SHORT FORM ORDER

INDEX No. 06-4077
CAL. No. 07-00898-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 6-6-07
ADJ. DATE 7-20-07
Mot. Seq. # 001 - MD

VIVIANA CARRERA and SOCRATES CARRERA, Plaintiffs, - against - TOWN OF ISLIP and TOWN OF ISLIP HIGHWAY DEPARTMENT, Defendants.	GRUNDFAST & HIGHAM Attorneys for Plaintiffs 207 Hallock Road, Suite 207 Stony Brook, New York 11790 LEWIS JOHS AVALLONE AVILES, L.L.P. Attorneys for Defendants 21 East Second Street Riverhead, New York 11901

Upon the following papers numbered 1 to 18 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 13-16 ; Replying Affidavits and supporting papers 17-18 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by defendant Town of Islip pursuant to CPLR 3212 for and order granting summary judgment dismissing the complaint is denied.

This is an action sounding in negligence to recover damages for personal injury sustained by plaintiff on June 22, 2005, when she tripped and fell on a roadway known as Nevada Avenue at or near the intersection with Brentwood Road, Bay Shore, Town of Islip, New York. Plaintiff alleges she was caused to fall due to uneven pavement on the roadway. Plaintiff claims in her bill of particulars that she sustained a trimalleolar fracture of the right ankle with distortion of the ankle mortise, lateral subluxation at the talotibial joint, a separation at the fracture site of the medial and lateral malleoli requiring an open reduction and internal fixation.

Defendant now moves for summary judgment asserting it did not receive prior written notice of the defect and did not cause or create the defect complained of. In support of the motion, defendant submits, among other things, the complaint, answer, and transcripts of the examination before trial of plaintiff Viviana Carrera, and of Peter Kletchka, an employee of the Town of Islip.

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, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [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, 427 NYS2d 595 [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, 538 NYS2d 843 [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, 435 NYS2d 340 [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, 416 NYS2d 790 [1979]).

Where, as here, a municipality has enacted a prior written notice statute pursuant to Town Law, Article 65, it may not be subjected to liability for personal injuries caused by an improperly maintained roadway unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies (***Wilkie v Town of Huntington***, 816 NYS2d 148, 29 AD3d 898 [2nd Dept 2006], citing to ***Amabile v City of Buffalo,*** 93 NY2d 471, 474, 693 NYS2d 77; ***Lopez v G&J Rudolph***, 20 AD3d 511, 512, 799 NYS2d 254 [2nd Dept 2005]; ***Gazenmuller v Incorporated Vil. of Port Jefferson,*** 18 AD3d 703, 704, 795 NYS2d 744[2nd Dept 2005]). Actual or constructive notice of a defect does not satisfy this requirement (***Wilkie v Town of Huntington,*** supra).

To prove a prima facie case of negligence in a slip/trip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (***Stumacher v Waldbaum***, 274 AD2d 572, 716 NYS2d 573 [2d Dept 2000]. To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant or it's employees to discover and remedy it (***Stumacher v Waldbaum,*** supra; *see also,* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Bykofsky v Waldbaum's Supermarkets, Inc.***, 210 AD2d 280, 619 NYS2d 760 [2d Dept 1994]). Liability can be predicated only on failure of the defendant to remedy the danger after actual or constructive notice of the condition (***Piacquadio v Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [2d Dept 1994]).

The adduced evidence indicates that Viviana Carrera testified that she lived at 1314 Brentwood Road, Bay Shore for two and one half years in a corner house. Nevada Avenue runs along the side of her house. On June 22, 2005, at about 10:00 p.m., she went outside of her house to retrieve some trays from her car which was parked on Nevada Ave. It was dark outside, it had rained earlier but stopped, and the pole light on the corner of Brentwood Road was out. She took about two steps on Nevada Avenue onto an area that is not level and her right foot twisted. She fell to the ground. She experienced pain in her

right foot. Immediately before and after the accident she did not see the area where she fell, but described it as uneven and raised. She never saw any work being done on the roadway prior to the date of the accident. She never notified the Town of Islip about the condition of the roadway prior to the accident.

Peter Kletchka testified at his examination before trial on behalf of the Town of Islip that he is employed by the Town of Islip Department of Public Works as Deputy Commissioner and oversees the operation of the department. He assists in defending claims against the Town of Islip by way of record searches, and testifying at depositions. He has done record searches for approximately four years, and made a record search with regard to the intersection of Nevada Avenue and Brentwood Road, Bay Shore for any complaints, and specifically with regard to any paving work in that location.

He searched the complaint data base and the written notice journals for a ten year period. These records are kept in the administration office of public works. He stated when a complaint is received by the central services unit, the department's hub for complaints for any public works matters, potholes, streetlights, trees, and problems and complaints of that nature, it is entered into the data base. A complaint ticket is then printed out and forwarded to the proper authority for investigation. With this type of claim would be investigated by the highway division. He testified he was unable to find any records of complaints with regard to this condition.

Mr. Kletchka testified the Town of Islip oversees the operations with respect to the roadways, although certain paving projects are contracted out if they involve more large-scale projects, full paving operations or resurfacing. He was unable to find out when the last time the roadway at issue was paved when he searched the records as that information went beyond the ten years of records which were available to him.

Mr. Kletchka testified that he visited the roadway concerned herein, and, in examining a photograph of the roadway, stated there appeared to be some type of asphalt overlay with a variation in color with a definitive edge to it. He stated there are various applications or needs for applications, and he did not know why it existed in that form, but there was a layer of asphalt over an area that required some sort of asphalt overlay.

Mr. Kletchka then testified he searched for a five year period prior to the date of the incident for written or oral notice of the condition, and no notice of either was found. He had no indication as to whether the Town may have undertaken some sort of paving project at the location. He also testified that the Southwest Sewer District may or may not have worked at the location in the past, but he did not know.

Based upon the foregoing, this court concludes that the adduced evidence demonstrates defendant Town's prima facie entitlement to summary judgment on the issue of prior oral or written notice. However, there are factual issues raised concerning whether or not the Town of Islip created the defect complained of herein. In that Mr. Fletchka testified that the larger jobs are contracted out, and that this defect appeared to be consistent with an asphalt overlay, there are factual issues concerning whether the Town placed the asphalt patch and whether such patch creates a defect or dangerous condition. Whether a defect or dangerous condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (***Trincere v***

Couonty of Suffolk, 90 NY2d 976, 665 NYS2d 615 [1997]; *see also,* ***Guerrieri v Summa, Jr.,*** 193 AD2d 647, 598 NYS2d 4 [2nd Dept 1993]). Therefore, these issues of fact preclude summary judgment.

The Town of Islip has not demonstrated that they did not create the overlay and cause the uneven condition on Nevada. Defendant Town has admitted ownership and control of the location in its answer and should be in a position to submit evidence that they did not create this condition, or set forth that another entity did. Mr. Fletchka has clearly testified there was an asphalt overlay, but stated he did not know who placed it from his search of the records. Therefore, this motion raises questions of fact as to whether defendants created the alleged dangerous condition by overlaying the area or permitting another entity to patch the area with asphalt (*see*, ***Kaplan v Waldbaum's Inc.***, 231 AD2d 680, 647 NYS2d 560 [2d Dept 1996]).

Since defendant failed to establish entitlement to judgment as a matter of law, the burden has not shifted to plaintiff to establish that there are issues of fact to preclude an order granting summary judgment (CPLR 3212[b]; ***Zuckerman v City of New York***, supra), and it is unnecessary to reach the question of whether or not plaintiff has raised a triable issue of fact (***Krayn v Torella,*** 833 NYS2d 406, NY Slip Op 03885 [2nd Dept 2007]).

Accordingly, the instant motion for summary judgment is denied.

Dated: 8/10/07

Emily Pines
HON. EMILY PINES J.S.C.

___ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**