SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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AMY GOLDSTEIN,

Plaintiff,

-against-

VILLAGE OF FARMINGDALE, CHRIS ANDERSON LLC, AA TIRE & SERVICE INC. d/b/a GOODYEAR, and COUNTY OF NASSAU,

Defendants.

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IAS Part 12
Index No. 606286/2018
Motion Seq. Nos. 004-006

AMENDED DECISION AND ORDER

LEONARD D. STEINMAN, J.

The following submissions, in addition to any memoranda of law, were reviewed in preparing this Decision and Order:

Defendant Nassau's Notice of Motion, Affirmation & Exhibits.....1
Defendant Farmingdale's Affirmation in Opposition & Exhibits.....2
Defendant Anderson & Goodyear's Notice of Motion, Affirmation & Exhibits.....3
Plaintiff's Affirmations in Opposition & Exhibits.....4
Defendant Farmingdale's Affirmation in Opposition & Exhibits.....5
Defendant Farmingdale's Notice of Motion, Affirmation & Exhibits.....6
Defendant Anderson & Goodyear's Affirmation in Opposition.....7
Defendant Nassau's Reply Affirmation.....8
Defendant Anderson & Goodyear's Reply Affirmation.....9
Defendant Farmingdale's Reply Affirmation.....10

Plaintiff alleges that in August 2017, she suffered personal injuries after she tripped over a metal protrusion from a sidewalk located adjacent to premises occupied by defendant AA Tire & Service Inc. and owned by defendant Chris Anderson, LLC, in the Village of Farmingdale, County of Nassau. Plaintiff asserts that the metal object is the remnant of a traffic signpost, and that is not disputed by any of the parties. All defendants now move for summary judgment dismissing the action. For the reasons set forth below, the motions of the County and the Village are granted and the motion of Chris Anderson and AA Tire is denied.

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).

Nassau County's Motion (Motion Seq. No. 4)

The plaintiff states that she does not oppose Nassau County's motion and, as a result, it is granted and the action is dismissed as against the County.[1]

Motion of Chris Anderson LLC and AA Tire (Motion Seq. No. 5)

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.*

[1] Although the Village opposes the dismissal of its cross-claim against the County the dismissal of the Village from this action renders such opposition moot.

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).

Here, it is undisputed that the Village has a statute (Village Code §485-5) requiring landowners and occupants to maintain and keep in safe condition adjoining sidewalks. That statute also imposes liability upon landowners and occupants to injured parties for the failure to properly maintain a sidewalk. That liability, however, does not extend to the failure to remove remnants of signposts because a landowner has no authority or duty to remove such stumps in a sidewalk. *See Kelley v. Incorporated Village of Hempstead*, 138 A.D.3d 934 (2d Dept. 2016); *Smith v. 125th Street Gateway Ventures, LLC*, 75 A.D.3d 425 (1st Dept. 2010).

Nonetheless, although Chris Anderson and AA Tire may not have had a duty to remove the signpost stump, they remained responsible for maintaining the sidewalk around the stump. *O'Connor v. Tishman Construction Corp.*, 182 A.D.3d 502 (1st Dept. 2020); *Bronfman v. East Midtown Plaza Housing Co., Inc.*, 151 A.D.3d 639 (1st Dept. 2017). An issue of fact exists as to whether the immediate area around the sign was overgrown with weeds thus creating a trap for the unwary and resulting in plaintiff's fall. It cannot be said as a matter of law that the condition of the sidewalk surrounding the stump was not the proximate cause of plaintiff's accident. *See Turturro v. City of New York*, 28 N.Y.3d 469, 483 (2016)(proximate cause is generally an issue for the trier of fact given the unique nature

of the inquiry in each case). As a result, the motion of Chris Anderson and AA Tire is denied.

Village of Farmingdale's Motion (Motion Sq. No. 6)

The Village argues that it is entitled to summary judgment because it never received prior written notice of the claimed sidewalk defect and did not create the defect at issue. Where a municipality has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by an improperly maintained roadway unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies. *Griesbeck v. County of Suffolk*, 44 A.D.3d 618, 619 (2d Dept. 2007). There are two exceptions to the prior written notice rule. Prior written notice is not required where (1) a municipality created the defect through its own act of negligence; or (2) a special benefit was conferred through its special use of the area. *Seegers v. Village of Mineola*, 161 A.D.3d 910 (2d Dept. 2018).

It is undisputed that a prior written notice statute is applicable. *See* Village Law §6-628; CPLR §9804. In support of its application the Village relies on the affidavit of Ann Rodenburg, the individual responsible for maintaining the applicable records for the Village Clerk, to whom she reports. Rodenburg attests that she conducted a search of the records maintained by the Village, which go back to 2013, and that she found no written notice of a defective condition reported or filed for the area in question.

An affidavit was also submitted by the Village Administrator (who is also the Village Clerk) who attests that no signs were placed or removed by the Village at the area in question since at least 2010. His affidavit is consistent with the testimony of other Village officials who were deposed in this action as well as the testimony of Chris Anderson. Anderson testified that in 2016 he found the traffic sign lying in the driveway of the parking lot of his premises. After calling the Village, the sign was taken away several days later (although he does not know by whom).

In response to this *prima facie* showing that the Village is not liable to plaintiff, she seeks to cast doubt upon the Village's record-keeping procedures. In that regard, plaintiff misstates the evidence. For example, plaintiff claims that the Village's prior written notice recording system is a marble notebook not indexed by date, name or location. But in truth, the Village keeps folders of all written complaints by year—as Rodenburg testified at her deposition and attested to in her affidavit. Rodenburg also has kept a notebook of complaints since 2017, which could include telephone complaints. To the extent that plaintiff disparages the Village's record-keeping procedures concerning work orders, etc., such records might, at most, reflect the Village's awareness of the claimed defect. But actual notice of the defect does not obviate the need to comply with the prior written notice requirement. *Coventry v. Town of Huntington*, 165 A.D.3d 750 (2d Dept. 2018); *Velho v. Village of Sleepy Hollow*, 119 A.D.3d 551 (2d Dept. 2014); *Chirco v. City of Long Beach*, 106 A.D.3d 941 (2d Dept. 2013).

Plaintiff also seeks to create an issue of fact as to whether the sign—and thus the offending piece of signpost—belonged to the Village. But whether it did or not is immaterial since the Village did not create the hazardous condition that caused plaintiff's accident. *Cf., Kelley v. Incorporated Village of Hempstead*, 138 A.D.3d 931 (2d Dept. 2016). Giving plaintiff every favorable inference, the Village at most removed the sign from Anderson's parking lot. There is no evidence that it first broke off the signpost from the remaining sidewalk stump and left it lying in Anderson's parking lot driveway before carting it away days later. As a result, because the Village did not receive prior written notice of the alleged defect the Village is entitled to summary judgment. *See Gutierrez v. Cohen*, 227 A.D.2d 447 (2d Dept. 1996).

Any relief requested not specifically addressed herein is denied. This constitutes the Decision and Order of the court.

Dated: September 17, 2020
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.