SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack

Justice

TRIAL/IAS, PART 18
NASSAU COUNTY

ZOILA E. FRANCO DE LEON,

Plaintiff(s),

Index No. 609621/19

-against-

INCORPORATED VILLAGE OF FREEPORT, COUNTY OF NASSAU, 135 WEST SUNRISE REALTY CORP., RGAG, INC., AARR, INC and FULTON FRANKLIN PARTNERS, L.P.

Motion Seq. No.: 001 & 002
Motion Submitted: 1/21/2020

Defendant(s).

The following papers read on this motion:

Notices of Motion/Supporting Exhibits.....XX
Affirmations in Opposition.....XX
Reply Affirmation.....X

Defendant, Incorporated Village of Freeport (the Village) moves this court (Motion Seq. 001) for an order pursuant to CPLR sec 3211(a)(7) and 3212, dismissing the complaint against it. Co-Defendant, County of Nassau (the County), moves this court (Motion Seq. 002) for an order, pursuant to CPLR §3211(a)(7) and 3212 dismissing the complaint against it. Plaintiff, Zoila E. Franco De Leon (De Leon) and co-

Defendant 135 West Sunrise Realty Corp. (135 West) oppose both motions. Co-Defendant Fulton Franklin Partners, L.P. submits no papers in support of or in opposition to either motion. The complaint has previously been discontinued against Defendants RGAG, Inc and AARR, Inc.

De Leon commenced this action, sounding in negligence, by service of a summons and complaint dated July 12, 2019. Issue was joined by service of an answer with cross claims by 135 West dated December 30, 2019. The Village and the County brought the within motions in lieu of answering.

In a motion for summary judgment the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (see Sillman v. Twentieth Century Fox Films Corp., 3 NY2d 395 [1957]; Friends of Animals, Inc. v. Associates Fur Mfrs., 46 NY2d 1065 [1979]; Zuckerman v. City of New York, 49 NY2d 5557 [1980]; Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see Winegard v. New York University Medical Center, 64 NY2d 851 [1985]). Once this showing has been made, however, 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 action. (see Zuckerman v. City of New York, 49 NY2d 557 [1980],

supra). The primary purpose of a summary judgment motion is issue finding not issue determination, (see Garcia v. J.C. Duggan, Inc., 180 AD2d 579 [1st Dept 1992]), and it should only be granted when there are no triable issues of fact (see Andre v. Pomeroy, 35 NY2d 361 [1974]).

Furthermore, neither actual nor constructive notice of a given defect is sufficient to overcome the requirement of prior written notice (Amabile v City of Buffalo, 93 NY2d 471, 474 [1998]; Caramancia v City of New Rochelle, 268 AD2d 496 [2d Dept 2000]). In order for a municipality to be held liable for a condition where no prior written notice was given, a plaintiff must set forth competent evidence that the municipality affirmatively created the alleged offending condition in issue (see Walker v Incorporated Village of Northport, 304 AD2d 823 [2d Dept 2003]; Monteleone v Incorporated Village of Floral Park, 74 NY2d 917 [1989]).

THE VILLAGE'S MOTION FOR SUMMARY JUDGMENT (MOTION SEQ. 001)

De Leon alleges she tripped over an uneven portion of sidewalk in front of property owned by 135 West, that resides within the Village. The Village alleges it had no prior written notice of any alleged defect, and that no exception to the prior written notice rule applies.

In support of the motion, the Village submits, inter alia, the affidavits of Pamela Walsh Boening, the Village Clerk, and Robert S. Fisenne, Superintendent of the

Department of Public Works for the Village. Ms. Boening states that the Village Code directs that any written notice of a sidewalk defect must be made to the Village Clerk's office. Further, the Village Clerk maintains any notices or records of any such defect. She did a search of all records for the subject location, dating back five years from the date of the accident, and found no written notices of any defect at the subject location.

Mr. Fisenne states that the Department of Public Works is responsible for all repairs and maintenance of sidewalks on Village owned property, and keeps records of all such repairs and maintenance. He performed a search of the Department of Public Works' records dating back five years from the date of the accident. According to his search, the Village performed no maintenance or repairs at the subject location within those five years.

"[W]here, as here, a municipality has enacted a prior written notice law, it may not be subject to liability for injuries caused by a dangerous roadway condition unless it has received prior written notice of the dangerous condition, or an exception to the prior written notice requirement applies" (Wald v City of New York, 115 AD3d 939 [2d Dept 2014]; Phillips v City of New York, 107 AD3d 774, [2d Dept 2013]; see Martinez v City of New York, 105 AD3d 1013, 1014 [2d Dept 2013]). "The only recognized exceptions to the statutory prior written notice requirement involve situations in which the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a benefit upon the municipality" (Wald v City of New York, supra; Long v City at Mount Vernon, 107 AD3d 765 [2d Dept 2013]; Oboler v City of

New York, 8 NY3d 888, 889-890 [2007]; Miller v Village of E. Hampton, 98 AD3d 1007, 1008 [2d Dept 2012]). In addition, "the affirmative negligence exception is limited to work by the [municipality] that immediately results in the existence of a dangerous condition" (Wald v City of New York, supra, quoting Yarborough v City of New York, 10 NY3d 726, 728 [2007], quoting Oboler v City of New York, supra at 889).

Based upon the affidavits of Ms. Boening and Mr. Fisenne, the court finds the Village has established entitlement to summary judgment as a matter of law. The Village received no prior written notice and did not create the defect or make a special use of the subject location. The burden shifts to De Leon and the other Defendants to raise an issue of fact requiring a trial of the action.

135 West argues that the motions are premature as they were made prior to 135 West submitting an answer. Because 135 West was not present for the 50-h hearing, they are at a disadvantage. 135 West submits pictures of the subject location and notes that there are white arrows painted on the subject sidewalk flag and at least one other sidewalk flag in the vicinity. 135 West opines these arrows call into question whether the Village performed work at the subject location as there is no indication as to when the pictures were taken. For these reasons, they should be allowed to perform discovery.

The court finds 135 West has failed to raise an issue of fact. The white arrows do nothing to contradict the affidavits of Ms. Boening and Mr. Fisenne. During her 50-h hearing, De Leon identified the location where she fell using the picture with the white arrows. At best, if the arrows mean anything, they mean something was to occur after

the accident. Further, 135 West has neglected to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. "The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion" (Hanover Ins. Co. v. Prakin, 81 AD3d 778 [2d Dept. 2011]; see also Essex Ins. Co. v. Michael Cunningham Carpentry, 74 AD3d 733 [2d Dept. 2010]; Peerless Ins. Co. v. Micro Fibertek, Inc., 67 AD3d 978 [2d Dept. 2009]; Gross v. Marc, 2 AD3d 681 [2d Dept. 2003]).

Further, while the court acknowledges that the Village's motion did not seek to dismiss 135 West's cross claims against the Village for contribution and indemnification, the court finds they must be dismissed anyway. This court finds there was no prior written notice. Absent prior written notice, the Village can only be found liable for affirmative acts of negligence. (Ferris v. County of Suffolk, 174 AD2d 70 [2d Dept 1992]). Allowing a party to seek indemnity or contribution from the Village when it committed no affirmative act of negligence would, in essence, be akin to ignoring the prior written notice statute. (Barry v Niagara Frontier Tr. Sys., 35 NY2d 629 [1974].

De Leon challenges the affidavits of Mr. Boening and Mr. Fisenne. De Leon claims that the affidavits are defective because they do not specify what records were reviewed. The court disagrees. Both Ms. Boening and Mr. Fisenne indicated they researched all records for the five year period before the accident. The court is satisfied that the affidavits properly indicate that a diligent search was performed of all relevant records. De Leon also raises the same arguments as 135 West regarding the painted

white arrows and the need for discovery. For the same reasons cited, supra, those arguments are rejected. As a result, De Leon is unable to raise an issue of fact.

THE COUNTY'S MOTION FOR SUMMARY JUDGMENT (MOTION SEQ. 002)

The County argues that it does not own, repair or maintain the subject sidewalk, nor did it grant any permits for a contractor to perform work there. The County further denies performing any work, repairs or maintenance on the subject sidewalk. Aside from lack of ownership and control, the County argues it received no prior written notice of a defect at the subject location.

One cannot be held liable for a dangerous or defective condition on property unless ownership, occupancy, control or special use of the property has been established. (Ruggiero v. City School District of New Rochelle, 109 A.D.3d 894 [2nd Dept 2013]; Soto v. City of New York, 244 A.D.2d 544 [2nd Dept. 1997]; James v. Stark, 183 A.D.2d 873 [2nd Dept. 1982]).

In support of its motion, the County submits, inter alia, the affidavits of Robert Dujardin, an employee of the Bureau of Claims and Investigations at the Nassau County Attorneys Office, and William Nimmo, Deputy Commissioner of the Nassau County Department of Public Works. Mr. Nimmo states that in his capacity of Deputy Commissioner of the Department of Public Works, and through his work experience, he is familiar with the appurtenances, sidewalks and roadways under the jurisdiction of Nassau County. Mr. Nimmo states he researched the records of the Department of

Public Works, including contracts, permits, complaints and repair records, and based upon those records and his personal knowledge, he determined that the County does not own, operate, maintain, or control the sidewalk at the subject location. Further, the County issued no permits, performed no work or repairs on the subject sidewalk, and entered into no contracts for any other entity to perform work at the subject location.

Mr. Djuardin states that as part of his duties, he maintains records of notices of claim and notices of defects. These records are kept by the Nassau County Attorneys office. Mr. Dujardin states he researched the records dating back six years before the accident herein, and found no written notices of any defect.

Based upon the affidavits of Mr. Dujardin and Mr. Nimmo, the court finds the County has established entitlement to summary judgment as a matter of law. The burden shifts to De Leon and the Defendants to raise an issue of fact.

135 West makes the identical arguments as they made regarding the Village's motion, and the court similarly finds those arguments do not raise an issue of fact. 135 West offers no admissible evidence to refute that the County did not receive written notice and that the County did not own, maintain or operate the subject sidewalk. Further, for the reasons discussed supra, 135 West's cross claims against the County cannot lie.

De Leon also raises the same arguments against the County as she did against the Village, and they must fail for the same reasons. The affidavits of Mr. Dujardin and Mr. Nimmo both provide the relevant information needed to establish that there was no prior

written notice, and that the County did not own, operate or maintain the subject sidewalk. Faced with these affidavits, De Leon is unable to raise an issue of fact.

Accordingly, it is hereby

ORDERED, that the Village's motion for summary judgment (Motion Seq. 001) is GRANTED. The complaint and all cross claims are dismissed against the Village; and it is further

ORDERED, that the County's motion for summary judgment (Motion Seq. 002) is GRANTED. The complaint and all cross claims are dismissed against the County.

This constitutes the Decision and Order of the Court.

Dated: April 13, 2020
Mineola, N.Y.

/S/
Hon. James P. McCormack, J. S. C.