SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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RITA WILLIAMS,

Plaintiff,

-against-

FREEPORT UNION FREE SCHOOL DISTRICT and INCORPORATED VILLAGE OF FREEPORT,

Defendants.

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IAS Part 21
Index No.605619/2015
Motion Seq. Nos. 001/002

DECISION AND ORDER

LEONARD D. STEINMAN, J.

The following submissions, in addition to any memoranda of law submitted by the parties, have been reviewed in preparing this Decision and Order:

001
Defendant School District's Notice of Motion, Affirmation, Affidavit & Exhibits.....1
Defendant Freeport's Amended Notice of Cross-Motion, Affirmation, Affidavit & Exhibits.....2
Plaintiff's Affirmation in Opposition & Affirmation.....3

002
Defendant School District's Reply Affirmation.....4

This is an action seeking to recover damages for personal injuries allegedly sustained by plaintiff on September 14, 2014. Plaintiff alleges that she tripped and fell on a raised, uneven sidewalk that abuts the administration building of the defendant Freeport Union Free School District. The School District and defendant Incorporated Village of Freeport now move for summary judgment dismissing all claims and cross-claims against them. Plaintiff opposes defendants' motion.

On a motion for summary judgment the proponent must tender sufficient evidence to demonstrate the absence of any material issues of fact in order to set forth a *prima facie* showing that it is entitled to judgment as a matter of law. *Giuffrida v. Citibank Corp.*, 100

N.Y.2d 72, 81 (2003). Where the movant fails to meet its initial burden the motion for summary judgment should be denied. *U.S. Bank N.A. v. Weinman*, 123 A.D.3d 1108 (2d Dept. 2014).

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfgrs., Inc.*, 46 N.Y.2d 1065 (1979); *Werner v. Nelkin*, 206 A.D.2d 422 (2d Dept. 1994).

The School District's Motion

The School District argues, among other things, that it cannot be held liable for plaintiff's alleged injuries as a matter of law because the Village owns the sidewalk in question.

As a general rule a landowner will not be liable to a pedestrian injured by a defect in a public sidewalk abutting the landowner's premises unless "the landowner created the defective condition or caused the defect to occur because of some special use...." *Bloch v. Potter*, 204 A.D.2d 672 (2d Dept. 1994), *quoting Surowiec v. City of New York*, 139 A.D.2d 727 (2d Dept. 1988); *see also Maya v. Town of Hempstead*, 127 A.D.3d 1146 (2d Dept. 2015).

Liability may also be imposed if the landowner violated a statute or an ordinance placing upon the owner or lessee the obligation to maintain the sidewalk. *Lowenthal v. Theodore H. Heidrich Realty Corp.*, 304 A.D.2d 725 (2d Dept. 2003); *see also Hausser v. Giunta*, 88 N.Y.2d 449 (1996). However, "[i]n order for a statute, ordinance, or municipal charter to impose liability upon an abutting owner for injuries caused by its negligence, the language thereof must not only charge the landowner with a duty, it must also specifically state that if the landowner breaches that duty he or she will be liable to those who are injured." *Picone v. Schlaich*, 245 A.D.2d 555, 556 (2d Dept. 1997); *see also Dalder v. Incorporated Vil. of Rockville Ctr.*, 116 A.D.3d 908 (2d Dept. 2014) (granting defendant summary judgment where the Code of the Village of Rockville Centre imposed a duty on the defendant to keep the abutting sidewalk in good and safe repair, but did not impose tort

liability upon the defendant for injuries caused by a violation of that duty); *Romano v. Leger*, 72 A.D.3d 1059 (2d Dept. 2010) (village code required property owner to pay for repairs of sidewalk but did not shift tort liability to landowner; summary judgment granted).

Although the Village transferred to the School District an obligation to *maintain* the sidewalk as an adjoining landowner under the Village Code, the Code did not transfer or impose *tort liability* upon an adjoining landowner. *See Ahdout v. Great Neck Park District*, 124 A.D.3d 810 (2d Dept. 2015). As a result, unless plaintiff can create a factual issue as to whether the School District affirmatively caused the defect or negligently repaired the sidewalk, the School District is entitled to summary judgment.

The School District established its *prima facie* entitlement to judgment as a matter of law by demonstrating that it did not create the condition or cause the sidewalk defect at issue to occur because of a special use. In opposition, plaintiff failed to raise a triable issue of fact. *Hyland v. City of New York*, 32 A.D.3d 822, 823-24 (2d Dept. 2006). Although plaintiff argues that the School District had at least constructive notice of the defect, such notice does not impose liability upon the School District in the absence of a statute or regulation imposing liability upon the School District as discussed above. Accordingly, the School District's application for summary judgment pursuant to CPLR §3212 is granted.

The Village's Motion

The Village is entitled to summary judgment because plaintiff has failed to refute the Village's demonstration that prior to the incident it did not receive written notice of the alleged defect as required by the Village Code to bring an action for injuries. *See* Freeport Village Code Section 27-3; *Donadio v. City of New York*, 126 A.D.3d 851 (2d Dept. 2015); *Oliveri v. Village of Greenport*, 93 A.D.3d 773 (2d Dept. 2012); *Holmes v. Oyster Bay*, 82 A.D.3d at 1048-49. Whether the Village had constructive notice of the sidewalk defect is immaterial--it was established by the Court of Appeals over 18 years ago that constructive notice of a sidewalk defect cannot satisfy the statutory requirement of written prior notice to a municipality. *Amabile v. City of Buffalo*, 93 N.Y.2d 471 (1999).

Plaintiff failed to set forth facts to create an issue of fact as to whether the Village had actual notice of the alleged defective condition of the sidewalk. Although plaintiff provided photographic evidence that markings on the sidewalk reflected that someone was aware of

the claimed defect, the relevant photograph was taken after plaintiff's accident. The photographs of the sidewalk taken on the day of plaintiff's fall do not reflect such markings. In all events, even if the Village had actual notice of the alleged defect prior to the accident this would not obviate the need to satisfy the prior written notice requirement. *McCarthy v. City of White Plains*, 54 A.D.3d 828 (2d Dept. 2008).

As a result, the Village's application for summary judgment pursuant to CPLR §3212 is also granted, and the complaint is dismissed as against both defendants.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: August 17, 2017
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.

xxx

ENTERED

SEP 15 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE