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| Boggio v County of Suffolk |
| 2019 NY Slip Op 34711(U) |
| June 27, 2019 |
| Supreme Court, Suffolk County |
| Docket Number: Index No. 611426-2018 |
| Judge: David T. Reilly |
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**SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 30 SUFFOLK COUNTY**

**PRESENT:
HON. DAVID T. REILLY, JSC**

INDEX NO.: 611426-2018

JUDITH BOGGIO and CHRISTOPHER BOGGIO,

**x Leo Tekiel, Esq.
Attorney for Plaintiffs
1900 Hempstead Turnpike, Suite 304
East Meadow, NY 11554**

Plaintiff,

-against-

**COUNTY OF SUFFOLK, TOWN OF ISLIP and
5R CORP.,**

**Dennis M. Brown
Suffolk County Attorney
Attorneys for Defendant County of Suffolk
H. Lee Dennison Building
100 Veterans Memorial Highway
P.O. Box 6100
Hauppauge, NY 11788**

Defendants.

**Law Offices of Raymond A. Giusto, P.C.
Attorneys for Defendant Town of Islip
715 South Country Road
West Bay Shore, NY 11706**

**Law Offices of Stewart H. Friedman
Attorneys for Defendant 5R Corp.
100 William Street, 9th Floor
New York, NY 10038**

**MOTION DATE: 09/19/18
SUBMITTED: 02/27/19
MOTION SEQ: 1 & 2
MOT. DECISION:
001 RRH
002 MG**

Upon the reading and filing of the following papers in this matter: (1) Defendant Town of Islip's (Islip) Notice of Motion dated August 16, 2018 and supporting papers with Memorandum of Law; (2) Defendant County of Suffolk's Notice of "Cross-Motion" dated August 23, 2018 and supporting papers; (3) Defendant 5R Corp.'s Affirmation in Opposition dated November 5, 2018 and supporting papers; (4) Plaintiff's Affirmation in Opposition dated January 22, 2019 and supporting papers; (5) Islip's Affirmation in Reply/Support dated February 12, 2019 and supporting papers (and after hearing counsel in support and in opposition to the motion) it is,

ORDERED that Islip's application (001) for an Order dismissing the plaintiff's complaint pursuant to CPLR 3211(a)(7) and defendant County of Suffolk's (Suffolk) application (002) for an Order granting it summary judgment are consolidated for purposes of this determination; and it is

ORDERED that Islip's motion for an Order dismissing the plaintiff's complaint as asserted against the town, pursuant to CPLR 3211(a)(7), is referred to oral argument to be held before the undersigned on **August 2, 2019 at 9:30 AM**; and it is

ORDERED that Suffolk's motion for an Order dismissing all claims asserted against it, pursuant to CPLR 3212, is granted; and it is

ORDERED that plaintiff file a copy of this decision and Order with the Calendar Clerk of the Court within fifteen (15) days of the date hereof.

Plaintiff commenced this action with the filing of a summons and complaint on June 13, 2018. According to the complaint, plaintiff was caused to suffer injuries on May 23, 2017 after she tripped and fell on a defective section of sidewalk located at the premises known as 3140 Veterans Memorial Highway, Bohemia, New York. Plaintiff alleges, *inter alia*, she fell due to the negligence, carelessness and recklessness of Islip and Suffolk, their agents and/or employees in the ownership, operation, control and maintenance of the area where the accident occurred.

Islip moves, pre-answer, to dismiss the plaintiff's complaint on the ground that the pleading fails to state a cause of action against Islip pursuant to CPLR 3211(a)(7). Islip maintains that the complaint must be dismissed inasmuch as the Town was not placed on notice of any unsafe or defective condition existing on the sidewalk. In support of the application, Islip references the Code of the Town of Islip (the Code) which provides, in pertinent part at §47A-3,

“No civil action shall be maintained against the Town of Islip or any of its employees for damages or injuries to persons or property sustained by reason of any highway, street, ... sidewalk ... or other property owned or maintained by the Town of Islip being defective, out of repair, unsafe, dangerous or obstructed unless written notice of such defective, out of repair, unsafe, dangerous or obstructed condition of such highway, street, ... sidewalk ... or other property was actually given to the Town Clerk or Commissioner of Public Works, and there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger, obstruction or condition complained of ...”

Islip has annexed to their motion papers the affidavits of Patricia Curci, the Deputy Town Clerk, and Carolyn Lucas, an Account Clerk Typist in the Islip Department of Public Works. Each of the affidavits indicate that after extensive searches of their respective records, neither search revealed evidence of prior written notice to Islip of the alleged defective condition of the sidewalk adjacent to 3140 Veterans Memorial Highway, Bohemia, New York. Accordingly, Islip argues, plaintiff's complaint against the town must be dismissed based upon lack of prior written notice. In support of their application and in addition to the foregoing, Islip submits a copy of the complaint, a copy of plaintiff's Notice of Claim against Suffolk and Islip, and a stenographic copy of the plaintiff's General Municipal Law §50-h hearing testimony.

Both plaintiff and defendant 5R Corp. have submitted opposition to Islip's motion. Defendant 5R Corp. maintains that the application is premature and, in addition, submits the affidavit of Lee Rayano, the president of the corporation, in which he alleges that Islip had prior knowledge of the defect in the subject sidewalk as evidenced by his observations of Islip Highway Department workers attempting to make repairs to the sidewalk "over the last several years and to date." The plaintiff maintains that the motion must be denied because no discovery has taken place and Islip has failed to demonstrate what efforts, if any, town employees undertook to ascertain whether the town had received prior written notice of the defect.

"A municipality that has adopted a 'prior written notice law' cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies" (*Betz v Town of Huntington*, 106 AD3d 1041, 966 NYS2d 471 [2d Dept 2013], quoting *Forbes v City of New York*, 85 AD3d 1106, 1107, 926 NYS2d 309 [2d Dept 2011]). Prior written notice laws must be strictly construed (*Betz v Town of Huntington, supra*, quoting *Lagrasta v Town of Oyster Bay*, 88 AD3d 658, 930 NYS2d 254 [2d Dept 2011]). "A verbal or telephonic communication to a municipal body, even if reduced to writing, cannot satisfy the prior written notice requirement" (*Tortorici v City of New York*, 131 AD3d 959, 960, 16 NYS3d 572; see *Gorman v Town of Huntington*, 12 NY3d 275, 280, 879 NYS2d 379 [2009]). Writings prepared by Town employees as a result of verbal complaints do not satisfy the prior written notice requirement (see *Wolin v Town of North Hempstead*, 129 AD3d 833, 11 NYS3d 627 [2d Dept 2015]). Prior written repair orders also do not satisfy the statutory requirement (see *Lopez v Gonzalez*, 44 AD3d 1012, 845 NYS2d 91 [2d Dept 2007]; *Dalton v City of Saratoga Springs*, 12 AD3d 899, 784 NYS2d 702 [3d Dept 2004]). Actual or constructive notice of the defective condition are both insufficient to satisfy the prior written notice requirement (*Groninger v Village of Mamaroneck*, 67 AD3d 733, 888 NYS2d 205 [2d Dept 2009]).

However, "[r]ecognized exceptions to the prior written notice requirement exist where the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a special benefit upon it" (*Morreale v Town of Smithtown*, 153 AD3d 917, 918, 61 NYS3d 269 [2d Dept 2017], quoting *Miller v Village of E. Hampton*, 98 AD3d 1007, 1008, 951 NYS2d 171 [2d Dept 2012]). "Only when one of these exceptions applies is the written notice requirement obviated" (*Rodriguez v City of New York*, 130 AD3d 999, 1000, 14 NYS3d 155 [2d Dept 2015]).

Here, through the affidavits of Patricia Curci and Carolyn Lucas, Islip has sufficiently demonstrated that it did not receive prior written notice of the alleged sidewalk defect. However, the Court directs that the remaining parties appear for oral argument to address the issue of whether the town "created the dangerous and defective condition" as alleged in paragraph "41" of the complaint. The Court has considered the affidavit of Lee Rayano, the president of defendant 5R Corp., who alleges that he witnessed Islip Highway Department employees attempt to make repairs to the sidewalk at issue prior to the date of the accident.


As to Suffolk's motion, it is well settled that the proponent of a summary judgment motion bears the initial burden of establishing his or her entitlement to judgment, as a matter of law, in his or her favor by offering admissible evidence sufficient to eliminate any material issues of fact from

the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of any opposition thereto (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once the movant has made the requisite showing, the burden then shifts to the opposing party, requiring him or her to present admissible evidence and facts sufficient to require a trial on any issue of fact (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*). On such a motion, the Court is charged with determining whether issues of fact exist while viewing any evidence in a light most favorable to the nonmoving party; the Court is not responsible for resolving issues of fact or determining matters of credibility (*see Chimbo v Bolivar*, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; *Pearson v Dix McBride, LLC*, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; *Kolivas v Kirchoff*, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see Chimbo v Bolivar*, *supra*; *Benetatos v Comerford*, 78 AD3d 730, 911 NYS2d 155 [2d Dept 2010]). “In determining a motion for summary judgment dismissing a complaint, all of the evidence must be viewed in the light most favorable to the opponent of the motion, and all reasonable inferences must be resolved in that party’s favor” (*Santelises v Town of Huntington*, 124 AD3d 863, 865, 2 NYS3d 574 [2d Dept 2015]).

Here, Suffolk has unequivocally established its entitlement to summary judgment by presenting sufficient evidence to demonstrate that it did not own, operate, manage or control the premises known as 3140 Veterans Memorial Highway, Bohemia, New York, the accident situs (*see Martens v County of Suffolk*, 100 AD3d 839, 956 NYS2d 61 [2d Dept 2012]). As a general rule, a municipality will not be held responsible for negligent design or maintenance of property it does not own or control (*Horn v Town of Clarkstown*, 46 AD3d 621, 848 NYS2d 260 [2d Dept 2007]). Furthermore, plaintiff nor defendant 5R Corp. offer opposition to the motion. When a respondent fails to oppose matters advanced on a motion, the facts alleged in the moving papers may be deemed admitted by the Court (*Kuehne & Nagel, Inc. V Baiden*, 36 NY2d 539, 369 NYS2d 667 [1975]; *Madeline D’Anthony Enter., Inc. V. Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; *Argent Mtge. Co, LLC v Mentosana*, 79 AD3d 1079, 915 NYS2d 591 [2nd Dept 2010]). Accordingly, Suffolk’s motion for summary judgment dismissing the complaint and any cross-claims asserted against it by defendant 5R Corp. is granted.

This constitutes the decision and Order of the Court.

Dated: June 27, 2019
Riverhead, New York



DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION