SHORT FORM ORDER

INDEX No. 12-22228
CAL. No. 16-01257OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 12-14-16
ADJ. DATE 6-28-17
Mot. Seq. # 001 - MD

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ANGELA PETTY,

Plaintiff,

- against -

COUNTY OF SUFFOLK and TOWN OF BABYLON,

Defendants.

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Upon the following papers numbered 1 to 28 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 24 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 25 - 26 ; Replying Affidavits and supporting papers 27 - 28 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Town of Babylon for summary judgment dismissing the complaint pursuant to Civil Practice Law and Rules (CPLR) §3212 is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Angela Petty on May 12, 2011, when she tripped on a piece of rotting wood inside the handball court at Wyandanch Park in the Town of Babylon, New York. Plaintiff alleges that the Town of Babylon ("the Town") was negligent, among other things, in "causing, permitting and/or allowing the handball court surface to become damaged and uneven." By stipulation dated April 29, 2014, the parties agreed to discontinue the action against the County of Suffolk.

According to her similar General Municipal Law 50-h and deposition testimony, plaintiff went to Wyandanch Park at approximately 4:30 p.m. on May 12, 2011 with her son, sister, nephew, and great-nieces. After briefly leaving the handball court to take her great-nieces to the restroom, plaintiff returned to the handball court at approximately 6:00 p.m. While walking across the handball court and "looking to see who was swinging," plaintiff tripped and fell on a rotting piece of wood trim between the handball

court fence and a bench. She testified that she never complained about the wood trim or knew of anyone that complained.

The Town now moves for summary judgment in its favor dismissing the complaint on the grounds that it lacked prior written notice of the rotting wood in the handball court, that it did not have actual or constructive notice of the alleged hazardous condition, and that plaintiff assumed the risk while walking across the handball court. The Town submits, in support of the motion, copies of the pleadings; the bill of particulars; the note of issue; the transcript of plaintiff's General Municipal Law 50-h testimony; the transcript of the deposition testimony of plaintiff and that of Leo Sottile; and the affidavits of Jennifer Taus, Patrick Farrell, and Thomas Stay. In opposition, plaintiff argues that the statutes requiring prior written notice do not apply to handball courts, and that the assumption of risk doctrine does not apply, because plaintiff was not engaged in a sport or recreational activity at the time of her accident.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Where a municipality has enacted a prior written notice law, it may not be subjected to liability for injuries caused by a defect which comes within the ambit of the law unless it has received prior written notice of the alleged defect, or an exception to the prior written notice requirement applies (*see* ***Conner v City of New York***, 104 AD3d 637, 960 NYS2d 204 [2d Dept 2013]; ***Masotto v Village of Lindenhurst***, 100 AD3d 718, 954 NYS2d 557 [2d Dept 2012]; ***Braver v Village of Cedarhurst***, 94 AD3d 933, 942 NYS2d 178 [2d Dept 2012]; ***Pennamen v Town of Babylon***, 86 AD3d 599, 927 NYS2d 164 [2d Dept 2011]). The Court of Appeals has recognized only two exceptions to the prior written notice requirement, namely, where the municipality created the defect through an affirmative act of negligence, or a special use confers a special benefit upon the municipality (*see* ***Yarborough v City of New York***, 10 NY3d 726, 853NYS2d 261 [2008]; ***Amabile v City of Buffalo***, 93 NY2d 471, 693 NYS2d 77 [1999]; ***Carlucci v Village of Scarsdale***, 104 AD3d 797, 961 NYS2d 318 [2d Dept 2013]; ***Pennamen v Town of Babylon***, *supra*).

Pursuant to Town Law §65-a and the Town of Babylon Code, as a precondition to commencing a civil action against the Town to recover damages for personal injuries sustained as a result of a defect on

Town property, the Town must be given prior written notice of the defect. Section 158-2 of the Town of Babylon Code states:

> No civil action will be maintained against the Town for damages or injuries to person or property sustained by reason of a defective, dangerous, unsafe, out-of-repair or obstructed sidewalks of the Town or in consequence of the existence of snow, ice or anything upon any of its sidewalks, unless such sidewalks have been constructed or are maintained by the Town pursuant to statute; nor shall any action be maintained for damages or injuries to person or property sustained by reason of such defective, dangerous, unsafe, out-of-repair or obstructed sidewalks or in consequence of such existence of snow, ice or anything upon any of its sidewalks unless written notice thereof, specifying the particular place, was actually given to the Town Clerk of the Town and there was a failure or neglect to cause such defective, dangerous, unsafe, out-of-repair or obstructed sidewalks to be remedied, such snow or ice to be removed or to make the place otherwise reasonably safe within a reasonable time after the receipt of such notice.

