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SHORT FORM ORDER

INDEX No. 08-8896

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Supreme Court

Mot. Seq. # 001 - MG

MICHAEL McNAMARA, Plaintiff, - against - INCORPORATED VILLAGE OF BABYLON, KEYSPAN ENERGY and LONG ISLAND POWER AUTHORITY, Defendants.	KUJAWSKI & DELLICARPINI Attorneys for Plaintiff 1637 Deer Park Avenue, P.O. Box 661 Deer Park, New York 11729-0661 SILER & INGBER, LLP Attorneys for Defendant. Inc. Village of Babylon 301 Mineola Boulevard Mineola, New York 11501 CULLEN & DYCKMAN, LLP Attorneys for Defendants Keyspan & LIPA 17 Montague Street Brooklyn, New York 11201-3602

Upon the following papers numbered 1 to 18 read on this motion and cross-motion for summary judgment Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 10 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 11-13 ; Replying Affidavits and supporting papers 14-18 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendant, Incorporated Village of Babylon, for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as asserted against it is granted.

In this action the plaintiff seeks damages for personal injury sustained on March 25, 2007 when the plaintiff tripped and fell on a depressed, cracked and broken surface on the roadway in front of his home located at 35 Bayview Avenue, Village of Babylon. It is claimed that the premises where the incident occurred was owned by the Village of Babylon; that the Village of Babylon had prior notice of the condition which caused the plaintiff to fall; that the Village of Babylon failed to warn of the condition complained of; and further that the Village of Babylon caused the defect.

The Incorporated Village of Babylon seeks summary judgment dismissing the complaint asserted against it on the basis that the village clerk received no prior written notice of the claimed defect as required by Village Law §6-628; that the plaintiff was aware of the condition and observed the area of the pavement several times during the months prior to his fall; and that the Village of Babylon did not cause or create the defect.

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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395 [1957]). The movant has the initial burden

of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065 [1979]).

In support of this motion, the Village of Babylon has submitted, inter alia, an attorney's affirmation; copies of the pleadings and plaintiff's verified bill of particulars; a copy of the transcript of the hearing conducted pursuant to GML 50-h of Michael McNamara dated June 1, 2007, and the transcripts of the examinations before trial of Michael McNamara dated December 5, 2008, and Charles Gardner dated June 29, 2009 on behalf of the Incorporated Village of Babylon; and the affidavit of Patricia Carley.

In opposition, the plaintiff has submitted an attorney's affirmation and a photograph.

In reply, the Village of Babylon has submitted an affidavit of Patricia Carley and a copy of Local Laws §1-3 and §1-4.

Michael McNamara testified at his 50–h hearing to the effect that there was a drain or gutter in the street in front of his home when he purchased his home thirty eight years ago at 35 Bayview Avenue. His neighbors, Bob and Tommy, had called the Village to let them know the gutters or drains needed to be fixed. In November or December 2006, work was commenced on the drains or gutters on Bayview Avenue. In about December 2006, he told Skip Gardner, the man in charge of the sanitation or highway men for the Village of Babylon, while Gardner was working on other drains or gutters, that his drain needed repair. In January 2007, the drain or gutter was replaced and a section was put in in front of his home. It was done in two sections. After the work was completed, it began to sink in, creating a depression or hole. On March 25, 2007, he walked out of his driveway to go to his car which was parked on the street in front of 35 Bayview Avenue. When he reached the asphalt patch on the street, his right foot got caught on the patched section on the hole and bump, causing him to fall. He had previously walked in that area but did not know if he ever walked on that spot. He then testified that Keyspan did work in that spot due to a gas leak in front of his house. He had noted the smell of gas and called Keyspan. He stated that the area has not been repaired after KeySpan dug up the area, but he had told Skip Gardner about it, however, he did not write or send e-mails or make phone calls to the Village of Babylon to report it. The accident occurred about 2:00 o'clock in the afternoon. There was no snow or debris on the roadway obstructing his view of the roadway and the patch.

