To commence the 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 WESTCHESTER

----------x

ELISE OSTER-BRUCK

Plaintiff,

-against-

VILLAGE OF LARCHMONT,

Defendant.

----------x

DECISION AND ORDER

Index No. 54308/2019
Motion Sequence #1

COLANGELO, J.

The following papers were read on the Defendant's Motion for an Order granting dismissal of the Complaint pursuant to CPLR §3211 and/or summary judgment pursuant to CPLR §3212:

Notice of Motion-Affirmation-Memorandum of Law-Exhibits A-I	NYSCEF	9-12
Affirmation in Opposition-Exhibits 1&2		19-21
Affirmation in Reply		23

Based upon the foregoing, it is hereby ORDERED that Defendant's motion is disposed of as follows:

Background

This action was brought by Plaintiff, Elise Oster-Bruck ("Plaintiff") against Defendant Village of Larchmont ("Defendant" or "the Village") to recover for personal injuries alleged to have been sustained on May 10, 2018 at approximately 7:44 pm on the sidewalk in front of the United States Post Office located at 1 Chatsworth Avenue, Larchmont, New York. According to

the Notice of Claim filed by Plaintiff, the accident occurred when Plaintiff tripped and fell over a raised and protruding gas line cover on the sidewalk. (Def. Exh. B, ¶3). Further, the Notice of Claim states that "[i]t shall be alleged that the gas cap cover edge was raised, lifted, protruding and/or extending upward from the sidewalk due to snow removal, plowing, shoveling or other activities by the Village of Larchmont employees ..." (*Id.*)

The Complaint filed by Plaintiff makes specific allegations with respect to the control and maintenance of the sidewalk on the date of the incident. (Def. Exh. A). Plaintiff alleges that Village of Larchmont was the owner, lessee, permittee, or otherwise in possession and control of the sidewalk, and was responsible for the maintenance, inspection and repairs of the sidewalk prior to and including the day of the incident; that the Village had an obligation to operate, manage and maintain the sidewalk in a reasonable and safe condition; that the Village, its agents and employees did maintain, cleaned, cleared, repaired and inspected the sidewalk and gas line cover within the sidewalk, and had a duty to so maintain, inspect and repair cracks and effect proper snow removal, plowing and shoveling. (Def. Exh. A., ¶¶7-9). The Complaint further alleges that the Village had prior notice of the raised gas cap which could constitute a tripping hazard which was due to snow removal, plowing, shoveling or othjer activities by the Village's employees. (*Id.*, ¶11).

Among the nine exhibits submitted by the Village in support of it's motion is the Affidavit of Ricky J. Vetere who has been the Public Works Foreman for the Village for the past ten years. (Def. Exh. F). His duties in this capacity include overseeing maintenance and repair for the Village as well as overseeing any snow or ice removal efforts undertaken by the Village. (*Id.* ¶3). A United States Post Office is located at 1 Chatsworth Avenue, and the subject gas cap

and the cement around it were poured in 2002 when the Village contracted to have the streetscape on Boston Post Road redone. The project involved replacing the sidewalks, was contracted for by the Village using an outside contractor, and paid for the abutting commercial landowners. Since 2002, the Village has had nothing to do with the repair, maintenance or control of the sidewalk, or the gas cap which is owned by Consolidated Edison, and has not undertaken any snow or ice removal of the sidewalk or gas cap. The Village Code imposes responsibility for snow and ice removal, as well as repair and maintenance of the sidewalk upon the commercial owner, which in this case, is the Post Office. (*Id.* ¶¶4-7). According to Mr. Vetere, the Village has nothing to do with the subject gas cap, and is not allowed to touch it. Any issue with respect to the gas cap should be reported to the Consolidated Edison. (*Id.* ¶8).

Mr. Vetere's Affidavit references four sections of the Village of Larchmont Code, which Defendant contends bars the instant action. According to §245-1, a civil action shall not be maintained against the Village for damages or personal injuries sustained as a consequence of a defective sidewalk unless written notice of said condition was actually given to the Village Clerk and there was a failure or neglect to remedy the defect or danger complained of within a reasonable time. The obligation for sidewalk snow removal is imposed upon the abutting landowner(§245-11); and the duty of the landowner to keep the sidewalks in front of the premises in good repair and in a safe condition (§245-19), and the service by the Village Engineer of a notice to repair or improve a sidewalk upon the owner of a premises in front of which a sidewalk is out of repair or in an unsafe condition (§245-20). All four sections of the Code were in full force and effect on the date of the accident. (*Id.* ¶¶10-14).

In his capacity as Public Works Foreman, and from personal knowledge, Mr. Vetere is

certain that no such notice was required or sent regarding the subject sidewalk or a cap during his tenure with the Village. (*Id.* ¶16). Mr. Vetere's role includes personal knowledge of whether any complaints were made related to repair, maintenance or snow/ice removal practices at 1 Chatsworth Avenue, and no such complaints have been made. (*Id.* ¶17).

Pursuant to a FOIL request by Plaintiff for any complaints of falls in front of the Post Office "due to tripping from the result of the Gas Cap" (Def. Exh. D), the Deputy Village Clerk, Brian Rilley, responded with one claim only, made by an elderly individual who slipped on ice near the newspaper machines in 2007. (Def. Exh. E). According to Mr. Rilley, the Village has received no other notices, notifications or complaints for the subject sidewalk location or area around the gas cap, or the gas cap itself. The Village has no control over or responsibility for maintenance of the gas cap which is owned by Consolidated Edison. (*Id.* ¶¶7 & 8).

Plaintiff's deposition testimony confirms her knowledge that the gas cap is owned by Consolidated Edison. (Def. Exh. H, pp. 57-58).

Summary Judgment

CPLR §3212(b) states in pertinent part that a motion for summary judgment "shall be granted if, upon all of papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

In *Andre v Pomeroy*, 35 N.Y.2d 361, 364 (1974), the Court of Appeals held that:

"[s]ummary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law . . . when there is no genuine

issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated."

It is well established that "[t]he 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 issues of fact from the case." *Winegrad v New York University Medical Center*, 64 N.Y.2d 851, 853 (1985); *Ayotte v Gervasio*, 81 N.Y.2d 1062, 1063 (1993); *S.J. Capelin Associates, Inc. v. Globe Manufacturing Corp.*, 34 N.Y.2d 338, 341 (1974); *Finkelstein v. Cornell University Medical College*, 269 A.D.2d 114, 117 (1st Dept. 2000). Once the moving party has sustained his burden of making a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Village of Larchmont Code §245-1 "limits the [Village's] duty of care over municipal streets and sidewalks by imposing liability only for those defects or hazardous conditions which its officials have been actually notified exist at a specified location" *De Zapata v. City of New York*, 172 A.D.3d 1306, 1307 (2d Dept. 2019), *quoting Katz v. City of New York*, 87 N.Y.2d 241, 243 (1995); (*see Gellman v. Cooke*, 148 A.D.3d 1117, 1118 [2d Dept. 2017]). Accordingly, "prior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against the City" (*Katz v. City of New York*, 87 N.Y.2d at 243; *see Gellman v. Cooke*, 148 A.D.3d at 1118). "The only recognized exceptions to the prior written notice requirement involve situations in which either the municipality created the defect through

an affirmative act of negligence, or a special use confers a special benefit upon the municipality" *De Zapata v. City of New York*, 172 A.D.3d at 1307, *quoting Puzhayeva v. City of New York*, 151 A.D.3d 988, 990 (2d Dept. 2017); *see Yarborough v. City of New York*, 10 N.Y.3d 726, (2008).

The failure of Plaintiff to demonstrate prior written notice leaves her without legal recourse against the Village for its purported nonfeasance or malfeasance in remedying a defective sidewalk.

Here, the Village established its prima facie entitlement to judgment as a matter of law by demonstrating through its submission, specifically, the Affidavits of Ricky J. Vetere and Brian Rilley, that the Village had not received prior written notice of the raised gas cap that Plaintiff claims caused her to fall. In opposition, Plaintiff failed to raise a triable issue of fact. Additionally, the evidence demonstrated that none of the exceptions to the prior written notice requirement were applicable here.

According and based upon the foregoing, Defendant's motion for summary judgment is granted, and Plaintiff's complaint is dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: October 10, 2019
White Plains, New York

HONORABLE JOHN P. COLANGELO, J.S.C.