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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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GEORGE EPSTEIN and ARLENE EPSTEIN,

Plaintiff(s),

-against-

VILLAGE OF PORT WASHINGTON NORTH,

Defendant(s).

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Index No. 19063/10

Motion Submitted: 1/17/12
Motion Sequence: 001

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendant Village of Port Washington North ("the Village') moves this Court for an Order granting summary judgment in its favor and dismissing the complaint. Plaintiffs oppose the requested relief.

On April 5, 2010, plaintiff George Epstein ("plaintiff") tripped and fell on a gap between two slabs (referred to as "flags") of sidewalk. The accident occurred at approximately 10:30 a.m., on a clear, dry day. As a result of the accident, plaintiff claims to have sustained various physical injuries.

The Village asserts that it is entitled to summary judgment because it did not receive prior written notice of the defect that caused plaintiff's accident and ensuing injuries.

Plaintiff relies upon a letter written by the property owner whose property abuts the sidewalk in question as having provided the required prior written notice.

This Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein plaintiffs. (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

A municipality which has enacted a prior written notice statute may not be subjected to liability for personal injuries resulting from an improperly-maintained sidewalk, unless it received actual written notice of the dangerous condition, its affirmative act of negligence proximately caused the accident, or a special use of the sidewalk confers a special benefit to the municipality.[1] (***Hampton v. Town of North Hempstead***, 298 A.D.2d 556, 748 N.Y.S.2d 675 (2d Dept., 2002) citing ***Amabile v. City of Buffalo***, 93 N.Y.2d 471, 715 N.E.2d 104, 693 N.Y.S.2d 77 [1999]).

It is undisputed that prior written notice of a sidewalk defect is required in order to impose liability upon the Village for personal injuries resulting from said defect (***CPLR § 9804; Village Law § 6-628; Village of Port Washington North Code, § 143-22***).

In support of its motion, the Village submits, *inter alia*, plaintiff's bill of particulars, including photographs, supplemental bill of particulars, the deposition testimony of plaintiff, the Village Clerk, and the Village's superintendent of public works. The Village also submits various photographs of the sidewalk marked during deposition, the letter from the property owner whose property abuts the sidewalk, and an affidavit from the Village Clerk.

In his bill of particulars dated December 9, 2010, plaintiff states that he was caused to fall and sustain injury because of a "gap" that "exist[s] between the contiguous sections of the sidewalk concrete." According to plaintiff, the flags were of differing heights. In fact, plaintiff characterized the gap between the contiguous sections as "wide," being "between 1 ½ to 2 inches." The height of the raised portion was stated to be 3/4 of an inch. Attached as an exhibit to the bill of particulars is Exhibit G, a collection of five photographs depicting

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[1]Plaintiff does not allege a special use of the sidewalk, nor does plaintiff allege that the Village created the defective condition.

the "area [of] the dangerous, defective and hazardous condition which caused plaintiff to fall and sustain his injuries" (paragraph 11).

In looking at those photographs, it is clear to the Court that there is a gap between two flags, with some vegetation growing within the gap. The fifth photo in the series depicts what appears to be the same gap shown in the close-ups, in relation to the private property and the street.

At his deposition, plaintiff testified that he was walking in a southbound direction on Soundview Drive, approximately five to ten feet from its intersection with Seagull Lane, and approximately fifteen feet past the property owner's driveway, when he fell. The property owner's address is 114 Soundview Drive. Plaintiff explained that he had walked past a section of newer concrete, which is light in color, past the driveway, and that he fell on an older, darker section of sidewalk. Plaintiff testified that he fell on the "dark strip," and not on any defect between an old and new flag. At the deposition, he identified the gap that caused his fall by circling the gap in the photograph marked as defendant's Exhibit C (Exhibit H in the instant motion). Plaintiff also identified the gap in relation to the property owner's driveway, marking defendant's Exhibit A (Exhibit G in the instant motion) with a circle.

The photographs submitted by defendant upon the instant motion clearly depict the newer flags of sidewalk as being significantly lighter in color than the older flags. Furthermore, the photographs marked by plaintiff at his deposition and submitted herewith demonstrate that plaintiff fell between two older, darker flags, past the property owner's driveway.

The letter from the property owner of 114 Soundview Drive is dated August 27, 2007. In that letter, the homeowner expressed her desire to install a new driveway, and that the new driveway would extend into the Village's sidewalk area to even out the "jagged edge" that exists in that area. The property owner also requested a new sidewalk to "create an even, finished edge," and she states that she may choose belgian (sic) blocks or bricks. Finally, she requested that the Village "have that area (abutting the driveway) replaced along with the other sections you have already marked."

Defendant's Exhibit G (Defendant's A at deposition) clearly depicts the "jagged edge" referred to by the property owner, demonstrating that area to be "abutting the driveway," as the property owner states in her letter. It is apparently the area where her asphalt driveway joins the darker flags of the sidewalk.

In response to the property owner's letter, the Village Clerk, Palma Torrisi, authored a letter to the property owner, dated August 28, 2007. The Village's letter acknowledges that the letter served as notice of a defect in the sidewalk at the premises. The Clerk also testified that some sidewalk replacement was done at 114 Soundview Drive, but that she did not know if that work was done in response to the property owner's letter.[2]

The Village's superintendent of public works, Ronald Novinski, testified that the only sidewalks that the Village has responsibility to replace/repair are flags that are damaged and/or raised by Village trees. Mr. Novinski explained that the Village replaced flags at 114 Soundview Drive that were raised up by Village tree roots, and that the areas referred to by the property owner as having been "marked" were the areas affected by Village tree roots. Mr. Novinski confirmed that the lighter colored flags depicted in defendant's photographs are the flags that the Village contracted to have replaced because of tree roots.

