[* 1]

SHORT FORM ORDER

INDEX No. 08-38633
CAL No. 14-01934OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 2-19-15 (#006)
MOTION DATE 3-26-15 (#007)
ADJ. DATE 7-30-15
Mot. Seq. # 006 - MG; CASEDISP
007 - MG

ALEXANDER N. COVENTRY, an infant under the Age of 14 years, by his mother and natural guardian KELLY M. COVENTRY and KELLY M. COVENTRY, Individually,

Plaintiffs,

- against -

TOWN OF HUNTINGTON and COUNTY OF SUFFOLK,

Defendants.

ANDREA & TOWSKY
Attorney for Plaintiffs
320 Old Country Road, Suite 202
Garden City, New York 11530

BARTLETT, MCDONOUGH, & MONAGHAN
Attorney for Defendant/Third-Party Plaintiff
Town of Huntington
170 Old Country Road, 4th Floor
Mineola, New York 11501

TOWN OF HUNTINGTON,

Third-Party Plaintiff,

- against -

HUNTINGTON BEACH COMMUNITY ASSOCIATION INC.,

Third-Party Defendant.

NICOLETTI HORNIG CAMPISE
Attorney for Third-Party Defendant Huntington Beach Community Association, Inc.
88 Pine Street, 7th Floor
New York, New York 10005

Upon the following papers numbered 1 to 51 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-14, 15-31; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 32-37, 38-46; Replying Affidavits and supporting papers 47-48, 49-51; Other ___; (and after hearing counsel in support and opposed to the motion); it is

ORDERED that these motions are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by third-party defendant Huntington Beach Community Association, Inc. ("HBCA") for an order pursuant to CPLR 3212 granting summary judgment dismissing all claims by the defendant/third-party plaintiff Town of Huntington ("Town") is granted; and it is further

ORDERED that the motion by defendant/third-party plaintiff Town of Huntington for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as asserted against it is granted.

This is an action to recover for personal injuries suffered by the infant Alexander N. Coventry on June 12, 2008 when he was walking in knee deep water in Centerport Harbor. Said infant plaintiff allegedly sustained injury when his foot came into contact with a defective, broken, rusty, jagged and/or dangerous drainage pipe as he was walking in the water. Plaintiffs allege that the defendant Town owned operated, maintained, controlled and serviced the defective pipe that caused the injuries. The Town then brought a third-party action against the HBCA asserting four causes of action, the first two sounding in negligence, the third alleging violation by HBCA of unspecified rules statutes and ordinances, and the fourth alleging the existence of an agreement between the Town and the HBCA, by which the HBCA agreed to maintain the location where the accident occurred and to indemnify defendant Town in the event of a recovery by the plaintiffs.

Defendant HBCA now moves for summary judgment dismissing the third-party complaint. In support of the motion it submits, *inter alia*, its attorney's affirmation, a copy of the pleadings, portions of the deposition transcripts of the plaintiffs, of Richard Conrad and Bianca Dresch as witnesses for defendant Town, and of Jeffrey R. Robinson as a witness for defendant HBCA. In opposition, defendant Town submits it attorney's affirmation, the deposition transcripts of the plaintiffs, and the deposition transcript of Jeffrey R. Robinson. Defendant Town also moves for summary judgment. In support, it submits, *inter alia*, its attorney's affirmation, a copy of the pleadings, the deposition transcripts of the plaintiff, and of Richard Conrad, Bianca Dresch, and Jeffrey R. Robinson, the affidavit of Michael Kaplan, sworn to on February 24, 2015, and the affidavit of Diana Esposito, sworn to on February 25, 2015. Plaintiffs, in opposition to the Town's motion, submit their attorney's affirmation, four photographs, the affidavit of Frank Meak, sworn to on July 2, 2015, and the affidavit of Kelly M. Coventry, sworn to on July 9, 2015.

The infant plaintiff testified that he sustained a cut to his left foot as a result of coming into contact with a rusty metal drainage pipe outside of the swimming area [marked out by the HBCA]. He had never seen the pipe before his accident. He was injured while retrieving a tennis ball from the water outside of the roped off swimming area. The water in the location where he was injured was thigh high. Plaintiff Kelly M. Coventry, the infant plaintiff's mother, testified that the accident in question occurred on June 12, 2008, at approximately 4:30 p.m. Infant plaintiff came home from school and met her at the beach. She was sitting on a beach chair on the beach in front of the area of the water which was cordoned off by buoys and ropes for swimming. She asked infant plaintiff to go into the water to retrieve a tennis ball which she had thrown into the water, and which the family dog had failed to retrieve. She observed the infant plaintiff enter the water approximately 15 feet to the right of the cordoned off swimming area. It was not low tide at the time of the accident; the water was somewhere between his knees and hips. She saw her son stumble and then observed blood in the water as he walked out of the water to the beach. She had never seen the drainage pipe before. She had to wait until low tide to actually see the pipe. She had no reason to believe that there was any dangerous condition in the water when she asked infant plaintiff to retrieve the ball. Even at low tide, the pipe was frequently not visible because it is covered with sand.

Richard Conrad testified as a witness for defendant Town. His current title is labor crew leader in the Highway Department. He testified that the Town owned the drainage pipe in question and the beach where the pipe was located. The pipe provides drainage for the public street (Adams Street) abutting the HBCA property. He was unaware of any agreement between the Town and the HBCA regarding the usage of the beach. He also testified as to the repair of the pipe after the infant plaintiff's accident. He testified that the repair had to be done at low tide because at high tide, water covered the area where the repairs had to be done.

Jeffrey R. Robinson testified as a witness for defendant HBCA. He is a former president and current board member of the HBCA. He testified as to the property which was owned by the HBCA, and produced a survey which showed the boundaries of the property. He further testified that it does not own the portion of the beach below the mean high water mark where the accident occurred. He also testified that the HBCA had built structures (a basketball court, a playground, a wooden guardrail) on adjacent property that is owned by the Town. He testified that the by-laws of the HBCA indicate that non-members were not permitted on the premises. However, he also testified that non-members could, in fact, walk on the beach and use the beach and did so all the time.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Third-party defendant HBCA has established its prima facie entitlement to summary judgment dismissing the third-party complaint. It is noted that the Town failed to set forth proof of any violation of laws, rules or regulations by the HBCA or of the existence of any agreement between the Town and HBCA, as alleged in the third and fourth causes of action set forth in the third-party complaint.

It is axiomatic that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff (*see* ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005]; ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]). As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (*see* ***Nappi v Incorporated Vil. of Lynbrook***, 19 AD3d 565, 566 (2d Dept 2005]; ***Dugue v 1818 Newkirk Mgt. Corp.***, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]; *see also* ***Ruggiero v City School Dist. of New Rochelle***, 109 AD3d 894, 972 NYS2d 606 [2d Dept 2013]; ***Butler v Rafferty***, 100 NY2d 265, 762 NYS2d 567 [2d Dept 2003]). Without evidence of ownership, occupancy, control, or special use of the property upon which the defect is situated, a defendant cannot be held liable for any injuries caused by the defect (*see* ***Ruggiero v City School Dist. of New Rochelle***, *supra*; ***Mitchell v Icolari***, 108 AD3d 600, 601, 969 NYS2d 503 [2d Dept 3013]; ***Cerrato v Rapistan Demag Corp.***, 84 AD3d 714, 716, 921 NYS2d 648 [2d Dept 2011]). Here HBCA has provided evidence that it did not own, maintain, control or have any special use of the drainage pipe which caused the infant plaintiff's injuries. In response defendant/third-

party plaintiff Town has failed to raise any question of fact. The argument set forth by the Town that the HBCA is subject to liability because it makes a "special use" of the Town's property (installing a basketball court and a playground) misstates and misapprehends the concept of special use.

The special use doctrine refers to a use different from the normal intended use of the public way, and thus, "[t]he special use exception is reserved for situations where a landowner whose property abuts a public street or sidewalk derives a special benefit from that property unrelated to the public use" (***Poirier v City of Schenectady***, 85 NY2d 310, 315, 624 NYS2d 555 [1995]; *see* ***Methal v City of New York***, 116 AD3d 743, 984 NYS2d [2d Dept 2005]; ***Minott v City of New York***, 230 AD2d 719, 720, 645 NYS2d 879 [2d Dept 1996]; ***Kaufman v Silver***, 90 NY2d 204, 207, 659 NYS2d 250, 681 [1997]). Liability arises only if the abutting owner or lessee created the defect or used the [public way] for a special purpose (***Granville v City of New York***, 211 AD2d 195, 197, 627 NYS2d 4), such as when an appurtenance was installed for its benefit or at its request (*see* ***Kaufman v Silver***, *supra*; ***Oles v City of Albany***, 267 AD2d 571, 572, 699 NYS2d 202 [3d Dept 1999]), contemplating a purpose different from that of the general public (***Otero v City of New York***, 213 AD2d 339, 340, 624 NYS2d 157). Also at issue is whether that special use was a substantial cause of the defect that allegedly caused the plaintiff's injury (*see* ***Weiskopf v City of New York***, 5 AD3d 202, 203, 773 NYS2d 389 [2d Dept 2004]). The drainage pipe which allegedly caused the plaintiff's injuries was not installed for defendant HBCA's benefit or for a purpose different from that of the general public. The drainage pipe was installed to provide drainage for the public roadway, Adams Street, which abuts not only the HBCA property and the Town property, but also which abuts numerous other residential properties in the area. Thus, HBCA has no special use of the drainage pipe and is entitled to summary judgment dismissing the third-party complaint.

The Town has established its entitlement to summary judgement by submitting evidence that it had no prior written notice of the alleged dangerous condition, the damaged drainage pipe, which falls within the definition of "culvert" under the Huntington Town Code.

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.

"A municipality that has adopted a prior written notice law cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies"

(***Barnes v Incorporated Vil. of Port Jefferson***, 120 AD3d 528, 529, 990 NYS2d 841[2d Dept 2014]; ***Carlucci v Village of Scarsdale***, 104 AD3d 797, 961 NYS2d 318 [2d Dept 2013]; ***Wilkie v Town of Huntington***, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006], citing ***Amabile v City of Buffalo***, 93 NY2d 471, 693 NYS2d 77 [1999]; ***Lopez v G&J Rudolph***, 20 AD3d 511, 799 NYS2d 254 [2d Dept 2005]). "The only two recognized exceptions to a prior written notice requirement are the municipality's affirmative creation of a defect or where the defect is created by the municipality's special use of the property" (***Gonzalez v Town of Hempstead***, 124 AD3d 719, 2 NYS3d 527 [2d Dept 2015]; ***Forbes v City of New York***, 85 AD3d 1106, 1107, 926 NYS2d 309 [2d Dept 2011]). Any prior verbal complaints or other internal documents generated by the Town are insufficient to satisfy the statutory requirement (*see* ***Wilkie v Town of Huntington***, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006]; ***Cenname v Town of Smithtown***, 303 AD2d 351, 755 NYS2d 651 [2d Dept 2003]). Similarly, neither constructive notice nor actual notice of a defect obviates the need for prior written notice to the Town (*see* ***Amabile v City of Buffalo***, *supra*; ***Wilkie v Town of Huntington***, *supra*; ***Cenname Town of Smithtown***, *supra*). "Actual notice of the alleged hazardous condition does not override the statutory requirement of prior written notice of a [alleged] defect" (***Velho v Village of Sleepy Hollow***, 119 AD3d 551, 552, 987 NYS2d 879 [2d Dept 2014]; *see also* ***Gonzalez v Town of Hempstead***,124 AD3d 719, 2 NYS3d 527 [2d Dept 2015]; ***Chirco v City of Long Beach***, 106 AD3d 941, 943, 966 NYS2d 450 [2d Dept 2013]). The affidavits of Diana Esposito and Michael Kaplan establish that there was no prior written notice of the alleged defect filed with either the town clerk's office or with the highway department, as required by the Town ordinance. 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 (***Velho v Village of Sleepy Hollow***, *supra*; ***Petrillo v Town of Hempstead***, 85 AD3d 996, 998, 925 NYS2d 660 [2d Dept 2011]; ***Pagano v Town of Smithtown***, 74 AD3d 1304, 904 NYS2d 729 [2d Dept 2010]; ***LiFrieri v Town of Smithtown***, 72 AD3d 750, 752, 898 NYS2d 629 [2d Dept 2010]).

Plaintiffs have failed to establish that either of the exceptions to the prior written notice requirement. The affirmative negligence exception "is limited to work by the City that immediately results in the existence of a dangerous condition" (*see* ***Yarborough v City of New York***, 10 NY3d 726, 853 NYS2d 261 [2008]; ***Oboler v City of New York***, 8 NY3d 888, 889, 832 NYS2d 871 [2007]). Herein, plaintiffs have failed to proffer evidence in admissible form that the Town's alleged negligence caused or immediately resulted in the existence of a dangerous condition (*see* ***Yarborough v City of New York***, *supra*; ***Denio v City of New Rochelle***, 71 AD3d 717, 895 NYS2d 727 [2d Dept 2010]; ***McCarthy v City of White Plains***, 54 AD3d 828, 863 NYS2d 500 [2d Dept 2008]). Thus, plaintiffs having failed to raise an issue of fact by submitting evidence in admissible form to show that the defendant either affirmatively created the condition causing plaintiff's accident or of a special use of the property, defendant Town is entitled to summary judgment (*see* ***Gonzalez v Town of Hempstead***, *supra*; ***Forbes v City of New York***, *supra*).

In light of the foregoing, the motion by defendant/third-party defendant Huntington Beach Community Association, Inc. ("HBCA") for an order pursuant to CPLR 3212 granting summary judgment dismissing all claims by the third-party plaintiff Town of Huntington is granted.

The motion by defendant/third-party plaintiff Town of Huntington for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is also granted.

Dated: 2/11/16

J.S.C.