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| Statam v Town of Southampton |
| 2021 NY Slip Op 33207(U) |
| July 25, 2021 |
| Supreme Court, Suffolk County |
| Docket Number: Index No. 621703/2018 |
| Judge: David T. Reilly |
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SHORT FORM ORDER

INDEX No. 621703/2018
CAL. No. 202100066OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

P R E S E N T :

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 5/19/21
ADJ. DATE 6/23/21
Mot. Seq. # 002 MD

-----X
LINDA STATAM,

Plaintiff,

- against -

TOWN OF SOUTHAMPTON, VILLAGE OF
WESTHAMPTON, KEVIN BUTLER,
KAREN BUTLER, and DOUGLAS ELLIMAN
OF LI, LLC,

Defendants.
-----X

CASSISI & CASSISI, P.C.
Attorney for Plaintiff
155 1st Street Suite 101
Mineola, New York 11501-4005

DEVITT SPELLMAN BARRETT, LLP
Attorney for Defendants Town of Southampton
and Village of Westhampton
50 Route 111, Suite 314
Smithtown, New York 11787-3700

MCCARTHY & ASSOCIATES
Attorney for Defendant
Douglas Elliman of LI LLC
1 Huntington Quad, Suite 2C18
Melville, New York 11747-4454

Upon the following e-filed papers read on this motion for summary judgment: Notice of Motion and supporting papers by defendant Village of Westhampton, dated April 20, 2021; Answering Affidavits and supporting papers by plaintiff, dated May 11, 2021; Replying Affidavits and supporting papers by defendant Village of Westhampton, dated June 15, 2021; it is

ORDERED that the motion by defendant Village of Westhampton Beach for summary judgment dismissing the complaint against it is denied.

This action was commenced by plaintiff Linda Statam to recover damages for injuries she allegedly sustained on July 21, 2018, when she tripped on the uneven surface of a sidewalk abutting the address known as 104 Main Street, Westhampton Beach, New York. Defendant Village of Westhampton Beach, i/s/h/a Village of Westhampton, is alleged to own, maintain, control, and to have installed the subject sidewalk. By a stipulation dated December 28, 2018, the action against defendant Douglas Elliman of LI, LLC, was discontinued, with prejudice. Then, by a stipulation filed October 10, 2019, the action against defendant Town of Southampton was discontinued, with prejudice. Further, by

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a stipulation filed January 14, 2020, the action against defendants Kevin Butler and Barbara Butler, i/s/h/a Karen Butler, was discontinued, with prejudice.

Defendant Village of Westhampton Beach (the Village) now moves for summary judgment in its favor, arguing that it did not create the alleged defective condition, and that it did not receive prior written notice thereof as required by Westhampton Beach Village Code § 114 and New York Village Law § 6-628. In support of its motion, the Village submits, among other things, transcripts of the parties' deposition testimony, a transcript of plaintiff's General Municipal Law § 50-h hearing testimony, transcripts of the deposition testimony of nonparties Gregory Liggon and John Kearns, an affidavit of Elizabeth Lindtvit, and two photographs.

Plaintiff testified that at approximately noon on the date in question, she was walking westward on the north side of Main Street in Westhampton Beach. She indicated that she frequents this area 4 to 7 times a week, and that the sidewalk consists of both brick and concrete portions. Plaintiff stated that a group of four people were walking toward her, so she moved to her left— onto the approximately three-foot-wide brick portion of the sidewalk— to allow them to pass. She indicated that after taking 2 to 4 steps on the brick portion while the group passed, she turned rightward, intending to resume walking on the concrete portion of the sidewalk. However, as she did so, her right foot “caught” on “elevated concrete” and the “momentum of it stopping [her] body going threw [her]” to the ground. Plaintiff testified that she visited the Westhampton Beach Police Department shortly after her fall to inquire if other accidents had occurred at the same location. She stated she was shown a report of a prior incident occurring approximately three years before.