At his deposition, Michael McNamara testified to the effect that his car was parked on the street to the right of his house on March 25, 2007 when the accident occurred. It was a sunny day about 11:00 or 12:00 o'clock. When he walked out of his driveway onto the street, he saw the spot on the street where Keyspan had worked on a gas leak and never filled the area back in correctly. He told the Keyspan drivers about it, but they never came back. There was a bump about an inch high which his right sneaker got caught on causing him to

fall. He identified the bump when shown the pictures identified as defendants Exhibit D and E. He testified that he told Skip Holmeyer from the Village of Babylon about the condition of the roadway in front of his house and nearby when Skip Holmeyer was working down the road on the roadway, but Holmeyer told him it was Keyspan's problem and that Keyspan would take care of the one problem. The road was eventually repaved by the Village of Babylon so the patched area is no longer there.

Patricia Carley set forth in her affidavit dated July 17, 2009 to the effect that she is the Village Clerk for the Incorporated Village of Babylon and was in 2007. The Village of Babylon maintains a prior written notice book to record any complaints of a hazard located on a public sidewalk which she reviewed and determined that there were no previous complaints or notices given to the Village of Babylon concerning any defect at the location of the plaintiff's accident on March 25, 2007. She avers that specifically, the Incorporated Village of Babylon received no prior written notice of any defect made for this specific location for a three year period prior to March 25, 2007. There is no special use for the area where the plaintiff fell, and the plaintiff does not allege that the Village created the defect.

Charles Gardner testified to the effect that he is employed by the Village of Babylon as the highway foreman since October 13, 1989. Prior to that position, he has been the assistant to the Mayor, worked in Code Enforcement and was an assistant foreman and a heavy equipment operator. Prior to Mr. McNamara's accident, he spoke to Mr. McNamara twice. Once was when he was replacing a gutter on the side of the street across from Mr. McNamara's house and he was asked by Mr. McNamara if the bad gutter in front of his house could be replaced also, which replacement was done the next day. A day or two latter, he was in front of the McNamara house and told Mr. McNamara that he was going to topsoil the back side of the gutter after the forms came off. He was able to fix the gutter in front of Mr. McNamara's house without preparing any paperwork as his contractor, Sager, was there. The drains and gutter had been replaced on Bayview Avenue due to flooding on the south end with northeaster storms. The work to replace the drains and gutters was started about February 2008. Thereafter, the road was repaved. He testified that prior to Keyspan digging up a road in the Village of Babylon, it must notify the village clerk and obtain a permit. If there is an emergency such as a gas leak, Keyspan might call him and tell him and the permits would follow. He did not recall receiving a telephone call from someone from Keyspan or National Grid indicating there was a suspected gas leak at 35 Bayview Avenue and that they would have to cut open the road. Had such a call been received, paperwork would not have been generated by him or his office. Keyspan would then file the permits with the village after the fact. There were occasions where KeySpan would open the street with no prior request and no subsequent permit filing, perhaps once every couple of months.

Prior written notice required by N.Y. Village Law §6-628 is a condition precedent to maintaining an action against the village for a sidewalk defect resulting from nonfeasance, which the plaintiff is required to plead and prove (***Mollahan v Village of Port Washington North,*** 153 AD2d 881 [2nd Dept 1989]). Village Law §6-628 provides that "No civil action shall be maintained against the village for damages or injuries to person or property sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out of repair, unsafe, dangerous or obstructed or for damages or injuries to person or property sustained solely in consequence of the existence of snow or ice upon any sidewalk, crosswalk, street, highway, bridge or culvert unless written notice of the defective, unsafe, dangerous or obstructed condition or of the existence of the snow or ice relating to the particular place, was actually given to the village clerk and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or to cause the snow or ice to be removed, or the place otherwise made reasonably safe."

