[* 1]

STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

RANDALL C. KREBBEKS,

Plaintiff,

-vs-

Index No. 76503

THE VILLAGE OF NEWARK,

Defendant.

2014

APPEARANCES: Greene & Reid, PLLC
(Eugene W. Lane, Esq., of counsel)
Attorneys for the Plaintiff

Petrone & Petrone, P.C.
(Mark O. Chieco, Esq., of counsel)
Attorney for Defendant

MEMORANDUM - DECISION

John B. Nesbitt, J.

Plaintiff seeks monetary damages from defendant, Village of Newark, for personal injury sustained by a trip and fall allegedly caused by a negligently maintained sidewalk. The defendant municipality ("Village") moves for summary judgment dismissing the action pursuant to CPLR 3212 on two grounds. First, the Village is not liable as a matter of law because, pursuant to local law, it is the adjacent landowner's responsibility to maintain the sidewalks in front of his or her property, not the Village's. Second, the Village is not liable as a matter of law because, pursuant to local law, the Village must receive written notice of any sidewalk defect and then fail to remedy the same within a reasonable time before a claim based upon such defect can be prosecuted against the Village. Here, no such notice was given.

The facts relevant to this motion are uncomplicated and largely undisputed. The plaintiff, Randall C. Krebbeks, lives with his wife, Jeanne, at 312 East Myrtle Street in the Village of Newark, Wayne County. On November 21, 2012, not long after 11:00 in the evening, Mr. Krebbeks and his wife left the local Elks Club for the quarter mile walk home. While walking on the sidewalk along Church Street, and only a few hundred yards from the Elks Club, Mr. Krebbeks came upon a portion of the sidewalk that was narrowed by a crescent shaped cutout designed to accommodate an adjacent

tree.[1] That tree had been removed some years earlier, but the cutout remained. The ground in the cutout area was apparently indented and not level with the sidewalk. Mr. Krebbeks did not notice the cutout, stepped into the depression (or "hole," as plaintiff describes it), lost his balance and stumbled. He fell on the sidewalk about a dozen feet further after a few awkward steps caused by his momentum and lack of balance. Mr. Krebbeks suffered an elbow fracture. Thereafter, a notice of claim was filed and this action ensued.

At the outset, the Village asserts that it has, by local law, imposed a duty upon private property owners whose lands abut a public street to maintain the sidewalks adjacent such lands in "good repair" and "safe, easy and commodious" for pedestrian traffic.[2] Assuming, however, in this case, that there was a property owner to which this law applied, and that the local law was violated by the existence of the sidewalk condition described by the plaintiff, this does not perforce mean that the Village cannot be civilly liable.

> "Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner. There are, however, circumstances under which this general rule is inapplicable and the abutting landowner will be held liable. Liability to abutting landowners will generally be imposed where the sidewalk was constructed in a special manner for the benefit of the abutting owner, where the abutting owner affirmatively caused the defect, where the abutting landowner negligently constructed or repaired the sidewalk, and where a local ordinance or statute specifically charges an abutting landowner with a duty to maintain and repair the sidewalks and imposes liability for injuries resulting from the breach of that duty" (*Hausser v Giunta*, 88 NY2d 449, 452-453 [1996][citations omitted]).

---

[1] The cutout is adjacent the residential address of 220 Church Street, Newark, New York.

[2] Newark Village Code §145-4. **Maintenance of sidewalks.**
A. The owner or occupant of every lot or parcel fronting upon any public street or traveled highway, in front of which parcel a sidewalk, curbstone or gutter has been or shall be laid, shall at all times maintain or keep such sidewalk, curb or gutter in good repair and so as to be safe, easy and commodious for persons using this highway. Hereafter, all sidewalks shall be constructed of concrete, and all repairs to existing sidewalks shall be of concrete and, prior to such repairs and such construction, a permit for same shall be obtained from the appropriate village authority.

The Village has not enacted a local law that not only "specifically charges an abutting landowner with a duty to maintain and repair the sidewalk," but also "imposes liability for injuries from the breach of that duty" (*Davison v City of Buffalo*, 96 AD3d 1516, 1517 [4th Dep't 2012]). Thus, any failure of an abutting owner in this case to keep the sidewalk safe for pedestrians is not ground to dismiss this action, nor does it diminish any liability of the Village.

Secondly, the Village asserts that it did not have prior written notice of any alleged defect in the sidewalk as required by section 145-19 of the Village Code; thus, it cannot be civilly answerable for any such defect.[3] The Village Code tracks Village Law §6-628.[4] So far as the present motion record reveals, no written notice of the alleged sidewalk defect complained of by the plaintiff was given to the Village prior to plaintiff's injuries. "Prior notification laws are a valid exercise of legislative authority" and "comports with the reality that municipal officials are not aware of every dangerous condition on its streets and public walkways, yet imposes responsibility for repair once the municipality has been served with written notice of an obstruction or other defect, or liability for the consequences of its nonfeasance, as the case may be." *Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999][citations and internal quotation marks omitted]). Plaintiff relies upon a well-established

---

[3]Newark Village Code §145-19. **Damages due to sidewalks.**
No civil action will be maintained against the village and/or the Village Clerk of the village for damages or injuries to person or property sustained by reason of any defect in the sidewalks ... of the village ..., unless such sidewalks have been constructed or are maintained by the village pursuant to statute, nor shall any action be maintained for damages or injuries to person or property sustained by reason of such defect ... unless written notice thereof, specifying the particular place, was actually given to the Village Clerk of the village and there was a failure or neglect to cause such defect to be remedied ... or to make the place otherwise reasonably safe within a reasonable time after the receipt of such notice.

[4]N.Y. Village Law §6-628. **Liability of village in certain actions.**
No civil action shall be maintained against the village for damages or injuries to person or property sustained in consequence of any ... sidewalk ... being defective, out of repair, unsafe, dangerous or obstructed ... unless written notice of the defective, unsafe, dangerous or obstructed condition ..., was actually given to the village clerk and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstructions complained of, ...or the place otherwise made reasonably safe.

exception to the prior notice requirement; that being where the "municipality created the defect or hazard through an affirmative act of negligence" (*Braver v Village of Cedarhurst*, 94 AD3d 933,934 [2d Dep't 2012). Plaintiff claims that this was the case here, based upon a tree removal occurring five years prior.

The sidewalk cutout at one time accommodated the location of a good sized maple tree situated between the sidewalk and the street. In early 2007, a local resident notified the Village that the tree had a large cavity in its trunk that could indicate that the tree was unhealthy and potentially hazardous. Later that year, the Village engaged an independent contractor, Empire Tree Surgeons, to remove the tree, which it did on November 7th at the cost of $875. The Supervisor of the Village Highway Department states in his affidavit that (1) the Village "did not control or supervise the removal of the tree" by the independent contractor and (2) "[i]t is customary practice for a tree removal to include stump grinding, top soiling and seeding, and to fill to grade for completion of the contract."

Plaintiff argues that it is irrelevant whether the tree removal was accomplished by an independent contractor rather than a village work crew. In either case, the Village acts through agents and is responsible for the outcome. Here, argues plaintiff, that outcome bespeaks negligence in two respects. First,

> "[t]he Village created a dangerous situation when it cut the tree down because it removed the visual cue which alerted pedestrians walking down the street that the sidewalk was narrowing, especially when it is dark out. Without the tree there was no reason for pedestrians to suspect that the sidewalk was narrowing and that continuing on a straight path would result in stepping on the edge of the sidewalk as the plaintiff did" (Plaintiff's Memorandum of Law [12/9/2014] at 5).

Second, that it may be "customary" to fill to grade after a tree removal does compel the inference that this was in fact done in this case. The trier of fact could find to the contrary, argues plaintiff.

In deciding these issues, we start with the proposition that "[t]he defendant village has a non-delegable duty to maintain its highways, of which sidewalks are a part, in a reasonably safe condition" (*Ricciuti v Village of Tuckahoe*, 202 AD2d 488, 489 [2nd Dep't 1994]](citations and internal quotation marks omitted]).[5] That the village acts through independent contractors rather its

---

[5]This duty is "independent of its duty not to create a defective condition" (*Kiernan v Thompson*, 73 NY2d 840, 841 [1988][city removed a tree stump, thereby allegedly creating a

own employees does not diminish or shift that duty. In the present context, the courts attribute the acts or omissions of independent contractors as those of the engaging municipality (see e.g. *Tumminia v Cruz Construction Corp.*, 41 AD3d 585 [2nd Dep't 2007]["issue of fact as to whether the City created the defect through its contractor's actions"]; *see also*, 19 McQuillin Mun. Corp. §54:171 [3rd ed. 2014]).

Where, as here, there is local and state legislation requiring prior written notice of a defective or unsafe sidewalk condition before a municipality can be liable for injuries caused by such condition, the municipality has the "initial burden [of] establishing that it did not receive the requisite written notice of the allegedly defective sidewalk condition as required by [law]" (*Davison v City of Buffalo*, 96 AD3d 1516, 1518 [4th Dep't 2012]). The Court finds that the Village has done so in this case. As such, the plaintiff must show, if he can, why the prior notice requirement does not apply:

> "Where the municipality establishes that it lacked prior written notice, the burden shifts to the plaintiff to demonstrate the applicability of an exception to the rule, i.e. that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the municipality. The affirmative negligence exception is limited to work by the municipality that *immediately* results in the existence of a dangerous condition. An omission on the part of the municipality does not constitute affirmative negligence excusing noncompliance with the prior written notice requirement" (*Hawley v Town of Ovid*, 108 AD3d 1034 [4th Dep't 2013])[citations and internal quotation marks omitted]).

Plaintiff alleges affirmative negligence on the part of the Village. First, the Village caused the tree to be removed but allowed the cutout to remain. This is undisputed. Plaintiff argues that a sidewalk cutout without a tree or other cue to a pedestrian that a cutout might be present creates a condition that the pedestrian may step off the sidewalk when the sidewalk narrows and into the area cutout of the sidewalk. Second, if the ground exposed by the cutout is depressed below the level of the sidewalk, an unsafe condition is created whereby a pedestrian may trip or stumble thereby injuring him or herself. This is exactly what plaintiff claims happened in this case.

Assuming in this case that the cutout without a visual cue as to its presence excused plaintiff's failure to stay on the sidewalk, there is nevertheless no evidence in the record by way of

---

defective condition that caused plaintiff's injuries").

affidavit or otherwise as to how the cutout area became depressed, assuming that was the case at the time of the plaintiff's fall. As indicated above, to obviate the application of the prior notice requirement, it is necessary that the work by the municipality (or, in this case, its contractor) *immediately* create the hazardous condition. This would require a showing that the depression was created by the tree removal *and* left unremedied by fill and grading after removal. There is no evidence to show whether this was the case or not.

Accordingly, the Court will deny the Village's motion for summary judgment with leave to renew until after further discovery and development of a record on this issue. Absent a further depositive motion on this issue, the Court would commend to the trier of fact the issue whether the Village, by its affirmative act(s) of negligence, created the conditions causing plaintiff's injuries.

THIS SHALL CONSTITUTE THE ORDER AND JUDGMENT OF THE COURT.

Dated: February 3, 2015
Lyons, New York

JOHN B. NESBITT
Acting Supreme Court Justice