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SHORT FORM ORDER

COPY

INDEX No. 09-31918
CAL No. 11-01549OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 11-22-11 (#001)
MOTION DATE 12-30-11 (#002)
ADJ. DATE 2-10-12
Mot. Seq. # 001 - MD
002 - XMD

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ADRIENNE BETZ,

Plaintiff,

- against -

TOWN OF HUNTINGTON,

Defendant.

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Upon the following papers numbered 1 to 22 read on this motion for summary judgment and cross motion for leave to serve and file a supplemental bill of particulars ; Notice of Motion/ Order to Show Cause and supporting papers 1-15 ; Notice of Cross Motion and supporting papers 16 - 20 ; Answering Affidavits and supporting papers 21 - 22 ; Replying Affidavits and supporting papers ___; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint is denied; and it is further

ORDERED that this cross motion by plaintiff for an order pursuant to CPLR 3025 (b) and CPLR 3043 (c) for leave to serve and file a supplemental bill of particulars is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff on August 20, 2008 at approximately 7:30 p.m. when she tripped on a crevice and fell in the parking lot of the Huntington train station located at the intersection of New York Avenue and May Street in Huntington, New York. In her complaint, plaintiff alleges that defendant and its employees were negligent in the ownership, maintenance and control of said parking lot in , among other things, failing to provide plaintiff with a safe place to walk, allowing the parking lot surface to become raised, uneven, crumbled and depressed with ruts, depressions and holes, thereby constituting a nuisance and a trap. Plaintiff also alleges that defendant had actual and constructive notice of the dangerous and defective condition. By its answer, defendant admits that it owns, maintains and repairs said parking lot. The Court's computerized records indicate that the note of issue in this action was filed on July 28, 2011.

RST

Defendant now moves for summary judgment dismissing the complaint on the ground that defendant lacked prior written notice of the alleged dangerous and defective condition and that defendant did not affirmatively create said condition. In addition, defendant argues that plaintiff has failed to provide the dimensions of the alleged defect in her bill of particulars or deposition testimony to establish that it was not trivial or any expert testimony that the area where plaintiff fell was raised to an inappropriate height. Defendant asserts that the deposition testimony of Mark Tyree, Deputy Director for the Department of General Services of the Town of Huntington, establishes that defendant did not receive prior written notice of the alleged defective condition. In support of its motion, defendant submits, among other things, the summons and complaint, defendant's answer, the note of issue and certificate of readiness, the compliance conference order with certification, plaintiff's bill of particulars, the transcript of plaintiff's deposition pursuant to General Municipal Law § 50-h on January 28, 2009; color photographs of the area where plaintiff allegedly fell that were marked as exhibits during plaintiff's General Municipal Law § 50-h deposition, the transcript of plaintiff's examination before trial on October 12, 2010, the transcript of the deposition of Mark Tyree who testified on behalf of defendant on December 1, 2010, and the affidavit dated May 31, 2011 of Andrew Persich.

During her General Municipal Law § 50-h deposition on January 28, 2009, plaintiff testified that her "foot went into a crevice, a fissure" and then her left foot "turned completely at a right angle" causing her to fall onto her left side. She described the crevice as a "fairly large crack" composed of "paving material" with grass growing in certain areas. Plaintiff identified the color photographs marked as respondent's exhibits A through E and attached to the motion papers herein, and testified that they accurately represented the place where her accident occurred and where her foot got caught in the crevice, especially exhibits E and B.

Mark Tyree testified at his deposition that he has been the Deputy Director for the Department of General Services of the Town of Huntington since July 2007 and that his department is the "facility manager" and that they "basically maintain everything the Town owns." In addition, he testified that the repair of the asphalt in the subject parking lot fell within the jurisdiction of his department, and that there are occasions when his department hires outside contractors to repair asphalt. Mr. Tyree testified concerning his maintenance work reports corresponding to a period of five years prior to the date of the subject accident for the various parking lots that his department manages. Mr. Tyree stated that his review of said records revealed that no work had been performed, by an outside contractor or otherwise, in the subject parking lot during that five year period. He also testified that he reviewed a complaint file, which would generate work orders, and found that there were no written complaints to the Town concerning the alleged condition.

The affidavit dated May 31, 2011 of Andrew Persich indicates that he is employed by defendant as Deputy Comptroller and is "responsible for handling the Town's finances from bill payments to financial statements." He states that he searched records, including records maintained by the Purchasing Department, Department of General Services, and Highway Department, concerning paving, resurfacing or repaving the Huntington Railroad Station parking lot between 2003 and 2008 and "did not locate any records, reports, invoices, bills, contracts, work orders, or any other documents regarding paving, resurfacing, or repaving of the subject parking lot."

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, citing to ***Zuckerman v City of New York***, 49 NY2d at 562, 427 NYS2d 595).

"[W]hether a dangerous or defective condition exists on the property of another so as to create liability 'depends on the peculiar facts and circumstances of each case' and is generally a question of fact for the jury" (***Trincere v County of Suffolk***, 90 NY2d 976, 977, 665 NYS2d 615 [1997], *quoting* ***Guerrieri v. Summa***, 193 AD2d 647, 647, 598 NYS2d 4 [2d Dept 1993][internal quotation marks omitted]); *see* ***Copley v Town of Riverhead***, 70 AD3d 623, 895 NYS2d 452 [2d Dept 2010]). However, injuries resulting from trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip, are not actionable (*see* ***Aguayo v New York City Hous. Auth.***, 71 AD3d 926, 897 NYS2d 239 [2d Dept 2010]; ***Joseph v Villages at Huntington Home Owners Assn., Inc.***, 39 AD3d 481, 835 NYS2d 231 [2d Dept 2007]).

Prior written notice laws apply to municipal parking lots (*see* Town Law 65-a; Village Law § 6-628; ***Wiley v Incorporated Vil. of Garden City***, 91 AD3d 764, 936 NYS2d 327 [2d Dept 2012]; ***Wohlars v Town of Islip***, 71 AD3d 1007, 898 NYS2d 59 [2d Dept 2010]; ***Latalardo v Town of Clarkstown***, 60 AD3d 913, 876 NYS2d 115 [2d Dept 2009]; ***Weber v Town of Hempstead***, 58 AD3d 617, 871 NYS2d 339 [2d Dept 2009]). A municipality that has enacted a prior written notice law is excused from liability absent proof of prior written notice or an exception thereto (*see* ***Poirier v City of Schenectady***, 85 NY2d 310, 313, 624 NYS2d 555 [1995]; ***DiGregorio v Fleet Bank of New York, NA***, 60 AD3d 722, 723, 875 NYS2d 204 [2d Dept 2009]). The Court of Appeals has recognized two exceptions to this rule, "namely, where the locality created the defect or hazard through an affirmative act of negligence" and "where a 'special use' confers a special benefit upon the locality" (***Amabile v City of Buffalo***, 93 NY2d 471, 474, 693 NYS2d 77 [1999]; *see* ***DiGregorio v Fleet Bank of New York, NA***, 60 AD3d at 723, 875 NYS2d 204; ***Delgado v County of Suffolk***, 40 AD3d 575, 835 NYS2d 379 [2d Dept 2007]).

Huntington Town Code § 174-3 (A) provides:

> No civil action shall be maintained against ...the Town of Huntington, its elected officials, public officers, agents, servants and/or employees ... for damages or injuries to person or property sustained by reason of any highway, bridge, culvert, street, sidewalk or crosswalk owned, operated or maintained by the town or owned, operated or maintained by any improvement or special district therein being defective, out of repair, unsafe, dangerous or obstructed unless written notice of the specific location and nature of such defective, unsafe, out of repair, dangerous or obstructed condition by a person with first-hand knowledge was actually given to the Town Clerk or the Town Superintendent of Highways in accordance

> with § 174-5 hereof and there was thereafter a failure or neglect within a reasonable time to repair or remove the defect, danger or obstruction complained of. In no event shall ... the Town of Huntington, its elected officials, public officers, agents, servants and/or employees ... be liable for damage or injury to persons or property in the absence of such prior written notice. Constructive notice shall not be applicable or valid.

Here, defendant failed to demonstrate its prima facie entitlement to judgment as a matter of law on the ground that defendant had no prior written notice as defendant failed to submit proof of such lack of notice from the proper municipal official (*see* ***Pangerl v Town of North Hempstead***, 76 AD3d 1001, 907 NYS2d 512 [2d Dept 2010]). Defendant failed to submit an affidavit from an employee of defendant's Town Clerk or Town Superintendent of Highways attesting to the fact that defendant had no prior written notice of the dangerous and defective condition that allegedly caused plaintiff to fall (*see* Huntington Town Code § 174-3 [A]; *compare* ***Kiszenik v Town of Huntington***, 70 AD3d 1007, 895 NYS2d 208 [2d Dept 2010]). Mr. Tyree's deposition testimony and Mr. Persich's affidavit cannot establish the absence of prior written notice inasmuch as the Department of General Services and the Deputy Comptroller, respectively, are not statutory designees to receive prior written notice under Town Law § 65-a and Huntington Town Code § 174-3 (A) (*see* ***Gorman v Town of Huntington***, 12 NY3d 275, 879 NYS2d 379 [2009]). Thus, the burden did not shift to plaintiff to raise a triable issue of fact as to either prior written notice or a recognized exception to that requirement, as is relevant here, that defendant affirmatively created the dangerous condition through an act of negligence (*see* ***Pangerl v Town of North Hempstead***, *supra*). In addition, as the movant for summary judgment, it was defendant's burden to demonstrate that the alleged defect was trivial in nature and lacked any of the characteristics of a trap or snare, and defendant could not rely, as it did herein, on alleged deficiencies in plaintiff's opposition papers to meet its burden (*see* ***Portaro v Tillis Inv. Co.***, 304 AD2d 635, 757 NYS2d 606 [2d Dept 2003]; *compare* ***Ramirez v City of New York***, 93 AD3d 833, 941 NYS2d 199 [2d Dept 2012]; ***Rogers v 575 Broadway Assocs., L.P.***, 92 AD3d 857, 939 NYS2d 517 [2d Dept 2012]). Therefore, defendant's motion for summary judgment is denied without regard to the sufficiency of plaintiff's opposition papers (*see* ***Braver v Village of Cedarhurst***, 2012 NY Slip Op 02828 [NYAD 2 Dept Apr 17, 2012]; ***Hill v Fence Man, Inc.***, 78 AD3d 1002, 912 NYS2d 93 [2d Dept 2010]).

Plaintiff cross-moves for an order pursuant to CPLR 3025 (b) and CPLR 3043 (c) for leave to serve and file a supplemental bill of particulars supplementing item 15 of her original bill of particulars to allege violations of Huntington Town Code Chapter 173 (Maintenance of Sidewalk Area) sections 15, 16 and 17, the American Association State Highway and Transportation Official's Maintenance Manual, 1997 (AASHTO Maintenance Manual) sections 2.020 (General), 2.120 (Potholes), and 2.400 (Maintenance Programs-Materials), and the American Society Testing and Materials "Standard Practice for Safe Walking Surfaces" (ASTM F1637) sections 4.2 (Walkway Changes in level), 4.2.1 (Adjoining walkway surfaces shall be made flush and fair wherever possible), 4.2.2 (Changes in levels of less than ¼ inch [6mm] in height may be without edge treatment), 4.2.3 (Changes in levels between ¼ inch and ½ inch [6 and 12 mm] shall be beveled with a slope no greater than 1:2), 4.2.4 (Changes in levels greater than ½ inch [12 mm] shall be transitioned by means of a ramp or stairway), and so forth. In support of the cross motion, plaintiff's counsel provides in his affirmation in support the contents of the sections of the AASHTO Maintenance Manual and the ASTM standards listed in the proposed supplemental bill of particulars and attaches copies of Huntington Town Code §§ 173-15, 173-16, and 173-17 and the proposed supplemental bill of particulars dated December 8, 2011.

In reply, defendant contends that Town Code Chapter 173 sections 15, 16 and 17 alleged by plaintiff in her supplemental bill of particulars are inapplicable to this action as they do not impose liability on the Town, do not obviate the applicability of the prior written notice statute, and instead impose a duty on adjacent landowners to maintain public sidewalks. In addition, defendant argues that plaintiff does not explain how the listed sections of the AASHTO Maintenance Manual, which merely provide definitions, are applicable to this action or how the Town is governed by this manual. Defendant further contends that inasmuch as discovery has been completed and the note of issue has been filed, defendant will be severely prejudiced if plaintiff is permitted to supplement her bill of particulars at this late juncture.

Leave to amend or supplement pleadings should be freely granted unless the amendment sought is palpably improper or insufficient as a matter of law, or unless prejudice and surprise directly result from the delay in seeking the amendment (*see* CPLR 3025 [b]; ***Maloney Carpentry, Inc. v Budnik***, 37 AD3d 558, 830 NYS2d 262 [2d Dept 2007]). Where the complaint alleges that the defendant's conduct was in violation of applicable statutes, ordinances, rules and regulations, the defendant is entitled to particulars from the plaintiff regarding the specific statutes, and so forth, claimed to have been violated (*see* ***Liga v Long Is. R. R.***, 129 AD2d 566, 514 NYS2d 61 [2d Dept 1987]).

Item 15 of plaintiff's original bill of particulars dated December 14, 2009 indicated "The plaintiff will ask the Court to take judicial notice of all statutes, ordinances, rules and regulations violated at the time of trial." The Court notes that defendant correctly argues that Town Code Chapter 173 sections 15, 16 and 17 are inapplicable to the instant action as they do not impose any liability upon defendant and relate to the maintenance and repair obligations of owners, lessees, tenants and occupants of lands fronting or abutting public streets, sidewalks, roadways and highways (*see* Huntington Town Code §§ 173-15, 173-16, and 173-17). Therefore, that portion of the proposed amendment is patently lacking in merit (*see* ***Holmes v Town of Oyster Bay***, 82 AD3d 1047, 919 NYS2d 207 [2d Dept 2011]). In addition, defendant has demonstrated that it will be severely prejudiced by allowing plaintiff at this stage of litigation to allege violations of the aforementioned sections of the AASHTO Maintenance Manual and the ASTM standards. Therefore, plaintiff's cross motion for leave to serve and file a supplemental bill of particulars is denied.

Accordingly, the instant motion and cross motion are denied.

Dated: April 27, 2012

Hon. Denise F. Molia

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION