To commence the statutory time 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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COREY YANCY,

Plaintiff,

Index No. 60277/2014

-against-

DECISION & ORDER

TUCKAHOE HOUSING AUTHORITY a/k/a SANFORD GARDENS and VILLAGE OF TUCKAHOE,

Defendant.

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The following papers numbered 1 to 5 were read on defendant Village of Tuckahoe's ("The Village") motion seeking an order of summary judgment dismissing the complaint:

PAPERS NUMBERED

Notice of Motion/Affidavit/Exhibits 1-3
Affirmation in Opposition 4
Replay Affirmation 5

Factual and Procedural Background

On August 21, 2013, plaintiff tripped and fell on the sidewalk in front of 29 Washington Street, Tuckahoe, New York due to a broken, defective or elevated condition in the sidewalk.

Plaintiff commenced this personal injury action on July 15, 2014. Issue was joined by the Village on August 6, 2014.

The Village now moves for summary judgment dismissing the complaint on the ground that it had no prior written notice of the defective condition which caused plaintiff's fall. The Village argues that Village Law § 6-628 requires prior written notice of a defect before plaintiff can recover personal injuries. In support of its motion, the Village submits the affidavit of Village Clerk Susan Ciamarra who states that she searched the Village's

prior written notice books and did not find any written notice of the complaints regarding the sidewalk in question. She also searched the Village records and determined that the Village had not done any work or repairs at that location prior to plaintiff's fall.

In opposition, plaintiff submits his attorney's affirmation. In his attorney affirmation, plaintiff argues that despite Ms. Ciamarra's statements there are still questions of fact regarding the efficacy and parameters of her search, the manner in which the search was performed, the amount of time the search took, the organization of the records in question, how notices and complaints are received, documented and reviewed and filed. Plaintiff's attorney affirmation also notes that in the complaint it is alleged that the Village was negligent in "causing . . . the dangerous condition to be and remain on the premises [,]" and "in causing the premises to be in a dangerous and trap-like condition[']and "in causing there to be a dangerous condition for an unreasonable period of time, which constituted a nuisance and/or hazard, thereby rendering the premises dangerous and unsafe []" Therefore, plaintiff claims the Village has the burden to establish that it did not create the condition which caused plaintiff's fall.

Discussion

A party moving for summary judgment must assemble *affirmative* proof to establish its entitlement to judgment as a matter of law. (*Zuckerman v. City of N.Y.*, 49 NY2d 557 [1980]). In order to meet its burden of entitlement to summary judgment as a matter of law, the City must establish that it did not receive prior written notice of the defect that allegedly caused the injured plaintiff's fall or that it did not create the dangerous condition. (*See Kravatz v. County of Suffolk*, 40 AD3d 1042 [2nd Dept 2007]; *Ferreira v. County of Orange*, 34 AD3d 724 [2nd Dept 2006]).

"Where, as here, a municipality has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by an improperly maintained street or sidewalk unless it has received written notice of the defect, or an exception to the written notice requirement applies" (*Carlucci v Village of Scarsdale*, 104 A.D.3d 797, 961 N.Y.S.2d 318 [2nd Dept 2013] *citing Amabile v City of Buffalo*, 93 NY2d 471 [1999]; *Miller v Village of E. Hampton*, 98 AD3d 1007 [2012]; *Braver v Village of Cedarhurst*, 94 AD3d 933 [2012]; *Pennamen v Town of Babylon*, 86 AD3d 599 [2011]). "Recognized exceptions to the prior written notice requirement exist where the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a special benefit upon it" (*Miller v Village of E. Hampton*, 98 AD3d at 1008; *see Amabile v City of Buffalo*, 93 NY2d at 474; *Braver v Village of Cedarhurst*, 94 AD3d 933 [2012]).

Contrary to plaintiff's arguments, the affidavit of Ms. Ciamarra was sufficiently specific to establish that the Village had no prior written notice of the defect that caused plaintiff's fall. "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, 824

N.Y.S.2d 410 [2nd Dept 2006] *citing Cruz v City of New York*, 218 AD2d 546, 547 [1st Dept 1995]).

Moreover, plaintiff's argument that defendant did not establish that it did not create the dangerous condition which caused plaintiff's fall is without merit. Notably, Ms. Ciamarra's affidavit indicates that the Village had not done any work in the area of plaintiff's fall prior to the accident. Further, although plaintiff relies on *Carlucci v. Village of Scarsdale* (104 A.D.3d 797, 961 N.Y.S.2d 318 [2nd Dept 2013]), to argue that allegations that the Village created the condition which caused plaintiff's fall are sufficient to raise an issue of fact, this Court does not agree such is the factual holding of that case.

In *Carlucci*, the Appellate Division, Second Department reversed the motion court's grant of summary judgment to defendant Village of Scarsdale on the ground that there were issues of fact regarding whether the Village of Scarsdale affirmatively created the condition which caused plaintiff's fall. A review of the record on appeal, discloses that plaintiff fell on a bluestone/cobblestone sidewalk in the Village of Scarsdale. In *Carlucci*, there was no dispute that 15 years prior to plaintiff's accident, the Village of Scarsdale had selected bluestone/cobblestone material to be used in the re-sidewalking of the Village. At the time the selection was made, the Village was aware that bluestone was not an ideal material for sidewalks in areas located in the Northeast because the colder season resulted in stones needing to be frequently replaced or reset. Further, in *Carlucci*, the Village acknowledged that the selection of bluestone as a material for a sidewalk was going to be a "major" maintenance issue.

Here, plaintiff provides no factual support for his conclusory allegations that the Village created the dangerous condition upon which plaintiff fell. Plaintiff makes no specific factual allegations regarding any design or construction defect in the sidewalk where he fell to raise a question of fact.

Notably the cases cited in *Carlucci*, *Miller v Village of E. Hampton*, 98 AD3d 1007 [2nd Dept 2012] and *Braver v Village of Cedarhurst*, 94 AD3d 933 [2nd Dept 2012]), each held that summary judgment in favor of the municipality should be denied where the plaintiffs therein raised issues of fact regarding whether the municipality had created a dangerous condition by alleging specified acts of negligence in the design and construction of the sidewalk, the lighting, and/or the landscaping in the area. Plaintiff here fails to allege any specified acts indicating that the Village negligently designed and/or constructed the sidewalk in question.

Accordingly, the Village's motion for summary judgment dismissing the complaint is GRANTED.

The remaining parties are directed to appear in the Preliminary Conference Part on January 12, 2015 at 9:30 a.m. room 800 for further proceedings.

Dated: White Plains, New York
December 4, 2014

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

H:\ALPHABETICAL MASTER LIST-WESTCHESTER\Yancy v. Tuckahoe Housing (SJ Granted no prior written notice).wpd