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SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA

JUSTICE

----------X PART 6

GRAZIO GODINO and PIETRO GODINO,

Plaintiff,

-against-

KIPEL ASSOCIATES, INC., DUNKIN' DONUTS, INC., DUNKIN BRANDS, INC., THE COUNTY OF NASSAU, THE TOWN OF HEMPSTEAD, FRANKLIN SQUARE DONUT SYSTEM, LLC, and DB REAL ESTATE ASSETS I, LLC,

Defendants.

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INDEX NO. 10566/08

XXX

MOTION DATE: 01/25/12

SEQUENCE NO. 004, 005, 006

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Upon the foregoing papers, the motions by defendants Dunkin' Donuts, Inc., Dunkin Brands, Inc., Franklin Square Donut System, Inc. and DB Real Estate Assets I, LLC (Seq. 004), defendant Kipel Associates, Inc. (Seq. 005), and defendant County of Nassau (Seq. 006), for summary judgment, pursuant to CPLR §3212, are each granted.

This is an action brought by plaintiff for personal injuries allegedly sustained on April 6, 2007, as a result of a trip and fall on the sidewalk abutting 595 Franklin Avenue, Franklin Square, New York, approximately five feet from the intersection of Ferngate Drive. Plaintiff alleges that she tripped on a defective sidewalk slab, which included within its surface, a

manhole cover. It is alleged, *inter alia*, that the defendants were negligent in causing, and/or permitting a dangerous, hazardous, and unsafe condition to exist on said sidewalk.

To begin, defendants Dunkin Donuts, Inc., Dunkin Brands, Inc., Franklin Square Donut System, LLC and DB Real Estate Assets I, LLC (collectively the "Dunkin defendants") move for summary judgment on liability grounds, contending, *inter alia*, that they cannot be held liable herein as they did not have a statutory duty to maintain the sidewalk, they neither had constructive nor actual notice of the alleged defect, they did not cause or create the defect, they did not negligently make any repairs to the sidewalk, and they did not make any special use of the sidewalk at issue. In support of their motion, the Dunkin defendants submit the plaintiff's bill of particulars, photographs of the accident location, the deposition transcripts of both plaintiffs, the deposition transcript of Kipel Associates, Inc.'s witness, Matthew King, the deposition transcript of Franklin Square Donut System, LLC's witness, David Jablon, the deposition transcript of the Town of Hempstead's witness, Andrew Brust, as well as an affidavit executed by Andrew Brust, the deposition transcript of the County of Nassau's witness, Andrew Petti, and the Dunkin defendants' responses to plaintiff's first set of interrogatories.

Defendant Kipel Associates, LLC (hereinafter "Kipel") also moves for summary judgment similarly arguing that it did not have a statutory duty to maintain the sidewalk, it neither had constructive nor actual notice of the alleged defect, it did not cause or create the defect, it did not negligently make any repairs to the sidewalk, and it did not make any special use of the sidewalk at issue. In support of its motion, Kipel submits plaintiff's bill of particulars, photographs of the accident location, a copy of the lease agreement for the premises, the deposition transcripts of the plaintiffs, the deposition transcript of Kipel Associates, Inc.'s witness, Matthew King, and the deposition transcript of the County of Nassau's witness, Andrew Petti.

Franklin Square Donut System, LLC (hereinafter "Franklin Donut") is a tenant at the subject premises located at 595 Franlkin Avenue, Franklin Square, New York. Defendant Kipel is the owner of said premises. Plaintiff alleges that the sidewalk where she fell abuts the subject premises. David Joblon is the principal of Franklin Donut and testified at a deposition on its behalf. Mr. Joblon testified that Franklin Donut did not maintain or make any repairs to the

sidewalk abutting the subject premises, nor is he aware of any other entity making repairs to said sidewalk. He also testified that Franklin Donuts did not receive any complaints regarding the subject sidewalk prior to plaintiff's accident. Mr. Joblon further testified that he did not walk on the subject sidewalk as he would park his car in the parking lot and walk to the store from the lot where he parked his car. As such, Mr. Joblon did not have notice of the alleged defective condition which caused the plaintiff's fall. In addition, Mr. Joblon testified that he never made any complaints to the County of Nassau about the sidewalk, never received any complaints about the sidewalk from anyone, and never received any notices from the County to repair the sidewalk. Dunkin Donuts, Inc. Dunkin Brands, Inc. and DB Real Estate Assets I, LLC also indicated within their Response to Plaintiff's First Set of Interrogatories that they did not repair or maintain the exterior portion of the premises, including the sidewalks and walkways, that they did not receive any complaints regarding the condition of the premises in 2006 and 2007, and that they did not receive any notice regarding the sidewalk from any municipal agency. Further, Dunkin Donuts, Inc., Dunkin Brands, Inc. and DB Real Estate Assets I, LLC were not present at the subject location and did not conduct any physical inspections of the premises.

Additionally, there is no evidence that any of the Dunkin defendants made special use of the sidewalk at issue. Further, the County of Nassau's witness, Highway Maintenance Supervisor, Andrew Petti, testified that the sidewalk in question is within the jurisdiction of the County of Nassau and that the abutting property owner would not be permitted to perform any repairs on the subject sidewalk flagstone slab since, unlike other sidewalk slabs, this slab has a Nassau County drain box in it and only Nassau County would have permission to make any repairs to it. Mr. Petti further testified that there was no prior written notice received by the County of Nassau regarding the subject defect. Further, Andrew Burst, a Sidewalk Inspector for the Town of Hempstead, also testified that the Town had no prior written notice or prior notice related to the sidewalk abutting 595 Franlkin Avenue.

Matthew King, Managing Agent for Kipel testified at a deposition that Kipel never made any repairs to the sidewalk, did not create the allegedly defective condition, did not receive notice of any defective condition on the sidewalk prior to plaintiff's accident, and had no duty to maintain the premises under the lease agreement. There is also no evidence that Kipel made

special use of the sidewalk. Further, the lease agreement excludes Kipel from responsibility related to the premises other than collecting rent.

The Dunkin defendants and defendant Kipel have both made prima facie showings of entitlement to summary judgment on liability grounds. An abutting landowner will not be liable to a pedestrian injured as a result of a defect on a public sidewalk unless the landowner created the defective condition or caused the defect to occur because of some special use of the sidewalk, or if a local ordinance or statute specifically charges the abutting landowner with a duty to maintain and repair the sidewalks and imposes liability for injuries resulting from a breach of that duty. (*Jacobs v. Village of Rockville Centre*, 41 A.D.3d 539, 838 N.Y.S.2d 597 (2d Dept. 2007); *Felshberg v. Emmons Ave. Hospitality Corp.*, 26 A.D.3d 460, 810 N.Y.S.2d 502 (2d Dept. 2006); *Hausser v. Guinta*, 88 N.Y.2d 449, 669 N.E.2d 470 (1996); *Diaz v. Vieni*, 303 A.D.2d 713, 758 N.Y.S.2d 98 (2d Dept. 2003); *see also, Dufrane v. Robideau*, 214 A.D.2d 913, 626 N.Y.S.2d 292 (3d Dept. 1995)(an exception to the prohibition against liability upon an abutting landowner may be incurred where a statute specifically charges an abutting landowner with a duty to maintain and repair the sidewalk and provides that a breach of that duty will result in liability). Where a local ordinance imposes upon the landowner a duty to maintain the sidewalk, but does not expressly impose tort liability upon the landowner for a violation of that duty, the landowner owes no duty to the plaintiff to keep the sidewalk in good repair and cannot be subject to tort liability for any alleged breach of such a duty, where the landowner neither created the condition nor caused the defect to occur by some special use of the sidewalk. (*Forelli v. Rugino*, 139 A.D.2d 489, 526 N.Y.S.2d 847 (2d Dept. 1988); *See also, Lodato v. Town of Oyster Bay*, 69 A.D.2d 904, 414 N.Y.S.2d 214 (2d Dept. 1979)).

In the instant matter, the Town of Hempstead Code §181-1, which is the controlling local ordinance herein, does not impose tort liability on adjoining landowners for claims for damages or injuries that arise from defects in the sidewalk. (*See, Marx v. Great Neck Park District*, 29 Misc.3d 1217(A), 2010 WL 4273810 (Sup. Ct. Nassau Cty. 2010)). As the Town Code does not place tort liability upon abutting landowners, the abutting landowner may only be held liable for injuries to pedestrians if it can be established that the landowner caused or created the defective condition in the sidewalk or caused the condition through a special use of the sidewalk. (*Id., see*

also, *Felshberg v. Emmons Ave. Hospitality Corp.*, 26 A.D.3d 460, 810 N.Y.S.2d 502 (2d Dept. 2006); *Roark v. Hunting*, 24 N.Y.2d 470, 248 N.E.2d 896 (1969)). There is no evidence in the submissions before this Court that any of the defendants caused or created the alleged defective condition in the sidewalk at issue or caused the condition through a special use of the sidewalk.

The proponent of a summary judgement motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (Ct. of App. 1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgement, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York,* 49 N.Y.2d 557 (Ct. of App. 1980)).

In opposition to the motions brought by the Dunkin defendants and defendant Kipel, the plaintiff has failed to demonstrate the existence of a triable issue of fact sufficient to defeat said defendants' prima facie showing of entitlement to summary judgment. There is no evidence that the Dunkin defendants or defendant Kipel caused or created the condition or used the sidewalk for a special use. In addition, although plaintiff contends that the lease agreement required the tenant to keep the premises is good order, repair and condition, there is nothing in the lease that states that the abutting sidewalk is part of the premises. In addition, even if there was such an obligation to maintain the sidewalk within the lease, it is well settled that a contractual obligation, even if breached, will only give rise to a duty to non-contracting third parties in three, limited situations: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely." (*Espinal v. Melville Snow Constrs.*, 98 N.Y.2d 136, 746 N.Y.S.2d 120 (2002); *Gadani v. Dormitory Auth. of State of New York*, 43 A.D.3d 1218, 841 N.Y.S.2d 709 (3d Dept. 2007)). There is no evidence that any of the three situations exist here. Further, the County witness, Andrew Petti, testified that the only entity who would be permitted to make repairs to the sidewalk flag at issue would be the County of Nassau.

In addition, there is no evidence that the Dunkin defendants or defendant Kipel made special use of the sidewalk. Plaintiff contends that the sidewalk slab where the plaintiff fell abuts a driveway apron to the Dunkin Donuts' parking lot, however, the plaintiff was not caused to fall by a defect in the driveway apron or driveway, and there is no evidence that the sidewalk slab where the plaintiff fell was put to any special use whatsoever. There is no structure, such as a driveway, entrance, or walkway present at the location where plaintiff fell, nor is there any evidence of special use by the Dunkin defendants or Kipel.

Accordingly, the motions by the Dunkin defendants and by defendant Kipel for summary judgment are granted. Plaintiff's complaint, together with all cross-claims, are dismissed as against the Dunkin defendants and defendant Kipel.

Lastly, the County of Nassau also moves for summary judgment on liability grounds as the County never received prior written notice of the defect at issue herein. In support of its motion, the County submits the deposition transcript of Highway Maintenance Supervisor, Andrew Petti, as well as an affidavit of an employee of the Claims and Investigation Division of the Office of the Nassau County Attorney, Veronica Cox. As noted *supra*, Mr. Petti testified that the County of Nassau had jurisdiction over the sidewalk at issue and never received any prior written notice of a defect in the sidewalk where the plaintiff fell. Mr. Petti testified that prior to the plaintiff's accident, the County of Nassau did do asphalt repair work to a sidewalk flagstone adjacent to the one which allegedly caused the plaintiff's accident, after a work order request was generated in or around September 2006, but indicated that the work was unrelated to the sidewalk flagstone where the plaintiff alleges that she fell. In addition, there is no testimony that Mr. Petti noticed the alleged defect that caused the plaintiff's accident at the time he entered the work request for the adjacent sidewalk flagstone, nor is there evidence that the County of Nassau inspected the flagstone at issue herein or had notice of the defect that caused plaintiff's accident prior to her accident. Mr. Petti testified that the work done to the adjacent flagstone involved concrete asphalt that was used to shore up the inlet from collapsing inside the catch basin.

In addition, County employee Veronica Cox attests that she personally searched the Nassau County files which contain notices of claims and notices of defects for records of prior written notice, which are located at the Office of the Nassau County Attorney, for a period of five

years up to and including the date of plaintiff's accident on April 6, 2007. Ms. Cox attests that there were no records of any prior written notices of claims and/or prior written complaints involving a defective condition at the location of plaintiff's accident.

Section 12-4.0(e) of the Administrative Code of Nassau County provides that no civil action may be maintained against the County of Nassau for damages or injuries to persons sustained by reason of a defective highway, street or sidewalk unless written notice of the defect was given to the County of Nassau. As the County did not receive prior written notice of the defect, the County contends that it cannot be found liable to the plaintiff for her injuries herein. (*Galante v. Village of Sea Cliff*, 13 A.D.3d 577, 787 N.Y.S.2d 376 (2d Dept. 2004); *Berner v. Town of Huntington*, 304 A.D.2d 513, 757 N.Y.S.2d 585 (2d Dept. 2003); *Gorman v. Town of Huntington*, 12 N.Y.3d 275, 879 N.Y.S.2d 379 (2009)).

The County of Nassau has made a prima facie showing of entitlement to summary judgment on liability grounds. In opposition, plaintiff contends that the County of Nassau had constructive notice of the defect as they repaired the adjacent flagstone prior to the plaintiff's accident and as Mr. Petti walked on the sidewalk daily for a period of time to get coffee at Dunkin Donuts. Plaintiff further contends that the manhole and sewer drain/catch basin provided a special use to the County of Nassau.

It is undisputed that the County of Nassau did not have prior written notice of the defect which the plaintiff alleges caused her fall. Prior written notice provisions are always strictly construed, and absent prior written notice of a dangerous or defective condition where a written notice statute is in effect, a municipality cannot be held liable for injuries. (*Vardoulias v. County of Nassau*, 84 A.D.3d 787, 923 N.Y.S.2d 577 (2d Dept. 2011); *Gorman v. Town of Huntington*, 12 N.Y.3d 275, 879 N.Y.S.2d 379 (2009)). Since the County did not receive prior written notice of the defect, and as there is no evidence that the County caused or created the defect through an affirmative act or that there was a "special use" which conferred a special benefit upon the County, the County cannot be found liable to the plaintiff for her injuries herein. (*Galante v. Village of Sea Cliff*, 13 A.D.3d 577, 787 N.Y.S.2d 376 (2d Dept. 2004); *Berner v. Town of Huntington*, 304 A.D.2d 513, 757 N.Y.S.2d 585 (2d Dept. 2003); *Amabile v. City of Buffalo*, 93 N.Y.2d 471, 693 N.Y.S.2d 77 (1999)). Constructive notice of a defect may not override the

statutory requirement of prior written notice of a sidewalk defect. (*Amabile v. City of Buffalo*, 93 N.Y.2d 471, 693 N.Y.S.2d 77 (1999); *Braunstein v. County of Nassau*, 294 A.D.2d 323, 741 N.Y.S.2d 565 (2d Dept. 2002)).

In addition, the roadway catch basin and manhole cover do not fall within the special use exception to the prior written notice requirement as there is no evidence that they served a municipal function inuring to the special benefit of the County. (*See, Vise v. County of Suffolk*, 207 A.D.2d 341, 615 N.Y.S.2d 429 (2d Dept. 1994)(the drainage function of the catch basin served to provide for the proper maintenance of a safe roadway and did not serve a municipal function inuring a special benefit to the municipality); *Obler v. City of New York*, 8 N.Y.3d 888, 864 N.E.2d 1270 (2007)(even if special use doctrine applied to manhole in city street, there was no evidence that this special use conferred any benefit on the city as would render inapplicable the requirement that the city receive prior written notice of street defects to be made liable for resulting injuries); *Melendez v. City of New York*, 72 A.D.3d 913, 898 N.Y.S.2d 868 (2d Dept. 2010)(no evidence that the manhole cover constituted a "special use" which conferred a special benefit upon the locality); *Ramos v. City of New York*, 55 A.D.3d 896, 866 N.Y.S.2d 737 (2d Dept. 2008)(a catch basin does not fall into the special use exception to prior written notice requirement)).

Accordingly, defendant County of Nassau's motion for summary judgment is granted and the plaintiff's action, together with all cross-claims, is dismissed as against the County of Nassau.

Dated: March 14, 2012

Anthony L. Parga, J.S.C.

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