The Town failed to establish a prima facie case of entitlement to summary judgment in its favor based on the lack of prior written notice concerning the alleged hazardous condition on the handball court (*see* ***Cieszynski v Town of Clifton Park***, 124 AD3d 1039, 2 NYS3d 243 [3d Dept 2015]; ***Giarraffa v Town of Babylon***, 84 AD3d 1162, 923 NYS2d 697 [2d Dept 2011]). While it proved that no prior written notice was given to the Town, such notice was unnecessary as the alleged location of plaintiff's injury is not one which falls within the purview of the statute (*see* ***Giarraffa v Town of Babylon***, *supra*).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Peralta v Henriquez***, 100 NY2d 139, 760 NYS2d 741 [2003]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Frank v JS Hempstead Realty, LLC***, 136 AD3d 742, 24 NYS3d 714 [2d Dept 2015]; ***Guzman v State of New York***, 129 AD3d 775, 10 NYS3d 598 [2d Dept 2015]). Property owners, however, are not insurers of the safety of people on the premises (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Donohue v Seaman's Furniture Corp.***, 270 AD2d 451, 705 NYS2d 291 [2d Dept 2000]). To establish liability in a premises liability action, a plaintiff must establish that a dangerous or defective condition caused his or her injuries, and that the defendant owner or possessor created the condition or had actual or constructive notice of it (*see* ***Sermos v Gruppuso***, 95 AD3d 985, 944 NYS2d 245 [2d Dept 2012]; ***Starling v Suffolk County Water Auth.***, 63 AD3d 822, 881 NYS2d 149 [2d Dept 2009]; ***Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc.***, 61 AD3d 629, 876 NYS2d 512 [2d Dept 2009]). A defendant moving for summary judgment must show, prima facie, that he, she, or it did not create the defective condition, or have actual or constructive notice of the alleged dangerous or defective condition for a sufficient length of time to discovery and remedy it (*see* ***Marinaro v Reynolds***, 152 AD3d 659, 59

NYS3d 87 [2d Dept 2017]; ***Witkowski v Island Trees Pub. Lib.***, 125 AD3d 768, 4 NYS3d 65 [2d Dept 2015]; ***Sinclair v Chau***, 117 AD3d 713, 985 NYS2d 267 [2d Dept 2014]; ***Ingram v Long Is. Coll. Hosp.***, 101 AD3d 814, 956 NYS2d 107 [2d Dept 2012]). In order to constitute constructive notice, a defect must be visible and apparent and must exist for a sufficient length of time prior to the accident to permit the landowner to remedy it, and it will not be imputed where the defect is latent or would not, upon reasonable inspection, be discovered (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Marinaro v Reynolds***, *supra*; ***Schnell v Fitzgerald***, 95 AD3d 1295, 945 NYS2d 390 [2d Dept 2012]; ***Applegate v Long Is. Power Auth.***, 53 AD3d 515, 862 NYS2d 86 [2d Dept 2008]). To demonstrate a lack of constructive notice, a defendant must offer evidence as to the last cleaning or inspection relative to when the plaintiff's accident occurred (*see* ***Schwartz v Gold Coast Rest. Corp.***, 139 AD3d 696, 31 NYS3d 535 [2d Dept 2016]; ***Green v Albemarle, LLC***, 107 AD3d 948, 966 NYS2d 904 [2d Dept 2013]; ***Arzola v Boston Props. Ltd. Partnership***, 63 AD3d 655, 880 NYS2d 352 [2d Dept 2009]).

