

Reid v Village of Westbury
2021 NY Slip Op 32968(U)
July 12, 2021
Supreme Court, Nassau County
Docket Number: Index No. 602014/2017
Judge: Leonard D. Steinman
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X
RUTH REID,

Plaintiff,

-against-

THE VILLAGE OF WESTBURY,

Defendant.

-----X
LEONARD D. STEINMAN, J.

**IAS Part 8
Index No. 602014/2017
Mot. Seq. Nos. 005-006**

DECISION AND ORDER

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

Defendant’s Notice of Motion, Affirmation, Affidavit & Exhibits.....	1
Plaintiff’s Cross-Motion, Affirmation in Opposition, Affidavit & Exhibits.....	2
Defendant’s Affirmation in Opposition & Reply.....	3

In this action, plaintiff alleges that she suffered personal injuries following a fall in December 2015 due to an uneven asphalt surface in the parking lot of the Long Island Railroad train station in Westbury New York (the lot). It is not disputed that the lot is owned and maintained by the Village of Westbury.

This action was initially assigned to Justice Robert A. Bruno and was re-assigned to this Part upon Justice Bruno’s death in November 2019. Prior to his death, by order dated May 17, 2018, Justice Bruno granted summary judgment to the Village on the ground that it did not have prior written notice of the alleged defect as required by the Village’s Code. Plaintiff successfully moved to reargue and, upon reargument, Justice Bruno found that the Village’s submissions were insufficient to establish lack of prior notice in a decision dated October 24, 2018. Justice Bruno specifically found the Affidavit of the Village Clerk/Treasurer “vague and scant of information regarding the scope of the search of the Village’s records.” Justice Bruno denied the Village’s summary judgment motion but granted it leave to “renew or reapply,” which it now does. Plaintiff opposes the application

and cross-moves for costs and sanctions pursuant to 22 NYCRR 130-1.1. For the reasons set forth below, the motions are denied.

The Village's Summary Judgment Motion

The Note of Issue in this action was filed on December 1, 2020. The Village did not file the instant motion until March 1, 2021, four weeks after the 60-day deadline set forth in this court's January 21, 2020 Certification Order. The motion therefore is untimely, as the Village concedes. See CPRL 3212(a). As a result, the Village must demonstrate good cause for its delay by setting forth a satisfactory explanation for the untimeliness. *Brill v. City of New York*, 2 N.Y.3d 648, 652 (2004).

The Village's counsel attempts to establish good cause for the Village's delay by explaining that she was "under the impression" that the Village had 90 days from the filing of the Note of Issue to move for summary judgment because she mistakenly referred to Justice Bruno's August 2017 preliminary conference order—which provided a 90-day window—rather than the 60-day time frame in this Part's later Certification Order. But counsel's mistaken reliance upon a prior inapplicable deadline following the reassignment of an action to a new judge does not constitute good cause excusing an untimely summary judgment motion. *Appleyard v. Tigges*, 171 A.D.3d 534 (1st Dept. 2019). Because the Village fails to show good cause for its delay, this court has no discretion to entertain its motion, even if it were meritorious and the delay is nonprejudicial. See *Bargil Associates, LLC v. Crites*, 173 A.D.3d 958 (2d Dept. 2019).

In all events, even if the court had discretion to entertain the instant motion, the Village still fails to establish its entitlement to summary judgment.

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. *US 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 Mfgs., Inc.*, 46 N.Y.2d 1065 (1979); *Werner v. Nelkin*, 206 A.D.2d 422 (2d Dept. 1994).

The Village argues that it (1) did not receive prior written notice of the alleged dangerous condition, precluding liability; and (2) did not create the dangerous condition.

First, the Village fails to sufficiently demonstrate that it did not receive prior written notice of the alleged defect. In support of the instant application, the Village submits another affidavit of Tadeus A. Blach, former Village Clerk/Treasure. Blach attests that the Village maintains records of written notice and that he has personally “gone through” the relevant folders and that the Village has not received any written notice or complaints for the location where the subject accident took place. But Blach’s affidavit is devoid of any detail regarding the duration these records are kept by the Village and when his search was conducted.

Second, the Village also has failed to affirmatively establish that it did not create or exacerbate the alleged dangerous condition of the asphalt through the use of snow/ice removal equipment. In his affidavit, Mr. Blach attests that—*in the absence of a preexisting condition in the parking lot*—the equipment used by the Village to remove snow would not cause the subject condition because the Village’s snow removal trucks are equipped with mechanisms to prevent damage to pavement. Mr. Blach further states that, based on his experience, photographs of the accident site demonstrate “pavement deterioration, with such contributing factors of excessive moisture, natural aging, sub-pavement failure and pavement fatigue.” Considering Mr. Blach’s own assessment, the asphalt may have had a “preexisting condition.” Irrespective of a preexisting condition, Mr. Blach testified at his deposition that the “steel shoes” on the snowplows make direct contact with the asphalt and could cause damage as a result. Thus, an issue of fact exists as to whether the Village created the subject condition.

Plaintiff's Cross-Motion

Plaintiff cross-moves for costs and sanctions on the grounds that the Village's motion is not only untimely, but is also without merit and frivolous since the Village has relied on the same evidence here as was submitted in support of its prior summary judgment motion. However, although unpersuasive, the Village did rely on evidence in support of this application that was not available when it initially moved for summary judgment. The deposition of the Village's witness was not completed until almost 1 year following the Village's initial motion. Therefore, in its discretion, this court denies plaintiff's cross-motion for costs and sanctions.

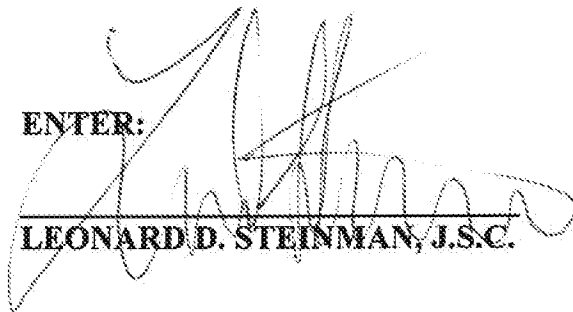
Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: July 12, 2021
Mineola, New York

ENTERED
Jul 14 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:



LEONARD D. STEINMAN, J.S.C.