| **Burgess v City of Beacon** |
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| 2019 NY Slip Op 34306(U) |
| May 20, 2019 |
| Supreme Court, Dutchess County |
| Docket Number: Index No. 2017-51685 |
| Judge: Christi J. Acker |
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To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF DUTCHESS**

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JANETTE BURGESS,

Plaintiff,

-against-

CITY OF BEACON, THE CITY OF BEACON WATER DEPARTMENT, CENTRAL HUDSON GAS & ELECTRIC, 474-476 MAIN STREET LLC and KEN STRAUS,

Defendants.

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**DECISION AND ORDER**

Index No.: 2017-51685

Motion Seq. #2 & 3

ACKER, J.S.C.

The following papers numbered 1-44 were considered in connection with the following motions: (1) motion of Defendants City of Beacon and The City of Beacon Water Department (hereinafter "Beacon Defendants") for an Order pursuant to CPLR §3212 granting said Defendants summary judgment dismissing Plaintiff's Complaint as well as all related and derivative claims asserted by any party and (2) the motion of Defendants 474-476 Main Street, LLC and Ken Straus (hereinafter "Main Street Defendants") for an Order pursuant to CPLR §3212 granting summary judgment dismissing said Complaint and any and all cross-claims:

Seq. #2

Notice of Motion-Affirmation of Katherine A. Lynch, Esq.-Exhibits A-V-Memorandum of Law in Support .......... 1-25
Affirmation in Opposition of Courtney Campbell, Esq.-Affidavit of Jay Feinberg .......... 26-27

1

Reply Affirmation of Katherine A. Lynch, Esq. ....28

Seq. #3
Notice of Motion-Affirmation of John J. McKenna, Esq.-Exhibits A-K .... 29-41
Affirmation in Opposition of Courtney Campbell, Esq.-Affidavit of Jay Feinberg .... 42-43
Reply Affirmation of John J. McKenna, Esq. ....44

This action was commenced by Plaintiff Janette Burgess (hereinafter "Plaintiff") on or about May 9, 2017.[1] It is alleged that on May 20, 2016, Plaintiff was injured when she fell on the roadway in front of 474 Main Street ("subject premises"). Specifically, Plaintiff claims that she stepped off the sidewalk and into the roadway, where she fell as a result of a depression next to a grate in the roadway. Defendant 474-476 Main Street owns the subject premises and Defendant Ken Straus is a member of the LLC. The City of Beacon owns the roadway in front of the subject premises.

It is well settled that on a motion for summary judgment, the proponent "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." *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 852 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]. In opposition, "the nonmoving party need only rebut the *prima facie* showing made by the moving party so as to demonstrate the existence of a triable issue of fact." *Poon v. Nisanov*, 162 AD3d 804, 806 [2d Dept. 2018], *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986].

The papers submitted in support of and in opposition to a summary judgment motion should be scrutinized in a light most favorable to the party opposing the motion. *Dowsey v. Megerlan*, 121 AD2d 497 [2d Dept. 1986]; *Gitlin v. Chirkin*, 98 AD3d 561 [2d Dept. 2012].

[1] There were previously two third-party actions in this matter which have been discontinued. In addition, Plaintiff has discontinued her action against direct Defendant Central Hudson Gas & Electric Corporation.

"Issue finding, rather than issue determination, is the court's function on a motion for summary judgment." *Vumbico v. Estate of Wiltse*, 156 AD3d 939, 941 [2d Dept. 2017]. Summary judgment is a drastic remedy that deprives a litigant of his or her day in court that should only be employed when there is no doubt as to the absence of triable issues. *Castlepoint Ins. Co. v. Command Sec. Corp.*, 144 A.D.3d 731, 733 [2d Dept. 2016].

**Facts**

Plaintiff, who managed the florist shop located at the subject premises, alleges that she was injured when she was supervising the loading of items into her van which was parked in front of the shop. She testified that she walked across the sidewalk, stepped down off the sidewalk into the road and as soon as her foot went down, she heard a "snap" and she fell.. She identified the condition that caused her to fall as a depression that turns into a hole about a foot off of the sewer grate located in the roadway. She had seen the condition before and saw it for the first time approximately two (2) years prior to the accident. She also testified that she had seen a woman fall in that location prior to her accident, but Plaintiff never made any complaints to anyone about the condition.

**Beacon Defendants' Motion**

The Beacon Defendants move for summary judgment arguing that they did not have prior written notice of the condition that allegedly caused Plaintiff's fall, which entitles them to judgment as a matter of law. They also argue that no exceptions to the prior written notice law are applicable herein. In support of its motion, the Beacon Defendants submit, *inter alia*, the Pleadings, Plaintiff's Bill of Particulars, the 50-h and deposition transcripts of the Plaintiff, the deposition transcript of Anthony Thomaselli, former Highway Superintendent of the City of

Beacon (on behalf of the Beacon Defendants), the affidavit of Iola C. Taylor, Beacon City Clerk ("Taylor Affidavit"), the affidavit of Anthony Thomaselli ("Thomaselli Affidavit"), the affidavit of Steven Pietropaolo, P.E. ("Pietropaolo Affidavit") and various exhibits from the depositions, including photographs of the alleged condition.

Where a municipality has enacted a prior written notice law, "it may not be subjected to liability for injuries caused by a dangerous condition which comes within the ambit of the law unless it has received prior written notice of the alleged defect or dangerous condition, or an exception to the prior written notice requirement applies." *Loghry v. Vill. of Scarsdale*, 149 AD3d 714, 715 [2d Dept. 2017]. "Once a municipality establishes that it lacked prior written notice of an alleged defect, the burden shifts to the plaintiff to demonstrate that a question of fact exists as to one of the exceptions to the prior written notice requirement, either that the municipality affirmatively created the alleged hazardous condition or that a special use of the area in question conferred a special benefit upon the municipality." *Cruzate v. Town of Islip*, 162 AD3d 853, 854 [2d Dept. 2018].

Beacon Defendants have established that they lacked prior written notice of the alleged defect. Said Defendants submit the Taylor Affidavit which requests that the Court take notice of the City's prior written notice law contained in the City of Beacon Charter, Chapter C, Article 9, General Provisions Sec. 9.10 entitled "Limitation of Actions Against the City."[2] This law provides that no action may be maintained against the City unless notice of the condition has previously been filed with the City and there was then a failure or neglect to remedy the condition within a reasonable time. Ms. Taylor avers that the City maintains a record of all

[2] Although not attached to the Taylor Affidavit, a copy of the relevant section of the Charter is annexed as part of Exhibit K to the Lynch Affirmation.

written notices that it receives and that all of the notices are maintained in a software program, according to the location of the alleged defective, unsafe, dangerous or obstructed condition. Ms. Taylor searched the database for five (5) years prior to May 20, 2016 and found no prior written notice of any defective conditions relating to the roadway in front of La Bella Rosa Florist located at 474 Main Street.

This is sufficient to shift the burden to Plaintiff to demonstrate that a question of fact exists that the Beacon Defendants had notice or that one of the exceptions are applicable. *Cruzate*, *supra*. Plaintiff has failed to do so. Plaintiff does not contest that the Beacon Defendants did not have prior written notice of the condition at issue, but argues generally that "each and every one" of the cases cited by Beacon Defendants regarding prior written notice are "patently" distinguishable from the instant matter. Surprisingly, Plaintiff does not explain this statement, nor provide any specific argument distinguishing "each and every one" of said unnamed cases.

Instead, it appears that Plaintiff's opposition centers on her argument that the Beacon Defendants had constructive notice of the condition because its witness testified that the Highway Department cleaned and inspected the grates on Main Street every year. However, Plaintiff's "contention that the City had actual or constructive notice of the condition is without merit. Where, as here, a municipality has enacted a prior written notice statute, '[c]onstructive notice of a condition is insufficient to satisfy the requirement of prior written notice' [citations omitted]." *Charles v. City of Long Beach*, 136 AD3d 634, 635 [2d Dept. 2016]. Moreover, actual notice does not obviate the need to comply with the prior written notice requirement. *Id.*

As such, Plaintiff fails to raise a triable issue of fact as to whether the Beacon Defendants

received prior written notice of the alleged condition. In addition, Plaintiff "presented no evidence indicating that either exception to the prior written notice requirement applied in this case." *Cruzate, supra*. Therefore, the Beacon Defendants are entitled to summary judgment.[3]

**Main Street Defendants**

Main Street Defendants also move for summary judgment arguing that they do not owe Plaintiff a duty as they do not own, occupy, control or make special use of the roadway on which Plaintiff fell. In support of its motion, the Main Street Defendants submit, *inter alia*, the Pleadings, Plaintiff's Bill of Particulars, the deposition transcripts of the Plaintiff, Anthony Thomaselli and Ken Straus and photographs of the grate in question.

In order to establish a *prima facie* case of negligence, a plaintiff must establish the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and that such breach was a proximate cause of injury to the plaintiff. *Donatien v. Long Island Coll. Hosp.*, 153 AD3d 600 [2d Dept. 2017]. If there is no duty of care owed by the defendant to the plaintiff, there can be no breach, and thus, no liability can be imposed upon the defendant. *Id.* Liability for a dangerous condition on property is generally predicated upon ownership, occupancy, control, or special use of the property. The existence of one or more of these elements is sufficient to give rise to a duty of care, however, where none is present, a party generally cannot be held liable for injuries caused by the allegedly defective condition. *Id.* at 600–601.

The Main Street Defendants have established that they did not own, occupy or control the street on which Plaintiff fell. It is uncontested that the road in question is owned, maintained

[3] As the Beacon Defendants are entitled to summary judgment on prior written notice, the Court need not reach said Defendants' argument that the condition was latent.

and controlled by the City of Beacon, so the Main Street Defendants do not have a duty to maintain the roadway. *Id.* at 601. Main Street Defendants have also established through the testimony of Ken Straus that the said Defendants did not make any special use of the area and that no work was done on the roadway by or on behalf of the Main Street Defendants. Thus, Main Street Defendants have shifted the burden to Plaintiff to raise a triable issue of fact.

In opposition, Plaintiff fails to raise a triable issue of fact. As an initial matter, Plaintiff offers no opposition to said Defendants' arguments that it did not occupy, control or put the area in question to special use. Accordingly, Main Street Defendants cannot be held liable on any of these grounds. Instead, Plaintiff argues that issues of fact remain as to whether said Defendants were on notice of the defect and should have reported same to the City of Beacon and whether the Main Street Defendants did in fact create the defect.

Notably, Plaintiff fails to provide any relevant case law demonstrating that the Main Street Defendants had a duty to report the condition at issue to the City of Beacon. Regardless, Plaintiff fails to rebut the testimony of Ken Straus that he had no knowledge of the condition that allegedly caused Plaintiff's fall. As such, Plaintiff fails to raise any issue of fact as to its notice argument.

Next, Plaintiff proffers only speculation on the issue of whether the Main Street Defendants performed any work in the area where Plaintiff fell. Plaintiff argues that there is evidence that there was a water main break that necessitated work in the roadway in the area of her fall (which concededly would have been done by the City of Beacon), and then implies that the condition at issue developed "over time." These scattershot allegations do not raise an issue of fact as to whether the Main Street Defendants affirmatively created the condition.

Further, in reply, the Main Street Defendants point to the Thomaselli Affidavit that was submitted by the Beacon Defendants in support of their motion. Mr. Thomaselli, the Highway Superintendent for the City of Beacon at the time of the accident, averred that he reviewed the Highway Department records for the area where Plaintiff fell for the time period of five (5) years prior to May 20, 2016. As a result of that review, he determined that no work was done by the City in the area of the roadway at issue and that no permits were issued for any contractors and/or agents to perform work in that area. As such, there is unrebutted evidence in the record that no work was performed in the area where Plaintiff fell in the five years prior to her accident. Plaintiff has not come forward with any evidence to contradict this. Based on the foregoing, Main Street Defendants are entitled to summary judgment.

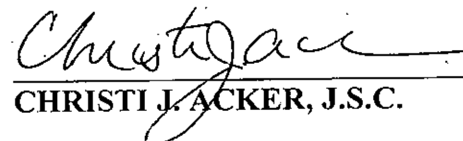
The Court has considered the additional contentions of the parties not specifically addressed herein and finds them unavailing. To the extent any relief requested by either party was not addressed by the Court, it is hereby denied. Accordingly, it is hereby

ORDERED that the Beacon Defendants motion is GRANTED and the Complaint is dismissed as against said Defendants, as well as all cross-claims; and it is further

ORDERED that the Main Street Defendants' motion for summary judgment is GRANTED and the Complaint is dismissed as against said Defendants, as well as all cross-claims.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
May 20, 2019



CHRISTI J. ACKER, J.S.C.

To: All Counsel Via ECF