Short Form Order

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

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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LAURA SERRANO,

Plaintiff,

-against-

COUNTY OF SUFFOLK, SUFFOLK COUNTY DEPARTMENT OF PUBLIC WORKS and SUFFOLK COUNTY SEWER DISTRICT,

Defendants.

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INDEX NO.: 36305/2006
CALENDAR NO.: 020072017OT
MOTION DATE: 5/10/18
MOTION SEQ. NO.: 005 MG; CASEDISP

PLAINTIFF'S ATTORNEY:
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DEFENDANTS' ATTORNEYS:
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Upon the following papers numbered 1 to 38 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 17 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 19 - 38 ; Replying Affidavits and supporting papers ___; Other memorandum of law 18 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (motion sequence no. 005) of defendants for an order pursuant to CPLR R. 3211 and CPLR R. 3212 granting summary judgment dismissing the complaint is granted.

This is an action to recover damages for personal injuries and property damage allegedly suffered as the result of two incidents of sewage system overflow in the Southwest Sewer District Number Three (the "District") operated by the defendant Department of Public Works ("DPW") as an agency of the defendant County of Suffolk (collectively the "County"). It is undisputed that the District experienced a sewage system overflow ("SSO") on October 14, 2005 that lasted until October 16, 2005; that rain water and untreated sewage overflowed from the interceptor and manhole located at the intersection of Homan Avenue and Gibson Avenue in Bay Shore, New York, on those dates; and that plaintiff owns a single-family dwelling located at 26 Homan Avenue (the "Premises"). The subject interceptor is an 84-inch diameter pipe that carries sewage effluent to the Bergen Point Sewage Treatment Plant (the "Treatment Plant") from various pipes leading from other sources of effluent. It is further undisputed that the District experienced a second SSO at the intersection on March 30, 2010.

After the October 2005 incident, plaintiff served a notice of claim on or about February 28, 2006 alleging that she sustained a severe illness as a result of the first SSO, and that the

overflow was "caused by the negligence of [the defendants] in failing to timely respond to the backup." Thereafter, plaintiff commenced an action by service of a complaint dated December 21, 2006 setting forth a single cause of action sounding in negligence. Defendants joined issue by the service of an answer dated January 25, 2007, which included an affirmative defense that the action was barred due to the lack of prior written notice to the County.

After the March 2010 incident, plaintiff served a notice of claim on or about May 28, 2010 alleging that she sustained personal injuries and damage to her residence as a result of the negligence, carelessness, and recklessness of the defendants "when the Southwest Sewer again failed" at the intersection, and "no repairs of clean up [*sic*] was conducted by [defendants]." Plaintiff commenced a second action against defendants by the filing of a summons and complaint on July 19, 2011 setting forth a single cause of action sounding in negligence. Defendants joined issue by the service of an answer dated August 17, 2011 which repeated as an affirmative defense that the action was barred due to the lack of prior written notice to the County.

By order dated June 8, 2015, the Court (GAZZILLO, J.) consolidated the two actions under the above-referenced index number. Plaintiff has not served an amended complaint setting forth all of her allegations therein. For the purposes of this motion, the undersigned will consider the two incidents as separate causes of action and, unless otherwise warranted, will discuss both causes of action as if set forth in a single complaint.

Defendants now move for summary judgment pursuant to CPLR R. 3212 dismissing the complaint against them on the grounds, among other things, that the County did not receive prior written notice of the alleged dangerous condition and for failure to state a cause of action pursuant to CPLR R. 3211. Because issue has been joined and failure to state a cause of action is one of the permissible grounds for a post-answer motion to dismiss (*see* CPLR R. 3211 [e]), this motion should be deemed to have been brought under CPLR R. 3212. Whenever a court elects to treat such an erroneously labeled motion as a motion for summary judgment, it must provide "adequate notice" to the parties (CPLR R. 3211[c]) unless it appears from the parties' papers that they deliberately are charting a summary judgment course by laying bare their proof (*see Rich v Lefkovits*, 56 NY2d 276, 452 NYS2d 1 [1982]; *Schultz v Estate of Sloan*, 20 AD3d 520, 799 NYS2d 246 [2d Dept 2005], *lv denied* 82 NY2d 657, 604 NYS2d 556 [1993]; *Singer v Boychuk*, 194 AD2d 1049, 599 NYS2d 680 [3d Dept 1993]). Here, upon review of the papers, the Court finds that the County has clearly charted a summary judgment course, that the County's notice of motion specifically demands said relief, and that it has submitted extensive documentary evidence and affidavits in support of its position (*see generally Harris v Hallberg*, 36 AD3d 857, 828 NYS2d 579 [2d Dept 2007]). Under these circumstances, the court, in determining this motion, is free to apply the standard applicable to summary judgment motions without affording the parties notice of its intention to do so (*see Mihlovan v Grozavu*, 72 NY2d 506, 534 NYS2d 656 [1988]; *Doukas v Doukas*, 47 AD3d 753, 849 NYS2d 656 [2d Dept 2008]); *Fuentes v Aluskewicz*, 25 AD3d 727, 808 NYS2d 739 [2d Dept 2006]).

In support of the motion, the County submits, among other things, copies of the pleadings, the transcripts of the deposition testimony of two employees of the County, and the affidavits of three of its employees. In his affidavit, Jason A. Richberg ("Richberg"), the Clerk of the Suffolk County Legislature, states that his duties require him to maintain records of all written complaints received by the Clerk concerning alleged defects on County-owned property pursuant to the provisions of the Suffolk County Charter §C8-2A. He states that he has searched for any written complaints filed with his offices concerning the District in or about the vicinity of the premises at any time prior to October 14, 2005 and March 30, 2010, and that his offices are not in receipt of any such written notice or complaint.

In his affidavit, John Donovan ("Donovan"), an investigator with the County of Suffolk in the Office of the County Attorney, states that his duties include maintaining records of all written complaints received by the County Attorney's offices concerning any alleged defects on the streets, roads and sidewalks and sewers of the County of Suffolk made prior to November 11, 2004, when the Suffolk County Charter was amended to provide that such notices be filed with the Clerk of the Suffolk County Legislature. He states that he searched such records for any complaints made regarding a defect or dangerous condition concerning the District in or about the vicinity of the premises at any time prior to October 14, 2005 and March 30, 2010, and that his offices are not in receipt of any such written notice or complaint. He further swears that the notices of claim filed by the plaintiff "fail to allege a defect in the Southwest Sewer District."

A municipality that has enacted a prior written notice statute may not be subjected to liability for injuries caused by a dangerous condition which allegedly caused the accident unless it either has received written notice of the defect or an exception to the written notice requirement applies (*Dibble v Village of Sleepy Hollow,* 156 AD3d 602, 66 NYS3d 26 [2d Dept 2017]; *Poveromo v Town of Cortlandt*, 127 AD3d 835, 6 NYS3d 617 [2d Dept 2015]). The only two recognized exceptions to the prior written notice requirement are where the municipality's affirmative negligence created the defect or the defect was created by the municipality's special use of the property (*Amabile v City of Buffalo*, 93 NY2d 471, 693 NYS2d 77 [1999]; *Gonzalez v Town of Hempstead*, 124 AD3d 719, 720, 2 NYS3d 527 [2d Dept 2015]).

The County contends that this action must be dismissed as it did not receive prior written notice of the alleged defective condition as required by Suffolk County Charter §C8-2A, which provides as follows:

> No civil action shall be maintained against Suffolk County or any of its departments, agencies, offices, districts, boards, commissions or subdivisions for damages or injuries to a person or property sustained by reason of any (a) highways; ... (v) sewers; (w) manholes; ... under the jurisdiction of the County, on account of that structure or thing enumerated above, in whole or in part, allegedly

> being in a defective condition, out of repair, unsafe, dangerous or obstructed ... unless the County has received written notice within a reasonable time before said injury or property damage was sustained.

The requirement of prior written notice is a substantive element of plaintiff's cause of action (*Cipriano v New York*, 96 AD2d 817, 465 NYS2d 564 [2d Dept 1983]). As a municipality's duty to repair or remove any defect complained of does not arise until actual written notice is given to it, no cause of action accrues against it (*Barry v Niagara Frontier Transit System, Inc.*, 35 NY2d 629, 364 NYS2d 823 [1974]). Under prior written notice statutes, thus, a municipality cannot be liable in negligence for nonfeasance unless it fails to remedy a defective condition within a reasonable time after receipt of such notice (*id*). It is therefore, a condition precedent to maintaining an action against a municipality (*Gorman v Town of Huntington*, 12 NY3d 275, 879 NYS2d 379 [2009]), and this includes counties (*Holt v County of Tioga*, 56 NY2d 414, 452 NYS2d 383 [1982]). Thus, it is incumbent on a plaintiff to both plead and prove that prior written notice had been given to the County, and failure to allege same in the complaint subjects the complaint to dismissal for failure to state a cause of action (*Katz v City of New York*, 87 NY2d 241, 638 NYS2d 593 [1995]; *Goldston v Babylon*, 145 AD2d 534, 535 NYS2d 738 [2d Dept 1988]).

