SHORT FORM ORDER **INDEX NO.: 5931/2018**

SUPREME COURT - STATE OF NEW YORK
PART 6- SUFFOLK COUNTY

PRESENT:
Hon. Sanford Neil Berland, A.J.S.C.

KAREN BUCKLEY,

Plaintiff,

-against-

EDWARD J. WOLM, ERIN WOLM, COUNTY OF SUFFOLK, TOWN OF ISLIP and SUFFOLK COUNTY WATER AUTHORITY,

Defendants.

ORIG. RETURN DATE: December 14, 2018
FINAL RETURN DATE: December 17, 2019
MOT. SEQ. #: 001A **MG**

ORIG. RETURN DATE: January 25, 2018
FINAL RETURN DATE: December 17, 2019
MOT. SEQ. #: 002 **MG**

ORIG. RETURN DATE: February 26, 2019
FINAL RETURN DATE: December 17, 2019
MOT. SEQ.#: 003 **MG**

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion (seq.#001A) by defendant County of Suffolk dated November 7, 2018 and supporting papers; (2) Affirmation In Opposition by defendants Edward and Erin Wolm dated December 7, 2018 and supporting papers; (3) Reply Affirmation by defendant County of Suffolk dated December 10, 2018; (4) Affirmation In Opposition by plaintiff dated September 29, 2019 and supporting papers; (5) Reply Affirmation by defendant County of Suffolk dated October 3, 2019; (6) Amended Affirmation In Opposition by plaintiff dated October 13, 2019 and supporting papers; (7) Notice of Motion (seq.#002) by defendants Edward and Erin Wolm dated December 7, 2018 and supporting papers; (8) Affirmation In Opposition by defendant County of Suffolk dated January 16, 2019; (9) Reply Affirmation by defendants Edward and Erin Wolm dated October 8, 2019; (10) Reply Affirmation by defendants Edward and Erin Wolm dated November 26, 2019; (11) Notice of Motion (seq.#003) by defendant Suffolk County Water Authority dated February 7, 2019 and supporting papers; (12) Affirmation In Opposition by defendants Edward and Erin Wolm dated March 26, 2019; (13) Reply Affirmation by defendant Suffolk County Water Authority dated June 10, 2019; and (14) Reply Affirmation by defendant Suffolk County Water Authority dated November 20, 2019, it is

ORDERED that the motions sequenced #001A, #002 and #003 are consolidated for purposes of this determination; and it is further

ORDERED that defendant County of Suffolk's motion (seq.# 001A) for summary judgment, pursuant to CPLR § 3212, is **GRANTED** and plaintiff's claims asserted against it are DISMISSED; and it is further

ORDERED that defendants Edward J. Wolm's and Erin Wolm's motion for summary judgment (seq.#002), pursuant to CPLR § 3212, is **GRANTED** and plaintiff's claims asserted against them are DISMISSED; and it is further

ORDERED that defendant Suffolk County Water Authority's motion (seq.#003) for summary judgment pursuant to CPLR § 3212 is **GRANTED** and plaintiff's claims asserted against it are DISMISSED.

This action was brought by plaintiff Karen Buckley to recover damages for personal injuries sustained on April 8, 2017, when she tripped and fell on an alleged defect of the sidewalk and adjacent grass strip which she claims was in front of 68 River Road, Great River, Town of Islip.

Plaintiff testified at a 50h hearing on September 12, 2017 as to the circumstances surrounding her accident. She testified that she was walking on the sidewalk when she suddenly reached a dip and her foot came in contact with a drain or grate, which caused her to fall. She marked a photograph presented to her at the hearing at the location where she fell.

Counsel for defendants County of Suffolk (the County), Edward and Erin Wolm (the

Wolms), and Suffolk County Water Authority (SCWA) argue that they are not responsible for plaintiff's injuries because none of them own, operate, maintain or in any way controlled or used the location where plaintiff's alleged accident occurred. In support of its motion, the County proffers, *inter alia*, an affidavit from Paul Morano, an assistant civil engineer from the Suffolk County Department of Public Works, who avers that the County had no ownership or control over the accident site, nor had the County entered into any agreements imposing responsibility for that site upon the County. Counsel for SCWA proffers a similar affidavit from Frederick C. Berg, the Construction Maintenance Administrator for SCWA, who adds that upon examination of photographs of the subject area, he was able to determine that the grate upon which plaintiff fell, based upon the castings used to create it, was not made by SCWA. Counsel for the Wolms proffers two surveys of the Wolm property at 68 River Road in Great River, which show that the accident site is not within the bounds of their property.

Counsel for the County further argues that the County was never provided with written notice of the claimed defect, a prerequisite to a claim against the County pursuant to § C8-2A of the Suffolk County Charter. Counsel for SCWA argues that it did not have actual or constructive notice of the defect.

In opposition, plaintiff argues that the motions are premature given that there has been no discovery in the case. Plaintiff does note that defendant Town of Islip, in its answer to the complaint, admitted jurisdiction, ownership and maintenance of the subject sidewalk.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*See Alvarez v Prospect Hosp.*, 68 N.Y.2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*See Miller v Journal News*, 211 A.D.2d 626 [2d Dept. 1995]). Thus, the burden on the moving party seeking summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*See Ayotte v Gervasio,* 81 N.Y.2d 1062 [1993]).

A claim for negligence requires the pleading of facts that impose a duty of care upon the defendant in favor of the plaintiff, a breach of that duty, and that the breach of such duty was a proximate cause of the plaintiff's injuries (*See Pulka v. Edelman*, 40 N.Y.2d 781 [1976]; *Akins v. Glens Falls School Dist.*, 53 N.Y.2d 325, 333 [1981]). Absent a duty of care, there is no breach, and without breach there can be no liability (*See Pulka v. Edelman*, *supra*; *Gordon v. Muchnick*, 180 A.D.2d 715 [2d Dept. 1992]). Preliminarily, however, whether a duty of care is imposed upon the defendant in favor of the plaintiff under the circumstances alleged is an issue of law for the court to decide (*See Church v. Callanan Indus.*, 99 N.Y.2d 104 [2002]).

It is well settled that a municipality that has enacted a prior written notice statute may not be subjected to liability for injuries caused by a defective condition in a sidewalk unless it either has received written notice of the defect or an exception to the written notice requirement applies (*see Wolin v. Town of N. Hempstead*, 129 A.D.3d 833, 834 [2d Dept. 2015], quoting *Monaco v. Hodosky*, 127 A.D.3d 705, 706 [2d Dept. 2015]; *Amabile v City of Buffalo,* 93 N.Y.2d 471, 474 [1999]). "Prior written notice statutes are strictly construed and only two exceptions are recognized, 'namely, where the locality created the defect or hazard through an affirmative act of negligence and where a special use confers a special benefit upon the locality'" (*Chirco v City of Long Beach*, 106 AD3d at 942, quoting *Amabile v City of Buffalo*, 93 N.Y.2d at 474 [citation and internal quotation marks omitted]; *see also Wolin v Town of N. Hempstead*, 129 AD3d at 834, [2d Dept. 2015] (an affirmative negligence exception is applicable where work done by a municipality immediately results in the existence of a dangerous condition). A*ccord Yarborough v. City of New York*, 10 N.Y.3d 726, 728 [2008]).

Here, defendants have each proffered sufficient evidence to establish that they did not own or control the site of the accident. Defendant the County has proffered sufficient evidence to establish that it did not have prior written notice of the alleged defect, and defendant SCWA has proffered sufficient evidence that it did not have actual or constructive notice of the defect. Plaintiff has failed to come forward with any evidence in admissible form to create a triable issue of material fact in opposition to the motions.

Accordingly, and for the above reasons, the motions for summary judgment at bar are granted.

The foregoing constitutes the decision and order of the court.

Dated: May 6, 2020

HON. SANFORD NEIL BERLAND, A.J.S.C.

____ **FINAL DISPOSITION** __XX__ **NON-FINAL DISPOSITION**