Matthew Smith testified that he has been Superintendent of Public Works for the Village since January of 2019, and that for the approximately 10 years prior to such time, he was employed by the Suffolk County Department of Public Works. He stated that his duties include monitoring and maintaining all highways, buildings, grounds, waterways, and sidewalks owned by the Village. Asked if he is aware of when the sidewalk in question was installed, he replied in the negative. However, he stated that he recalls the subject brick portion being “[n]ear flush” with the concrete at some point in the period between his hiring in January 2019 and when the sidewalk was renovated later that same year. Questioned regarding the Village's record-keeping, Mr. Smith explained that records of sidewalk repairs would only be kept if an injury was associated with the condition. He further explained that the Village typically is informed of injuries sustained due to trips and falls when the Westhampton Beach Police Department transmits a report. Mr. Smith testified that such police reports are first transmitted to the Village Department of Public Works and, thereafter, “maintained in the Village Clerk's office.”

Nonparty Gregory Liggon testified that prior to his retirement after 32 years of service, he was the foreman for the Village Highway Department. He stated that his duties included “oversee[ing] jobs,” as well as maintenance, inspection, and repair of sidewalks in the Village. Upon questioning, he stated that the brick portion of the subject sidewalk was installed in 1986.

Nonparty John Kearns testified that he retired on January 21, 2019, but was Superintendent of Public Works for the Village at the time of plaintiff's incident. He stated that he was typically informed of sidewalk defects via e-mail from the Village, and/or a fax from the Westhampton Beach Police

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Department. Mr. Kearns indicated that he would keep such notices on file at the Village's Department of Public Works building.

The Village submits an affidavit of Elizabeth Lindtvit, wherein she states that she is Village Clerk for the Village of Westhampton Beach, and that she is responsible for maintaining a file of all written notices of defects pursuant to Westhampton Beach Village Code § 114. She indicates that she reviewed plaintiff's notice of claim, then conducted a search of the file maintained by her office, attempting to locate prior written notice, or prior notices of claim, pertaining to the subject incident location. Ms. Lindtvit states that, following her search, she determined that "[t]he Village Clerk of the Village of Westhampton Beach never received prior written notice of the allegedly hazardous condition that allegedly caused plaintiff's injuries."

A party moving for summary judgment "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 issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

Liability for a dangerous or defective condition on property is generally "predicated upon ownership, occupancy, control, or special use of the property" (*Tilford v Greenburgh Hous. Auth.*, 170 AD3d 1233, 1235, 97 NYS3d 278 [2d Dept 2019] [internal quotations and citations omitted]). The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 429 NYS2d 606 [1980]; *Milewski v Washington Mut., Inc.*, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). Where a municipality has enacted a prior written notice statute, it "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" (*Taustine v Incorporated Vil. of Lindenhurst*, 158 AD3d 785, 785, 71 NYS3d 547 [2d Dept 2018], quoting *Forbes v City of New York*, 85 AD3d 1106, 1107, 926 NYS2d 309 [2d Dept 2011]; *see Barnes v Incorporated Vil. of Port Jefferson*, 120 AD3d 528, 529, 990 NYS2d 841 [2d Dept 2014]). New York Village Law § 6-628 provides, in pertinent part, that

No civil action shall be maintained against the village for damages or injuries to person or property sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out of repair, unsafe, dangerous or obstructed or for damages or injuries to person or property . . . unless written notice of the defective, unsafe, dangerous or obstructed condition . . . relating to the particular place, was actually given

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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 . . . or the place otherwise made reasonably safe.

More specifically, Westhampton Beach Village Code § 114-2 provides

No civil actions shall be maintained against the Village of Westhampton Beach for damages or injuries to person or property sustained by reason of any defect in any sidewalk, boardwalk, staircase, walkway [or] curb . . . unless written notice of such defective, unsafe, dangerous, obstructed or other condition shall be filed with the Village Clerk 15 calendar days prior to the event giving rise to the alleged claim.

Further, disclaiming liability occasioned by actual or constructive notice, Westhampton Beach Village Code § 114-3 provides

In the absence of written notice, as required hereinabove, no civil action shall be maintained against the Village of Westhampton Beach, nor shall any civil action be maintained based upon an allegation that such defect, unsafe condition, danger, obstruction or otherwise existed for so long that the same should have been discovered and remedied in the exercise of reasonable care and diligence, nor shall any civil action be maintained based upon an allegation that a Village employee possessed actual notice of such condition, unless written notice is filed with the Village Clerk, as required hereinabove.

Finally, Westhampton Beach Village Code § 114-4 provides “The written notice required by this chapter shall state the exact location of the alleged defect, unsafe condition, dangerous condition, obstruction or otherwise and shall specifically state the exact condition complained of. If this requirement is not met, the notice shall be void and insufficient.”

Prior written notice provisions are always strictly construed (*Gorman v Town of Huntington*, 12 NY3d 275, 279, 879 NYS2d 379 [2009]). A “municipality’s actual or constructive notice of the allegedly defective condition does not satisfy the prior written notice requirement” (*Dutka v Odierno*, 145 AD3d 661, 663, 43 NYS3d 409 [2d Dept 2016]; see *DeVita v Town of Brookhaven*, 128 AD3d 759, 9 NYS3d 115 [2d Dept 2015]). Furthermore, 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 [2d Dept 2015]).

The Court of Appeals has recognized only two exceptions to the prior written notice requirement, namely, where the municipality created the defect through an affirmative act of negligence, or a special use confers a special benefit upon the municipality (see *Yarborough v City of New York*, 10 NY3d 726, 853 NYS2d 261 [2008]; *Amabile v City of Buffalo*, 93 NY2d 471, 693 NYS2d 77 [1999]). Such an

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exception to the prior written notice law requires that the municipality’s negligent act “immediately results in the existence of a dangerous condition” (*Yarborough v City of New York, supra* at 728; *see Gutierrez-Contreras v Vilage of Port Chester*, 172 AD3d 1333, 101 NYS3d 149 [2d Dept 2019]; *Cornish v City of Ithaca*, 149 AD3d 1321, 52 NYS3d 565 [3d Dept 2017]).

The Village failed to establish a prima facie case of entitlement to summary judgment in its favor (*see Levy v Incorporated Vil. of E. Hampton*, 193 AD3d 714, 141 NYS3d 889 [2d Dept 2021]; *see generally Alvarez v Prospect Hosp., supra*). While Ms. Lindtvit’s affidavit demonstrated, prima facie, that the Village received no prior written notice of the alleged defective condition, it failed to establish that it did not create the alleged defective condition (*see Holleran v Incorporated Vil. of Floral Park*, 189 AD3d 1370, 134 NYS3d 795 [2d Dept 2020]). Both plaintiff’s complaint and her bill of particulars contain assertions that the Village created the dangerous condition that was a proximate cause of her alleged injuries. None of the evidence submitted by the Village established, prima facie, that the difference in height between the brick portion and the concrete portion of the subject sidewalk was not present at the time the sidewalk was created. Notably, the current and former employees of the Village deposed in this action had no memory of the sidewalk’s condition at the time of its installation. Nor did the Village submit evidence, such as an affidavit of an expert, opining that one or more of the sidewalk elements raised or subsided thereafter. Mr. Smith testified that the two portions of the subject sidewalk were “[n]ear flush,” but only at some time after plaintiff’s accident– not at the time of plaintiff’s accident, or at the time the sidewalk was installed. The Village having failed to establish a prima facie case, the Court need not consider plaintiff’s papers in opposition (*see Montemurro v Nassau County*, 188 AD3d 871, 136 NYS3d 62 [2d Dept 2020]; *see generally Winegrad v New York Univ. Med. Ctr., supra*).

Accordingly, the motion by the Village for summary judgment dismissing the complaint against it is denied.



Dated: July 25, 2021

David T. Reilly, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION