motion to dismiss (*see* CPLR 3211 [e]), this motion should be deemed to have been brought under CPLR 3212. Whenever a court elects to treat such an erroneously labeled motion as a motion for summary judgment, it must provide "adequate notice" to the parties (CPLR 3211[c]) unless it appears from the parties' papers that they deliberately are charting a summary judgment course by laying bare their proof (*see* ***Rich v Lefkovits***, 56 NY2d 276, 452 NYS2d 1 [1982]; ***Schultz v Estate of Sloan***, 20 AD3d 520, 799 NYS2d 246 [2d Dept 2005], *lv denied* 82 NY2d 657, 604 NYS2d 556 [1993]; ***Singer v Boychuk***, 194 AD2d 1049, 599 NYS2d 680 [3d Dept 1993]). Here, upon review of the papers, the Court finds that the County has clearly charted a summary judgment course, that the County's notice of motion specifically demands said relief, and that it has submitted extensive documentary evidence and affidavits in support of its position (*see generally* ***Harris v Hallberg***, 36 AD3d 857, 828 NYS2d 579 [2d Dept 2007]). Under these circumstances, the court, in determining this motion, is free to apply the standard applicable to summary judgment motions without affording the parties notice of its intention to do so (*see* ***Mihlovan v Grozavu***, 72 NY2d 506, 534 NYS2d 656 [1988]; ***Doukas v Doukas***, 47 AD3d 753, 849 NYS2d 656 [2d Dept 2008]); ***Fuentes v Aluskewicz***, 25 AD3d 727, 808 NYS2d 739 [2d Dept 2006]).

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 issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of its motion, the County submits, among other things, the plaintiffs' complaint and its verified answer, the plaintiffs' notice of claim and its demand for examination, and the affidavits of four employees of the County or DPW. Concerning its contention that the plaintiffs are precluded from commencing an action against it for failure to comply with its demand for examination, the County submits the affidavit of Deborah Schurman (Schurman), dated January 29, 2013. It is undisputed that, provided that a municipality properly serves a demand, GML 50-h requires a putative plaintiff to submit to a municipal hearing as a condition precedent to the commencement of an action. GML 50-h (5) provides in pertinent part:

> Where a demand for examination has been served ... no action shall be commenced ... unless the claimant has duly complied with such demand for examination ... If such examination is not conducted within ninety days of service of the demand, the claimant may commence the action. The action, however, may not be commenced until compliance with the demand for examination if the claimant fails to appear at the hearing or requests an adjournment or postponement beyond the ninety day period. If the claimant requests an adjournment or postponement beyond the ninety day period, the city, county ... shall reschedule the hearing for the earliest possible date available.

In her affidavit, Schurman swears that she is employed as the calendar clerk for the Office of the Suffolk County Attorney, that part of her duties include making entries in a diary regarding the scheduling of court appearances, depositions and hearings, and that the diary is kept in the regular course of her office's business. She states that "[a] review of this legal file ... reveals that a demand to conduct an oral examination, pursuant to GML [50-h], was mailed to claimant by certified mail on September 1, 2011, following claimant's service of a Notice of Claim on August 19, 2011," scheduling examinations for December 12, 2011, and that a copy of the certified mail "postcard," signed by the plaintiff is attached as an exhibit to this motion.[1] Schurman further swears that a review of the diary reveals that "no phone call was received from anyone on behalf of these claimants on December 11, 2011 to confirm their appearances," that no one appeared for the claimants on December 12, 2011, and that she has never received any communication seeking to reschedule the examinations. She states that markings on the diary indicating these facts "were made at the close of business on December 11, 2011," and that a copy of the "diary pages for the dates of the 50-h hearings are annexed as Exhibit 'D'" Schurman further swears that "[m]oreover, a review of the diary, as well as the legal file maintained by this office reveals that at no time after March 7, 2012, did claimant or his (*sic*) counsel attempt to reschedule the hearing." (emphasis in original).

The County has failed to establish its entitlement to summary judgment on this branch of its motion. A review of the diary page submitted, and actually attached as Exhibit "F" to the motion, reveals the notation: "No Call 3:50 pm on 12-9-11." The County has failed to establish whether the legal file contains any information that someone other than Schurman was contacted regarding the rescheduling of the required examinations, or what transpired between December 9, 2011 and March 7, 2012. In addition, in their opposition to the County's motion, the plaintiffs allege that a municipal hearing was held at the offices of the defendant Town of Brookhaven (Town) on January 10, 2012, which the County voluntarily refused to attend.

In support of its contention that the County owed no duty to the plaintiff because it had no duty to maintain the situs of the accident, the County submits the affidavit of Paul R. Morano (Morano), dated February 5, 2013. In his affidavit, Morano swears that he is employed by DPW as an assistant civil

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[1] A proper foundation for the statements made by Schurman regarding "this legal file" as opposed to the diary, the mailing of the demand, and the certified mail card has not been made. However, the plaintiffs do not dispute any of the information, or the authenticity of the subject exhibit.

engineer, and that his duties include investigating allegations made in claims against the County by searching the official records of DPW to ascertain whether the County "maintains or controls a given location." He states that he made a diligent search of the records maintained by the County regarding the sidewalks adjacent to the premises located at 560 Port Jefferson-Westhampton Road, which revealed that the County did not maintain or control said sidewalk, or contract with any party to do so, prior to or on May 27, 2011.

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; *see also* ***Schindler v Ahearn***, 69 AD3d 837, 894 NYS2d 462 [2d Dept 2010]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005], *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]; ***Elliot v Long Is. Home, LTD***, 12 AD3d 481, 784 NYS2d 615 [2d Dept 2004]). In the absence of duty, there is no breach and without a breach there is no liability (***Pulka v Edelman***, *supra*; ***Miglino v Bally Total Fitness of Greater N.Y., Inc.***, 92 AD3d 148, 937 NYS2d 63 [2d Dept 2011]; ***Schindler v Ahearn***, *supra*). In addition, the determination whether a duty is owed by one member of society to another is a legal issue for the courts (***Darby v Compagnie Natl. Air France***, 96 NY2d 343, 728 NYS2d 731 [2001]; ***Eiseman v State of New York***, 70 NY2d 175, 518 NYS2d 608 [1987]; ***De Angelis v Lutheran Med. Center***, 58 NY2d 1053, 462 NYS2d 626 [1983]; ***Miglino v Bally Total Fitness of Greater N.Y., Inc.***, *supra*).

Here, it is the duty of the Town, not the County, to keep the public sidewalk adjacent to County Road 111 in reasonably safe condition and to repair any defects. The town superintendent of highways must, subject to the rules and regulations of the Department of Transportation, maintain all sidewalks in a town constructed by the county adjacent to county roads (Highway Law 140 [18]; ***Strauch v Town of Oyster Bay***, 25 NYS2d 809 [Sup Ct, Nassau County1941]; ***Schlatter v Town of Hempstead***, 182 Misc 545, 44 NYS2d 923 [Sup Ct, Nassau County 1943; *see generally* ***Van Etten v State***, 103 Misc 2d 487, 426 NYS2d 908 [Ct Cl, 1980). Said statute provides in pertinent part:

> § 140. General powers and duties of town superintendent
>
> The town superintendent shall, subject to the rules and regulations of the department of transportation, made and adopted as provided in this chapter:
>
> * * *
>
> 18. Maintain all sidewalks in the town constructed by the state adjacent to state highways and all sidewalks in the town constructed by the county adjacent to county roads and, when authorized by the town board, cause the removal of snow therefrom, and the cost thereof shall be paid from the miscellaneous or other town funds.

The County has established its prima facie entitlement to summary judgment herein on the ground that it did not owe a duty to the plaintiff. In opposition to the motion, the plaintiff submits the

affirmation of her attorney, her bill of particulars, photos of the accident site, and the transcript of her testimony at the municipal hearing held on January 10, 2012. The Court notes that the plaintiffs have failed to address the arguments proffered by the County in this branch of their motion. New York Courts have held that the failure to address arguments proffered by a movant or appellant is equivalent to a concession of the issue (*see* ***McNamee Constr. Corp. v City of New Rochelle***, 29 AD3d 544, 817 NYS2d 295 [2d Dept 2006]; ***Welden v Rivera***, 301 AD2d 934, 754 NYS2d 698 (3d Dept 2003]; ***Hajderlli v Wiljohn 59 LLC***, 24 Misc 3d 1242[A], 901 NYS2d 899 [Sup Ct, Bronx County 2009]). Accordingly, the County is entitled to summary judgment dismissing the complaint regarding this branch of its motion.

Nonetheless, in his affirmation, the attorney for the plaintiffs contends that this motion is premature as the plaintiffs have not had the opportunity to depose the defendants, and that they "have not had an opportunity to prove that Defendant County and [DPW] had prior written notice of the severely defective sidewalk ..." Here it is determined that summary judgment is not premature as there is no evidentiary basis offered to suggest that discovery could lead to relevant evidence. "[S]ummary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (***Williams v D & J School Bus***, 69 AD3d 617, 893 NYS2d 133 [2d Dept 2010]; ***Panasuk v Viola Park Realty***, 41 AD3d 804, 939 NYS2d 520 [2d Dept 2007]; ***Gasis v City of New York***, 35 AD3d 533, 828 NYS2d 407 [2d Dept. 2006]). The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered as a result of depositions is an insufficient basis for denying the motion as to what that discovery would uncover (*see generally* ***Lauriello v Gallotta,*** 59 AD3d 497, 873 NYS2d 690 [2d Dept 2009]; ***Kimyagarov v Nixon Taxi Corp.*** 45 AD3d 736, 846 NYS2d 309 [2d Dept 2007]). This is especially true where the issue is one within the knowledge of the plaintiffs.

In his affirmation, the attorney for the plaintiffs also contends that "triable issues of fact exist as to whether Defendants derived a special use/benefit and/or created the defective condition in question." Both of these issues relate to the County's argument that the complaint must be dismissed as it did not receive written notice of the allegedly defective condition. It is undisputed that the County has enacted a written notice provision regarding claims for injuries along its roadways.[2] Where, as here, a municipality has enacted a prior written notice statute, it may not be subjected to liability for personal injuries caused by an improperly maintained sidewalk unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies (***Wilkie v Town of Huntington***, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006], citing ***Amabile v City of Buffalo,*** 93 NY2d 471, 693 NYS2d 77 [1999]; ***Lopez v G&J Rudolph***, 20 AD3d 511, 799 NYS2d 254 [2d Dept 2005]; ***Gazenmuller v Incorporated Vil. of Port Jefferson,*** 18 AD3d 703, 795 NYS2d 744[2d Dept 2005]). The courts recognize two exceptions to prior written notice laws, "namely, 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***, *supra*; *see also* ***Oboler v City of New York***, 8 NY3d 888, 832 NYS2d 871 [2007]; ***DiGregorio v Fleet Bank of N.Y., NA***, 60 AD3d 722, 875 NYS2d

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[2] The County has submitted the affidavits of two employees in which they establish pursuant to the relevant statute that the County did not received prior written notice of or written complaints about the alleged defect prior to the plaintiffs accident.

204 [2d Dept 2009]).

It has been held that the "affirmative negligence" exception to prior written notice statutes applies only where the action of the municipality "immediately results in the existence of a dangerous condition" (***Oboler v City of New York***, *supra*; ***Yarborough v City of New York***, 10 NY3d 726, 853 NYS2d 261 [2008]; ***Laracuente v City of New York***, 104 AD3d 822, 961 NYS2d 527 [2d Dept 2013]; ***Forbes v City of New York***, 85 AD3d 1106, 926 NYS2d 309 [2d Dept 2011]). Thus, the affirmative creation exception applies only where the allegedly dangerous condition would have been immediately apparent (*see* ***San Marco v Village/Town of Mount Kisco***, 16 NY3d 111, 919 NYS2d 459 [2010]; ***Laracuente v City of New York***, *supra*). Here, the plaintiffs do not allege any affirmative act of negligence on the part of the County in their complaint or in their bill of particulars. In addition, the notice of claim filed with the County does not allege such affirmative acts.

In addition, the attorney for the plaintiffs contends that the defective area of the sidewalk includes a traffic signal box "likely installed by the Defendants" which falls under the special use exception to the written notice statute. However, the courts have concluded that the special use exception does not apply if the instrumentality was maintained by the municipality as part of its duty to maintain safe streets (***Poirier v City of Schenectady***, 85 NY2d 310, 624 NYS2d 555 [1995]; ***D'Antuono v Village of Saugerties***, 101 AD3d 1331, 956 NYS2d 264 [3d Dept 2012]; ***Melendez v City of New York***, 72 AD3d 913, 898 NYS2d 868 [2d Dept 2010]; *see* ***Fazio v Mamaroneck***, 226 AD2d 338, 640 NYS2d 216 [2d Dept 1996] [traffic signal box not subject to special use exception])

Regardless, the Court finds that the plaintiffs' arguments are academic as there can be no liability on the part of the County in the absence of a duty owed to the plaintiff. Accordingly, the County's motion for summary judgment dismissing the complaint is granted.

The claims against the defendants County of Suffolk and Suffolk County Department of Public Works dismissed herein are severed and the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: 5/24/13

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**