

Levy v Village of Port Jefferson
2020 NY Slip Op 35155(U)
February 6, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 607831-2019
Judge: David T. Reilly
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**SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 30 SUFFOLK COUNTY**

**PRESENT:
HON. DAVID T. REILLY, J.S.C.**

INDEX NO.: 607831-2019

CHERYL SUSAN LEVY,

Plaintiff,

**Cellino & Barnes, P.C.
Attorneys for Plaintiff
600 Old Country Road, Suite 412
Garden City, NY 11530**

-against-

**Law Offices of Thomas M. Volz, PLLC
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280 Smithtown Boulevard
Nesconset, NY 11767**

**VILLAGE OF PORT JEFFERSON and
LIGHTHOUSE PLAZA CORP.,**

Defendants.

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MOTION DATE: 09/26/19
SUBMITTED: 12/04/19
MOTION SEQ: 1
MOT. DECISION: MG

Upon the reading and filing of the following papers in this matter: (1) Defendant Village of Port Jefferson's Notice of Motion filed on August 28, 2019 and supporting papers; (2) Plaintiff's Affirmation in Opposition filed on September 16, 2019; and (3) Village of Port Jefferson's Reply Affirmation filed on October 1, 2019 (~~and after hearing counsel in support and in opposition to the motion~~) it is,

ORDERED that the Village of Port Jefferson's (the Village) application for an Order dismissing the plaintiff's complaint as asserted against it, pursuant to CPLR 3211, is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Cheryl Susan Levy on July 3, 2018, when she tripped and fell on a public sidewalk located in front of the premises at 14 East Broadway, Port Jefferson, New York. Plaintiff allegedly fell due to an uneven, raised piece of concrete sidewalk. Plaintiff alleges that defendants were negligent in permitting the subject sidewalk to be and remain in a dangerous and defective condition.

The Village now moves to dismiss the plaintiff's complaint pursuant to CPLR 3211. In support of the application the Village references the Code of the Incorporated Village of Port Jefferson (the Code) which provides, in pertinent part at §177-1,

“No civil action shall be commenced against the Incorporated Village of Port Jefferson for damages or injuries to persons or property sustained by reason of the defective, out-of-repair, unsafe, dangerous or obstructed condition of any highway, street, bridge, culvert, sidewalk, crosswalk or other properties or lands of the Incorporated Village of Port Jefferson ... unless previous to the occurrence resulting in such damages or injuries, written notice of such defective, out of repair, unsafe, dangerous or obstructed condition, specifying the particular place and location, was actually given to the Village Clerk and that there was a failure or neglect within a reasonable time, after the giving of such notice, to repair or remove the defect, danger, obstruction or condition complained of ...”

The Code, at §177-1, mirrors the language contained in New York State Village Law §6-628.

The Village has annexed to their motion papers the affidavits of Barbara Sakovich, the Village Administrator/Deputy Clerk of the Village and Steven Gallagher, Superintendent of the Department of Public Works for the Village. The affidavit by Ms. Sakovich indicates that she performed a search of the indexed book maintained by the Village concerning all written notices of defect filed with or received by the Village Clerk for any raised, uneven, improperly and/or repaired sidewalk in the vicinity of 14 East Broadway. She also searched the indexed book maintained by the office of the Village Clerk concerning any notices of claim filed with or received by the Village Clerk for any accidents involving the sidewalk in and around 14 East Broadway. Neither of those searches revealed any prior written notice of defect or written notice of claim.

The affidavit of Steven Gallagher, the Superintendent of the Department of Public Works for the Village for approximately twelve years, states that he is responsible for overseeing the day-to-day operations of the Public Works Department and is responsible for the maintenance and repair of all sidewalks in the Village. He avers that he has no personal knowledge of the Village ever performing any type of installation, repair or maintenance work on any sidewalk in the vicinity of 14 East Broadway and that the Village is not under any contracts which require it to maintain any sidewalk in and around the vicinity of 14 East Broadway. Accordingly, the Village argues, plaintiff's cause of action against it must be dismissed based upon lack of prior written notice.

Plaintiff has submitted opposition to the motion wherein she maintains that the Village's motion is premature inasmuch as little to no discovery has taken place with respect to this action. Further, plaintiff contends that the Village improperly moved for dismissal under CPLR 3211, when the proper vehicle for dismissal would have been a motion for summary judgment pursuant to CPLR 3212.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. A court must determine whether, accepting the facts as alleged in the complaint as true and according the plaintiff the benefit of every favorable inference, those facts fit within any cognizable legal theory (see *Morone v Morone*, 50 NY2d 481, 429 NYS2d 592 [1980]). However, a dismissal is warranted under CPLR 3211 if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (see *Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]; see generally *Ganzenmuller v Inc. Vill. of Port Jefferson*, 18 AD3d 703, 795 NYS2d 744 [2d Dept 2005]).

“A municipality that has adopted a ‘prior written notice law’ cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies” (*Betz v Town of Huntington*, 106 AD3d 1041, 966 NYS2d 471 [2d Dept 2013], quoting *Forbes v City of New York*, 85 AD3d 1106, 1107, 926 NYS2d 309 [2d Dept 2011]). Prior written notice laws must be strictly construed (*Betz v Town of Huntington*, *supra*, quoting *Lagrasta v Town of Oyster Bay*, 88 AD3d 658, 930 NYS2d 254 [2d Dept 2011]). “A verbal or telephonic communication to a municipal body, even if reduced to writing, cannot satisfy the prior written notice requirement” (*Tortorici v City of New York*, 131 AD3d 959, 960, 16 NYS3d 572; see *Gorman v Town of Huntington*, 12 NY3d 275, 280, 879 NYS2d 379 [2009]). Writings prepared by Town employees as a result of verbal complaints do not satisfy the prior written notice requirement (see *Wolin v Town of North Hempstead*, 129 AD3d 833, 11 NYS3d 627 [2d Dept 2015]). Prior written repair orders also do not satisfy the statutory requirement (see *Lopez v Gonzalez*, 44 AD3d 1012, 845 NYS2d 91 [2d Dept 2007]; *Dalton v City of Saratoga Springs*, 12 AD3d 899, 784 NYS2d 702 [3d Dept 2004]). Actual or constructive notice of the defective condition are both insufficient to satisfy the prior written notice requirement (*Groninger v Village of Mamaroneck*, 67 AD3d 733, 888 NYS2d 205 [2d Dept 2009]).

However, “[r]ecognized exceptions to the prior written notice requirement exist where the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a special benefit upon it” (*Morreale v Town of Smithtown*, 153 AD3d 917, 918, 61 NYS3d 269 [2d Dept 2017], quoting *Miller v Village of E. Hampton*, 98 AD3d 1007, 1008, 951 NYS2d 171 [2d Dept 2012]). “Only when one of these exceptions applies is the written notice requirement obviated” (*Rodriguez v City of New York*, 130 AD3d 999, 1000, 14 NYS3d 155 [2d Dept 2015]).

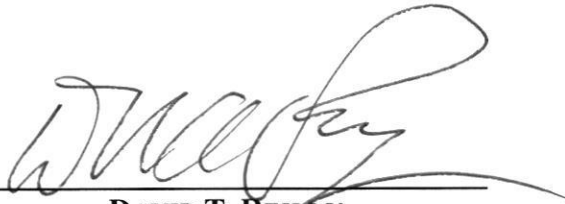
Here, the affidavits of Barbara Sakovich and Steven Gallagher establish that there was no prior written notice of the alleged defective condition filed with the Village Clerk’s office as required by the Village Code. The testimony of an official charged with the responsibility of keeping an indexed record of all notices of defective conditions received by a village is sufficient to establish that no prior written notice was filed (see *Velho v Village of Sleepy Hollow*, 119 AD3d 551, 987 NYS2d 879 [2d Dept 2014]).

The Village having established the lack of prior written notice, the burden shifts to plaintiff to proffer evidence that one of the claimed exceptions to the prior written notice requirement applies (see

Betzold v Town of Babylon, 18 AD3d 787, 796 NYS2d 680 [2d Dept 2005]). Here, plaintiff has failed to allege that the Village committed any act which would constitute affirmative negligence (*see Corey v Town of Huntington*, 9 AD3d 345, 780 NYS2d 156 [2d Dept 2004]). To the contrary, the affidavit of Steven Gallagher establishes that the Village did not create the alleged defect through an affirmative act of negligence. Further, plaintiff has failed to assert in the complaint that the alleged defect was created by the Village’s special use of the property (*see Gonzalez v Town of Hempstead*, 124 AD3d 719, 2 NYS3d 527 [2d Dept 2015]). Accordingly, the Village’s motion to dismiss the complaint as asserted against it is granted.

This shall constitute the decision and Order of the Court.

Dated: February 6, 2020
Riverhead, New York


DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

 FINAL DISPOSITION X NON-FINAL DISPOSITION