SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 19

Present: HON. WILLIAM R. LaMARCA
Justice

GINA MANGIARACINA,

Plaintiff,

-against-

COUNTY OF NASSAU, TOWN OF HEMPSTEAD, and VILLAGE OF ROCKVILLE CENTRE,

Defendants.

Motion Sequence # 001, # 002, # 003
Submitted June 25, June 25 and June 8, 2007, respectively
XXX
INDEX NO: 9064/06

The following papers were read on these motions:

VILLAGE Notice of Motion(#001) 1
TOWN Notice of Motion (#002) 2
COUNTY Notice of Motion (#003) 3
Affirmation in Opposition 4
VILLAGE Reply Affirmation.....5

Defendant, VILLAGE OF ROCKVILLE CENTRE (hereinafter referred to as the "VILLAGE"), moves for an order, pursuant to CPLR §3212, granting it summary judgment dismissing the complaint and all cross-claims against it. In unopposed cross-motions, defendant, the TOWN OF HEMPSTEAD (hereinafter referred to as the "TOWN"), and defendant, the COUNTY OF NASSAU (hereinafter referred to as the "COUNTY"), move for an order, pursuant to CPLR §3212, granting them summary judgment dismissing the complaint and all cross-claims against them. The plaintiff, GINA MANGIARACINA, relying

on the affidavits of the TOWN and the COUNTY that they are not the owners of the property where the accident occurred, concedes that they are not responsible for its repairs and maintenance, but opposes the VILLAGE's motion. The motion and cross-motions are determined as follows:

This lawsuit arises out of an accident that occurred on May 14, 2005 in parking lot #1 in the VILLAGE. The plaintiff alleges that she fell when she stepped in a depression in the parking lot, specifically at parking spot # 188. The deposition testimony of the plaintiff reflects that she walked over the subject area when she got out of the car earlier in the evening, that she never noticed the depression and never made any complaints to the VILLAGE about the parking lot condition prior to the accident nor knew of any complaints to the VILLAGE that had previously been made.

Pursuant to Village Law § 6-628 and Rockville Centre Code § 66-1, as a precondition to commencing civil action against the VILLAGE to recover damages for personal injuries sustained as a result of a roadway defect, the VILLAGE must be given prior written notice of the condition. *See, Shannon v Village of Rockville Centre*, 39 AD3d 528, 834 NYS2d 537 (2nd Dept. 2007); *Frullo v Incorporated Village of Rockville Centre*, 274 AD2d 499, 711 NYS2d 185 (2nd Dept. 2000); *see also, Quiroz v Incorporated Village of Cedarhurst*, 31 AD3d 624, 819 NYS2d 101 (2nd Dept. 2006). The prior written notice requirements apply to municipal parking lots. *See, Mendes v Whitney-Floral Realty Corp.*, 216 AD2d 540, 629 NYS2d 63 (2nd Dept. 1995). Absent prior written notice of a defect, a municipality may be cast in liability for a dangerous condition on its streets only if the municipality created the condition through an act of negligence or special use that

conferred a benefit upon the locality. *See Amabile v City of Buffalo*, 93 NY2d 471, 693 NYS2d 77, 715 NE2d 104 (C.A. 1999); *Lauer v Great South Bay Seafood Co., Ltd.*, 299 AD2d 325, 750 NYS2d 305 (2nd Dept. 2002). The mere settling of a roadway that creates a depression does not constitute an affirmative act of negligence. *Cf.*, *Ferreira v County of Orange*, 34 AD3d 724, 825 NYS2d 122 (2nd Dept. 2006); *Gold v County of Westchester*, 15 AD3d 439, 790 NYS2d 675 (2nd Dept. 2005). In the affidavit of Donald Graham, Deputy Superintendent of Public Works for the VILLAGE, after a search of the records of the Department of Public Works where complaints are kept on file, he states that the VILLAGE did not receive written notice of any defects or any other condition concerning parking lot # 1 in the VILLAGE prior to the accident.

Prior written notice of an alleged defect is a necessary prerequisite to imposing liability upon a municipality for an allegedly defective and/or dangerous sidewalk condition (*Frullo v Incorporated Village of Rockville Centre*, *supra; Brooks v Village of Babylon*, 251 AD2d 526, 674 NYS2d 726 [2nd Dept. 1998]). Prior notification laws are a valid exercise of legislative authority. Such laws reflect a legislative judgment to modify the duty of care owed by a locality in order to address the vexing problem of municipal street and sidewalk liability. General Municipal Law § 50-e(4), the authorizing statutory provision, specifically allows for the enactment of prior notification statutes and requires compliance with such laws. Thus a locality may avoid liability for injuries sustained as a result of defects or hazardous conditions on its sidewalks if it has not been notified in writing of the existence of the defect or hazard at a specific location. Neither actual nor constructive notice may override the statutory requirement of prior written notice of a side walk defect. The

legislature has made plain its judgment that a municipality should be protected from liability in these circumstances until it has received written notice of the defect or obstruction. *Amabile v City of Buffalo, supra.* There are only two exceptions to the statutory rule requiring prior written notice, namely where the locality created the defect or hazard through an affirmative act of negligence or where a "special use" confers a special benefit upon the locality. *Amabile v City of Buffalo, supra.* A municipality makes a *prima facie* showing of its entitlement to judgment as a matter of law by establishing that it neither received the requisite prior written notice of the alleged defect, nor bore responsibility for the creation of the alleged defect (*Amabile v City of Buffalo, supra*).

It is well settled on a motion for summary judgment that, after movant has made a *prima facie* showing that they are entitled to judgment as a matter of law, the other party must establish the existence of material facts of sufficient import to create a triable issue of fact. Bare allegations are insufficient to create a genuine issue of fact. *Shaw v Time-Life Records,* 38 NY2d 201, 379 NYS2d 390, 341 NE2d 817 (C.A. 1975).

It is the judgment of the Court that the VILLAGE has established its *prima facie* entitlement to judgment. In opposition to the VILLAGE's motion, the plaintiff has failed to raise a triable issue of fact with respect to the contention that written notice was not required because the defendant created the alleged defect by negligently constructing the parking lot. *See, Strauss v Town of Oyster Bay*, 201 AD2d 553, 607 NYS2d 730 (2nd Dept. 1994). Plaintiff's unsubstantiated allegation, made in her attorney's affirmation who had no personal knowledge of the fact that the "deep depression in the ground . . . may have been caused by work performed by the Village of Rockville Centre or their agents", is

insufficient to defeat the defendants' motion. *Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923, 501 NE2nd 572 (C.A. 1986); *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 (C.A. 1980); *see, Delgado v County of Suffolk*, 40 AD3d 575, 835 NYS2d 379 (2nd Dept. 2007); *Tyschak v Incorporated Village of Westbury*, 193 AD2d 670, 597 NYS2d 474 (2nd Dept. 1993).

Based on the foregoing, it is hereby

ORDERED, that the VILLAGE's motion for summary judgment dismissing the complaint and all cross-claims is granted; and it is further

ORDERED, that the TOWN's unopposed motion for summary judgment dismissing the complaint and all cross-claims is granted; and it is further

ORDERED, that the COUNTY's unopposed motion for summary judgment dismissing the complaint and all cross-claims is granted.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

All proceedings under index No. 009064/06 are terminated.

Dated: August 29, 2007

WILLIAM R. LaMARCA, J.S.C.

ENTERED

AUG 31 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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