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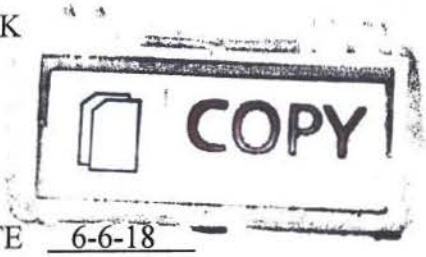
SHORT FORM ORDER

INDEX No. 12-13892
CAL. No. 18-00682OT

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




***PRESENT:***

Hon. SANFORD NEIL BERLAND
Acting Justice of the Supreme Court

MOTION DATE 6-6-18
ADJ. DATE 11-13-18
Mot. Seq. # 008 - MG

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ORTUD HANUS and EDWARD HANUS,

Plaintiffs,

- against -

LONG ISLAND RAILROAD, METROPOLITAN TRANSPORTATION AUTHORITY, TOWN OF ISLIP, SUFFOLK COUNTY WATER AUTHORITY and THE COUNTY OF SUFFOLK,

Defendants.

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Upon the following papers numbered 1 to 30 read on this motion for summary judgment: Notice of Motion and supporting papers, 1-14; Answering Affidavits and supporting papers, 15-18; 19-23; 24-26; and Replying Affidavits and supporting papers 27-30, it is,

***ORDERED*** that the motion of defendant County of Suffolk for summary judgment dismissing the complaint and any cross claims against it is granted.

Plaintiff Ortud Hanus commenced this action to recover damages for personal injuries she allegedly sustained July 14, 2011, when she tripped and fell on a sidewalk at the Ronkonkoma Train Station. Plaintiff's husband, Edward Hanus, asserts a derivative claim for loss of services and companionship. The complaint alleges, *inter alia*, that defendants negligently failed to maintain the premises in a reasonably safe condition, that they negligently failed to repair a dangerous condition on the premises and that they negligently failed to warn plaintiff of the dangerous condition. By their bill of particulars, plaintiffs allege that the sidewalk, which was south of the train platform, contained uneven concrete, constituting a tripping hazard that caused plaintiff's injuries.

The County of Suffolk now moves for summary judgment dismissing the complaint against it on the grounds that it did not receive prior written notice of the alleged dangerous condition and that it had no duty to maintain the subject sidewalk. In support of the motion, the County submits copies of the pleadings, transcripts of the parties' deposition testimony, copies of photograph of the area where the incident occurred and affidavits of John Donovan and Jason Richberg, employees of the County.

Ortud Hanus testified that on the morning of the incident, she and her husband arrived at the Ronkonkoma Train Station at approximately 9:00 a.m to take a train to Penn Station to go to an exhibit. They parked their vehicle in the station parking lot and walked onto the sidewalk located on the south side of the train platform. Mrs. Hanus testified that it was a clear, cool day, that she did not observe any debris or weeds on the sidewalk and that she was looking straight ahead when her left foot hit something in the cement slab, causing her to trip and fall. Plaintiff was shown photographs of the subject area, and she testified that the pictures show the cement slab where she was walking. She testified that the pictures had been shown to her at the General Municipal Law § 50-h hearing, at which time she marked one of the photographs with an X indicating the area of the sidewalk where she fell. She testified that the cement was elevated in the area she marked on the photograph, that she did not take any of the photographs and that she did not know who took them.

Edward Stegmeir testified that he has worked for the County of Suffolk since 1978 and that he has been working as a highway zone supervisor for over ten years. He testified that he supervises 20 workers in the highway department and that he is responsible for maintaining and repairing county roads and highways within Zone 2, which encompasses the entire area between Ronkonkoma and Shirley. He testified that the County does not maintain sidewalks in Zone 2 and that it is the responsibility of the Town of Islip to maintain them. Stegmeir was shown photographs of the Ronkonkoma Train Station, and he testified that the area depicted in the photographs looks similar to how the area appeared in July 2011. He testified that one of the photographs depicts the south side of the station and that the sidewalk adjacent to the platform is not maintained by the County. He testified that he has observed the Long

Island Railroad removing snow from the sidewalks and that the County is responsible for removing snow and ice from the parking lot. Stegmeir further testified that the Highway Department is responsible for repairing potholes in the parking lot, that he personally inspects the parking lot bi-weekly and that members of his staff also inspect the parking lot.

In his affidavit, John Donovan states that he is an investigator with the County of Suffolk and works in the Office of the County Attorney. Donovan further states that he is charged with maintaining records of all written complaints received by the County Attorney that have been forwarded by the Clerk of the Legislature concerning alleged dangerous conditions on the streets, parking lots and sidewalks of the County, pursuant to Section C8-2A of the Suffolk County Charter. He avers that he searched such records for written complaints or notices made at any time prior to July 24, 2011 regarding a defective condition on the south side sidewalk of the Ronkonkoma Train Station and that he did not find any written complaints regarding that sidewalk.

An affidavit of Jason Richberg is also submitted. Richberg states that he is the Chief Clerk of the Suffolk County Legislature, that his duties include maintaining records of all written complaints regarding dangerous conditions on County owned property and that he has searched for written complaints filed with the Clerk of the Legislature regarding any defects or dangerous conditions concerning the sidewalk at the south side of the Ronkonkoma train station at any time prior to July 24, 2011. He avers that the Clerk of the County Legislature is not in receipt of any such written notices or complaints.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]). Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy, control, or special use (*see* ***Rodriguez v 5432-50 Myrtle Ave., LLC***, 148 AD3d 947, 50 NYS2d 99 [2d Dept 2017]; ***Russo v Frankels Garden City Realty Co.***, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]; ***Ellers v Horwitz Family Ltd. Partnership***, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]). A municipality has the nondelegable duty of maintaining its roads and highways in a reasonably safe condition (***Wittorf v City of New York***, 23 NY3d 473, 479, 991 NYS2d 578 [2014]; ***Stiuso v City of New York***, 87 NY2d 889, 639 NYS2d 215 [1995]), and that duty extends to parking lots (*see* ***Groninger v Village of Mamaroneck***, 17 NY3d 125, 927 NYS2d 304 [2011]).

Nevertheless, 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]; ***Dutka v Odierno***, 116 AD3d 823, 983 NYS2d 405 [2d Dept 2014]; ***Forsythe-Kane v Town of Yorktown***, 249 AD2d 505, 672 NYS2d 355 [2d Dept 1998]). 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 of Suffolk has enacted a prior written notice requirement for defects in sidewalks in Section C8-2 A [2] [ii]) of the Suffolk County Charter. It provides that no civil action shall be maintained against Suffolk County for personal injuries due to, among other things, a defect in a sidewalk unless the County receives written notice within a reasonable time prior to the incident. Such notice must be mailed by certified or registered mail and sent to the Clerk of the Suffolk County Legislature, who shall forward a copy to the County Attorney.

The requirement of prior written notice is a substantive element of plaintiff's cause of action (***Cipriano v City of New York***, 96 AD2d 817, 465 NYS2d 564 [2d Dept 1983]). As a municipality's duty to repair or remove a dangerous or defective condition does not arise until actual written notice of such condition is given to it, no cause of action accrues against it absent such notice (***Barry v Niagara Frontier Tr. Sys., Inc.***, 35 NY2d 629, 364 NYS2d 823 [1974]). Under prior written notice statutes, 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.*).

Prior written notice of the condition complained of is a condition precedent to maintaining an action against a municipality (***Gorman v Town of Huntington***, 12 NY3d 275, 879 NYS2d 379 [2009]; ***Holt v County of Tioga***, 56 NY2d 414, 452 NYS2d 383 [1982]), thus requiring plaintiff to plead and prove that such notice was given (***Hinton v Village of Pulaski***, 33 NY3d 931, 98 NYS3d 534 [2019]; ***Katz v City of New York*** 87 NY2d 241, 638 NYS2d 593 [1995]; ***De Zapata v City of New York***, 172 AD3d 1306, 2019 NY Slip Op 04132 [2d Dept 2019]; ***Allen v City of New York***, 164 AD3d 725, 83 NYS3d 556 [2d Dept 2018]).

Here, the County established a prima facie case entitling it to summary judgment by demonstrating that it did not receive prior written notice of the alleged defect (*see* ***Amer v City of New York***, 166 AD3d 571, 84 NYS3d 903 [2d Dept 2018]; ***Taustine v Incorporated Vil. of Lindenhurst***, 158 AD3d 785, 71 NYS3d 547 [2d Dept 2018]; ***Morreale v Town of Smithtown***, 153 AD3d 917, 61 NYS3d 269 [2d Dept 2017). Moreover, the complaint is devoid of any allegation that the County had prior written notice of the defect (***Woodson v City of New York***, 93 NY2d 936, 693 NYS2d 69 [1999]), thus, subjecting it to dismissal for failure to state a cause of action in negligence based upon the County's alleged nonfeasance (***Cipriano v City of New York***, 96 AD2d 817, 465 NYS2d 564; *see also* ***Doremus v Incorporated Vil. of Lynbrook***, 18 NY2d 362, 275 NYS2d 505 [1966]). Having established its prima

facie entitlement to summary judgment, the burden shifts to the parties opposing the County's motion to proffer proof in admissible form sufficient to raise a triable issue of fact.

In opposition, plaintiffs' counsel contends that the question of which of the several remaining defendants had responsibility for maintaining the sidewalk in question was held in a prior order of the court, dated July 11, 2017 (Martin, J.(ret.)) to present a triable issue of fact for the jury. That order, however, determined motions for summary judgment made by defendants Long Island Railroad (the "LIRR"), the Metropolitan Transit Authority (the "MTA") and the Town of Islip, not the current movant, the County of Suffolk, which is seeking summary judgment for the first time in this action and advancing, as grounds for its motion, the absence of prior written notice of the claimed defect as well as the lack of County responsibility for maintaining the sidewalk. Thus, as to the County and the summary judgment motion it has now made, the prior order cannot be deemed dispositive.

The LIRR and the MTA also oppose the County's motion, arguing that the County has failed to establish that it did not create the dangerous condition and did not have special use of the property. The prima facie showing that a movant is obligated to make on its motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings and bill of particulars (***Rojas v Hazzard***, 171 AD3d 820, 97 NYS3d 177 [2d Dept 2019]; ***Toscano v Town of Huntington***, 156 AD3d 837, 838, 68 NYS3d 81 [2d Dept 2017]; ***Loghry v Village of Scarsdale***, 149 AD3d 714, 53 NYS3d 318 [2d Dept 2017]). Where, as here, there is no allegation in the pleadings that the moving municipality created the allegedly dangerous condition through an affirmative act of negligence or that it made special use of the area in question, that municipality does not have the burden of negativing the applicability of those exceptions to the requirement of prior written notice in order to establish a prima facie entitlement to summary judgment in its favor (*see* ***Taustine v Incorporated Vil. of Lindenhurst***, 158 AD3d 785, 71 NYS3d 547; *compare* ***Gutierrez–Contreras v Village of Port Chester***, 172 AD3d 1333, 2019 NY Slip Op 04145 [2d Dept 2019]). Further, neither the MTA nor the LIRR offers any evidence to suggest that the County created the alleged defect in the sidewalk through affirmative acts of negligence or that the special use exception to the requirement of prior written notice is applicable. Finally, although the Town of Islip also opposes the County's motion, it focuses its opposition on the question of ownership and control of the sidewalk, but without sufficient competent evidence to refute the County's prima facie showing, and does not seek to counter the County's prima facie demonstration that it was not provided with prior written notice of the claimed sidewalk defect.

As neither plaintiffs nor co-defendants have submitted sufficient receivable evidence to raise a triable issue of fact, the motion by the County of Suffolk for summary judgment dismissing the complaint and any cross-claims against it is granted (*see* ***Gebhardt v County of Suffolk***, 171 AD3d 708, 95 NYS3d 841 [2d Dept 2019]).

Dated: 2/12/2019

A.J.S.C.
HON. SANFORD NEIL BERLAND

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