

<b>Mitchell v Village of Monroe</b>
2021 NY Slip Op 33318(U)
May 12, 2021
Supreme Court, Orange County
Docket Number: Index No. EF001874-2017
Judge: Sandra B. Sciortino
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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

-----X  
PATRICIA MITCHELL

Plaintiff,

-against-

THE VILLAGE OF MONROE and THE  
VILLAGE OF MONROE DEPARTMENT OF  
PUBLIC WORKS,

Defendants.  
-----X

SCIORTINO, J.

**DECISION AND ORDER**

**INDEX NO.: EF001874-2017**

**Motion Date: 3/12/2021**

**Sequence No. 1**

The following papers numbered 1 to 36 were considered in connection with the defendants' application for summary judgment and dismissal of the Complaint:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation (Waye)/Exhibits A-J/ Affidavit (Baxter)/Exhibits 1 - 3	1 - 16
Affirmation in Opposition (Schonberg)/Affidavit (Lovaglio)/ Exhibits A - P	17 - 34
Reply Affirmation (Waye)/Exhibit A	35 - 36

**Background and Procedural History**

This is an action for personal injuries arising out of a trip and fall accident which is alleged to have occurred on August 28, 2016 in on the grassy area abutting the sidewalk on the eastern side of Route 17M in the Village of Monroe. Plaintiff filed a Notice of Claim dated October 21, 2016. A 50-H hearing was conducted on January 16, 2017. Plaintiff commenced this action by the electronic filing of a Summons and Verified Complaint on March 9, 2017. Issue was joined by

service of a Verified Answer on April 18, 2017.

Non-party John C. Moore was deposed on September 12, 2018. Non-party Ernest D. Mabee was deposed on March 16, 2018. Defendant John Linderman, on behalf of defendants The Village of Monroe (hereinafter “the Village”) and the Village of Monroe Department of Public Works (hereinafter “DPW”) was deposed on February 5, 2018.

Note of Issue was filed on October 30, 2020; this motion was timely filed on December 29, 2020.

#### Plaintiff's 50-H Hearing

Plaintiff testified that, at approximately 11:00 a.m., she was walking northbound on a paved sidewalk in Crane Park, on the eastern side of Route 17M. She stepped off the sidewalk with her left foot, intending to walk on the grass. As she stepped onto the grass, she stepped in a depression abutting the sidewalk, twisted her left ankle, and fell onto the sidewalk fracturing her right elbow. Although she did not know why she fell, she remembered seeing a blue marking. Plaintiff returned to the place of the accident two days later with her fiancée, John Moore, to see what caused her fall. Upon returning to the area, she observed a blue marking on the asphalt which appeared to be marking a depression in the grassy area next to the asphalt path. The depression was obscured with grass. She removed the grass in order to take better photographs. She estimated the depth of the hole to be four inches and the length approximately one foot.

#### John Linderman Deposition

Linderman, Supervisor of the Department of Public Works, testified that the DPW is responsible for maintaining the path where the plaintiff fell. At the time of the underlying accident, superintendent Smith was responsible for performing inspections of the area. The DPW maintained

the grass in the area. Prior to the filing of the Notice of Claim in this matter, Linderman had never received notice of a hole in the area.

#### Ernest Mabee Deposition

Mabee, Chief Water Operator, testified that he marked the area of the valve with blue paint in response to a notification from Dig Safe New York, which requires marking of utility lines whenever digging is to occur in an area. That was done approximately two months prior to the underlying accident. Mabee had located the water valve cap with a metal detector; he did not perform any digging. Although the cap itself could not be seen from the photographs shown at the deposition, Mabee indicated the marked depression in the photographs was where a water valve cap was located. The valve cap was last removed for a water main break in 2013, and Mabee replaced the cap when that work was completed. No one was permitted to dig up or remove the cap other than the water department. Mabee had never received a complaint about the subject valve cap.

#### **Motion for Summary Judgment**

Defendants move for summary judgment on the grounds that plaintiff failed to comply with the prior written notice requirement pursuant to New York State Village Law § 6-628 and CPLR § 9804. Arguing that the sidewalk includes the grassy area abutting the sidewalk, the defendants note that prior written notice of the allegedly defective and/or dangerous sidewalk condition was never received. As the Village did not create the alleged defect or hazard and the sidewalk and water cap provided no special use, there is no valid exception to the written notice requirement.

Defendants append the affidavits of Ernest Mabee, Chief Water Operator of the Village's Water Department; John Linderman, Supervisor of the Department of Public Works for the Village; and Ann-Margret Baxter, Village Clerk. Mabee avers he marked the water cap valve in June or July

of 2016. No holes or depressions were made during the “mark out” process, nor were any holes or depressions observed at the time. The mark out had nothing to do with any alleged notice of the claimed unsafe condition. Linderman avers the Village has not performed any excavation or digging where plaintiff allegedly fell for at least five years prior to her fall, and the Village did not create the alleged condition at the subject location. Baxter avers that the Village of Monroe did not receive any written notice pursuant to New York State Village Law Section 6-628 or CPLR 9804 regarding the subject area.

Finally, the defendants state that the Department of Public Works, as a “sub-unit” of the Village, cannot be sued separately from the Village itself.

### **Opposition**

Plaintiff argues prior written notice is not required here since the Village performed inspection and work in the area two months prior to the accident. As the defendants have failed to establish that the area was part of a “sidewalk” within the meaning of the statutes, the Village Law is not applicable. Even if the Village Law was applicable, written notice is not required when the defective condition was created by the municipality through an affirmative act of negligence.

Defendants failed to establish that they did not receive prior written notice. The affidavits upon which defendants rely fail to make the necessary factual statements. Specifically, Baxter’s affidavit leaves open the possibility that the Village received notice which, in her opinion, did not satisfy the notice statutes.

Plaintiff appends the affidavit of Michael Lovaglio, New York State Licensed Water Systems Operator for Grades D, C and 1A. Lovaglio’s affidavit is based on a review of the appended deposition testimony. Lovaglio avers the testimony indicates the valve box was not at an even

elevation at the time of plaintiff's fall. Lovaglio opines the hole was created by members of the Village Water Department or DPW during the mark-out dig. This affirmative act of negligence immediately resulted in the dangerous, defective condition which caused the accident. It is customary and safe practice to raise the valve cap boxes to proper elevation using valve box extensions. The presence of the blue paint indicates that the Village of Monroe was aware of the recessed box and should have been aware of the potential for injury.

Plaintiffs also argue that the defendants have failed to cite relevant authority for the contention the Department of Public Works may not be sued directly.

### Reply

In reply, defendants argue that the written notice statutes apply as the deposition testimony establishes that the alleged hole was in the sidewalk itself. Under the Village Law, written notice is a condition precedent to maintaining an action against a municipality. Ms. Baxter's affidavit establishes that the Village of Monroe had no prior written notice of the alleged defective condition that caused plaintiff's accident. Plaintiff's argument that Baxter, by mentioning the relevant statute, gives a legal opinion is pure conjecture and speculation. Furthermore, plaintiff filed her Note of Issue without seeking to depose Baxter.

A municipality's actual or constructive notice of an alleged condition does not override the statutory requirement of prior written notice. Defendants have established that the alleged defect was not affirmatively created by the Village. Plaintiff's expert opinion is speculative, conclusory, and contains unsubstantiated claims that are insufficient to defeat a motion for summary judgment.

Defendants submit the affidavit of Neil Dwyer, the Mayor of the Village of Monroe. Dwyer avers the Department of Public Works is a department or sub-unit of the Village and has no

independent legal identity.

#### Discussion

“A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact.” (*Nash v Port Wash. Union Free School Dist.*, 83 AD3d 136, 146 [2d Dept 2011], citing, *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]) Where, as here, a locality has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by an improperly maintained street or sidewalk unless it has received written notice of the defect, or an exception to the written notice requirement applies. (*Hannibal v. Incorporated Village of Hempstead*, 110 AD3d 960, 961 [2d Dept. 2013]) “Recognized 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.” (*id.*, citing, *Amabile v. City of Buffalo*, 93 NY2d 471, 474 [1999])

Here, the grassy area adjacent the sidewalk is considered part of the sidewalk. (*Hinton v. Village of Pulaski*, 33 NY3d 931 [2019]; *Gallo v. Town of Hempstead*, 124 AD2d 700 [2d Dept. 1986]; *Zizzo v. City of New York*, 176 AD2d 722 [2d Dept. 1991]) Baxter’s affidavit indicates the Village did not receive any written notice pursuant to New York State Village Law § 6-628 or CPLR 9804 regarding the subject area. Mabee’s affidavit indicates no holes or depressions were made when he marked the around the water valve, nor did he observe any holes or depressions at the time of inspection. No one else was permitted to dig in the area or remove the water valve cap. Linderman’s affidavit indicates the Village has not performed any excavation or digging where plaintiff allegedly fell for at least five years prior to her fall.

The only individuals permitted to dig or remove the valve cap and who would have personal knowledge aver the Village did not create the alleged condition at the subject location. No evidence has been submitted that the sidewalk or grassy area was conferred a special use. The deposition testimony and supporting affidavits submitted by defendants demonstrate that defendants did not have prior written notice of the alleged defective condition as required by NY Village Law § 6-628, nor was the alleged defective condition the result of an affirmative act of negligence. (*Simon v. Incorporated Village of Lynbrook*, 116 AD3d 692 [2d Dept. 2014])

Defendants having made a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish the existence of material issues of fact. (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]) In opposition, the plaintiff has failed to raise an issue of fact sufficient to defeat defendants' *prima facie* showing.

On the basis of the foregoing, defendants application for summary judgment is granted, and the complaint is dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: May 12, 2021  
Goshen, New York

ENTER



HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*