SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice.

TRIAL/IAS PART 2
NASSAU COUNTY

ADELA KELLEY,

Plaintiff,

-against-

INCORPORATED VILLAGE OF HEMPSTEAD, MADONNA HOLDINGS, LLC, 7-11, INC. and SOUTHLAND CORPORATION,

Defendants.

ORIGINAL RETURN DATE: 04/22/13
SUBMISSION DATE: 08/30/13
Index No. 5612/12

MOTION SEQUENCE #003

The following papers read on this motion:

Notice of Motion	1
Affirmations in Opposition	2, 3
Reply Affirmation	4
Supplemental Affirmation in Opposition	5

Defendant, Incorporated Village of Hempstead (the "Village"), moves, pursuant to CPLR 3212, seeking an order granting summary judgment dismissing plaintiff's complaint and any and all cross claims against it.

It is well settled that on a motion for summary judgment movant must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the lack of any material issues of fact (*Ayotte v Gervasio,* 81 NY2d 1062 [1993]; *Alvarez v Prospect Hosp.,* 68 NY2d 320 [1986]). If such a showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require resolution at trial (*Alvarez v Prospect Hosp.,* 68 NY2d at 324).

Where, as here, defendant moves for summary judgment in a trip and fall type of action based upon defendant's lack of written notice of the alleged dangerous condition, "defendant is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law (citations omitted)" (*Beltram v Metropolitan Life Ins. Co.*, 259 AD2d 456, 457 [2d Dept. 1999]).

This action was brought by plaintiff to recover damages for personal injuries allegedly sustained by plaintiff on April 4, 2011, when she tripped and fell in the grassy area between the public sidewalk and curb on a defective sign post stump located approximately six to seven feet north of the northwest corner of the intersection of California Avenue and Fulton Avenue (Route 24), in the Incorporated Village of Hempstead, Town of Hempstead, County of Nassau and State of New York (the "Subject Location").

The Village alleges that it did not receive prior written notice of the alleged dangerous or defective condition of the Subject Location prior to the occurrence as a condition precedent for liability. The Village cites to General Municipal Law Section 50-e, CPLR 9804, Village Law Section 6-629 and the Incorporated Village of Hempstead Code Section 39-1(c).

Patricia Perez, Village Clerk for the Village, avers that her office made a search of the Village's "Sidewalk Book," the only record of all prior written notices received by the Village, and that said search revealed that the Village did not receive prior written notice of any defect at the Subject Location for a five-year period through the date of plaintiff's accident.

The Village contends that it, therefore, has made a *prima facie* showing of entitlement to judgment as a matter of law by proffering sufficient evidence that it has not been provided with prior written notice of the alleged defective condition as required under law (*see, Lopez v Gonzalez,* 44 AD3d 1012 [2d Dept. 2007]). Once the initial burden has been met, the burden then shifts to plaintiff to submit evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial to resolve. (*Alvarez v Prospect Hosp.*, 68 NY2d at 324). This plaintiff and co-defendants have failed to do.

Two exceptions exist to the prior written notice rule: the affirmative creation of the dangerous or defective condition by the municipality and when a benefit is conferred upon the municipality by a special use. (*See, Lopez v Town of Hempstead,* 50 AD3d

645, 646 [2d Dept. 2008]). Plaintiff and co-defendants contend that the Village created the dangerous condition by failing to fully remove the sign post and instead hammering it below grade. The affirmative negligence exception is limited to work by the Village that immediately results in the existence of a dangerous condition (*Schleif v. City of New York,* 60 AD3d 926, 928 [2d Dept. 2009]). "[W]here the defect develops over time with environmental wear and tear, the affirmative negligence exception is inapplicable" (*Id.*).

Plaintiff and co-defendants base their contentions on the deposition testimony of Brian O'Keefe, a former employee of the Incorporated Village of Hempstead (the "Village"). According to Mr. O'Keefe's testimony, prior to his retirement on June 22, 2012, he was the Supervisor of the Paint and Sign Department.

The record reveals that the Mr. O'Keefe installed a new stop sign in April 2009, cut and ground the pole of the damaged sign and hammered it below grade level (Pl's Ex. G, ¶5). According to Mr. O'Keefe, when he left the location the pole was covered in grass (Id.).

The Village alleged in its Bill of Particulars that erosion in the Subject Location caused the sign anchor to extend above grade and that it was either climatic conditions or the actions of the party who replaced, maintained or installed the handicapped ramps and sidewalk area adjacent to the Subject Location that caused the erosion (Id.).

Amare M. Woldekerkos, Senior Engineering Aide in the Public Works/Engineering Department of the Department of Public Works for the Village, attested that a search of the property records for a five-year period prior to plaintiff's accident revealed that there are no records evidencing that the Village performed sidewalk repairs or sidewalk maintenance at the Subject Location. The Village submits that as no work was done by the Village at the Subject Location, it did not create the alleged defective condition.

Moreover, the Village submits that pursuant to Hempstead Village Code § 116 the co-defendants, as adjacent owner and occupant of the Subject Location, are responsible for the maintenance thereof and liable to all persons injured as a result of their failure to do so.

Based upon all of the foregoing, defendant's the Village's motion to dismiss is granted, and the complaint and any and all cross claims as against it are dismissed.

Accordingly, the caption is amended to read as follows:

"ADELA KELLEY,

Plaintiff, Index No. 5612/12

-against-

MADONNA HOLDINGS, LLC,
7-11, INC. and SOUTHLAND
CORPORATION,

Defendants."

This decision constitutes the order of the court.

Dated: November 14, 2013

THOMAS P. PHELAN, J.S.C.