At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tioga County Courthouse, Owego, New York, on the 17th day of March, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF TIOGA

NANCY ARKIN and DAVID ARKIN

vs.

DECISION AND ORDER

Index No. 47180
RJI No. 2017-0050-M

VILLAGE OF OWEGO and/or JAMES H. WAGNER and/or LORRAINE M. WAGNER

APPEARANCES:

Counsel for Plaintiffs:

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Village of Owego:

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EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court on motion of Defendant, Village of Owego, ("Village"), to dismiss Plaintiffs' complaint in lieu of Answering. Plaintiffs, Nancy Arkin and David Arkin, filed a cross motion seeking an Order allowing Plaintiffs to amend the complaint, and denying the Village's motion to dismiss. Defendants, James Wagner and Lorraine Wagner, ("Wagners") filed responsive papers in opposition to the Village's motion to dismiss. The Village then filed a reply affidavit in opposition to Plaintiffs' cross motion, and also argued that the Wagners have no standing to oppose the Village's motion, as the motion is not against the Wagners. Oral argument was heard on March 17, 2017 with respect to the motion and cross motion.

Plaintiffs' complaint alleges that, on or about December 27, 2015, Nancy Arkin fell while walking easterly on Main Street in the Village of Owego, Tioga County, which she claims was due to a defective sidewalk. Plaintiffs sought leave of Court to serve a late notice of claim, which was granted in December, 2016 (Tioga County Index No.: 46690). Plaintiffs then filed the summons and complaint in this matter on January 17, 2017. The Village's motion to dismiss in lieu of Answering was filed on February 14, 2017.

The Village's motion argues that it can only be held liable if it received prior written notice of the alleged defect in the sidewalk, created the condition through an affirmative act of negligence, or the sidewalk conferred a "special benefit" to the Village. *Amabile v. City of Buffalo*, 93 NY2d 471 (1999). The Village contends that the complaint fails to allege any of these situations, and, therefore, the complaint should be dismissed under CPLR §3211(a)(7). The Village also asserts that any amendment of the complaint would be without merit, and should be denied. In support of that contention, the Village submitted affidavits to show that the Village had no prior written notice, and did not perform any work on the sidewalk which would have caused the alleged defect.

Indeed, the Plaintiffs did cross move to amend their complaint to specifically add an allegation of prior written notice, and to add clarifying language to the complaint concerning the Village creating the defect.. Plaintiffs argue that the original complaint already contained a specific allegation that the Village created the defect, and therefore was legally sufficient. The

Wagners join in that assertion.

Further, Plaintiffs also oppose the Village's motion for dismissal. Plaintiffs highlight that no discovery has occurred, and that they should be afforded that opportunity to rebut, or discredit, the Village's claims as to lack of prior notice and/or lack of work performed on the sidewalk. Plaintiffs further make a claim in their request to amend the complaint that the Village may be liable for negligent maintenance of a tree adjacent to the sidewalk and/or for violating a Village Law for keeping sidewalks in good condition.

The Wagners have also opposed the Village's motion, noting that the Plaintiffs' complaint alleges that the Village created the defect in the sidewalk, and therefore, the complaint does state a cause of action. The Wagners further assert that the court should not consider the affidavits submitted in support of the Village's motion, as that would go toward the merits of the claim, and would be inappropriate in a motion to dismiss under CPLR §3211; it would be more appropriate for a summary judgment motion. The Wagners take no position on the motion to amend. The Village believes that the Wagners have no standing to oppose the Village's motion.

DISCUSSION

1.Motion to Dismiss

On a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a claim, the court "must afford the complaint a liberal construction, accept the facts as alleged in the pleading as true, confer on the plaintiff(s) the benefit of every possible inference and determine whether the facts as alleged fit within any cognizable legal theory." *Torok v. Moore's Flatwork & Founds., LLC*, 106 AD3d 1421, 1421 (3rd Dept. 2013) [internal quotation marks and citation omitted]; *NYAHSA Servs., Inc., Self-Ins. Trust v. People Care Inc.*, 141 AD3d 785, 788 (3rd Dept. 2016); *see Tenney v. Hodgson Russ, LLP*, 97 AD3d 1089, 1090 (3rd Dept. 2012); *Leon v. Martinez,* 84 NY2d 83 (1994). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005); *see also AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 NY3d 582 (2005); *Jacobs v. Macy's E.*, 262 AD2d 607 (2nd Dept. 1999). The Court of

Appeals has stated:

> Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail (*see Foley v D'Agostino*, 21 AD2d 60, 64-65; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:24, p 31; 4 Weinstein-Korn-Miller, NY Civ Prac, par 3211.36). When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate (*see Rappaport v International Playtex Corp.*, 43 AD2d 393, 394-395; 4 Weinstein-Korn-Miller, NY Civ Prac, par 3211.36; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:25, p 31).

