At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Courthouse, in the City of Binghamton, New York on the 21st day of May 2021

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF BROOME

LYNN FAUGHNAN,

Plaintiff, **DECISION AND ORDER**

vs. **Index No. EFCA 2019002729**

VILLAGE OF JOHNSON CITY, UNITED HEALTH SERVICES HOSPITALS, INC., U.H.S., WILSON MEDICAL CENTER, SETHI, INC., KHALID SETHI, M.D., INDIVIDUALLY and as CHIEF EXECUTIE OFFICER of SETHI, INC.,

Defendants.

APPEARANCES:

Ronald R. Benjamin, Esq.
Law Office of Ronald R. Benjamin
Attorneys for Plaintiff
126 Riverside Drive
Binghamton, NY 13905

Carol Poles, Esq.
O'Connor, O'Connor, Bresee & First, P.C.
Attorneys for UHS Defendants
20 Corporate Woods Boulevard
Albany, NY 12211

Paul Mullin, Esq.
Sugarman Law Firm, LLP
Attorneys for Defendant Village
211 West Jefferson Street
Syracuse, NY 13202

HON. JEFFREY A. TAIT, J.S.C.

This matter is before the court on the motion of the defendant Village of Johnson City (Village) requesting summary judgment dismissing the complaint against it and denying the cross motion of the plaintiff Lynn Faughnan. Ms. Faughnan opposes the Village's motion for summary judgment and cross moves for leave to permit discovery of information necessary to oppose the motion for summary judgment.

The Motion and Cross Motion

In support of the motion, the Village submits the affirmation of its counsel with exhibits, the affidavit of its Village Clerk with exhibits, the affidavit of its Director of Public Services with an exhibit, and a memorandum of law.

In opposition to the motion and in support of the cross motion, Ms. Faughnan submits the affirmation of her counsel with exhibits and a memorandum of law.

In response, the Village submits the reply affirmation of its counsel and a reply memorandum of law.

The action

Ms. Faughnan commenced this action on August 30, 2019 by filing a summons and complaint seeking recovery for injuries she alleges she sustained due to a fall caused by a water system mechanism that was not level with the surrounding ground.

Law

The Village seeks summary judgment based on its lack of any prior notice of the claimed defect of the mechanism which Ms. Faughnan alleges caused her fall and injuries.

Village Law § 6-628 provides:

> "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 sustained solely in consequence of the existence of snow or ice upon any sidewalk, crosswalk, street, highway, bridge or culvert unless written notice of the defective, unsafe, dangerous or obstructed condition or of the existence of the snow or ice, 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 to cause the snow or ice to be removed, or the place otherwise made reasonably safe."

The Village has also enacted a code provision which states:

> "No civil action shall be maintained against the village for damages or injuries to person or property sustained in consequence of any sidewalk being defective, out of repair, unsafe, dangerous or obstructed unless written notice of the defective condition was actually given to the Village Clerk and there was a failure or neglect after such notice to repair or remove the defect."

The law is clear that where a municipality "created the defect or hazard through an affirmative act of negligence," such notice is not required as a condition for maintaining an action for personal injuries (*Groninger v. Village of Mamaroneck*, 17 NY3d 125, 127-128 [2011]).

Analysis

It is clear the applicable statute and code provision prevent liability in situations such as this if there is no prior written notice of the claimed defect. It is also clear the Village did not have prior written notice of the defect alleged to have caused Ms. Faughnan's fall.

For those reasons, this action is subject to dismissal unless Ms. Faughnan can establish there are disputed issues of material fact regarding the application of one of the exceptions to the prior written notice law.

In this instance, it is only if there is evidence the Village may have created the dangerous condition that an exception might apply. Here, the allegedly dangerous condition is the water mechanism's protrusion above ground level. This protrusion could have occurred by the natural settling of the ground over many months or years.

Ms. Faughnan asserts there may have been affirmative negligence that created the condition based on the condition of the water mechanism. She asserts the mechanism shows signs that it was hit and damaged.

The Village states that it repaired the water valve after it was notified of Ms. Faughnan's injury. The pertinent Work Order from December 2018 contains the following notation:

> "Located curb box, appears to have been hit during snow removal. Was bent from being hit causing it to stick up in the air. Part of the cap was broken off and jagged. We cut off the top about 5 inches below dirt, and gravel. Put an extension on along with a new cap – it is now flush with the ground – Ian, Phil, Tim I."

Ms. Faughnan's counsel submits Google street view pictures of the area. He asserts they show the Village was performing work in the area, as they show two sawhorses with the initials JC DPW.[1] He states these images are from July 2018, which was 3 to 4 months before Ms. Faughnan's injury on November 28, 2018.

As the record is clear the Village did not have prior written notice of the defect, the issue is whether the Village created the condition that caused Ms. Faughnan's injury. Based on the foregoing, Ms. Faughnan has raised sufficient potential fact disputes to avoid summary

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1 DPW meaning Department of Public Works.

judgment at this time and to permit further discovery on the issue of whether the Village created the condition through an affirmative act of negligence.

It is noteworthy that the condition by which natural settling of an object or the surrounding ground occurs is not deemed an affirmative act of negligence. Where an alleged defect exists by the settling of the object or surrounding ground, the prior written notice of defect provisions apply and control (*Murphy v. County of Westchester*, 228 AD2d 970 [3d Dept 1996]).

Conclusion

In light of the foregoing, the Village's motion for summary judgment is denied and Ms. Faughnan's cross motion is granted.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: May 25, 2021
Binghamton, New York

HON. JEFFREY A. TAIT
Supreme Court Justice