

Klehr-Keyes v 99 Main LLC
2020 NY Slip Op 34839(U)
February 6, 2020
Supreme Court, Putnam County
Docket Number: Index No. 500658/2017
Judge: Victor G. Grossman
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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 PUTNAM**

-----X
LAURA KLEHR-KEYES,

Plaintiff,

-against -

99 MAIN LLC, VILLAGE OF COLD SPRING,
TOWN OF PHILIPSTOWN, ANTIQUE ALLEY,
AVH INCORPORATED d/b/a ANTIQUE ALLEY,
CONSTANCE KELLEY d/b/a THE COUNTRY
TOUCH and THE COUNTRY TOUCH, INC.

Defendants.
-----X

ANTIQUÉ ALLEY,

Third-Party Plaintiff,

-against-

CONSTANCE KELLEY d/b/a
THE COUNTRY TOUCH and
THE COUNTRY TOUCH, INC.,

Third-Party Defendants.
-----X

GROSSMAN, J.S.C.

The following papers, numbered 1 to 58, were considered in connection with the following motions:

DECISION & ORDER

Index No. 500658/2017

Sequence Nos. 3-6

Motion Date: 12/4/2019

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This is an action for damages for personal injuries sustained by Plaintiff Laura Klehr-Keys when she tripped and fell on a public curb located in the Village of Cold Spring in front of 97 Main Street (the "Premises"). Plaintiff alleges that the curb was broken and defective. It is undisputed that Defendant Village of Cold Spring ("Village") owns the curb on which Plaintiff fell.

Plaintiff commenced this action on August 3, 2017. Issue was joined and the parties have completed discovery. The parties executed a stipulation, discontinuing the action against 99

¹The parties and counsel shall familiarize themselves with this Court's Part Rules, which can be found on the OCA website, as parts of this motion and the responsive papers fail to comply with those Rules, to the extent that Plaintiff shall designate exhibits by number, while Defendant shall designate exhibits by letter, as well as exceeding the Court's page limitations. Any future motions that do not comply with this Court's Part Rules will be rejected or dismissed.

Main Street, LLC. The action was also discontinued against Town of Philipstown.

Each party now moves for, *inter alia*, summary judgment.

Antique Alley's & Country Touch's Motions for Summary Judgment (Seq. #3-4)

Defendant Antique Alley moves for summary judgment to dismiss the Complaint and all cross claims and counterclaims against it on the ground that it owed no legal duty to Plaintiff for a fall that occurred on a public sidewalk due to a broken curb over which Antique Alley had no obligation or duty to maintain or repair. In support of its motion, Antique Alley proffers: (1) the pleadings; (2) Plaintiff's deposition testimony; (3) Jeffrey Vidakovich's deposition testimony; (4) Steven Handelsman's deposition testimony; (5) Constance Kelley's deposition testimony; (6) photographs; and (7) a copy of the lease between Antique Alley and Country Touch that was in effect at the time of the accident (Notice of Motion [seq. #3]; Exhs. A-I).

Similarly, Defendants Constance Kelley d/b/a The Country Touch and The Country Touch, Inc. ("Kelley" and/or "Country Touch") move for summary judgment to dismiss the Complaint, and all Third-Party claims and cross-claims against it. Country Touch argues that it did not have a legal obligation or duty to Plaintiff to repair or maintain the subject public curb, and therefore, establishing *prima facie* entitlement to summary judgment. Country Touch also argues that it did not make special use of the broken curb, and it did not cause or create the broken curb by any special use of the sidewalk or the curb. Finally, according to Country Touch, there is no legal or evidentiary basis to suggest that the broken curb was caused or created by the placement of any merchandise and a potted plant on the sidewalk.

In support of its motion, Country Touch proffers, *inter alia*: (1) Constance Kelley's

Affidavit; (2) pleadings; (3) Plaintiff's deposition transcript; (4) photographs; (5) Jeffrey Vidakovich's deposition testimony; (6) payment vouchers to the Village of Cold Spring; (7) copy of the Village Code; (8) Steven Handelsman's deposition testimony; (9) a copy of the lease between Antique Alley and Country Touch that was in effect at the time of the accident; and (10) Constance Kelley's deposition testimony (Notice of Motion [seq. #4]; Exhs. A-O).

Simply put, both parties maintain that it is undisputed that the Village was solely responsible for any repairs to the subject curb.

