SHORT FORM ORDER

COPY

INDEX No. 13-4211
CAL. No. 18-01405OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 12-14-18 (003)
MOTION DATE 12-20-18 (004)
MOTION DATE 12-27-18 (005)
ADJ. DATE 3-1-19
Mot. Seq. # 003 - MG
004 - MG
005 - MG; CASEDISP

---X

DONALD O'BRIEN and EMILY O'BRIEN,

Plaintiffs,

- against -

VILLAGE OF BABYLON, LESSING'S INC., and SOUTHLAND RESTAURANT CORPORATION, BABYLON BEAUTIFICATION SOCIETY, INC.,

Defendants.

---X

LESSING'S INC., and SOUTHLAND RESTAURANT CORPORATION,

Third-Party Plaintiffs,

- against -

BABYLON BEAUTIFICATION SOCIETY, INC. and VILLAGE OF BABYLON,

Third-Party Defendants.

---X

SULLIVAN PAPAIN BLOCK MCGRATH & CANNAVO, P.C.
Attorney for Plaintiffs
1140 Franklin Avenue, Suite 200
Garden City, New York 11530

LAW OFFICES OF STEWART H. FRIEDMAN
Attorney for Defendant/Third-Party Defendant
Babylon Beautification Society, Inc.
401 Franklin Avenue, Suite 314
Garden City, New York 11530

WHITE FLEISCHNER & RINO, LLP
Attorney for Defendants/Third-Party Plaintiffs
Lessing's Inc. and Southland
1527 Franklin Avenue, Suite 200
Mineola, New York 11501

KELLY, RODE & KELLY
Attorney for Defendant/Third-Party Defendant
Village of Babylon
330 Old Country Road, Suite 305
Mineola, New York 11501

RST

Upon the following papers numbered 1 to 87 read on these motions for summary judgment: Notice of Motion and supporting papers 1 - 25; 26 - 46; 47 - 65; Answering Affidavits and supporting papers 66 - 83; Replying Affidavits and supporting papers 84 - 85; 86 - 87; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. 003) by defendants/third-party plaintiffs Lessing's Inc. and Southland Restaurant Corporation, the motion (seq. 004) by defendant/third-party defendant Babylon Beautification Society, Inc., and the motion (seq. 005) by defendant/third-party defendant Village of Babylon, are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendants/third-party plaintiffs Lessing's Inc. and Southland Restaurant Corporation for summary judgment dismissing the complaint and any cross claims against it is granted; and it is

ORDERED that the motion by defendant/third-party defendant Babylon Beautification Society, Inc., for summary judgment dismissing the complaint, the third-party complaint, and any cross claims against it is granted; and it is further

ORDERED that the motion by defendant/third-party defendant Village of Babylon for summary judgment dismissing the complaint, the third-party complaint, and any cross claims against it is granted.

This action was commenced by plaintiff Donald O'Brien to recover damages for injuries he allegedly sustained on June 25, 2012, when he tripped and fell in a depressed area of a tree well installed in a public sidewalk in the Village of Babylon, New York. His wife, Emily O'Brien, asserts a derivative claim for loss of services.

Lessing's Inc., and Southland Restaurant Corporation (collectively, the Lessing's defendants), now move for summary judgment in their favor, arguing that they did not own the subject tree well, did not install it, did not alter or repair it, did not make special use of it, and did not have a duty to maintain it. In support of their motion they submit, among other things, copies of the pleadings and transcripts of the parties' deposition testimony.

The Babylon Beautification Society, Inc. (the BBS) also moves for summary judgment in its favor, arguing that it had no duty to maintain or repair the subject tree well, and that it was not negligent in any manner. In support of its motion, the BBS submits, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, multiple color photographs, and a letter from the Babylon Village Clerk, dated August 8, 2012.

The Village of Babylon (the Village) moves for summary judgment in its favor, arguing that a prior written notice statute exists in the Village of Babylon, that the Village received no prior written notice of the alleged dangerous condition, and that the Village did not create it. In support of its motion, the Village submits, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, and an affidavit of Babylon Village Clerk Patricia Carley.

Donald O'Brien testified that at approximately 8:45 p.m. on the date in question, he parked his motor vehicle in a municipal lot near the Post Office Café in the Village of Babylon, New York. He

stated that he had dinner alone at the Post Office Café, then departed the restaurant at approximately 10:00 p.m., walking out the front door and intending to walk to the municipal parking lot across the street. Mr. O'Brien indicated that the ground was wet from heavy rain earlier in the day, but it was not raining at the time of his incident and he did not have any difficulty seeing the area in question. He testified that he intended to walk between two cars parked in the street adjacent to a tree well in the sidewalk. He further testified that the opening between the two cars was to the left of the tree planted in the well. Mr. O'Brien stated that he walked down the Post Office Café's front steps, "took one step with [his] left foot, and [then his] right foot went to the area where the sidewalk meets the tree bed," sinking "into a hole," and causing him to fall.

Kerri Rose testified that she is employed by the Lessing's defendants, and served as the general manager of the Post Office Café for the six years prior to the date of her deposition. She stated that while she was not present at the time of Mr. O'Brien's incident, she reviewed an incident report the next day. Asked if she inspected the area of Mr. O'Brien's alleged fall that following day, she indicated that she did not, because "[i]t's the Village's property, [and] was not something that [she] had to fix or maintain." She did testify, however, that the tree well in front of the Post Office Café contained an approximately 20-year-old plaque memorializing one of the Café's former employees. Ms. Rose testified that, to her knowledge, the Village installed such plaque, but that she is unaware of when the tree well was constructed.

Charles Gardner testified that he has been employed by the Village for 46 years, and has served as its public works superintendent since 1996. He indicated that he is "responsible for all roadways, the parks, golf course, marinas . . . [s]nowplowing, road sweeping, tree work, [and] special events." With respect to "tree work," Mr. Gardner stated that it included planting trees in both residential and business districts, as well as responding to complaints relating thereto. Questioned as to the sidewalk adjacent to the Post Office Café, he testified that it is owned by the State of New York and is maintained by the Village. Regarding the tree near the front of the Café, Mr. Gardner indicated that it was maintained by the Village, and that the extent of such maintenance was depositing black mulch every Memorial Day and every October, as well as weed whacking and adding weed killer "once or twice a year."

Asked to described the physical characteristics of the area in front of the Post Office Café, Mr. Gardner stated that there is a curb, an area of red bricks, a sidewalk, and then the building. He indicated that either the Village or a vendor installed the red brick portion in "probably the mid-80's," but that no records pertaining to specific locations remain. He further stated that it was the Village's highway department that created the tree well in question, at the request of the BBS. Mr. Gardner testified that the Village had instituted a program whereby the BBS would solicit donations from community members to fund the planting of trees commemorating deceased loved ones in the Village's business district. He stated that the donors were generally asked their preference as to a commemorative tree's placement within the Village, and a plaque was often placed in the tree's well, but that the BBS had no role in constructing the tree well or any obligation to maintain it. Mr. Gardner further testified that in the instant case, a volunteer named John Murphy was involved in the planning of the tree well, specifying the location. Following Mr. Murphy's choice of location, the Village removed an approximately 4-foot by 4-foot portion of the red bricks, and Mr. Murphy planted a tree where the bricks had previously been. Mr. Gardner was unsure of Mr. Murphy's affiliation or connection to the BBS, if any.

Regarding Mr. O'Brien's incident, Mr. Gardner testified that he was informed of it by the Village Clerk's office, which told him there was an unsafe condition present. He stated that he went to the area of the Post Office Café and observed the tree well in question. He indicated that the plaque that had been placed in the tree well was now buried in the dirt, so he raised it up to its proper level, then added mulch to the tree well to make it "safe." Shown a photograph of the tree bed in question, he acknowledged that there were "half bricks" missing from its perimeter, but that such half bricks were present at the time the well was originally constructed. Finally, Mr. Gardner testified that neither the Village, nor any other entity, altered or repaired the subject tree well subsequent to its initial construction.

Donna Consola testified that she has been a member of the not-for-profit BBS since 1993 and has served, at various times, as both its treasurer and president. She indicated that the BBS "is an organization that was founded in the early 1980's by a group of ladies who just simply wanted to beautify Babylon Village with plants and bushes and stuff like that." Ms. Consola stated that meetings of the BBS were held once a month at the Babylon Village hall, but that the BBS had no headquarters of its own. Asked what role the BBS played in the trees along Main Street in the Village, she explained that it did not own or maintain the trees, but that it operated a memorial plaque program. She indicated that the plaque program was established by the founders of the BBS, and allowed residents to purchase memorial plaques. The BBS would then obtain permission from the Village to install the plaque at the base of a tree, the plaque would be given to the Village, and the Village would install such plaque. Ms. Consola stated that after a plaque was installed, the BBS had no further involvement with that plaque or its upkeep. She also denied that the BBS ever planted any trees in the Village, stating that "you are not allowed to plant the trees [because] [t]hat is Village property."

A party moving for summary judgment "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 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***O'Brien v Port Auth. of N.Y. & N.J.***, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

Liability for a dangerous or defective condition on property is generally "predicated upon ownership, occupancy, control, or special use of the property" (***Tilford v Greenburgh Hous. Auth.***, 170 AD3d 1233, 1235, 97 NYS3d 278 [2d Dept 2019] [internal quotations and citations omitted]). More specifically, "liability for injuries sustained as a result of dangerous and defective conditions on public sidewalks is placed on the municipality, and not the abutting landowner" (***Hanze v City of New York***, 166 AD3d 734, 735, 87 NYS3d 238 [2d Dept 2018], quoting ***Staruch v 1328 Broadway Owners, LLC***, 111 AD3d 698, 698, 974 NYS2d 796 [2d Dept 2013]). An abutting owner or lessee will be liable to a pedestrian injured by a dangerous condition on a public sidewalk only when the owner or lessee either

created the condition or caused the condition to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner or the lessee and expressly makes the owner or the lessee liable for injuries caused by a breach of that duty (*see* ***Bousquet v Water View Realty Corp.***, 161 AD3d 718, 76 NYS3d 205 [2d Dept 2018]; ***Rodriguez v City of Yonkers***, 106 AD3d 802, 965 NYS2d 527 [2d Dept 2013]).

Here, the BBS and the Lessing's defendants established a prima facie case of entitlement to summary judgment in their favor (*see* ***Tilford v Greenburgh Hous. Auth.***, *supra*; ***Hanze v City of New York***, *supra*; ***Williams v Town of Smithtown***, 135 AD3d 854, 24 NYS3d 150 [2d Dept 2016]; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). Through the depositions of the witnesses, the Lessing's defendants and the BBS demonstrated that they did not own the area in which the alleged defective condition existed, that they did not create the alleged condition, and that they had no duty to maintain such tree well (*see* ***Pantaleo v Bellerose Senior Hous. Dev. Fund Co., Inc.***, 147 AD3d 777, 46 NYS3d 189 [2d Dept 2017]). The Lessing's defendants also demonstrated, prima facie, that they did not make special use of the tree well. The burden then shifted to plaintiffs to raise a triable issue (*see generally* ***Vega v Restani Constr. Corp.***, *supra*).

In opposing such motions of the Lessing's defendants and the BBS, plaintiffs do not dispute that neither the BBS nor the Lessing's defendants owned the property where the alleged defect existed. As to the Lessing's defendants, however, plaintiffs contend that they made special use of the tree and tree well, since the tree allegedly memorialized one of their former employees, and that they decorated the tree with lights during holidays. The special use doctrine "authorizes the imposition of liability against any entity that installs an object onto the sidewalk or roadway, for injuries arising out of circumstances where the entity has been permitted to interfere with a street solely for private use and convenience which is in no way connected with the public use" (***Posner v New York City Tr. Auth.***, 27 AD3d 542, 543, 813 NYS2d 106 [2d Dept 2006]). Here, it was plaintiffs' burden to demonstrate that a special use "caused or contributed to the defect" (***Hernandez v Ortiz***, 165 AD3d 559, 560, 86 NYS3d 42 [1st Dept 2018]). Plaintiffs have failed to do so, as the evidence shows the subject tree and tree well benefitted the public at large by, arguably, enhancing the aesthetic beauty of the Village, and the Lessing's "defendants did not derive a special benefit therefrom" (***Garcia v Thomas***, 173 AD3d 842, 2019 NY Slip Op 04682 [2d Dept 2019]; *see also* ***Budoff v City of New York***, 164 AD3d 737, 83 NYS3d 163 [2d Dept 2018]). Further, plaintiffs adduced no evidence that either the tree or the plaque caused or contributed to the dangerous condition alleged, namely a sunken tree well and/or missing bricks. In addition, none of the witnesses testified that the Lessing's defendants decorated the subject tree prior to the incident. At her deposition, Ms. Consola merely testified that she may have seen such tree decorated with lights in the years subsequent thereto, but not before.

Regarding the BBS, plaintiffs argue that it participated in the design and installation of the subject tree well, planted the tree, and installed the memorial plaque, and, therefore, is liable for injuries attendant thereto. This argument is unavailing. None of the witnesses testified that any entity, other than the Village of Babylon, installed the tree well and plaque, or had a duty to maintain them, and plaintiffs failed to adduce any evidence supporting such contention. Accordingly, the motion by the Lessing's defendants for summary judgment dismissing the complaint and any cross claims against them, and the

motion by the BBS for summary judgment dismissing the complaint, the third-party complaint, and any cross complaints against them, are granted.

Turning to the Village's motion, it too established a prima facie case of entitlement to summary judgment in its favor (*see* ***Taustine v Inc. 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]; ***DeSalvio v Suffolk County Water Auth.***, 127 AD3d 804, 7 NYS3d 331 [2d Dept 2015]; ***Brooks v Vil. of Babylon***, 251 AD2d 526, 674 NYS2d 726 [2d Dept 1998]). The Village submits an affidavit of Patricia Carley, wherein she states that she is Village Clerk for the Incorporated Village of Babylon, and has occupied that position since 2010. She indicates that a review of the Village's records reveals that it "never received any prior written notice of any condition/defect at the subject location" prior to June 25, 2012. She further states that the Village was not performing any work at the subject location on the date of plaintiff's fall.

Where a municipality has enacted a prior written notice statute, it "cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies" (***Taustine v Inc. Vil. of Lindenhurst***, *supra* at 785, quoting ***Forbes v City of New York***, 85 AD3d 1106, 1107, 926 NYS2d 309 [2d Dept 2011]; *see* ***Barnes v Incorporated Vil. of Port Jefferson***, 120 AD3d 528, 529, 990 NYS2d 841 [2d Dept 2014]). New York Village Law § 6-628 provides, in pertinent part, 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 . . . unless written notice of the defective, unsafe, dangerous or obstructed condition . . . 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 the place otherwise made reasonably safe.

Prior written notice provisions are always strictly construed (***Gorman v Town of Huntington***, 12 NY3d 275, 279, 879 NYS2d 379 [2009]). A "municipality's actual or constructive notice of the allegedly defective condition does not satisfy the prior written notice requirement" (***Dutka v Odierno***, 145 AD3d 661, 663, 43 NYS3d 409 [2d Dept 2016]; *see* ***DeVita v Town of Brookhaven***, 128 AD3d 759, 9 NYS3d 115 [2d Dept 2015]). Furthermore, a "verbal or telephonic communication to a municipal body, even if reduced to writing, cannot satisfy the prior written notice requirement" (***Tortorici v City of New York***, 131 AD3d 959, 960, 16 NYS3d 572 [2d Dept 2015]). The Court of Appeals has recognized only two exceptions to the prior written notice requirement, namely, where the municipality created the defect through an affirmative act of negligence, or a special use confers a special benefit upon the municipality (*see* ***Yarborough v City of New York***, 10 NY3d 726, 853NYS2d 261 [2008]; ***Amabile v City of Buffalo***, 93 NY2d 471, 693 NYS2d 77 [1999]; ***Garcia v Thomas***, *supra*).

By Ms. Carley's affidavit, the Village demonstrated that it had no prior written notice of the alleged defective condition. The testimony of Mr. Gardner established, prima facie, that no defective condition was present at the time the tree well was created, that no subsequent alteration created the dangerous condition present at the time of plaintiff's fall, and that the Village derived no special benefit from it. The burden, thus, shifted to plaintiffs to raise a triable issue.

In opposition, plaintiffs argue that the tree well was negligently constructed and, therefore, the Village created the alleged dangerous condition. Plaintiffs submit an affidavit of Nicholas Bellizzi, a professional engineer, wherein he states that the tree well in question should have been constructed with a barrier of mortar holding the red bricks in place, and with the interior contents of the well bed flush with the sidewalk surface. Plaintiffs' submissions fail to raise a triable issue (*see* ***Abreu-Lopez v Inc. Vil. of Freeport***, 142 AD3d 515, 36 NYS3d 492 [2d Dept 2016]; ***DeVita v Town of Brookhaven***, *supra*). Absent an affirmative negligent act by the Village which immediately led to his fall, prior written notice of the alleged dangerous condition was an absolute necessity (*see* Village Law § 6-628; ***Gorman v Town of Huntington***, *supra*; ***Taustine v Inc. Vil. of Lindenhurst***, *supra*). Plaintiffs neither submitted evidence that the Village had prior written notice of the alleged defect, nor demonstrated that the Village created the condition (*see* ***Taustine v Inc. Vil. of Lindenhurst***, *supra*). Further, while plaintiffs argue that the Village's installation of the tree well was an "affirmative act of negligence," such exception to the prior written notice law requires that the Village's act "immediately results in the existence of a dangerous condition" (***Yarborough v City of New York***, *supra* at 728; *see* ***Gutierrez-Contreras v Vil. of Port Chester***, 172 AD3d 1333, 101 NYS3d 149 [2d Dept 2019]; ***Cornish v City of Ithaca***, 149 AD3d 1321, 52 NYS3d 565 [3d Dept 2017]).

Even assuming, arguendo, that the subject tree well was negligently constructed by the Village or its agents, such that it was prone to excessive degradation over time, such a circumstance is not dispositive of the issue of liability for plaintiff's alleged injuries. To be deemed to have created a dangerous condition, such that the Village would be stripped of the protections of the prior written notice statute, the condition had to have been dangerous at the moment of its creation– not merely prone to future degradation (*see* ***Gutierrez-Contreras v Vil. of Port Chester***, *supra*). In other words, plaintiffs needed to prove that the depression and/or missing bricks in the tree well were present immediately after its creation. They have not.

Accordingly, the motion by defendant/third-party defendant Village of Babylon for summary judgment dismissing the complaint, the third-party complaint, and any cross claims against it is granted.

Dated: 8-5-19

Hon. Denise F. Molia
A.J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION