

ORIGINAL

STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

SANDRA COULTER AND STEPHEN COULTER,

Plaintiffs,

-against-

Index No.: 20178

TOWN OF MOREAU, THE MICHAELS GROUP, L.L.C.
AND WOODSCAPE NORTH HOMEOWNERS'
ASSOCIATION 11, INC.,

Defendants.

MEMORANDUM OF LAW

2021 APR 12 AM 9:51
SARATOGA COUNTY
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FILED

Respectfully submitted,

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PRELIMINARY STATEMENT

This Memorandum of Law is submitted in support of Defendant Town of Moreau's Motion for Summary Judgment pursuant to CPLR §3212 dismissing the Complaint of Plaintiffs, Sandra and Stephen Coulter. As demonstrated in the instant motion, there are no triable issues of fact with regard to this defendant. The Plaintiffs' claims against the Town of Moreau are insufficient as a matter of law because the Town of Moreau did not receive prior written notice of the alleged defective condition, as required by the town code. Additionally, Plaintiffs will be unable to prove that either exception to the prior written notice statute applies. As Plaintiffs cannot make a prima facie case that the Town of Moreau received prior written notice, the claim is not actionable as a matter of law.

The Town of Moreau seeks an Order granting summary judgment in favor of the Town of Moreau with respect to all claims and for further relief as this Court may deem just and proper.

STATEMENT OF FACTS

For a complete recitation of the facts underlying this action, this Court is respectfully referred to the Accompanying Affirmation of Stephanie S. McDermott, Esq. and exhibits annexed thereto. Briefly, the material facts of this case are that on November 25, 2015, as Plaintiff Sandra Coulter crossed the lawn and entered the street at 35 Woodscape Drive in the Town of Moreau, she allegedly tripped and fell. Mr. Coulter has a derivative claim based on his wife's injuries. The town code of the Town of Moreau requires that in order to maintain a claim against the Town, it must have received prior written notice of the alleged defective condition. As established in the Affidavit of Town Clerk Leann McCabe, the town did not receive prior written notice of the alleged defective condition in the road in front of 35 Woodscape Drive.

LEGAL AUTHORITY and ARGUMENT

Generally, summary judgment is a drastic remedy that should not be granted when there is any doubt as to the existence of a triable issue of fact. See, O'Brien v. Port Authority of New York and New Jersey, 29 NY3d 27 (2017). However, summary judgment “shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” See, CPLR §3212(b).

“[W]here the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do.” Zuckerman v. City of New York, 49 NY2d 557, 560 (1980). “[O]nly the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment.” Rotuba Extruders, Inc. v. Ceppos, 46 NY2d 223, 231, (1978).

Where the proponent of a motion for summary judgment proffers proof to demonstrate the lack of evidence in support of a non-movant’s allegations, the burden shifts to the non-movant to tender sufficient proof in support of their allegations to raise a question of fact. Kendall v. Amica Mut. Ins. Co., 135 AD3d 1202, 1208, (3d Dept. 2016).

I. THE DEFENDANT, TOWN OF MOREAU, NEW YORK, DID NOT RECEIVE PRIOR WRITTEN NOTICE OF THE ALLEGED DEFECTIVE CONDITION.

Where a municipality has enacted its own prior written notice statute it cannot be held liable unless such written notice was actually provided. Actual or constructive notice will not suffice if not provided for in the local notice law. See, Palo v. Town of Fallsburg, 101 AD3d

1400 (3d Dept 2012). See also, Gagnon v. City of Saratoga Springs, 51 AD3d 1096 (3d Dept 2008). Furthermore, the Third Department has also held that an action may only proceed if prior written notice of the alleged defect was filed in compliance with the local prior written notice law. Cook v. City of Amsterdam, 173 AD3d 1420, 1421 (3d Dept 2019). Here, the Town of Moreau has enacted a prior written notice statute, which does not provide for actual or constructive notice when prior written notice of the alleged defect was not provided in compliance with the Town's prior written notice law. The Court is respectfully referred to the Affirmation of Stephanie S. McDermott, Esq. for the full text of the Town of Moreau's prior written notice law.

In Cook v. City of Amsterdam, 173 AD3d 1420 (3d Dept 2019), the Third Department affirmed the decision of the Montgomery County Supreme Court, holding that a defendant met its initial burden of showing the absence of prior written notice by submitting affidavits from the custodian of records who averred that a review of the relevant records maintained by their office revealed that no written notice of any defect had been received for the relevant area. Additionally, CPLR §4521 provides that the lack of a record may be established by having the custodian of such record sign a statement stating that he has made a diligent search of and has found no record or entry of a specified nature.

Leann McCabe, Town Clerk and Receiver of Taxes for the Town of Moreau, submitted an Affidavit in Support of the instant Motion for Summary Judgment. A copy of Ms. McCabe's Affidavit in Support is attached hereto as Exhibit "J".

Consequently, the Affidavit of Leanne McCabe establishes that she is responsible for maintaining any written notices of defects that the Town of Moreau may receive. Moreover, she has personally conducted a thorough search of the aforementioned records and has averred that

she can find no prior written notice concerning defects at 35 Woodscape Drive, the location complained of. Accordingly, the Town of Moreau has met its burden of demonstrating a lack of prior written notice regarding the alleged defect in front of 35 Woodscape Drive.

New York's Town Law also contains a prior written notice statute. The Court is respectfully referred to the Affirmation of Stephanie S. McDermott, Esq. for the full text of Town Law §65-a. Town Law §65-a provides for constructive notice of a defect. However, as articulated in Horan v. Town of Tonawanda, “[b]ecause the Legislature has not expressly prohibited defendant from enacting a more restrictive notice requirement than that contained in Town Law §65-a(1), defendant was entitled to do so.” Horan v. Town of Tonawanda, 83 AD3d 1565, 1566 (4th Dept. 2011). Thus, the Town of Moreau was authorized to enact a more restrictive notice requirement, the Town did enact such a law, and the requirement that prior written notice must be given is applicable in the instant case. Because of the Town's more restrictive prior written notice requirement, Plaintiffs will be unable to demonstrate, let alone prove, that the theory of constructive notice applies to the instant case.

Affording Plaintiffs every favorable inference, and based upon the Affidavit of Leann McCabe, Plaintiffs will be unable to prove that the Town of Moreau received prior written notice, as required by the Town of Moreau town code, and therefore the Motion for Summary Judgment should be granted.

II. PLAINTIFFS CANNOT MEET THEIR BURDEN TO DEMONSTRATE THAT EITHER OF THE RECOGNIZED EXCEPTIONS TO THE PRIOR WRITTEN NOTICE STATUTE APPLY.

There are only two recognized exceptions to the prior written notice requirement: (a) that the defective condition at issue constituted a special use by conferring a special benefit to the municipality or (b) proof that the defect at issue was affirmatively, and immediately, caused by

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