Here, the defendants have established their *prima facie* entitlement to summary judgment through the submission of the affidavits of Richberg, Clerk of the Suffolk County Legislature, and Donovan, an investigator employed by the Suffolk County Attorney's office, in which they stated that they conducted a search of the records and files maintained by their respective offices and found no records indicating that the defendant had received prior written notice of the alleged defective condition of the sewer system where this incident occurred (*see Politis v Town of Islip*, 82 AD3d 1191, 920 NYS2d 185 [2d Dept 2011]; *McCarthy v City of White Plains*, 54 AD3d 828, 863 NYS2d 500 [2d Dept 2008]).

In opposition, plaintiff contends that the notice of claim served in February 2006, after the October 2005 incident, establishes that defendants had "actual knowledge of the events [herein]." Plaintiff does not address that portion of defendants' motion regarding the lack of written notice prior to the October 2005 incident. New York Courts have held that the failure to address arguments proffered by a movant or appellant is equivalent to a concession of the issue (*see McNamee Constr. Corp. v City of New Rochelle*, 29 AD3d 544, 817 NYS2d 295 [2d Dept 2006]; *Welden v Rivera*, 301 AD2d 934, 754 NYS2d 698 [3d Dept 2003]; *Hajderlli v Wiljohn 59 LLC*, 24 Misc 3d 1242A, 2009 NY Slip Op 51849U [Sup Ct, Bronx County 2009]). Thus, plaintiff's claim involving the October 2005 incident is dismissed.

To the extent that plaintiff's opposition can be read to contend that the notice of claim served in February 2006 serves as prior written notice of an alleged defect in the interceptor at the intersection, it is without merit. The notice states that the claim arose due to the "negligence

of [the defendants] in failing to timely respond to the backup." It is well settled that the requirements of the statutes requiring notices of claim are met when the notice describes the incident with sufficient particularity so as to enable the municipality to conduct a proper investigation and assess the merits of the claim (*Davis v City of New York*, 153 AD3d 658, 61 NYS3d 551 [2d Dept 2017]; *Yankana v City of New York*, 246 AD2d 645, 668 NYS2d 241 [2d Dept 1998]; *see also Lipani v Hiawatha Elementary Sch.*, 153 AD3d 1247, 61 NYS3d 582 [2d Dept 2017]). The language of the subject notice does not indicate any failure within the sewer system and fails to place the defendants on notice as any alleged defective condition.

Furthermore, contrary to plaintiff's assertion, constructive notice of a defect is not an exception to the statutory requirement of prior written notice of the defect (*see Groninger v Village of Mamaroneck*, 17 NY3d 125, 927 NYS2d 304 [2011]; *Amabile v City of Buffalo*, *supra*; *Rosenblum v City of New York*, 89 AD3d 439, 931 NYS2d 326 [1st Dept 2011]). In addition, actual notice does not obviate the need to comply with the prior written notice requirement (*Charles v City of Long Beach*, 136 AD3d 634, 24 NYS3d 404 [2d Dept 2016]; *Velho v Village of Sleepy Hollow*, 119 AD3d 551, 987 NYS2d 879 [2d Dept 2014]).

Defendants having established that they lacked prior written notice under the applicable statute, the burden shifts to plaintiff to demonstrate the applicability of one of two recognized exceptions to the rule (*Yarborough v City of New York*, 10 NY3d 726, 853 NYS2d 261 [2008]; *Marshall v City of New York*, 52 AD3d 586, 861 NYS2d 77 [2d Dept 2008]). Plaintiff has failed to raise a triable issue of fact as to whether there was such prior written notice or as to whether one of the two exceptions to the prior written notice requirement applied (*see Amabile v City of Buffalo*, *supra; Politis v Town of Islip*, *supra; McCarthy v City of White Plains*, *supra*). Thus, plaintiff's claim involving the March 2010 incident is dismissed.

Finally, the adduced evidence, including the extensive deposition testimony of the employees of the DPW, indicates that these events were triggered by unusually significant rainfalls which impacted the sewer system and resulted in flows that exceeded the system's design capacity. It is well settled that a municipality is immune from liability arising out of claims that it negligently designed its sewerage system (*Gugel v County of Suffolk*, 120 AD3d 1189, 1190 [2d Dept 2014]; *Moore v City of Yonkers*, 54 AD3d 397 [2d Dept 2008]).

Accordingly, defendants' motion for summary judgment dismissing the complaint is granted.

Dated: November 29, 2018

HON. PAUL J. BAISLEY, JR.

J.S.C.