The Town failed to establish a prima facie case that it did not create the alleged hazardous condition or have actual or constructive notice of it (*see* ***Schwartz v Gold Coast Rest. Corp.***, *supra*; ***Green v Albemarle, LLC***, *supra*; ***Arzola v Boston Props. Ltd. Partnership***, *supra*). The Town did not proffer any evidence as to when the subject location was last inspected before plaintiff's accident (*see* ***Green v Albemarle, LLC***, *supra*; ***Arzola v Boston Props. Ltd. Partnership***, *supra*). Mr. Sottile's reference to general cleaning and inspection of the handball court in his testimony is insufficient to establish lack of constructive notice (*see* ***Clarkin v In Line Rest. Corp.***, 148 AD3d 559, 52 NYS3d 304 [1st Dept 2017]; ***Ansari v MB Hamptons, LLC***, 137 AD3d 1174, 28 NYS3d 397 [2d Dept 2016]; ***Green v Albemarle, LLC***, *supra*; ***Marchese v St. Martha's R.C. Church, Inc.***, 106 AD3d 881, 965 NYS2d 557 [2d Dept 2013]).

With respect to defendant's contention that plaintiff assumed the risk, a plaintiff cannot recover for injuries which occur during voluntary sporting or recreational activities if it is determined that he or she assumed the risk (*see* ***Morgan v State of New York***, 90 NY2d 471, 662 NYS2d 421 [1997]; ***Rueckert v Cohen***, 116 AD3d 1026, 983 NYS2d 894 [2d Dept 2014]; ***Zachary v Young Israel of Woodmere***, 95 AD3d 946, 944 NYS2d 203 [2d Dept 2012]; ***Reidy v Raman***, 85 AD3d 892, 924 NYS2d 581 [2d Dept 2011]; ***Leslie v Splish Splash at Adventureland***, 1 AD3d 320, 766 NYS2d 599 [2d Dept 2003]). A voluntary participant in a sporting or recreational activity consents to commonly-appreciated risks which are inherent in and arise out of the nature of such activity generally, and which flow from participation (*see* ***Morgan v State of New York***, *supra*; ***Rueckert v Cohen***, *supra*; ***Reidy v Raman***, *supra*; ***Leslie v Splish Splash at Adventureland***, *supra*). Thus, under the primary assumption of risk doctrine, a person who engages in an athletic or recreational activity will be barred from recovering damages for injuries sustained during a such activity if it is established that the injury-causing conduct, event or condition was known, apparent or reasonably foreseeable (*see* ***Morgan v State of New York***, *supra*; ***Benitez v New York City Bd. of Educ.***, 73 NY2d 650, 543 NYS2d 29 [1989]; ***Turcotte v Fell***, *supra*; ***Maddox v City of New York***, 66 NY2d 270, 496 NYS2d 726 [1985]; ***Sarvia v Makkos of Brooklyn***, 264 AD2d 576, 694 NYS2d 393 [1st Dept 1999]). This doctrine also applies to spectators

and bystanders in close proximity to a playing area (*see* ***Spiteri v Bisson***, 134 AD3d 799, 20 NYS3d 429 [2d Dept 2015]).

The Town also failed to establish a prima facie case of entitlement to summary judgment based on plaintiff's assumption of risk (*see* ***Abato v County of Nassau***, 65 AD3d 1268, 886 NYS2d 218 [2d Dept 2009]). As plaintiff testified that she was merely walking across the handball court while others were playing handball, she was not engaged in an athletic or recreational activity, or injured as a result of a commonly appreciated risk inherent to the instrumentality of the activity (*cf.* ***Spiteri v Bisson***, *supra*; ***Palladino v Lindenhurst Union Free School Dist.***, 84 AD3d 1194, 924 NYS2d 474 [2d Dept 2011]). The Town did not establish that tripping over wood on the handball court was a known, apparent, or reasonably foreseeable consequence of being a handball spectator (*see* ***Abato v County of Nassau***, *supra*).

As the Town failed to meet its prima facie burden, it is unnecessary to consider whether the papers in opposition are sufficient to raise a triable issue of fact (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Accordingly, the motion by defendant Town of Babylon for summary judgment dismissing the complaint is denied.

Dated: February 9, 2018

J.S.C.
HON. DAVID T. REILLY

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**