

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. JEFFREY S. BROWN
JUSTICE

VIVIAN L. NOTO-AGNELLO,
Plaintiffs,
-against-
THE INCORPORATED VILLAGE OF FREEPORT,
Defendants.
TRIAL/IAS PART 12
INDEX # 608648/16
Mot. Seq. 1
Mot. Date 6.21.18
Submit Date 8.8.18
XXX

The following papers were read on this motion: Papers Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 13
Answering Affidavit ..... 31
Reply Affidavit..... 38

Defendant moves pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint.

In this personal injury action, plaintiff Vivan Noto-Agnello, alleges that on June 8, 2015 she tripped and fell on a pothole on the roadway in front of and adjacent to the condominium complex at one Anchorage Way, in Freeport, New York.

In support of their motion, the Village of Freeport submits the affidavits of Sophia Johnson, Pamela Walsh Boening, and Robert Fisenne.

Sophia Johnson, the Information Specialist for the Village of Freeport, states that her duties includes reviewing the Village's website for communications received by the Village. If there is correspondence involving a road complaint, Johnson would convey the complaint via e-mail to the Superintendent of Department of Public Works, the Assistant Superintendent of the Department of Public Works, and the secretary for the Department of Public Works. Johnson

stated that she conducted a search of the Incorporated Village of Freeport's website for complaints regarding roadway conditions on Anchorage Way and confirmed that there were no complaints received prior to June 8, 2015.

Pamela Walsh Boening, the Village Clerk for the Village of Freeport, stated that she conducted a search for a ten-year period immediately prior to and including the date of the alleged accident which confirmed that the Village Clerk's office did not have a record of any prior written notice of a defective road condition in the area of One Anchorage Way, Freeport, New York.

By his affidavit, Robert Fisenne, the Superintendent of the Department of Public Works, states that he personally searched the Village of Freeport Department of Public Works' hard copy and digital records and found no record of any road work performed on Anchorage Way or in front of One Anchorage Way, Freeport, New York. Fisenne also confirms that the Village of Freeport did not perform any substantive road work or contract for any road work at the subject location for a period of ten years prior to and including June 8, 2015. Furthermore, Fisenne acknowledges the Village of Freeport does conduct pothole repairs; however, no records are prepared or maintained for pothole repair work. Lastly, Fisenne confirms from the photographs provided by the plaintiff that pothole repairs were made prior to the plaintiff's accident.

The Village of Freeport also provides a copy of an e-mail from a resident to the Mayor of Freeport which was later then forwarded to Robert Fisenne. The e-mail, dated February 9, 2015, states, in full:

The end of Guy Lombardo at Anchorage Way has several deep potholes that are totally obscured when covered with ice, snow and at dark. Those of us knowing they are there are having close calls with trying to enter to exit hugging the one side of the road. I had a guest last night very upset at hitting them and has damage to her car. Please do whatever is necessary, perhaps a lit warning barrier until the road can be repaired. Thank you.

Plaintiff Noto-Agnello claims to have sustained serious and severe injuries to her right leg, requiring surgical intervention. Plaintiff claims defendants are not entitled to summary judgment as a matter of law because defendant has failed to prove *prima facie* they had no prior written notice of the defective condition which caused Noto-Agnello's accident. Plaintiff contends the affidavits which defendant provided are deficient and serve only to raise issues as to whether the defendant, Village of Freeport, had prior written notice of the subject defect.

In opposition, plaintiff submits four depositions and one affidavit. The first deposition is of plaintiff Vivan Noto-Agnello. Plaintiff testified she had her accident on June 8, 2015 at approximately 10:15 a.m., while walking her dog along Anchorage Way. She testified that her foot went into a hole. Plaintiff further testified there is patchwork in the area. The road is jagged with patches and holes and there were patches around the hole her foot came into contact with.

After her foot got stuck, she stumbled forward and could not catch herself because of the uneven roadway.

The next deposition is of, Brian Nicholson, who at the time of his deposition was employed by the Village of Freeport as a construction inspector for the Department of Public Works. Nicholson testified that if a complaint was received, he would receive a slip of paper with the name, address, and information regarding the complaint. If a repair needed to be made by the highway department, he would put the note in the highway supervisor's mailbox. He further testified if the highway department drove by and determined a hazardous condition on their own, they would repair the condition. However, Nicholson would not always be informed if a repair was completed by the highway department. The database only contains documents of notices regarding sidewalks, curbs, or trees, and does not contain notice regarding roadways.

Robert Fisenne testified that at the time of the deposition he was employed by the Village of Freeport as the Superintendent of Public Works. His duties included inspecting hazardous conditions on Village roadways. Prior to deposition, Fisenne completed a search for prior notices or written notices relative to the incident on his individual computer and not the Village of Freeport servers. If Fisenne received a complaint of repairs needed he would inform James Magee, Highway Supervisor for the Department of Public Works but would not complete any log or form for the work. There is no form or document that Magee was required to complete with regards to repairing or filing potholes in the Village of Freeport roadways.

On February 9, 2015, Fisenne received an e-mail, forwarded to him from the Mayor of the Village of Freeport, regarding several deep potholes on Guy Lombardo Avenue at Anchorage Way. When he received the e-mail, he put the e-mail in James Magee's mailbox and believed Magee completed the work pursuant to the complaint set forth in the e-mail. Fisenne further testified that the Village had completed pothole repairs on Anchorage Way prior to the plaintiff's accident. However, there were no records prepared or maintained for the work.

On February 29, 2018, James Magee appeared for a non-party deposition. Magee last held his position as a Highway Supervisor for the Department of Public Works for the Village of Freeport in April 2015. Magee confirmed he would on occasion receive informal pieces of papers from Brian Nicholson regarding potholes that needed repair. Magee further confirmed he would add it to his to-do list of roads that needed repair and would throw out the informal piece of paper. Any notice Magee would receive in his mailbox he would also add it to his to-do list and throw out the notice. Once Magee completed his to-do list, the list would get thrown out as well.

Magee testified that he recalled receiving three or four complaints in his mailbox regarding Anchorage Way from 2013-2015. He added the complaints to his to-do list and threw the complaints out. Magee further testified that some of those three to four complaints were about potholes on Anchorage Way. When Magee received a complaint, he would go out to the site and inspect the area, and if the area needed repairs, he would then tell his foreman to make the repairs. Magee's foreman did not keep any forms for work that was completed.

Moreover, Magee testified he could not recall receiving the February 9, 2015 e-mail regarding the roadway condition on Guy Lombardo Avenue and Anchorage Way. Nonetheless, Magee stated if he had received the e-mail, he would inspect all of Anchorage Way until he reached the marina (the end of the roadway).

Furthermore, Magee testified that from 2013-2015, prior to the plaintiff's incident, he told his crew to repair all cracks, potholes, and bird baths on Anchorage Way. He was aware of cracks, potholes, and bird baths on Anchorage Way prior to the plaintiff's incident. This included the front of the condominium complex where plaintiff lives, and where the incident occurred.

Lastly, the plaintiff offered an affidavit from Tamara Delamora, a member of the Board of Managers of the Anchorage of Freeport Owners Corporation. Delmora, states that she made numerous telephone calls to the Village of Freeport before and after the incident to complain about the condition of the road where the plaintiff fell. She states the Village of Freeport assured her that it would send someone from the Village to inspect the area. Furthermore, Delamora states that she does not know if the inspections were ever conducted. Lastly, Delamora states the Village of Freeport, in the past, has repaired the potholes and cracks to the pavement that are present along One Anchorage Way.

"It is well established that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.' (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]; see also *William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 N.Y.3d 470, 475-476 [2013]; CPLR 3212[b]). Once the movant makes the proper showing, '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*, 68 N.Y.2d at 324). The 'facts must be viewed in the light most favorable to the non-moving party' (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503, 942 N.Y.S.2d 13, 965 N.E.2d 240 [2012] [internal quotation marks omitted]). However, bald, conclusory assertions or speculation and '[a] shadowy semblance of an issue' are insufficient to defeat summary judgment (*S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 [1974]), as

are merely conclusory claims (*Putrino v. Buffalo Athletic Club*, 82 N.Y.2d 779, 781 [1993]).

(*Stonehill Capital Management, LLC v. Bank of the West*, 28 N.Y.3d 439 [2016]; see also *Fairlane Financial Corp. v. Longspaugh*, 144 AD3d 858 [2d Dept 2016]; *Phillip v. D&D Carting Co., Inc.*, 136 AD3d 18 [2d Dept 2015]).

Section 27-3 of the Code of Ordinances of the Incorporated Village of Freeport provides that:

“No civil action shall be maintained against the Incorporated Village of Freeport for injuries or damages to a person or property sustained by reason of any defect in . . . streets . . . prior written notice of said defect causing the injuries or damages was actually given to the Village Clerk in accordance with § 27-4 . . . .”

The Village has established its prima facie entitlement to judgment as a matter of law by submitting the affidavits of Pamela Walsh Boening, Robert Fisenne, and Sophia Johnson, which demonstrate, after a reasonable search of the records, that the Village of Freeport did not have any prior written notice of the alleged defect at the location of the incident. (*Koehler v. Village of Lindenhurst*, 42 A.D.3d 438 [2d Dept. 2007]; *Selburn v. City of Poughkeepsie*, 28 A.D.3d 468, 469 [2d Dept. 2006]).

Plaintiff produced deposition testimony that on February 9, 2015, the Mayor of the Village of Freeport received an e-mail regarding a complaint made about deep potholes at the area of Guy Lombardo and Anchorage Way, which the Mayor forwarded to the Superintendent of Public Works for the Village of Freeport. That testimony, however, fails to demonstrate, that the Village of Freeport had received proper written notice in accordance of Village Law . In *Gorman v. Town of Huntington*, 12 N.Y.3d 275 [2009], the Court of Appeals found the defendant town entitled to summary judgment where the applicable written notice statute required notice to the Town Clerk or Town Superintendent of Highways, but notice was instead provided to the Town’s Department of Engineering Services. (*Gorman*, 13 N.Y.3d at 280 [“Because the Department of Engineering Services is not a statutory designee, notice to that department is insufficient for purposes of notice under Village Law § 65-a and section 174-2 of the Huntington Town Code. We are unpersuaded that the Department of Engineering Services’ practice of recording complaints and repairs warrant a departure from our precedent strictly construing prior written notice provisions.”]). Moreover, even if provided to the Village Clerk, the e-mail did not identify the same area of plaintiff’s accident. Finally, plaintiffs’ allegations of the Village’s actual notice of the condition of the road is unavailing. (*Gonzalez v. Town of Hempstead*, 124 A.D.3d 719, 720 [2d Dept. 2015] [“Actual notice of the alleged hazardous condition does not override the statutory requirement of prior written notice of a . . . defect”] [quoting *Velho v. Village of Sleepy Hollow*, 119 A.D.3d 551, 552]).

Here, there is no proof that the Village of Freeport had received notice of the defect or that a special use exception to the prior notice requirement applied. The Village made a *prima*

*facie* showing that it did not create the alleged defect through an affirmative act of negligence. Therefore, it is necessary for the plaintiff to submit competent evidence that the Village affirmatively created the alleged defect, (*Koehler v. Inc. Village of Lindenhurst, supra; Adams v. City of Poughkeepsie*, 296 A.D.2d 468, 469 [2d Dept. 2002]), or that any work performed by the defendant in February 2015 immediately resulted in the dangerous condition leading to plaintiff's accident in June of 2015. Plaintiff provides photograph evidence of the accident scene tending to show that work was done prior to the accident, but fails to demonstrate that any work performed by the defendant immediately resulted in the dangerous condition leading to the plaintiff's accident. Mere evidence that defendant conducted potholes repairs in the vicinity of the accident is insufficient. (*Diaz v. City of N.Y.*, 56 A.D.3d 599 [2d Dept. 2008]; *Marshall v. City of N.Y.*, 52 A.D.3d 586 [2d Dept. 2008] ["Contrary to the plaintiff's contention, repair orders or reports reflecting only that pothole repairs had been made to the subject area more than a year before the accident, were insufficient to constitute prior written notice of the defect that allegedly caused the plaintiff's injuries."]); *see also Yarborough*, 10 NY3d 726 ["Even assuming the City performed the negligent pothole repair, plaintiffs expert found that the deterioration of the asphalt patch—the condition that caused plaintiff's injury—developed over time with environmental wear and tear."]; *Wald v. City of New York*, 115 A.D.3d 939, [2d Dept. 2014] [Repairs conducted "[m]ore than 10 weeks prior to the happening of the accident[] did not raise a triable issue of fact as to whether the City affirmatively created the condition, as there was no evidence that a dangerous condition existed immediately after the repair was completed or that a repair caused subsequent immediate deterioration."]).

For the foregoing reasons, it is hereby

ORDERED, that the defendant's motion for summary judgment is granted.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York  
September 24, 2018

ENTER:

  
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**ENTERED**

SEP 25 2018

NASSAU COUNTY  
COUNTY CLERK'S OFFICE