Mr. Novinski also testified that he spoke to the property owner at or about the time she sent the aforementioned letter to the Village. According to Mr. Novinski, the property owner told him that she was going to replace her driveway, and she complained "about this piece of sidewalk here because she wanted to put a new drive way in," (referring to defendant's Exhibit G [defendant's Exhibit A at deposition]). Novinski "told her it would have to be replaced because the edge is all jagged and all the stone is coming up on it, so it's very rough. [Novinski] said while the [sidewalk contractor] is here if you want to have him do it, work a deal out with them and you can do it but it's not our responsibility."[3]

Based on the foregoing, it is clear to the Court that the written notice of defect supplied to the Village related to the jagged edge of the sidewalk abutting the driveway of 114 Soundview Drive, not the gap between sidewalk flags located past the driveway area that plaintiff alleges caused his fall.

Thus, the Village did not receive prior written notice of the particular defect that caused plaintiff's fall (***Daniels v. City of New York***, 2012 N.Y. Slip Op. 322, 936 N.Y.S.2d 897 (2d Dept., 2012) (City's notice of defects in a particular portion of a crosswalk did not constitute sufficient written notice of defect alleged by plaintiff in a different portion of same crosswalk); **Camacho v. City of New York**, 218 A.D.2d 725, 630 N.Y.S.2d 557 (2d Dept.,

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[2]The Village's letter also advised the property owner that it is her responsibility to maintain and repair the sidewalk abutting her property. Included with the Village's letter was an application for a Sidewalk Permit.

[3]It is obvious from defendant's Exhibit G that the property owner did not install a Belgium block or brick driveway.

1995) [Notation on map regarding raised portion of sidewalk insufficient notice of plaintiff's claim that hole about three feet wide by three feet long and one foot deep actually caused accident]). Accordingly, defendant Village has established its prima facie entitlement to summary judgment.

In order to overcome the Village's summary judgment motion, plaintiffs must raise a triable issue of fact. Plaintiffs have not sustained their burden.

In opposition, plaintiffs attempt to expand the 2007 written notice made by the property owner of 114 Soundview Drive into written notice about the defect that plaintiff George Epstein claims caused the accident giving rise to this action.

Plaintiffs have submitted only the deposition testimony of the Village's superintendent of public works, Ronald Novinski. Plaintiffs have not submitted the deposition testimony of George Epstein, nor have they submitted the original or supplemental bill of particulars.[4]

Instead, plaintiff has submitted an affidavit dated January 6, 2012, which is not supported by the record, and is, in fact, in contravention to his July 11, 2011 deposition testimony and the photographic record outlined above. In his affidavit, plaintiff states that his "foot caught on the deteriorated edge of the sidewalk slab that abuts that home's driveway as a result of an unreasonably large gap that existed between the sidewalk slabs." Plaintiff further states, "I know where and why I fell and I submit that the area complained of in the [property owner's] written notice letter is the defective section which caused me to fall."

Plaintiff's affidavit is also in contravention to his notice of claim and amended notice of claim, which are attached to his opposition papers. In the notice of claim filed on May 5, 2010, plaintiff states that he was caused to trip and fall as a result of "the unreasonable gap." Plaintiff further stated in his notice of claim that he "had passed the driveway of 114 Soundview Drive . . . when his foot was caused to strike a large gap in the sidewalk sections . . . ." In his amended notice of claim filed on June 16, 2010, plaintiff made the same claims with respect to the alleged defect, and its location relative to the driveway of 114 Soundview Drive.

Plaintiff's affidavit also implies that, based on Mr. Novinski's deposition testimony, the Village had actual notice of the alleged defect stated to be "the edges between the sidewalk flags had become jagged as a result of 'deterioration.'"

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[4]Following the conclusion of all depositions, plaintiffs served a supplemental bill of particulars dated October 31, 2011, claiming that plaintiff tripped and fell on a "jagged edge sidewalk."

Whether or not the Village had actual or constructive notice of a defect related to the sidewalk at 114 Soundview Drive, actual or constructive notice does not satisfy the prior written notice requirement (***Amabile, supra*** at 475-476; ***Wilkie v. Town of Huntington***, 29 A.D.3d 898, 816 N.Y.S.2d 148 (2d Dept., 2006); ***Silva v. City of New York***, 17 A.D.3d 566, 793 N.Y.S.2d 478 (2d Dept., 2005); ***Costa v. Town of Babylon***, 6 Misc. 3d 7, 787 N.Y.S.2d 810 (App. Term, 2d Dept., 2004); ***Tonorezos v. County of Nassau***, 266 A.D.2d 387, 698 N.Y.S.2d 331 [2d Dept., 1999]).

In any event, plaintiff has failed to raise a triable issue of fact because the self-serving affidavit submitted in opposition to the instant motion contradicts his prior sworn testimony wherein he stated that he fell because of a gap between the sidewalk flags located approximately fifteen (15) feet past the driveway of 114 Soundview Drive (*see* ***Lipsher v. 650 Crown Equities, LLC***, 81 A.D.3d 789, 917 N.Y.S.2d 249 [2d Dept., 2011]).

Defendant Village's motion for summary judgment is granted, and the complaint is dismissed.

The foregoing constitutes the Order of this Court.

Dated: March 22, 2012
Mineola, N.Y.

Karen V. Murphy
J. S. C.
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ENTERED
MAR 27 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE