To commence the statutory time period 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 WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

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LINDSAY LA FLEUR,

Plaintiff,

– against –

MARC JANOWITZ, TAL JANOWITZ and VILLAGE OF BRIARCLIFF MANOR,

Defendant.

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Index No. 56237/2020

Motion Seq. 2 & 3

DECISION & ORDER

In an action to recover damages for personal injuries, (1) the defendants MARC JANOWITZ and TAL JANOWITZ move for summary judgment dismissing the complaint and any and all cross-claims, pursuant to CPLR 3212; and (2) the defendant VILLAGE OF BRIARCLIFF MANOR moves for summary judgment dismissing the complaint and all cross-claims against it, pursuant to CPLR 3212:

Papers Considered

Motion Seq. 1 NYSCEF DOC NO. 27-37; 60-63; 67-74; 86; 88

1. Notice of Motion/Statement of Chikodi E. Emerenini, Esq. of undisputed facts/Affirmation of Chikodi E. Emerenini, Esq./Exhibits A-H
2. Affirmation of Cristina A. Soller, Esq. in opposition/Exhibits A-B/Response to statement of undisputed facts
3. Affirmation of Eli Wagschal, Esq. in opposition/Exhibits 1-4/Response to statement of material facts/Certification of Eli Wagschal, Esq./Certificate of service
4. Reply Affirmation of Chikodi E. Emerenini, Esq. (NYSCEF Doc No. 86)
5. Reply Affirmation of Chikodi E. Emerenini, Esq. (NYSCEF Doc No. 88)

Motion Seq. 2 NYSCEF DOC NO. 39-55; 57-59; 66; 75-83; 87

1. Notice of Motion/Affirmation of Cristina A. Soller, Esq./Statement of material facts/Memorandum of law/Exhibits M
2. Statement of material facts/Affirmation of Chikodi E. Emerenini, Esq. in opposition/Exhibit A
3. Affirmation of Cristina A. Soller in reply (NYSCEF Doc No. 66)

4. Affirmation of Eli Wagschal, Esq. in opposition/Exhibits 1-5/Response to statement of material facts/Certification of Eli Wagschal, Esq./Certificate of service
5. Affirmation of Cristina A. Soller in reply (NYSCEF Doc No. 87)

Factual and Procedural Background

The instant action was commenced with the filing of the summons and complaint on June 16, 2020. Defendant Village of Briarcliff Manor (hereinafter "Briarcliff") joined issue with the filing of its answer on July 23, 2020. Defendants MARC JANOWITZ, TAL JANOWITZ (hereinafter referred to as "Janowitz defendants") joined issue with the filing of their answer on August 11, 2020.

The plaintiff sustained injuries on June 2, 2019 when she was running on the sidewalk adjacent to the premises located at 51 Larch Road, Briarcliff Manor, New York, and caused to fall due to an alleged dangerous, defective and unsafe condition that existed on the sidewalk. The premises was owned by defendants MARC JANOWITZ, TAL JANOWITZ (hereinafter referred to as "Janowitz defendants").

The plaintiff was familiar with the condition of the subject sidewalk prior to the accident at issue. At the time of her fall, it was bright out. The plaintiff was looking straight ahead, so she did not see the sidewalk at that time, running at a normal pace. The plaintiff stubbed the front of her left foot and started falling toward her left, so she tucked her left arm underneath and all of her weight landed on top of her left wrist. The plaintiff knows the adjacent property owners and they had complained to both the plaintiff and Briarcliff about the sidewalk on numerous occasions, specifically that when it rains, the water rushes down the road and erodes the curb and sidewalk. The Janowitz defendants made repairs to the subject sidewalk more than once prior to the plaintiff's accident. Defendant MARC JANOWITZ sent an e-mail to Superintendent of Public Works, Edward Torhan, on April 1, 2019 with subject "51 Larch Rd Street Drainage problem" and attached a photograph indicating where the "sidewalk has eroded over time."

In support of their motion, the Janowitz defendants claim that they did not have any duty to repair and/or maintain the subject sidewalk. The Janowitz defendants argue that the sidewalk was not on their property, but in the public right-of-way, and that the ordinance in effect on the date of the plaintiff's accident, Chapter 186 Street and Sidewalk, did not place a duty on the adjacent homeowners to repair or maintain the sidewalk conditions, other than removing snow and ice. The Janowitz defendants submit an affidavit of Timothy Joganich, MS, CHFP, who affirmed, to a reasonable degree of scientific certainty, that based on the Westchester Tax Map, the sidewalk at issue was located within the public right-of-way and not on the property owned by the Janowitz defendants. Mr. Joganich also swears that the ordinance in effect on the date of the plaintiff's accident at issue, Chapter 186 Street and Sidewalk, did not indicate that the homeowner was responsible for repair of the sidewalk. The Janowitz defendants also argue that the plaintiff did not properly identify the location of her fall.

The Janowitz defendants' motion is opposed by defendant Briarcliff and the plaintiffs. Briarcliff and the plaintiff argue that there is a question of fact as to whether the Janowitz defendants caused and/or created the alleged defective condition, as plaintiff Mr. Janowitz made repairs to the subject sidewalk on more than one occasion between 2013 and 2019. Plaintiff further argues that since defendant Mr. Janowitz undertook the sidewalk repairs, he had a duty to repair the sidewalk properly. Briarcliff and plaintiff also argue that the Janowitz defendants derived a special use from the sidewalk, including access to the driveway and walkway leading to their premises, and therefore are responsible for keeping the sidewalk in a reasonably safe condition. In addition, plaintiff argues that she did identify the location of her fall and that the Janowitz defendants failed to meet their burden to show that the defect in the sidewalk was trivial.

In support of its motion, defendant Briarcliff argues that it did not have prior written notice of the alleged defective condition, the homeowner was responsible for maintaining and repairing the subject sidewalk, the plaintiff cannot identify the specific accident location and was the proximate cause of her accident, and the alleged defect was trivial in nature. In support, Briarcliff argues that New York Village Law 6-628 requires that it cannot be liable for personal injuries resulting from an alleged defective condition unless prior written notice of the alleged condition was given to the village clerk and there was a failure to neglect within a reasonable time after the receipt of such notice to repair or remove the defect. Briarcliff submits the affidavit of Christine Dennett, Clerk for the Village of Briarcliff Manor, who swears that it is her duty to maintain all prior written notice complaints and Notices of Claim as to the roadways and sidewalks. Ms. Dennett swears that she conducted a search of any prior written notices and Notices of Claim pertaining to the subject sidewalk for the past twenty years up to and including June 2, 2019, and that her search revealed that Briarcliff did not receive prior written notice or any Notices of Claim regarding the subject sidewalk prior to and including the date of the plaintiff's accident on June 2, 2019. Ms. Dennett also swears that she never received an email or other correspondence regarding the subject sidewalk.

In opposition, the Janowitz defendants argue that Ms. Dennett's affidavit is insufficient to establish lack of written notice as it fails to provide the necessary information to adequately establish what was actually searched, the manner of the search, how Briarcliff stores and keeps records, specifically by building address, street name or another fashion, and to what extent the records are filed to establish prior written notice. In addition, the Janowitz defendants argue that they had no statutory duty to maintain the sidewalk abutting their premises.

Plaintiff, in opposition, argues that defendant Briarcliff had prior written notice of the alleged defective condition and liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous or defective conditions to public sidewalks is placed on the municipality, not the abutting landowner. Plaintiff argues that the Village Clerk received actual notice by virtue of her status as the custodiam of all Village records and that the e-mails in the possession of the Superintendent of Public Works are within the custody of the Village Clerk. Plaintiff also argues that the Village's website states "All residents should report potholes and street light problems to Dept. of Public Works.", and

this would require the Clerk to search the records of DPW to determine whether it has received prior written notice. Plaintiff argues that Briarcliff's longstanding policy of not maintaining its sidewalks does not constitute a statute or ordinance, placing its obligation to maintain the sidewalk on the owner. Plaintiff also argues that she did identify the cause and location of her trip and fall, and defendants failed to meet their burden of proof to show the defect was trivial.

Discussion

A party seeking summary judgment has the burden of tendering evidentiary proof in admissible form to demonstrate the absence of material issues of fact (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In determining a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party (*Boulos v Lerner-Harrington*, 124 A.D.3d 709, 709 [2d Dept 2015]). Where the moving party establishes prima facie entitlement to judgment as a matter of law, the burden then shifts to the opposing party to demonstrate that genuine issues of fact exist to preclude summary judgment (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562-563 [1980]).

I. The Janowitz Defendants Motion for Summary Judgment

Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner (*Hausser v Giunta*, 88 NY2d 449, 452-453, 669 NE2d 470, 646 NYS2d 490 [1996]; *see Morelli v Starbucks Corp.*, 107 AD3d 963, 968 NYS2d 542 [2013]; *Khaimova v City of New York*, 95 AD3d 1280, 1281, 945 NYS2d 710 [2012]). An abutting owner or lessee will be liable to a pedestrian injured by a dangerous condition on a public sidewalk only when the owner or lessee either created the condition or caused the condition to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner or the lessee and expressly makes the owner or the lessee liable for injuries caused by a breach of that duty (*Maya v Town of Hempstead*, 127 A.D.3d 1146, 1147 [2d Dept 2015]).

Here, the Janowitz defendants have established their prima facie entitlement to judgment as a matter of law. It is undisputed that, at the time of the plaintiff's accident at issue, Briarcliff did not have a statute or ordinance that placed an obligation on the owner or the lessee to maintain the sidewalk and expressly made the owner or lessee liable for injuries caused by a breach of that duty.

In opposition, plaintiff argues that there is testimony that the Janowitz defendants had repairs done to the subject sidewalk. Notably, however, plaintiff does not provide any evidentiary support or expert testimony to show that the repairs made were negligent and that the negligent repairs were a proximate cause of the plaintiff's injuries. As such, this is merely speculative and insufficient to raise a triable issue of fact as to whether the Janowitz defendants made a negligent repair at the location where the plaintiff fell, and

that the negligent repair was a proximate cause of the plaintiff's fall (*Ciavarelli v Town of Islip*, 67 AD3d 623, 624 [2d Dep 2009]).

An abutting owner or occupant may be liable to a pedestrian passing on a public sidewalk if they caused the defect to occur because of some special use of the sidewalk (*Benenati v City of New York,* 282 AD2d 418, 419 [2d Dept 2001]; *see also Kaufman v Silver,* 90 NY2d 204 [1997]). In order to find an abutting owner responsible for a defect based upon a special use of the public way, there must be evidence that the defect was caused by the special use or that the use contributed to the condition (*Benenati* at 419*).* Where a sidewalk is adjacent to but not part of the area used as a driveway, the plaintiff bears the burden of proof on a motion for summary judgment of showing that the special use of the sidewalk contributed to the defect (*Adorno v Carty,* 23 A.D.3d 590, 591 [2d Dept 2005]). However, if the defect is in the portion of the sidewalk used as a driveway, the abutting landowner, on a motion for summary judgment, bears the burden of establishing that he or she did nothing to either create the defective condition or cause the condition through' the special use of the property as a driveway (*id.*).

In this case there is insufficient evidence that the Janowitz defendants made any special use of the sidewalk. The photographs submitted do not show, and it is not argued, that the area of the sidewalk where the alleged defect that allegedly caused the plaintiff's fall was part of the driveway, and plaintiff has failed to show that a special use of the sidewalk contributed to the defect (*Jackson v Thomas*, 35 A.D.3d 666, 667-668 [2d Dept 2006]).

II. Defendant Briarcliff's Motion for Summary Judgment

New York Village Code 6-628 mandates, in relevant 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 . . . 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 . . .

NY CLS Vill § 6-628

Defendant Briarcliff has made a prima facie showing that it did not receive prior written notice. The affidavit of an official charged with the responsibility of keeping an indexed record of all notices of defective conditions received by [a town] is sufficient to establish that no prior written notice was filed" (*Scafidi v. Town of Islip*, 34 A.D.3d 669, 669 [2d Dept 2006]). Here, the Village Clerk's submitted affidavit sufficiently establishes that she maintains the records and performed a search of same, which revealed no prior written notice of the alleged defective condition of the sidewalk at issue (*Beiner v Village*

of Scarsdale, 149 AD3d 679, 680 [2d Dept 2017]). In opposition, the homeowner defendants and plaintiff failed to raise a triable issue of fact.

The Janowitz defendants' and plaintiff's argument that the affidavit of the Village Clerk, Ms. Dennett, fails to establish that Briarcliff did not receive prior notice of the defective condition at issue is misguided. The Janowitz defendants rely on *Betz v Town of Huntington*, however, that case is distinguishable as the Second Department found that the deposition testimony of the town's deputy director of Department of General Services and an affidavit from its deputy comptroller were insufficient as "neither of those individuals averred that they had specifically searched the records maintained by the Town Clerk and the Town Superintendent of Highways to determine whether the defendant had prior written notice of the defect of at issue." (106 AD3d 1041, 1042 [2d Dept 2013]).

The cases relied on by plaintiff are likewise distinguishable as in *Ortiz v Town of Islip*, the Town submitted an affidavit of an administrative aid for the Department of Public Works and the deposition transcript of a Town representative, both of whom failed to state that the records of the Town Clerk were searched (175 AD3d 699, 700 [2d Dept 2019]). *Schtz-Prepscius v Incorporated Vil. of Port Jefferson* involves the limited circumstances under which a municipality may be estopped from utilizing the defense that written notice of a defective condition was not sent to the statutory designee, which is not being argued in the instant motions (51 AD3d 657, 658 [2d Dept 2008]). Plaintiff's further argument, unsupported by any case law, that the e-mails of the Superintendent of Public Works are within the custody of the Village Clerk, while creative, is flawed. In addition, actual notice of the alleged hazardous condition does not override the statutory requirement of prior written notice of a sidewalk defect (*Velho v Village of Sleepy Hollow*, 119 A.D.3d 551, 552 [2d Dept 2014]).

Accordingly, it is hereby

ORDERED that motion of the defendants MARC JANOWITZ and TAL JANOWITZ for summary judgment dismissing the complaint and any and all cross-claims, pursuant to CPLR 3212, is GRANTED (motion seq. 2); the motion of the defendant VILLAGE OF BRIARCLIFF MANOR for summary judgment dismissing the complaint and all cross-claims against it, pursuant to CPLR 3212, is GRANTED (motion seq. 3); and the complaint is dismissed in its entirety.

Dated: White Plains, New York
March 4, 2022

HON. WILLIAM J. GIACOMO, J.S.C.