At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 27th day of January 2023.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT: COUNTY OF BROOME

CHERYL CLUTE,

Plaintiff,

vs.

TOWN OF LISLE,

Defendant.

DECISION AND ORDER

Index No. EFCA2020002502

APPEARANCES:

Counsel for Plaintiff:

Stanley Law Office
BY: JAMIE RICHARDS, ESQ.
215 Burnett Ave
Syracuse, NY 13203

Counsel for Defendant:

Coughlin & Gerhart, LLP
BY: SAMUEL M. BLAKELY, ESQ.
PO Box 2039
Binghamton, NY 13902

EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court on the motion of Defendant Town of Lisle ("Defendant" or "Town") for summary judgment dismissing the Complaint of Plaintiff Cheryl Clute ("Plaintiff" or "Clute"). Oral argument was conducted and the attorneys for both parties were present. After due deliberation, this constitutes the Court's Decision and Order.[1]

BACKGROUND FACTS

This case arises out of a slip and fall on snow that occurred on December 19, 2019 at the Town of Lisle Highway Department Building located on Route 79 in the Town of Lisle. Plaintiff, a school bus driver, was delivering cookies to Town employees, as she had done seasonally for over ten years. Unfortunately, on this occasion, she slipped and fell injuring her left lower leg and foot.

Plaintiff filed a Notice of Claim with the Town on March 10, 2022. Plaintiff commenced this action by the filing of a Summons and Verified Complaint on December 3, 2020 alleging negligence and a violation of the New York State Building Code. Defendant filed a Verified Answer with Affirmative Defenses on March 2, 2021. Thereafter, the parties conducted discovery, including depositions of the two witnesses to this accident- Plaintiff and Town Highway Superintendent Mitchell Quail.

Defendant filed this motion on December 20, 2022. In support of its motion, Defendant submitted an affidavit from Brenda Tillotson, the Town Clerk for the Town of Lisle; an affidavit from Mr. Quail with Exhibit "A"; an attorney affidavit from Samuel M. Blakely, Esq. with Exhibits "A" to "E"; and Memorandum of Law. Defendant filed a supplemental attorney affirmation attaching the Town of Lisle's "prior written notice" law. Plaintiff filed opposition papers to the motion and included an Affirmation of Jamie Richards, Esq., with Exhibit "A" to "C" and a Memorandum of Law in Opposition. Defendant filed a reply affidavit.

Defendant contends that it is not liable because it did not have any notice, written or otherwise, of any snow, ice or defect, and secondly, that the Plaintiff fell in a grassy area which the Defendant had no obligation to clear. Plaintiff argues that questions of fact exist as to

[1] All the papers filed in connection with the motion are included in the NYSCEF electronic case file, and have been considered by the Court.

whether Defendant created the dangerous condition and whether the prior written notice statute applied since this area was not for public use.

LEGAL DISCUSSION AND ANALYSIS

When seeking summary judgment, "the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact." *Lacasse v. Sorbello*, 121 AD3d 1241, 1241 (3rd Dept 2014) *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986) and *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (other citation omitted); *see Amedure v. Standard Furniture Co.*, 125 AD2d 170 (3rd Dept. 1987); *Bulger v. Tri-Town Agency, Inc.*, 148 AD2d 44 (3rd Dept. 1989), *app dismissed* 75 NY2d 808 (1990). Such evidence must be tendered in admissible form. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 (1979). Once this obligation is met, the burden shifts to the respondent to establish that a material issue of fact exists. *Dugan v. Sprung*, 280 AD2d 736 (3rd Dept. 2001); *Sheppard-Mobley v. King*, 10 AD3d 70, 74 (2nd Dept. 2004) *aff'd as mod.* 4 NY3d 627 (2005); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853. "When faced with a motion for summary judgment, a court's task is issue finding rather than issue determination *(see, Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]) and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact." *Boston v. Dunham,* 274 AD2d 708, 709 (3rd Dept. 2000) (citation omitted). The motion "should be denied if any significant doubt exists as to whether a material factual issue is present or even if it is arguable that such an issue exists." *Haner v. De Vito*, 152 AD2d 896, 896 (3rd Dept. 1989) (citation omitted); *Lacasse v. Sorbello*, 121 AD3d 1241; *Asabor v. Archdiocese of N.Y.*, 102 AD3d 524 (1st Dept. 2013). It "is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact." *Vega v. Restani Constr. Corp.*, 18 NY3d 499, 505 (2012) (citation omitted).

"[A] municipality which has enacted a prior written notice statute is not subject to liability for personal injury resulting from an improperly maintained sidewalk unless it received prior written notice of the condition, the accident was proximately caused by an affirmative act

of negligence or a special use confers a benefit on the municipality." *Miller v. City of Albany*, 278 AD2d 647, 648 (3rd Dept. 2000), *citing Amabile v. City of Buffalo*, 93 NY2d 471 (1999) (other citations omitted); *Harvish v. City of Saratoga Springs*, 172 AD3d 1503 (3rd Dept. 2019); *Cornish v. City of Ithaca*, 149 AD3d 1321 (3rd Dept. 2017). The exception for an affirmative act of negligence "is limited to work by the [municipality] that immediately results in the existence of a dangerous condition." *Yarborough v. City of New York*, 10 NY3d 726, 728 (2008), *quoting Oboler v. City of New York*, 8 NY3d 888, 889 (2007); *Chance v. County of Ulster*, 144 AD3d 1257 (3rd Dept. 2016); *see, Hubbard v. County of Madison*, 93 AD3d 939 (3rd Dept. 2012).

The Town of Lisle has adopted a prior written notice statute that provides:

> [N]o ... action shall be maintained for damages or injuries to persons or property sustained solely in consequence of the existence of snow or ice upon any highway, bridge, sidewalk, curb, culvert or any other property owned by the Town... unless written notice thereof, specifying the particular place and condition, was actually given to the Town Clerk of the Town of Lisle or the Superintendent of Highways of the Town of Lisle and there was failure or neglect to cause such snow or ice to be removed or to make the place otherwise reasonably safe within a reasonable time after the receipt of such notice.

Town of Lisle, NY, Local Law of the Year 2017 § 4(A).

Here, Defendant submitted an affidavit from the Town Clerk stating that she had conducted a search of the Town's record and concluded that the Town did not "receive any written notice of any snow, ice, or other slippery defect being present at the Town of Lisle Highway Department building... on December 19, 2019 or in the sixty (60) days preceding December 19, 2019." Defendant also submitted an affidavit and deposition testimony from Mr. Quail wherein he also confirmed that he had not been provided any notice of ice or snow on the walkway.

Plaintiff offered no evidence to raise a question as to Defendant's lack of prior written notice of any defect and accordingly, "the burden shifts to the plaintiff to raise issues of fact as to the applicability of an exception to the written notice requirement." *Chance v. County of Ulster*, 144 AD3d at 1258-1259 (citations omitted); *Harvish v. City of Saratoga Springs*, 172 AD3d 1503. Plaintiff argues that her fall was the result of an affirmative act of negligence by the Town.

Clute testified that around Christmas, she and other bus drivers would bake cookies to give to Town employees. She arrived at the Town of Lisle Highway Department Building around 8:40 am. Although it had snowed earlier, it was not snowing at the time she got there.

There are two doors to the building and she went to the door she had always used when delivering cookies. She described it as the front door. She went across the pavement and in front of another parked car. She stepped from the pavement of the parking lot to a cement pad leading to the door. As she stepped on the cement pad, she slipped on ice and fell. She stated that she did not see any ice because it was covered with snow. Around the same time, Mr. Quail was coming out because he had heard Clute's car. Quail told her that they do not maintain that entrance in the winter, but Clute testified that there were no signs indicating that the entrance was closed.

Quail also testified. He is the Town Highway Superintendent and his office is located near where this fall occurred. He stated that door where Clute fell is for employees only and has a sign indicating to use the other door. The employees would be responsible for clearing snow and ice from that entrance, but that it generally was not maintained because that door was not used in the winter. Although it is the front door because it faces the road, the public entrance is actually the side door.

On this morning, Quail called in the plowing crew to perform snow removal. Quail arrived at around 3:30 am, prior to the other employees, and he plowed the snow that had fallen in the parking lot and cleared the public entrance to the building. The other employees arrived and went out with the snowplows around 4:30 am while Quail remained at the building. He heard Clute's vehicle and looked out his window just before she fell. He testified that she was walking on a grassy area and not the blacktopped parking lot.

The Town urges this Court to dismiss Plaintiff's Complaint because the Town did not receive any prior written notice of the condition. "The purpose of a prior written notice provision is to place a municipality on notice that there is a defective condition on publicly-owned property which, if left unattended, could result in injury. This ensures that a municipality, which is not expected to be cognizant of every crack or defect within its borders, will not be held responsible for injury from such defect unless given an opportunity to repair it. The policy behind this rule is to limit a municipality's duty of care over its streets and sidewalks 'by imposing liability only for those defects or hazardous conditions which its officials have been actually notified exist at a specified location.'" *Gorman v. Town of Huntington*, 12 NY3d 275, 279 (2009), *quoting Poirier v. City of Schenectady*, 85 NY2d 310, 314 (1995). Unlike the situations which the rule is designed to address- a municipality's inability to be aware of all

defects- this case presents a situation where one of the people to whom notice was to be given (the Town Highway Superintendent) actually saw the condition and performed snow removal activities only 4 to 5 hours prior to the Plaintiff's fall. "Failure to comply with the 'notice' statute is excused 'when a municipality has or should have knowledge of a defective or dangerous condition because it either has inspected or is performing work upon the subject area shortly before the accident.'" *Giganti v. Hempstead*, 186 AD2d 627, 628 (2nd Dept. 1992), *quoting Klimek v. Town of Ghent*, 114 AD2d 614, 615 (3rd Dept. 1985) (other citations omitted); *Brzytwa-Wojdat v. Town of Rockford*, 256 AD2d 873 (3rd Dept. 1998); *cf. Mitchell v. Town of Fowler*, 231 AD2d 170 (3rd Dept. 1997) (Town's general survey and review of all Town roads for the purpose of prioritizing work projects is not a legal substitute for prior written notice). Quail was performing snow removal activities in the area a few hours before Plaintiff's fall. Whether Quail actually created the condition by not clearing the snow adequately or allowed it to remain by not clearing the cement pad, he was certainly in a position to be aware of the condition. His inspection was of the slippery conditions on this one parcel where he had his office, not of all the roads and parking lots in the Town for some future work activities.

The purpose of the prior written notice rule is not advanced in any reasonable manner by requiring written notice to the Town of a condition existing on the property of its own Highway Department, when the Highway Superintendent had himself cleared the snow and cannot claim to be unaware of the potential for slippery conditions. The timing of the fall just 4 to 5 hours after the snow removal is also sufficiently immediate to come within the exception to the prior written notice rule (i.e. the alleged affirmative acts of negligence immediately resulted in the dangerous condition). Where there has been considerable time that has elapsed after the alleged affirmative act of negligence, sometimes years, the municipality cannot be expected to engage in ongoing monitoring of the condition and be aware of any deterioration. *See, O'Brien v. City of Schenectady*, 26 AD3d 655 (3rd Dept. 2006); *see also Farnsworth v. Village of Potsdam*, 228 AD2d 79 (3rd Dept. 1979) (inspection done six or seven months prior to accident does not fit within the exception). However, here the alleged affirmative acts of negligence were to eliminate the exact dangerous slippery condition that caused Plaintiff's injuries only a few hours later. Under these facts, Plaintiff has raised a triable question as to the applicability of one of the exceptions to the prior written notice requirement.

Defendant also argues that regardless of the lack of prior written notice, it had no duty to Plaintiff because she fell on the grassy area and Defendant had no obligation to clear the grass of snow or ice. However, Plaintiff's testimony was that she slipped on the cement pad. The conflicting testimony as to where the Plaintiff fell raises a clear question of fact precluding summary judgment. The Court cannot make credibility determinations on a motion to for summary judgment.

Defendant also claims that this was not a public entrance and was not maintained in the winter months. Therefore, persons were directed by some sign to use the other door. The adequacy of any notice to prevent a member of the public from using the front door also presents a question of fact precluding summary judgment. Moreover, one would need to approach the building to see the sign. It is in approaching the building that this accident occurred.

CONCLUSION

Based on the foregoing discussion, it is hereby

ORDERED, that Defendant's motion for summary judgment dismissing the Plaintiff's Complaint is DENIED; and it is further

ORDERED, that the attorneys are directed to appear for a pre-trial conference on **MAY 8, 2023 AT 2:30 PM TO BE CONDUCTED BY MICROSOFT TEAMS.**

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: March 30, 2023
Binghamton, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice