

<b>Seales v GBG Dev. Group, LLC</b>
2021 NY Slip Op 33736(U)
June 30, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 605409-2020
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, JSC**

**INDEX NO.: 605409-2020**

**WILLIAM SEALES,**

**x Cerussi & Gunn, P.C.  
Attorneys for Plaintiff  
300 Garden City Plaza, Suite 308  
Garden City, NY 11530**

**Plaintiff,**

**- against -**

**GBG DEVELOPMENT GROUP, LLC., THE  
INCORPORATED VILLAGE OF BRIGHTWATERS,  
TOWN OF ISLIP,**

**Law Office of Charles F. Harms, Jr.  
Attorneys for  
Defendant/Third Party Plaintiff  
GBG Development Group, LLC  
990 Stewart Avenue, Suite 400  
Garden City, NY 11530**

**Defendants.**

**GBG DEVELOPMENT GROUP, LLC,**

**x Kelly, Rode & Kelly, LLP  
Attorneys for  
Defendant/Third Party Defendant  
The Incorporated Village of Brightwaters  
330 Old Country Road, Suite 305  
Mineola, NY 11501**

**Third Party-Plaintiff,**

**-against-**

**THE INCORPORATED VILLAGE OF  
BRIGHTWATERS and TOWN OF ISLIP,**

**Law Offices of John B. Zollo, P.C.  
Attorneys for  
Defendant/Third Party Defendant  
Town of Islip  
12 Manor Road  
Smithtown, NY 11787**

**Third-Party Defendants.**

**MOTION DATE: 11/30/20  
SUBMITTED: 04/14/21  
MOTION SEQ. NO.: 1-3  
MOTION DEC.: 001 MG  
002 MG  
003 MG; CASEDISP**

Upon the reading and filing of the following papers in this matter: (1) Town of Islip’s Notice of Motion (001) dated October 23, 2020 and supporting papers; (2) Plaintiff’s Affirmation in Opposition (001) dated November 12, 2020 and supporting papers; (3) Village of Brightwaters Notice of Motion (002) dated November 23, 2020 and supporting papers; (4) Town of Islip’s Reply Affirmation (001) dated November 25, 2020; (5) Plaintiff’s Affirmation in Opposition (002) dated January 4, 2021 and supporting papers; (6) Village of Brightwaters Affirmation in Reply (002) dated January 18, 2021; (7) Plaintiff’s Notice of Motion (003) dated February 18, 2021 and supporting papers; (8) Town of Islip’s

Affirmation in Partial Opposition (003) dated March 23, 2021; (9) Village of Brightwaters Affirmation in Opposition (003) dated March 31, 2021; and (10) Plaintiff's Affirmation in Reply (003) dated April 2, 2021 and supporting papers (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that Motion Seq. Nos. 001, 002 and 003 are consolidated for purposes of this determination; and it is

**ORDERED** that defendant/third party defendant Town of Islip's (Islip, or the Town) application to dismiss the plaintiff's amended complaint and the third-party complaint is granted; and it is

**ORDERED** that defendant/third party defendant Village of Brightwaters' (Brightwaters, or the Village) application to dismiss the plaintiff's complaint and the third-party complaint is similarly granted; and it is

**ORDERED** that defendant/third party plaintiff GBG Development Group, LLC's (GBG, LLC) application for an Order granting it summary judgment dismissing the plaintiff's complaint and any counterclaims against it is granted, and the plaintiff's complaint is dismissed.

Plaintiff commenced this action with the filing and service of a summons and complaint on May 25, 2020 seeking money damages for personal injuries allegedly sustained on November 6, 2019 when he tripped and fell in front of the premises located at 201 Orinoco Drive, Village of Brightwaters, Town of Islip, County of Suffolk. Plaintiff asserts in his complaint that he sustained serious injuries when he was caused to trip and fall due to a hazardous condition in the sidewalk in front of the premises, owned by defendant GBG, LLC. On August 17, 2020 GBG, LLC commenced a third-party action against Islip and Brightwaters seeking contribution and indemnification against the third-party defendants.

Islip now moves to dismiss the plaintiff's complaint and the third-party complaint arguing, in the first instance, that plaintiff failed to timely file a notice of claim pursuant to General Municipal Law (GML) §§50-I and 50-e, that plaintiff has failed to state a proper claim pursuant to CPLR 3211(a)(1) and (7), and in the alternative seeks summary judgment pursuant to CPLR 3212. Islip argues, with respect to the motion to dismiss/summary judgment, it does not own, operate, manage, supervise, control or otherwise maintain the subject premises, or the sidewalk appurtenant thereto, located at 201 Orinoco Drive such that liability could be imposed upon the Town. In addition, Islip contends that it never received prior notice of the alleged defect in the sidewalk in front of the premises, thereby failing the condition precedent to imposing liability against the Town pursuant to Town Law §(65)(a)(1) and Code of the Town of Islip §47(a)(3). In support of the motion Islip submits, among other things, the affidavits of Teresa Bogardt, the Executive Assistant to the Town Clerk for the Town of Islip, and Noelle Martin, an Administrative Assistant in the Department of Public Works for the Town of Islip. In addition, Islip has submitted a copy of the pleadings.

Similarly, Brightwaters moves for dismissal of the plaintiff's complaint and the third-party complaint based primarily upon the same grounds as asserted by Islip. In support of the motion the Village submits, among other things, the affidavit of Carol Posimato, the Deputy Village Clerk of Brightwaters, which attests to the fact that the Village did not receive prior written notice of the

alleged defect in the sidewalk and that plaintiff failed to file a notice of claim against the Village.

GBG, LLC has submitted a motion seeking an Order granting it summary judgment and dismissing the plaintiff's complaint and any counterclaims asserted against them. GBG, LLC argues that it did not own, operate or control the front of the subject premises and, therefore, was not obligated to perform any repairs or maintain and inspect the subject sidewalk. In support of its motion GBG, LLC submits, among other things, a copy of the pleadings and copies of tax records showing the payment of taxes to Brightwaters and Islip.

Turning first to Islip's application, on a motion to dismiss a complaint under CPLR 3211(a)(7), the test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2010]). 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 (*Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, 799 NYS2d 170, 175 [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]). 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]).

The Code of the Town of Islip (the Code) provides, in pertinent part at §47A-3,

No civil action shall be maintained against the Town of Islip or any of its employees for damages or injuries to persons or property sustained by reason of any highway, street, ... sidewalk ... or other property owned or maintained by the Town of Islip being defective, out of repair, unsafe, dangerous or obstructed unless written notice of such defective, out of repair, unsafe, dangerous or obstructed condition of such highway, street, ... sidewalk ... or other property was actually given to the Town Clerk or Commissioner of Public Works, and 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 ...

Islip has annexed to their motion papers the affidavits of Teresa Bogardt, the Executive Assistant to the Town Clerk and Noelle Martin, an Administrative Assistant in the Department of Public Works. Those affidavits indicate that Islip did not own, maintain or operate the sidewalk in front of the subject premises. In addition, the affidavits state that the Town never received a notice of claim on behalf of the plaintiff in violation of GML §50. Finally, after searches of their respective records, neither search revealed evidence of prior written notice to Islip of the alleged defective condition of the sidewalk adjacent to 201 Orinoco Drive.

With respect to the motion by Brightwaters, similar to the arguments by Islip, the Village maintains that it never received prior written notice of the alleged defect in the sidewalk as required by Village Law §6-628 and Civil Practice Law and Rules Section 9804. The New York Consolidated Laws §6-628 states 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... unless written notice of the defective, unsafe, dangerous or obstructed condition... relating to the particular place, was actually given 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.”

Here, the Village has submitted the affidavit of Village Deputy Clerk, Carol Posimato, which states, in sum and substance, that the Village did not receive any prior written notice of the condition alleged. Additionally, a review of the records created and held in the ordinary course of business by the Village did not reveal any work orders, notices of alleged defective or dangerous conditions, or repair orders for the Village in the location of the sidewalk/apron at 201 Orinoco Drive, Brightwaters, New York.

As to the two exceptions in the prior written notice statutes of the Town and Village, the Court finds that the defendants have sufficiently demonstrated that neither the Town nor Village created the allegedly defective condition through an affirmative act of their own or that a special use of the sidewalk conferred a special benefit upon them. The Court further finds that plaintiff has failed to raise a triable issue of fact against the municipal defendants. Accordingly, plaintiff's claims against the Town and Village, as well as any cross-claims asserted against them, are dismissed.

Turning to the plaintiff's claims against GBG, LLC, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property (*see Matter of K.G. v City of New York*, 186 AD3d 1366, 128 NYS3d 900 [2d Dept 2020]). An abutting landowner will be liable to a pedestrian injured by a defect in a public sidewalk only when the owner either created the condition or caused the defect to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner and expressly makes the owner liable for injuries caused by a breach of that duty (*see Hanus v Long Is. Rail Rd.*, 186 AD3d 679, 129 NYS3d 466 [2d Dept 2020]; *Finocchiaro v Town of Islip*, 164 AD3d 871, 79 NYS3d 919 [2d Dept 2018]). Special use occurs where a landowner whose property abuts a public street or sidewalk derives a special benefit unrelated to the public use, and is therefore required to

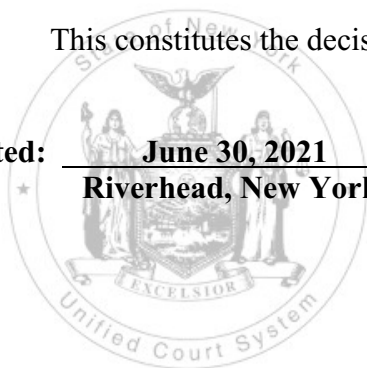
maintain a portion of that property (*see Poirier v City of Schenectady*, 85 NY2d 310, 624 NYS2d 555 [1995]). Special use is a use different from the normal intended use of the public way (*see Loiaconi v Village of Tarrytown*, 36 AD3d 864, 829 NYS2d 191 [2d Dept 2007]).

Here, there is no allegation that there is a statute which expressly makes GBG, LLC liable for injuries on the abutting sidewalk. Moreover, GBG, LLC, through the affidavit of Baldo Petralia, one of the owners of GBG, LLC, this defendant established, prima facie, that they did not create the dangerous condition and did not make special use of the sidewalk abutting their property. In opposition, plaintiff failed to raise a triable issue of fact.

Based on the sum of the foregoing, the defendants' motions are granted and plaintiff's complaint is dismissed.

This constitutes the decision and Order of the Court.

Dated: June 30, 2021  
Riverhead, New York



**DAVID T. REILLY**  
**JUSTICE OF THE SUPREME COURT**

  X   FINAL DISPOSITION             NON-FINAL DISPOSITION