In opposition, Plaintiff asserts that Country Touch and Antique Alley are liable under the doctrine of special use. Plaintiff argues that Antique Alley "benefitted from a special use of the sidewalk and curb by collecting rent from" Kelley "who in turn had a special benefit from the sidewalk and curb by virtue of the fact that she used the sidewalk to display merchandise and she kept a potted plant there to attract business to her store" (Affirmation in Opposition at ¶46). Plaintiff argues that both Country Touch and Antique Alley had a direct financial benefit by virtue of their special use of the sidewalk in displaying merchandise and making her business more attractive to potential shoppers.

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of facts are raised and cannot be resolved on conflicting affidavits (*see Millerton Agway Coop. v Briarcliff Farms*, 17 NY2d 57, 61 [1966]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Initially, "the proponent... must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact." However, once a movant makes a sufficient showing, "the burden shifts to the party opposing the motion for summary judgment to

produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Where the moving papers are insufficient, the court need not consider the sufficiency of the opposing papers (*id.*; see also *Fabbricatore v Lindenhurst Union Free School Dist.*, 259 AD2d 659 [2d Dept 1999]).

“As a general rule, liability for a dangerous or defective condition on property is predicated upon ownership, occupancy, control, or special use of the property” (*Leitch-Henry v Doe Fund, Inc.*, 2020 NY Slip Op 00112 [2d Dept 2020]). “Generally, liability for injuries sustained as a result of a dangerous condition on a public sidewalk is placed on the municipality, and not on the owner of the abutting land” (*Crawford v City of New York*, 98 AD3d 935, 936 [2d Dept 2012], quoting *James v Blackmon*, 58 AD3d 808 [2d Dept 2009]). “The exceptions to this rule are when the landowner actually created the dangerous condition, made negligent repairs thereby causing the condition, created the dangerous condition through a special use of the sidewalk, or violated a statute or ordinance imposing liability on the abutting landowner for failing to maintain the sidewalk” (*Crawford v City of New York*, *supra*). Similarly, “[a] tenant of property abutting a public sidewalk ‘owes no duty to maintain the sidewalk in a safe condition, and liability may not be imposed upon it for injuries sustained as a result of a dangerous condition in the sidewalk, except where the abutting lessee either created the condition, voluntarily but negligently made repairs, caused the condition to occur because of some special use, or violated a statute or ordinance placing upon the lessee the obligation to maintain the sidewalk which imposes liability upon the lessee for injuries caused by a violation of that duty’” (*Leitch-Henry v Doe Fund, Inc.*, *supra*, quoting *Martin v Rizzatti*, 142 AD3d 591, 592-593 [2d

Dept 2016)).

Not only is there no evidence that Country Touch and/or Antique Alley owned the subject curb (*see generally Nguyen v Brentwood School Dist.*, 239 AD2d 406 [2d Dept 1997] [plaintiff's fall occurred in street, not on any property owned or maintained by defendant]), but there is no statute requiring a Village landowner, or lessee, to repair a broken sidewalk or curb. Specifically, the Village Code only requires an abutting landowner, or its tenant, to clear the area from snow and ice and keep the sidewalk free of weeds and rubbish (Notice of Motion [seq. #4]; Ex. K). And here, none of those situations apply, as the allegation is that Plaintiff was injured as the result of a broken curb. In fact, any implication in Plaintiff's papers that the merchandise or the potted plant may have compromised her movement on the curb and sidewalk was explicitly refuted by Plaintiff's own testimony where she was not asked about the location of the merchandise, and she emphatically stated that none of those things caused her fall or were any where near her at the time she fell (Plaintiff's EBT at 209-10). In fact, Plaintiff stated she was not even sure the potted plant was there at the time of her accident (Plaintiff's EBT at 116).

In addition, Defendants Country Touch and Antique Alley established their *prima facie* entitlement to judgment as a matter of law by demonstrating that none of the exceptions to the aforementioned rule apply. There is no evidence before the Court that Defendants Country Touch and Antique Alley created the broken curb. Kelley testified and stated in her affidavit that the defect existed at the time she became a tenant in 2001 and remained there even after the accident (Kelley EBT at 25; Kelley Affidavit at ¶8). There is no evidence that Defendants Country Touch and Antique Alley voluntarily, but negligently, made repairs to the subject curb (Handelsman EBT at 67; Kelley Affidavit at ¶¶4-7). Based on the Court's review of the

Village's Code related to the care of streets and sidewalks, the Code is silent as to who maintains and repairs the sidewalks and curbs, speaking only to snow and ice removal (Notice of Motion [seq. #4]; Exh. K at Article VII ["Care of Streets and Sidewalks; Conduct"]). And most importantly, according to Jeffrey Vidakovich, the Village Clerk, it is solely the Village's responsibility to repair a broken curb, and specifically the broken curb at issue here (Vidakovich EBT at 32, 56-57, 98, 110-111, 114).

Thus, the only issue to resolve is whether Country Touch and Antique Alley established a *prima facie* case that they did not cause the condition because of a special use. "To recover from a tenant which occupies premises abutting a sidewalk under the theory that the tenant has a special use of the sidewalk, the tenant must be in exclusive possession and control of the alleged special-use area * * *, and the plaintiff must demonstrate that the special use created the defective condition which proximately caused his or her injuries" (*O'Toole v City of Yonkers*, 107 AD3d 866, 867 [2d Dept 2013] [internal quotation marks and citations omitted]). "The special use exception is reserved for situations where a landowner whose property abuts a public street or sidewalk derives a special benefit from that property unrelated to the public use" (*Loiaconi v Village of Tarrytown*, 36 AD3d 864, 865 [2d Dept 2007]). Finally, "[t]he causal connection between the owner's special use of a portion of the public walkway and the defective condition that caused the injury is an issue for the trier of fact and precludes the granting of summary judgment" (*Mondel v Wu*, 4 Misc3d 1006[A], *1 [Sup Ct, Kings County 2004]).

Here, Country Touch and Antique Alley established, *prima facie*, that the special use exception does not apply. First, there is no evidence that the placement of the merchandise and planter on the sidewalk constituted a special benefit to Country Touch that would allow it to be

liable for injuries sustained from a broken public curb (*see generally Minott v City of New York*, 230 AD2d 719, 720 [2d Dept 1996] [public parking space on the public street upon which Plaintiff slipped and fell, and which is across the street from defendant's business, does not constitute special use]).² And second, even if the Court were to find that the placement of these items did rise to the level of a special use, there is no evidence that that special use caused the defect to the curb, or that it was a proximate cause of the accident (*see Taveras v City of New York*, 59 AD3d 178 [1st Dept 2009] [regardless of special use defendant had with respect to padlocked cellar doors, plaintiff failed to present evidence that this use was proximate cause of accident]).

The deposition transcripts submitted establish that Plaintiff tripped on the broken curb and fell on the roadway. The broken curb was located near the planter and no where near Country Touch's merchandise. Plaintiff explicitly stated that she did not trip on the planter, and made no reference to the merchandise, and that the planter was, at best, adjacent to the curb where she tripped and fell (*see Hanze v City of New York*, 166 AD3d 734 [2d Dept 2018] [property owners did not cause sidewalk defect through special use of sidewalk as driveway and therefore, not liable for injuries sustained by pedestrian who tripped and fell on defect; defect located on a flagstone that was merely adjacent to a flagstone the owners used as driveway]). Finally, Plaintiff did not even allege special use in her Complaint, Amended Complaint, Second Amended Complaint, and Bill of Particulars.

In opposition, Plaintiff failed to raise a triable issue of fact. Moreover, Plaintiff's claim

²The Court notes that pursuant to Cold Spring's Village Code §108-24(B), merchants are permitted to display merchandise in front of their buildings on Village sidewalks, subject to certain conditions (Notice of Motion [seq. #4]; Exh. K).

that the broken curb was caused by the placement of the merchandise and/or planter on the sidewalk in front of the building is based on mere speculation and conjecture, as there is no evidence that the merchandise and planter were located on the precise location of the damaged curb (*see Crawford v City of New York, supra* at 937 [plaintiff's contention that defendant's landscaper may have caused curb valve cover to break when he or she cut the grass around it were based on mere speculation and conjecture]).

Furthermore, as to that portion of Country Touch's motion to dismiss the Third-Party Complaint against it, no party has opposed – or even addressed – that branch of the motion. In any event, in light of the above finding by the Court that there is no actionable case against Antique Alley and Country Touch for the reasons stated above, the First and Second Causes of Action for indemnification and contribution in the Third-Party Complaint are rendered moot and dismissed. However, as to the Third Cause of Action in the Third-Party Complaint regarding Country Touch's failure to procure insurance, no arguments or evidence addressing this claim are before the Court. Accordingly, that Cause of Action remains, and the parties are to continue to appear on that cause of action until it is resolved.

