SHORT FORM ORDER

INDEX NO. 20824/2003

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

SONDRA E. SACCENTE,

Plaintiff,

-against-

LUCY ANN M. SIMON,

Defendant.

LUCY ANN M. SIMON,

Third-Party Plaintiff,

-against-

TOWN OF HUNTINGTON,

Third-Party Defendant.

TOWN OF HUNTINGTON,

Second Third-Party Plaintiff,

-against-

WELSBACH ELECTRIC CORP., L.I.,

Second Third-Party Defendant.

ORIG. RETURN DATE: OCTOBER 5, 2006
FINAL SUBMISSION DATE: JANUARY 25, 2007
MTN. SEQ. #: 005
MOTION: MG

ORIG. RETURN DATE: OCTOBER 5, 2006
FINAL SUBMISSION DATE: JANUARY 25, 2007
MTN. SEQ. #: 006
CROSS-MOTION: MG

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Third-Party Index No. 24/156

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Second Third-Party Index No. 25/365

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Upon the following papers numbered 1 to 10 read on this motion and cross-motion FOR SUMMARY JUDGMENT. Notice of Motion and supporting papers 1-3; Memorandum of Law in Support 4; Amended Notice of Cross-Motion and supporting papers 5-7; Answering Affidavits and supporting papers 8, 9; Reply Affirmation 10; it is,

ORDERED that this motion by second third-party defendant, WELSBACH ELECTRIC CORP., L.I. ("WELSBACH"), for an Order, pursuant to CPLR 3212, granting summary judgment dismissing the second third-party plaintiff's complaint on the grounds that there is no issue of material fact regarding WELSBACH's liability, is hereby **GRANTED** for the reasons set forth herein. The Court notes that no opposition was interposed thereto. It is further

ORDERED that this cross-motion by third-party defendant, TOWN OF HUNTINGTON ("TOWN"), for an Order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint of third-party plaintiff, LUCY ANN M. SIMON ("SIMON"), on the grounds that there is no issue of material fact regarding the TOWN's liability, is hereby **GRANTED** for the reasons set forth herein.

This action is for injuries alleged to have occurred as a result of a motor vehicle accident involving vehicles driven by plaintiff, SONDRA E. SACCENTE, and defendant, SIMON, on February 19, 2002, at the intersection of Deepdale Drive and New York Avenue, Town of Huntington, New York. On or about August 20, 2003, plaintiff served a summons and complaint on defendant SIMON. Thereafter, on or about March 8, 2004, defendant SIMON served a third-party summons and complaint on third-party defendant, COUNTY OF SUFFOLK. Within the third-party complaint, defendant SIMON alleged that the traffic light at the subject intersection was malfunctioning and inoperable at the time of the accident.

By Order dated April 1, 2005 (Werner, J.), the COUNTY OF SUFFOLK was granted summary judgment dismissing the third-party complaint and all cross-claims against it. Within the aforementioned Order, the Court noted that during the discovery process, it was revealed that the TOWN, not the COUNTY OF SUFFOLK, "owned operated and controlled" the traffic signal at the subject intersection. As such, third-party plaintiff SIMON was granted leave to serve an amended third-party complaint adding the TOWN as a necessary third-

party defendant. On or about November 29, 2005, the TOWN served a second third-party summons and complaint on WELSBACH, the corporation under contract with the TOWN responsible for the maintenance and repair of illuminated traffic control devices within the TOWN.

On or about December 22, 2005, WELSBACH served a Notice to Admit upon the TOWN. On or about January 4, 2006, the TOWN served a response thereto admitting that WELSBACH had no notice of the allegedly malfunctioning traffic signal at the subject intersection for at least two months prior to the accident. Accordingly, WELSBACH argues that it is entitled to summary judgment as a matter of law in that WELSBACH did not receive notification of a malfunction of the traffic signal prior to the accident, and that WELSBACH fully complied with its limited contractual obligation to the TOWN.

WELSBACH had entered into an agreement with the TOWN to maintain traffic signals for the period November 1, 2001 to November 1, 2002. Pursuant to the contract, WELSBACH was required to respond to a location within two hours of notification that a repair to a traffic signal was required. WELSBACH argues that it was not obligated to patrol or locate malfunctioning traffic signals in need of repair. BRANDON FRIEDRICH, a Supervisor of Traffic Signal Maintenance for WELSBACH at the time of the accident, alleges that WELSBACH conducted routine scheduled maintenance of the traffic signal on October 10, 2001, when no defects were found, and that the next routine maintenance was scheduled for April of 2002. According to MR. FRIEDRICH, WELSBACH neither received notification of a malfunctioning traffic signal at that intersection on the date of the subject accident, to wit: February 19, 2002, nor received any notification of a malfunctioning traffic signal at that intersection in the three months prior to the accident. WELSBACH contends that the records of the TOWN are similarly devoid of any notification of a problem at the intersection. Accordingly, WELSBACH argues that its contractual obligation to appear at the intersection to fix a malfunctioning traffic signal was never triggered. Further, WELSBACH alleges that the TOWN is not entitled to indemnification from WELSBACH, as pursuant to the terms of the contract between WELSBACH and the TOWN, the agreement to indemnify the TOWN only arises out of or results from the "performance of work" by WELSBACH, and there was no such "performance of work" by WELSBACH in this matter.

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, 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 (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

In the case at bar, the Court finds that WELSBACH has made a *prima facie* showing of entitlement to judgment as a matter of law (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v Pomeroy*, 35 NY2d 361, *supra*; *Rodriguez v N.Y. City Transit Auth.*, 286 AD2d 680 [2001]). The TOWN has not come forth to establish the existence of any material issues of fact which would require a trial to determine whether WELSBACH is in any way liable for the subject accident. In fact, the TOWN proffers a similar lack of notice argument in support of its instant cross-motion for summary judgment. As such, this motion of WELSBACH for Order granting summary judgment dismissing the TOWN's complaint and any cross claims asserted in this action is granted.

The TOWN has cross-moved for an Order granting summary judgment dismissing the complaint of third-party plaintiff SIMON on the grounds that there is no issue of material fact regarding the TOWN's liability. In support thereof, the TOWN contends that it received no prior written notice of a defective condition existing at the subject intersection, and as such, is therefore absolved of any liability regarding the subject accident pursuant to Art. I, ch. 174-3(A) of the Code of the Town of Huntington.[1] The TOWN notes that although Town Law §

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[1] Art. I, ch. 174-3(A) of the Code of the Town of Huntington, adopted on October 15, 2002 by Local Law No. 52-2002, is the successor notice provision to Article V, section 173-18, the section of the Code in effect on the date of the accident.

65-a(1) provides for liability based upon actual notice as well as constructive notice, it is permissible for the Town Code to be more restrictive in its notice requirement (eliminating constructive notice), on the authority of Municipal Home Rule Law § 10(1)(ii)(d)(3), unless it appears that the Legislature has "expressly ... prohibited" such supersession (Municipal Home Rule Law § 10[1][ii][d][3]; *see also Wall v Town of Niskayuna*, 14 AD3d 988 [2005]; *Walker v Town of Hempstead*, 190 AD2d 364 [1993]; *Berner v Town of Huntington*, 193 Misc 2d 331 [Sup Ct, Suffolk County 2002]). The TOWN alleges that a search of the records of the Town Clerk reveal that the TOWN received no such written notice of a defective traffic signal existing at the subject intersection up to and prior to February 19, 2002. In support, the TOWN has submitted an affidavit of a town clerk, AUDREY JARAMILLO, wherein she details the lack of written notice. Further, the TOWN alleges that the only recognized exceptions to the foregoing notice requirement are the situations wherein the municipality affirmatively created the defect or where a special use confers a special benefit on the municipality (*see Amabile v City of Buffalo*, 93 NY2d 471 [1999]; *see also Ferreira v County of Orange*, 2006 NY Slip Op 8915 [2d Dept]; *Berner v Town of Huntington*, 304 AD2d 513 [2003]), neither of which, the TOWN argues, is applicable here.

A deposition of GARY GIL, a traffic engineer employed by the TOWN, was conducted on July 20, 2006. MR. GIL testified that there were no problems with the subject traffic signal between October 2001, when routine maintenance was performed, and February 19, 2002, the date of the accident. MR. GIL further testified that he is responsible for keeping maintenance and installation records with respect to the subject traffic signal. MR. GIL testified that if the TOWN had received any complaints from the Suffolk County Police Department about the traffic signal, they would be received in his department or by WELSBACH directly, depending on the time of day. MR. GIL indicated that if WELSBACH received a complaint directly, a service report would be generated and maintained in the Engineering Department. MR. GIL testified that he enters such complaints in a written log. A review of this written log reveals that from October 2001 to February 19, 2002, there were no records of any complaints or defects regarding the subject traffic signal.

In opposition, SIMON has submitted an affirmation of counsel wherein counsel argues that summary judgment is a drastic remedy which is not warranted herein, in that a question of fact exists as to whether the traffic signal

was defective on the date of the accident. Counsel cites MS. SIMON's deposition testimony wherein she states that a police officer at the scene of the accident told her that "when there's power outs, they have trouble with the light." Although SIMON has submitted an affirmation of counsel in opposition to the instant cross-motion, she has failed to submit an affidavit of someone with personal knowledge of the essential facts to demonstrate the existence of any material issues of fact that would preclude the granting of summary judgment to the TOWN. Counsel's affirmation in opposition to the cross-motion, made without personal knowledge of the facts, is without any evidentiary value and is insufficient to defeat a motion for summary judgment (*see S. J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *Moran v Man-Dell Food Stores, Inc.*, 293 AD2d 723 [2002]; *Hoffman v Eastern Long Island Transp. Enter.*, 266 AD2d 509 [1999]; *Cataldo v Waldbaum, Inc.*, 244 AD2d 446 [1997]).

In view of the foregoing, the Court finds that the TOWN is entitled to judgment as a matter of law, as it is undisputed that the TOWN never received prior written notice of the alleged defective condition (*see Berner v Town of Huntington*, 304 AD2d 513, *supra*), and that the facts of this case do not fall within any recognized exception to the written notice requirement. As discussed, SIMON failed to raise an issue of fact which would require a trial of this action. Accordingly, this cross-motion by the TOWN for summary judgment dismissing the complaint of third-party plaintiff SIMON is granted.

The foregoing constitutes the decision and Order of the Court.

Dated: March 23, 2007

HON. JOSEPH FARNETI
Acting Justice Supreme Court