Guggenheimer v. Ginzburg, 43 NY2d 268, 275 (1977).

A. Lack of written notice or an exception to that requirement

A municipality "cannot be held liable for damages resulting from an injury arising from a defective sidewalk without prior written notice of the allegedly defective or dangerous condition." *Hockett v. City of Ithaca*, 2017 N.Y. App. Div. LEXIS 3034, 2017 NY Slip Op 03096 (NY App Div 3rd Dept. Apr. 20, 2017) (*citing Amabile v. City of Buffalo*, [supra]; *Chance v. County of Ulster*, 144 AD3d 1257, 1258 (2016); *Stride v City of Schenectady*, 85 AD3d 1409, 1410 (2011); *General Municipal Law* § 50-e). New York Village Law §6-628 provides that "[n]o civil action shall be maintained against the village ... unless written notice of the defective, unsafe, dangerous or obstructed condition ... relating to the particular place, was actually given to the village clerk and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of." There are two "recognized exceptions to the rule—that the municipality affirmatively created the defect through an act of negligence or that a special use resulted in a special benefit to the locality." *Yarborough v. City of New York*, 10 NY3d 726, 728 (2008); *Amabile, supra.* If the Village created the defect, then prior written notice is not necessary. *See Groninger v. Village of Mamaroneck*, 17

NY3d 125 (2011); *Benty v. First Methodist Church of Oakfield*, 34 NY3d 1189 (4th Dept. 2005). There is no allegation in this case as to any special benefit to the municipality. Nor does the Plaintiffs' original complaint contain an allegation that prior written notice was provided, leaving only the possible exception of the Village creating the defect.

Plaintiffs oppose the Village's motion to dismiss by arguing that their original complaint does allege that the Village created the defect and therefore, at least at this early stage of litigation, is legally sufficient. The original complaint states:

> The defendants, [Village] and/or the Wagners were negligent and/or created said sidewalk defect and breached what are non-delegable duties to keep said sidewalk in a safe condition. Said defendants were negligent in allowing said unsafe condition to exist for years after having actual and/or construction [sic] notice of the same.

Complaint at ¶10.

Indeed, that paragraph does allege defendants may have **created** a sidewalk defect, but case law is clear that the affirmative act exception "is limited to work by the [municipality] that immediately results in the existence of a dangerous condition." *Yarborough*, *supra* at 728, *quoting Oboler v. City of New York*, 8 NY3d 888, 889 (2007). In the present case, the allegations are of something that occurred over time, and existed for years, rather than immediate. Such an alleged defect is not sufficient to impose liability upon the Village. *See Hockett, supra*; *Loghry v. Village of Scarsdale*, 2017 N.Y. App. Div. LEXIS 2577, 2017 NY Slip Op 02635 (NY App Div 2nd Dept. Apr. 5, 2017).

Thus, the complaint lacks an allegation of prior written notice, and only contains allegations of negligence with results occurring gradually over time. This would be insufficient to constitute an affirmative act exception to the prior written notice rule. Further, there are no claims of a special benefit to the Village.

B. Violation of local laws

Plaintiffs complaint also alleges that the Village has enacted laws which expand its liability for defects in a sidewalk. (See, Plaintiffs' complaint at ¶11-"defendants violated local

laws requiring the ... sidewalks to be kept in good repair.") The Village's motion to dismiss did not specifically address the violation of local laws theory, but it has been addressed in Plaintiffs' cross motion, and subsequently, in the Village's reply and opposition to the Plaintiffs' cross motion.

Plaintiffs contend that Village laws extinguish a prior written notice requirement. Specifically, Plaintiffs point to local laws §172-12 and §172-13, which provide that sidewalks shall meet a specific standard, and if they do not, they shall be replaced. The local laws do not reference a prior written notice requirement, and therefore, Plaintiffs contend that means that the Village opted to eliminate that requirement.

However, the Village correctly points out that the purposes of those local laws is to identify the sidewalks in need of replacement. They do not eliminate the prior written notice requirements of New York Village Law §6-628 and General Municipal Law §50-e(4). Moreover, the Village cannot enact local laws that are inconsistent with State Laws except in certain limited exceptions-if it falls within the supersession authority under Municipal Home Rule Law §10. *See Kamhi v. Town of Yorktown*, 74 NY2d 423 (1989). The supersession areas for Villages are enumerated in Municipal Home Rule Law §10(1)(ii)(a), and (e), none of which seem applicable to this situation. Further, "[w]hen a municipality adopts a local law that is intended to supercede a state statute, such intent must be clearly and unequivocally expressed in the body of the local law." *Wright v. Rezendez*, 90 AD3d 1388, 1389 (3rd Dept. 2011) *citing* Municipal Home Rule Law §§ 10, 22; *Kamhi v. Town of Yorktown*, 74 NY2d 423, 429, 434 (1989). The Village of Owego local laws do not state they are superseding Village Law §6-628 or General Municipal Law §50-e(4). Thus, Village Law does not eliminate the prior written notice requirement either.

Accordingly, Plaintiffs' complaint fails to allege prior written notice of the defect, or an exception to the prior written notice requirement, and also fails to state a claim that prior written notice is not required under a local law. The Village has therefore provided adequate basis to grant dismissal of the complaint.

2. Cross motion to amend the complaint

Plaintiffs seek to avoid dismissal of the complaint by filing a cross motion seeking permission to amend the complaint. The Village, in anticipation of such a motion, included two affidavits to establish that any proposed amendment would be futile; an affidavit from the Village Clerk stating that the Village never received written notice about the alleged defect, and an affidavit from the Superintendent of Public Works asserting that the Village never performed any work on the subject sidewalk. Accordingly, the Village argues that the Plaintiffs cannot allege, and establish, prior written notice, or an affirmative act that could have caused the sidewalk defect.

Leave to amend a pleading is left to the discretion of the trial court and "'should be freely granted'" so long as no prejudice befalls the nonmoving party and "'the amendment is not plainly lacking in merit.'" *Davis v. Wyeth Pharms., Inc.*, 86 AD3d 907, 908 (3rd Dept. 2011), *quoting Shelton v. New York State Liq. Auth.*, 61 AD3d 1145, 1149 (3rd Dept. 2009); *Leclaire v. Fort Hudson Nursing Home, Inc.*, 52 AD3d 1101 (3rd Dept. 2008). Leave to amend a complaint may be denied if the delay is substantial, there is no satisfactory excuse provided for the delay, and there is prejudice to the opposing party. *See, Ciarelli v. Lynch*, 46 AD3d 1039 (3rd Dept. 2007). Plaintiffs seek to amend their complaint to: 1) add in allegations of prior written notice and insert additional language concerning the Village creating the alleged defect; specifically identify the local laws they believe eliminate the written notice requirement, and 3) to add allegations of negligent maintenance of a tree adjacent to a sidewalk.

A. Lack of written notice or an exception

Plaintiffs concede that neither the original complaint, nor the proposed amended complaint contain an allegation of prior written notice. However, the allegation in the amended complaint refers to "inspection notes, written contracts with contractors hired to repair the walkway, interoffice memos etc, all of which may require discovery" to show the Village had written notice of the sidewalk defect. At best, the Plaintiffs' amended complaint alleges actual notice. The fact that "officials of the Village may have had actual knowledge of the alleged

defect [is] not sufficient to satisfy the requirement of prior written notice." *Mahler v. Village of Port Jefferson*, 18 AD3d 450, 451 (2nd Dept. 2005) (citations omitted). Plaintiffs do not allege in their complaint, or proposed amended complaint that prior written notice of the defect was made directly to the Village; only that the Village may have obtained actual knowledge. That is insufficient to impose liability. Thus, even without considering the affidavit from the Village Clerk, the Court concludes that the proposed amended complaint fails to allege written notice.

Plaintiffs alternatively contend that their amended complaint does not require prior written notice if: 1) the Village created the condition and/or 2) a tree in the Village right of way is involved. The latter is a new cause of action, premised upon an alleged violation of Village of Owego laws, supposedly creating Village liability even in the absence of prior written notice.

The proposed amended complaint alleges that the Village "may have created the defect through an affirmative act of negligence by reason of an improper installation of the walkway atop tree roots known to cause heaving." (Proposed Amended Complaint at ¶12). Whether the claim is negligence on the part of the Village as to the planting of the tree, or failure to maintain the sidewalk, Plaintiffs' claim fails. Both are allegations that the alleged defect was caused by environmental effects over time. As noted in the discussion above, these are not sufficient to establish the Village's liability. *Loghry, supra; see also Hockett, supra.* Even assuming the Village had planted the tree, "such an act, in addition to the Village's failure to control the roots of the tree, would at most constitute nonfeasance, not affirmative negligence." *Lowenthal v. Theodore H. Heidrich Realty Corp.*, 304 AD2d 725, 726 (2nd Dept. 2003). The effects are not immediate, but occurring gradually over time. This does not constitute an affirmative act of negligence sufficient to be an exception to the lack of notice. This conclusion, like the lack of written notice, is made without consideration of the affidavits submitted by the Village.

While Plaintiffs argue that they should be entitled to discovery on these issues, such would only be true if their allegations would state a cause of action. Even the proposed amended complaint fails to allege prior written notice, or an act of affirmative act of negligence. The Plaintiffs cite to *Westbrook v. Village of Endicott*, 67 AD3d 1319 (3rd Dept. 2009) and *Finch v. Village of Freeport*, 173 AD2d 591 (2nd Dept. 1991) as supporting a claim that they should be entitled to discovery. However, those cases dealt with the sufficiency of affidavits trying to establish a lack of written notice, and the Courts permitted discovery. Here, the allegations in the

complaint, even without considering the affidavits, do not claim prior written notice was provided, or that there was an affirmative act of negligence. As such, the Court finds those cases distinguishable. Thus, the Court concludes that the amended complaint fails to allege prior written notice of the alleged defect, or an exception to the written notice rule.

B. Violation of local law

As noted above, Plaintiffs have also argued that local ordinances have been enacted by the Village which do not contain a written notice requirement, and may have expanded Village liability. Plaintiffs' initial complaint alleged that "defendants violated local laws requiring the aforementioned sidewalk to be kept in good repair." (Complaint at ¶ 11). The proposed amended complaint argues that prior written notice is not required based upon local laws §172-12 and §172-13. For reasons already discussed, the Court concludes that the local laws do not eliminate the requirement of prior written notice.

C. Tree involvement

Plaintiffs' initial complaint made allegations concerning the sidewalk, and the proposed amended complaint seeks to add allegations of negligence in improperly installing a sidewalk atop a tree root known to cause heaving and negligently maintaining the tree. As previously addressed, the installation of the sidewalk did not immediately result in a dangerous condition, but took years. Thus, it does not constitute and exception to the written notice requirement.

Further, Plaintiffs request to amend the complaint to allege negligence with respect to the trees is insufficient. As noted above, failure to control the roots of trees, or placing a sidewalk atop tree roots which could heave and create an uneven sidewalk, are not affirmative acts of negligence. The cases relied upon by Plaintiff involve the tree itself being negligently maintained, and injuries resulting from the tree branching falling and/or striking someone. Here, the injury was not occasioned by something above the ground, but potentially by something under the ground. The Court agrees with the Village that this would not constitute affirmative negligence, and cannot be relied upon as an exception to the written notice requirement.

CONCLUSION

The Court concludes that Plaintiffs cross motion to amend the complaint is without merit, and therefore is DENIED.

The Village's motion to dismiss the complaint against it is GRANTED.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: May 16, 2017
Owego, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice

The following papers were received and reviewed by the Court in connection with this motion:

1) Village's Notice of Motion to Dismiss in lieu of Answering, with Affirmation of Eric M. Gernant, II dated February 14, 2017, with attached Exhibits;

2) Plaintiffs' Notice of Cross Motion, with Affirmation of Anna Czarples, Esq., dated March 7, 2017, with attached Exhibits (already filed in Clerk's office);

3) Wagners' responsive papers, with Affirmation of William D. VanDelinder, Esq., dated March 10, 2017 (already filed in Clerk's office);

4) Village's Reply Affirmation in support of Motion to Dismiss and in opposition to Plaintiffs' Cross Motion, with Affirmation of Eric M. Gernant, II dated March 15, 2017.