Village's Motion (seq. #5) & Plaintiff's Cross Motion (seq. #6)

The Village moves for summary judgment on the ground that Plaintiff failed to establish "prior written notice" as a condition precedent to suit against the Village. In support of its motion, the Village proffers, *inter alia*: (1) pleadings; (2) photographs; (3) Plaintiff's deposition testimony; (4) Jeffrey Vidakovich's deposition testimony; (5) Steven Handelsman's deposition testimony; (6) Constance Kelley's deposition testimony; and (7) Jeffrey Vidakovich's Affidavit.

Plaintiff cross moves for summary judgment against the Village on the issue of liability. Alternatively, Plaintiff seeks relief pursuant to CPLR § 3126, requesting that the Court preclude Defendant from asserting the application of NY Village Law § 6-628, and striking the Village's affirmative defense of lack of prior written notice for its failure to provide a copy of the prior written complaint made by Defendant Kelley. In support of her motion, Plaintiff proffers: (1) Robert F. Downey's deposition testimony; and (2) a good faith letter.

According to Village Law § 6-628,

No civil action shall be maintained against the village for damages or injuries to person * * * sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out of repair, unsafe, dangerous or obstructed * * * unless written notice of the defective, unsafe, dangerous or obstructed condition * * * was actually given to the village clerk and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of * * *.

(see also CPLR § 9804). "Such notice is obviated where the plaintiff demonstrates that the municipality 'created the defect or hazard through an affirmative act of negligence' or that a 'special use' conferred a benefit on the municipality" (*Groninger v Village of Mamaroneck*, 17 NY3d 125, 127-128 [2011], quoting *Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]). However, constructive notice of a defect may not satisfy the statutory requirement of written notice to a municipality (*Amabile v City of Buffalo*, *supra* at 476). Finally, a curb falls under the purview of Village Law 6-628 (*Mellor v Village of Elmsford*, 101 AD3d 1092 [2d Dept 2012]).

In support of its motion, the Village submitted Vidakovich's affidavit. Vidakovich explained that although he was not the Village Clerk at the time of the purported complaint, he, as the current Village Clerk, personally searched the Village's files and could not find any written notice (Vidakovich EBT at 9-10, 12; Vidakovich Affidavit at ¶4). Vidakovich stated that

the Village's sidewalk complaint file included complaints about curbs, and Vidakovich's definition of a sidewalk included curbs (Vidakovich EBT at 123-124). Moreover, there was no evidence that the Village created the defective curb, and that the repairs to the sidewalk next to the broken curb did not include the curb (Vidakovich Affidavit at ¶¶5-6). Finally, Vidakovich stated that the subject curb "was not installed to provide any special benefit to the Village," the "Village is not the recipient of any special use benefits by virtue of the existence of the curb," and that "[n]o interests or property owned by the Village of Cold Spring were in any manner improved or benefitted by virtue of the existence of this curb" (Vidakovich Affidavit at ¶7). Vidakovich explained that when written complaints are received by the Village, they are forwarded to the Highway Department's Crew Chief (Vidakovich EBT at 32-33, 41, 44-45, 47). Robert F. Downey, the current Highway Department's Crew Chief, stated that he searched the complaints and could not find any written complaint for this curb (Downey EBT at 25-27). Accordingly, the Village established its *prima facie* entitlement to judgment as a matter of law.

In response, Plaintiff is required to come forward with admissible evidence to raise a triable issue of fact as to whether written notice was given, whether the Village created or exacerbated the alleged defective condition through its affirmative acts of negligence (*Krausch v Incorporated Village of Shoreham*, 87 AD3d 715, 716 [2d Dept 2011]), or whether "a 'special use' conferred a special benefit" upon the Village (*Scavuzzo v City of New York*, 47 AD3d 793, 794-795 [2d Dept 2008], quoting *Amabile v City of Buffalo*, *supra* at 474). According to her deposition testimony, about 1 or 2 years before the May 2016 sidewalk repairs, Kelley hand-

delivered to Mary Saari in the Village office,³ a written complaint to the mayor about the condition of the sidewalk in front of her store (Kelley EBT at 25-28, 50-51, 54, 67), although she could not recall if she mentioned anything about the curb (Kelley EBT at 56-57). Kelley did not save a copy of her complaint, and she did not receive any acknowledgment of, or response to, the complaint (Kelley EBT 28, 31). But according to Kelley, Saari told her that she would pass the written complaint along (Kelley EBT at 29-31, 69). Kelley stated that after she made this complaint, the sidewalks were repaired, but those repairs did not address the broken curb (Kelley EBT at 29). Based on this evidence, Plaintiff has raised a triable issue of fact as to whether written notice was given to the Village. Accordingly, the Court need not address the remaining arguments, and holds that the Village's motion and Plaintiff's cross motion are denied.

To the extent Plaintiff asserts that the exceptions to notice apply, Plaintiff failed to establish that the Village created the defect or hazard through an affirmative act of negligence as there is no proof before this Court that there was any repair work or maintenance done to this specific broken curb, or that any maintenance to the sidewalk caused the broken curb. Similarly, Plaintiff failed to establish that the existence of the curb constituted a special use which conferred a special benefit upon the Village. The curb is specifically contemplated within the statute requiring notice (*Mellor v Village of Elmsford, supra; cf. Ocasio v City of Middletown*, 148 AD2d 431, 432 [2d Dept 1989] [manhole constitutes special use; prior written notice requirements not applicable]; *DiLorenzo v Village of Endicott*, 70 Misc2d 159 [Sup Ct, Broome County 1972] [metal sewer grating in gutter area of street was not part of street surface within

³Although Ms. Kelley referenced Ms. Saari as a secretary, Plaintiff, in her cross motion papers, indicated that Ms. Saari was the Village Clerk at the time (Zogala Affirmation [seq. 36] at ¶6).

meaning of statute requiring prior notice to village of defect as prerequisite to maintenance of action)). Thus, Plaintiff failed to meet her burden that an exception to the written notice applies.

Finally, because there is a question of fact as to whether written notice was given, the Court finds that any discussion of sanctions for failing to preserve such notice is premature.

* * *

As such, it is hereby

ORDERED that Defendant Antique Alley's motion (seq. #3) is granted and the Complaint and all cross claims related to Antique Alley are dismissed to the extent stated herein; and it is further

ORDERED that Defendant Constance Kelley d/b/a The Country Touch and The Country Touch, Inc.'s motion (seq. #4) is granted, and the Complaint and all cross claims related to Constance Kelley d/b/a The Country Touch and The Country Touch, Inc. are dismissed to the extent stated herein; and it is further

ORDERED that the First and Second Causes of Action in the Third-Party Complaint are dismissed for the reasons stated herein; and it is further

ORDERED that the Third Cause of Action in the Third-Party Complaint remains and the parties are to continue to appear on that cause of action until it is resolved.

ORDERED that Defendant Village of Cold Spring's motion (seq. #5) is denied; and it is further

ORDERED that Plaintiff's cross motion (seq. #6) is denied; and it is further

ORDERED that the parties are appear before the undersigned on Monday, February 24, 2020 at 9:30 a.m. for a pre-trial conference.

The foregoing constitutes the Decision and Order of the Court.

Dated: Carmel, New York
February 6, 2020


HON. VICTOR G. GROSSMAN, J.S.C.

To: Jay S. Campbell, Esq.
Of Counsel
Schwab & Gasparini, PLLC
Attorneys for Defendant/Third Party
Plaintiff Antique Alley
1441 Route 22, Suite 206
Brewster, New York 10509

Kahn, Gordon, Timko & Rodriques, P.C.
Attorneys for Plaintiff
20 Vesey Street, Suite 300
New York, New York 10007

Alan B. Brill & Associates, LLC
Attorneys for Defendant 99 Main Street, LLC
20 Squadron Boulevard, Suite 540
New City, New York 10956

Carmen M. Vasquez, Esq.
O'Connor, McGuinness, Conte, Doyle, Oleson,
Watson & Loftus, LLP
Attorneys for Defendant Village of Cold Spring
One Barker Avenue, Suite 675
White Plains, New York 10601

Cook, Netter, Cloonan, Kurtz & Murphy, P.C.
Attorneys for Defendant Town of
Philipstown
85 Main Street
P.O. Box 3939
Kingston, New York 12402

O'Connor Redd Orlando, LLP
Attorneys for Defendants/Third-Party Defendants
Constance Kelley d/b/a The Country
Touch and The Country Touch, Inc.
242 King Street
P.O. Box 1000
Port Chester, New York 10573