

Bennett v Village of Millbrook
2020 NY Slip Op 34662(U)
June 22, 2020
Supreme Court, Dutchess County
Docket Number: Index No. 2019-50968
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**

-----X
MARION BENNETT,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 2019-50968

VILLAGE OF MILLBROOK,

Defendant.

-----X
ACKER, J.S.C.

The following papers numbered 1-22 were considered in connection with the motion of Defendant Village of Millbrook (hereinafter "Defendant") for an Order pursuant to CPLR §3212 granting said Defendant summary judgment dismissing Plaintiff's Complaint:

Notice of Motion-Affirmation of Alana R. Bartley, Esq.-Exhibits A-I-	
Affidavit of Sarah J. Witt-Affidavit of Robert Collocola-Memorandum of	
Law in Support.....	1-14
Affirmation in Opposition of Joel S. Finkelstein, Esq.-Exhibits A-F.....	15-21
Reply Affirmation of Alana R. Bartley, Esq.....	22

This action was commenced by Plaintiff Marion Bennett (hereinafter "Plaintiff") on or about March 7, 2019. It is alleged that on December 9, 2018, at approximately 8:30 pm, Plaintiff was injured when she tripped and fell in the driveway of the Thorne Building in the Village of Millbrook. Defendant owns the Thorne Building and the lot upon which it sits and maintains a public parking lot on the premises.

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]. “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 AD3d 731, 733 [2d Dept. 2016].

Discussion

The facts of Plaintiff’s fall are uncontested. On the day of the accident, Plaintiff drove to the Village to attend a service at the Lyall Memorial Federated Church in Millbrook (“Lyall Church”). She parked at another church across from the Thorne Building and walked from that lot, through the Thorne Building driveway and into the Lyall Church, where she attended a service. At approximately 8:30 pm, Plaintiff left the church to return to her car, walked across the municipal lot and onto the Thorne Building driveway. As Plaintiff was walking on the

driveway, she tripped and fell into a hole. At the time of the accident, the area in which she fell was dark and the pavement was dry. Because it was dark, she could not identify the nature of the hole on which she tripped, but when she returned to the location approximately two months later, she observed a grate that had sunken below the driveway level. At her 50-h hearing, Plaintiff was shown a photograph and identified a catch basin depicted therein as the location of her fall. Defendant installed the catch basin and repaved the driveway in December 2007 and, since that time, no other work has been done in that area.

Defendant moves for summary judgment, arguing that (1) any claim based upon the creation of an alleged dangerous condition is time barred; (2) that it did not have prior written notice of the condition that allegedly caused Plaintiff's fall and no exceptions to the prior written notice requirement exist; and (3) that it had no duty to install or maintain lighting at the location. In support of its motion, Defendant City submits, *inter alia*, the Pleadings, Plaintiff's Bill of Particulars and Supplemental Bill of Particulars, excerpts from the Plaintiff's 50-h and deposition transcripts, the affidavit of Sara J. Witt, the Village Clerk of Defendant ("Witt Affidavit") the affidavit of Robert Collocola, the Highway Superintendent for Defendant ("Collocola Affidavit") and a photograph of the accident location.

As to its first argument, Defendant has established its *prima facie* entitlement to summary judgment on Plaintiff's claim based upon the negligent design and/or construction of the catch basin at issue herein. General Municipal Law §50-i(1) requires that an action against a municipality be commenced within one year and ninety days from the happening of the event upon which it is based. "The cause of action alleging faulty construction or design, whether characterized as negligence, malpractice, or breach of contract, accrued upon the date of

completion of construction, not when the injury occurred or the defective condition is discovered.” *Regatta Condo. Ass’n v. Vill. of Mamaroneck*, 303 AD2d 737, 738 [2d Dept. 2003].

Through the testimony and affidavit of Robert Collocola, Defendant established that the catch basin was installed between December 13 and 18, 2007. Collocola further avers that when the 2007 work was completed, both the catch basin and the driveway were free from defects, safe for pedestrians and in good overall condition. This was also the last time that any work was performed on the catch basin and driveway of the Thorne Building. As such, in order to be timely, any claim of faulty design or construction of the catch basin was required to be commenced within a year and ninety days after December 18, 2007. As the instant lawsuit was not commenced until 2019, well past this time period, Defendant has established its *prima facie* entitlement to summary judgment on Plaintiff’s claim of negligent design and construction. As Plaintiff fails to address this argument in opposition, Defendant is entitled to summary judgment on this issue.

Defendant next argues that it is entitled to summary judgment based upon lack of prior written notice. “A municipality that has enacted a prior written notice provision ‘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’ [citations omitted].” *Seegers v. Vill. of Mineola*, 161 AD3d 910 [2d Dept. 2018]. Further, the “‘prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings.’ [citation omitted].” *Loghry v. Vill. of Scarsdale*,

149 AD3d 714, 715 [2d Dept. 2017]. In the instant matter, Plaintiffs' Verified Bill of Particulars alleges, *inter alia*, that Defendant was negligent in the maintenance and control of the subject property, negligently designed, constructed and maintained the sunken catch basin, failing to provide the public with a safe walking surface, failing to provide lighting in the area of the accident and failing to inspect the area. Having already established its entitlement to summary judgment on the negligent construction and design claim, Defendant must now demonstrate, *prima facie*, that it did not have prior written notice of the alleged defect, that no exceptions to prior written notice exist and that it had no duty to install lighting in the subject area. *Id.*

Defendant attempts to establish that it lacked prior written notice of the alleged defect through the submission of the Witt Affidavit. Pursuant to §155-1 of the Village of Millbrook Code, no civil action shall be maintained against Defendant for personal injury as a result of any street, sidewalk or grounds owned by the Village of Millbrook being defective, out of repair, unsafe, dangerous or obstructed unless written notice of said condition was received by the "Clerk of the governing body of the Village" and there was a failure or neglect to repair or remove said condition within a reasonable time thereafter.

In her affidavit, Witt avers that she is the Village Clerk and has held that position since 2016. She further states that pursuant to §155-1(A)(1) of the Village Code, the Village Clerk keeps and maintains all written notices of defective out of repair, unsafe, dangerous and obstructed conditions. After searching the records maintained by her Office, Witt avers that Defendant did not receive written notice of the condition complained of by Plaintiff prior to the December 9, 2018 accident. However, §155-1(A)(1) of the Village Code specifically provides

that the required written notice shall be made to the “Clerk of the governing body of the Village.” The Witt Affidavit is silent as to whether she, as Village Clerk, is also the Clerk of the governing body referenced in the Code. Without this, Defendant has not established that the search conducted by Witt was sufficient under the Village Code to establish its lack of prior written notice.¹ As such, Defendant fails to establish its *prima facie* entitlement to summary judgment on the issue of prior written notice.

Furthermore, assuming, *arguendo*, that Defendant had established its *prima facie* case, Plaintiff raises triable issues of fact in opposition sufficient to deny summary judgment. Plaintiff submits the affidavit and deposition testimony of Reverend Thoma Feit, along with a May 13, 2016 letter that he sent to the Village Council regarding conditions in the parking lot at the Thorne Building. Reverend Feit is the Pastor at Lyall Church and avers that he and Jan Miller, the President of the congregation, sent the May 13, 2016 letter to advise the Village of the generally deteriorating condition of the pavement in the driveway and parking lot at the Thorne Building. He further states that both he and Ms. Miller signed the letter and he personally mailed it to the Village Council. In addition, the Feit Affidavit indicates that about a week after the letter was sent, the Village came out and filled a number of the potholes, but did not address the catch basin. As a result, Plaintiff has raised an issue of fact as to whether the clerk of the governing body of the Village received prior written notice of the condition that caused

¹ Indeed, in reply, Defendant further highlights this issue of fact, by arguing that the records of the Village Council are completely separate from the records of the Village Clerk. If the Village Council is the governing body of the Village, and Witt is its Clerk, then records sent to the Village Council may well be documents that should be maintained by Witt. As this remains unanswered in the record, the Court cannot find that Witt searched the appropriate records pursuant to §155-1(A)(1) of the Village Code.

Plaintiff's accident and Defendant's motion on this ground is denied.²

However, Defendant has established that no exceptions to the prior written notice requirement are applicable herein and Plaintiff fails to raise an issue of fact in reply. Courts recognize an exception to the prior written notice requirement in circumstances where the municipality affirmatively created the defect through an act of negligence, however this exception is limited to work performed by the municipality that immediately results in the existence of a dangerous condition.³ *Murphy v. Brown*, 178 AD3d 832, 833 [2d Dept. 2019]. It is uncontested that the alleged dangerous condition of the catch basin did not immediately result in the existence of a dangerous condition. Indeed, Plaintiff's expert specifically avers that the alleged defective condition likely formed within two to three years after the original installation of the catch basin. Weinstein Affidavit, ¶12. Thus, at the trial of this matter on the issue of prior written notice, the jury must only decide whether Defendant received such notice pursuant to §155-1(A)(1) of the Village Code, as its has been established that no exceptions to this requirement exist.

Finally, although Defendant established a *prima facie* case that it had no duty to install lighting or maintain existing lighting on the subject driveway, Plaintiff's opposition raises an

² Although Defendant argues in reply that the letter did not specifically reference the defective catch basin, said letter speaks of the condition of the macadam of the entire parking lot, so it remains an issue of fact as to whether the letter is sufficient to put the Village on notice of the condition of the catch basin.

³ Plaintiff does not assert that the defect was created by the Village's special use of the property, which is the only other recognized exception to prior written notice. See e.g. *Creutzberger v. Cty. of Suffolk*, 180 AD3d 991, 993 [2d Dept. 2020]. Plaintiff's lengthy argument regarding a "third narrow exception" based on the condition being readily apparent is not an exception recognized by the Second Department. See *Beiner v. Vill. of Scarsdale*, 149 AD3d 679, 680-81 [2d Dept. 2017] (evidence suggesting that the Village defendant actually knew of the alleged defect did not satisfy the requirement in the local law that prior written notice of the alleged defect be given to the Village Clerk), citing *Velho v. Vill. of Sleepy Hollow*, 119 AD3d 551, 552 [2d Dept. 2014] ("Actual notice of the alleged hazardous condition does not override the statutory requirement of prior written notice of a sidewalk defect.").

issue of fact. “In order for plaintiff to establish a prima facie case of defendant's negligence with respect to her allegation of inadequate lighting, she must establish that defendant had a duty to light the area where she was injured.” *Lauria v. City of New Rochelle*, 225 AD2d 1013, 1014 [3d Dept. 1996]. “Such a duty is ‘limited to those situations in which illumination is necessary to avoid dangerous and potentially hazardous conditions’ [citation omitted].” *Gagnon v. City of Saratoga Springs*, 51 AD3d 1096, 1098 [3d Dept. 2008], *lv denied* 11 NY3d 706 [2008]. Defendant argues that the sunken catch basin at issue herein is not a dangerous and potentially hazardous condition that requires lighting as a matter of law, citing, *Abbott v. Cty. of Nassau*, 223 AD2d 662 [2d Dept. 1996] (“A pothole is not the type of dangerous and potentially hazardous condition that imposes a duty on the Village to trim the tree branches that obscure the street lights.”).

In opposition, Plaintiff submits the affidavit of her expert, Herbert Weinstein, who, in addition to making two personal visits to the site of the accident, also reviewed photographs, deposition testimony and Plaintiff's Verified Bill of Particulars. His affidavit indicates that he visited the scene of the accident on the evening of February 17, 2019. Weinstein avers that the nearest light source was not functioning and that the only source of illumination was from a building approximately 200 feet to the rear of the catch basin, which offered no illumination in the area of the accident. Mr. Weinstein states that the catch basin is a “very obvious and defective condition” which posed a clearly foreseeable trip hazard for pedestrians utilizing the parking lot and driveway. Weinstein Affidavit, ¶20. Based on the foregoing, Plaintiff raises an issue of fact as to whether Defendant had a duty to provide illumination to avoid a dangerous and potentially

hazardous condition on its property and Defendant's motion on this ground is denied.⁴

Accordingly, it is hereby

ORDERED that as discussed herein, Defendant's motion is granted in part and denied in part; and it is further

ORDERED that, as counsel have previously been advised, a virtual settlement conference via Skype is scheduled for **June 25, 2020 at 11:00 am**.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
June 22, 2020


CHRISTI J. ACKER, J.S.C.

To: All Counsel Via ECF

⁴ The cases relied upon by Defendant on this issue, both in its motion in chief and in reply, do not vitiate these issues of fact. These cases are either based upon fact patterns dissimilar to the case at bar, or on cases which state generically, without analysis, that the defendants therein had no duty to provide lighting in the area where the plaintiffs fell. See e.g. *Greenberg v. McLaughlin*, 242 AD2d 603 [2d Dept. 1997] and *Lauria*, *supra*.