The defendant village has a non-delegable duty to maintain its highways in a reasonably safe condition (see, ***Ovisinak et al v Town of Southold,*** 277 AD2d 295 [2nd Dept 2000]; ***Combs et al v Incorporated Village of Freeport***, 139 AD2d 688 [2nd Dept 1988]). Here the testimony by the plaintiff establishes that although he may have spoken to Mr. Gardner about defects on the roadway, Mr. McNamara did not provide written notice to the Village of Babylon about the defect from the patched area where KeySpan repaired a gas leak. Nor does Mr. McNamara assert that anyone else provided written notice to the village clerk about the claimed defect prior to the accident. Village Law § 6-628 requires that written notice be provided to the village clerk as a precedent to commencing an action. In that Mr. Gardner was not the village clerk and instead worked for the highway department, such verbal report to him by Mr. McNamara does not constitute notice to the village clerk. In ***Conlon v Pleasantville,*** 146 AD2d 736 [2nd Dept 1989], the court held that a report by a superintendent of water regarding damage to a sidewalk did not constitute written notice to the village clerk within the meaning of Village Law §6-628. Likewise, the plaintiff's arguments that Mr. Gardner was aware of the defect prior to the accident does not fulfill the requirement of prior written notice to the village clerk.

The plaintiff cites to ***Pittel v Town of Hempstead***, 154 AD2d 581, ***DeWitt Props. v City of New York***, 44 NY2d 417, and ***Monroe v City of New York***, 67 AD2d 89 in the argument that the Village of Babylon failed to make a diligent inspection and did not discover a dangerous dangerous support of condition, constituting negligence. However, the plaintiff's reliance on these cases is misplaced as there was no latent defect undiscovered at the site and the village did not cause the defect which the plaintiff has established was caused by KeySpan.

While prior written notice of an alleged defect is a condition precedent to maintaining an action against a village arising from a sidewalk defect, no prior written notice of a defect is necessary where there is an affirmative act of negligence by the village (***Brooks v Village of Babylon,*** 251 AD2d 526 [2nd Dept 1998]). Here the plaintiff does not claim that the Village of Babylon negligently or affirmatively caused or created the defect complained of. The unrefuted testimony establishes that the defendant KeySpan dug the hole while repairing a gas leak at the location of the plaintiff's fall.

The plaintiff asserts that the defect existed for a sufficient period of time to provide actual or constructive notice of the defect to the Village of Babylon. However, actual or constructive notice of a defect does not satisfy the requirement of prior written notice, ***Wilkie v Town of Huntington,*** 29 AD3d 898 [2nd Dept 2006]).

The plaintiff argues that Mr. Gardner did not have paperwork regarding the on-site repair of the gutter, which is a different defect from the one allegedly caused by KeySpan, which therefore evidences that there are factual issues concerning the indexing system. However, this argument is without merit as the village clerk is required to keep the indexing system and maintain the record concerning prior written notices. The plaintiff has failed to establish that Mr. Gardner from the highway department was charged with the duty to index and maintain prior written notice communications, which has been demonstrated to be a duty of the village clerk. The plaintiff has further failed to raise a factual issue concerning the negligent repair of the site of the accident as the testimony establishes that Mr. Gardner repaired the gutter the day following Mr. McNamara's complaint and not that he repaired the site where KeySpan had dug to repair the gas leak and where Mr. McNamara claims to have fallen.

The plaintiff argues that the Village of Babylon has not expressly implemented the prior written notice requirement of Village Law §6-628, or that the Village of Babylon has expressly repealed its

adoption of Village Law §6-628. In reviewing Local Law §1-3, it is noted that only local laws and ordinances of a general and permanent nature in force and not contained in such Code or recognized and continued in force by reference therein are repealed. Section 1-4 repeals local laws and ordinances provided for in §1-3. The plaintiff's conclusory statements and unsupported assertions have not raised a factual issue that the Village of Babylon is not subject to Village Law §6-628 or that it has the power to repeal state law.

Based upon the foregoing, it is determined that the Village of Babylon has established prima facie entitlement to summary judgment dismissing the complaint as asserted against it and the plaintiff has failed to raise a triable issue of fact to preclude summary judgment being granted to the Village of Babylon.

Dated: August 18, 2010

HON. JOSEPH C. PASTORESSA

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION