

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D55153
L/htr

_____AD3d_____

Argued - December 8, 2017

WILLIAM F. MASTRO, J.P.
SHERI S. ROMAN
SANDRA L. SGROI
JEFFREY A. COHEN, JJ.

2016-10187

DECISION & ORDER

Nicholas Casciano, respondent, v Town/Village of
Harrison, appellant, et al., defendant.

(Index No. 59966/14)

Vincent J. Aceste, White Plains, NY (Stephen A. Weinberg and Nelson E. Canter of counsel), for appellant.

Zalman Schnurman & Miner, P.C., New York, NY (Marc H. Miner of counsel), for respondent.

In an action to recover damages for personal injuries, the defendant Town/Village of Harrison appeals from an order of the Supreme Court, Westchester County (Joan B. Lefkowitz, J.), dated September 6, 2016, which denied its motion for summary judgment dismissing the complaint insofar as asserted against it.

ORDERED that the order is affirmed, with costs.

The plaintiff alleges that he was injured when he slipped and fell on ice on a roadway in the vicinity of his residence in the Town/Village of Harrison (hereinafter the Town). He commenced this action against the Town and another defendant, alleging, inter alia, that the Town affirmatively created, through its negligence in constructing and paving the road, a condition which allowed water to accumulate and freeze on the roadway, and that the condition caused his fall. The Town moved for summary judgment dismissing the complaint insofar as asserted against it, contending, among other things, that it did not receive prior written notice of the alleged defective condition. The Supreme Court denied the motion, and the Town appeals.

In support of its motion, the Town was required to demonstrate that it did not receive

prior written notice of the alleged defective condition, and that it did not create that condition through an affirmative act of negligence that permitted water to accumulate and freeze on the roadway (*see generally Morreale v Town of Smithtown*, 153 AD3d 917, 918; *DeSalvio v Suffolk County Water Auth.*, 127 AD3d 804, 805). The Town failed to establish, prima facie, that it did not create the alleged defective condition through an affirmative act of negligence. Contrary to the Town's contention, the evidence submitted in support of its motion failed to demonstrate, prima facie, that it did not negligently construct or pave the road in a manner that permitted water to accumulate and freeze on the roadway, or that it subsequently successfully repaired the alleged defective condition prior to the plaintiff's accident (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853; *Zuckerman v City of New York*, 49 NY2d 557, 562). Since the Town failed to establish its prima facie entitlement to judgment as a matter of law, the motion was properly denied without regard to the sufficiency of the plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853).

MASTRO, J.P., ROMAN, SGROI and COHEN, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court