SHORT FORM ORDER INDEX NO. 6044/2007

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

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

TODD BURGESS,

Plaintiffs,

-against-

COUNTY OF SUFFOLK, VILLAGE OF FARMINGDALE and TOWN OF BABYLON,

Defendants.

ORIG. RETURN DATE: APRIL 9, 2007
FINAL SUBMISSION DATE: MAY 24, 2007
MTN. SEQ. #: 001
MOTION: MG

ORIG. RETURN DATE: MAY 9, 2007
FINAL SUBMISSION DATE: MAY 24, 2007
MTN. SEQ. #: 002
MOTION: MG

ORIG. RETURN DATE: MAY 9, 2007
FINAL SUBMISSION DATE: MAY 24, 2007
MTN. SEQ. #: 003
CROSS-MOTION: XMG

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Upon the following papers numbered 1 to 14 read on these motions _____
FOR SUMMARY JUDGMENT AND TO DISMISS.
Notice of Motion and supporting papers 1-3; Notice of Motion and supporting papers 4-6; Notice of Cross-motion and supporting papers 7-9; Memorandum of Law 10; Affirmation in Opposition and supporting papers 11, 12; Reply Affirmation and supporting papers 13; Affirmation in Reply 14.

The Court has before it three motions in the above-captioned matter. The first is a motion by defendant TOWN OF BABYLON ("Town") for an Order, pursuant to CPLR 3211(a)(7), dismissing plaintiff's complaint as asserted against the Town. The second is a motion by defendant VILLAGE OF FARMINGDALE ("Village") for an Order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's complaint and all cross-claims asserted against the Village. The third is a cross-motion by defendant COUNTY OF SUFFOLK ("County") for an Order, pursuant to CPLR 3211 and 3212, granting summary judgment dismissing plaintiff's complaint and all cross-claims against the County. Plaintiff has filed a single affirmation of counsel in opposition to all three motions. The Village and the County have filed reply affirmations in response thereto. As such, the Court has considered the foregoing submissions in rendering the within decision and Order.

This is an action recover damages for personal injuries allegedly sustained in an accident on November 27, 2005 when plaintiff's motorcycle struck an expansive joint in the road on New Highway, approximately one-quarter (¼) mile north of Route 109. Plaintiff filed a Notice of Claim against defendants County and Village on February 10, 2006, however, he failed to timely serve the Town with notice of claim. By Order dated October 23, 2006 (Werner, J.), the Court denied plaintiff's application to serve a late notice of claim, holding that plaintiff had not provided a reasonable excuse for the delay in filing the notice of claim; that the Town did not have actual notice of the accident; and that the Town had been prejudiced in its ability to investigate both the conditions existing at the time of the accident and the claimed damages. By Order dated September 27, 2007, this Court granted plaintiff's motion to reargue its application for leave to serve a late notice of claim. Upon reargument, the Court adhered to the determination in the Order of October 23, 2006.

The Town now moves to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(7), failure to state a cause of action, as well as pursuant to General Municipal Law §§ 50-e(1)(a) and 50-i(1)(a), the sections of the General Municipal Law relating to the notice of claim requirement. The Town argues that

despite the Order of October 23, 2006 (Werner, J.) denying plaintiff's application to serve a late notice of claim, plaintiff served upon the Town a summons and verified complaint on or about February 23, 2007 naming the Town as a defendant herein.

It is undisputed that plaintiff failed to timely serve a notice of claim upon the Town, and by Orders dated October 23, 2006 (Werner, J.) and September 27, 2007, the Court denied plaintiff's applications for leave to serve a late notice of claim upon the Town. In view of the foregoing, it is

ORDERED that this motion by the Town for an Order, pursuant to CPLR 3211(a)(7) and General Municipal Law §§ 50-e(1)(a) and 50-i(1)(a), dismissing plaintiff's complaint and any cross-claims asserted against the Town for failure to timely serve a notice of claim, is hereby **GRANTED**.

The Village has filed a motion, pursuant to CPLR 3212, seeking summary judgment dismissing plaintiff's complaint and all cross-claims asserted against the Village. The Village alleges that it does not own, operate, maintain, manage or control the roadway where plaintiff's accident occurred. As such, the Village argues that no liability can be assessed against it. In support thereof, the Village has submitted an affidavit of ELIZABETH KAYE, Village Clerk for the Village of Farmingale, who attests to the foregoing, and avers, upon information and belief, that the Town is the municipality with jurisdiction over the roadway in question.

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 the Village 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]). Specifically, the Court finds that the Village has established that it has no ownership interest or control over the roadway upon which plaintiff's accident occurred. In opposition, plaintiff failed to submit any evidence in admissible form to indicate that the roadway in question was owned or maintained by the Village. As such, there does not exist any material issues of fact which would require a trial of the action with respect to the Village. Accordingly, it is

ORDERED that this motion by defendant Village, for an Order, pursuant to CPLR 3212, dismissing plaintiff's complaint as asserted against the Village, along with all cross-claims, on the grounds that the Village has no ownership interest or control over the roadway upon which plaintiff's accident occurred, is hereby **GRANTED**.

The third motion is a cross-motion by the County for an Order, pursuant to CPLR 3211 or 3212, dismissing plaintiff's complaint and all cross-claims asserted against the County. The County moves for dismissal alleging that it does not own or maintain the roadway where plaintiff's accident occurred. In the alternative, the County seeks summary judgment alleging that the County did not receive prior written notice of the alleged defect as required by the Suffolk County Charter (Suffolk County Charter § C8-2A). In support thereof, the County has submitted an affidavit of CARMELLA R. BALBUS, an employee of the Suffolk County Department of Public Works, Highway Engineering Division, who attests to the foregoing, and avers that the County has had no jurisdiction over the accident location, prior to, during or after November 27, 2005, the date of plaintiff's accident. In addition, the County has submitted an affidavit of RENEE ORTIZ, the Chief Deputy Clerk of the Suffolk County Legislature, who avers that the County is not in receipt of any written notice or written complaints regarding the alleged defective condition existing at the accident location prior to November 27, 2005.

In opposition, plaintiff has submitted an affirmation of counsel wherein counsel argues that summary judgment is a drastic remedy which is not warranted herein, in that questions of fact exist as to which municipality had

jurisdiction over the roadway in question on the date of plaintiffs' accident, and which municipality had responsibility for maintaining the roadway. In addition, plaintiff submits that defendants' applications are premature, as pretrial discovery is necessary to get an "idea" as to who was responsible for maintenance of the subject roadway.

The Court finds that the County 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, *supra*; *Andre v Pomeroy*, 35 NY2d 361, *supra*; *Rodriguez v N.Y. City Transit Auth.*, 286 AD2d 680, *supra*). Specifically, the Court finds that the County has established that it does not own or maintain the roadway where plaintiff's accident occurred. In addition, the County has established that it did not receive prior written notice of the alleged defect. In opposition, plaintiff failed to submit any evidence in admissible form to indicate that the roadway in question was owned or maintained by the County; that the County received prior written notice of the alleged defect; or that the County created the alleged defective condition. As such, the Court does not find the existence of any material issues of fact which would require a trial of the action with respect to the County. Accordingly, it is

ORDERED that this motion by defendant County, for an Order, pursuant to CPLR 3211 or 3212, dismissing plaintiff's complaint and all cross-claims asserted against the County, on the grounds that the County does not own or maintain the roadway where plaintiff's accident occurred, and that it did not receive prior written notice of the alleged defect, is hereby **GRANTED**. Although plaintiff urges a denial of the motions, speculating as to the defendants' responsibility with respect to the roadway where plaintiffs' accident occurred, the mere hope or speculation that evidence sufficient to defeat a motion for summary judgment motion may be uncovered during the discovery process is insufficient to deny the motion or to postpone a decision on the motion (*see Arbizu v REM Transp.*, 20 AD3d 375 [2005]; *Kershis v City of New York*, 303 AD2d 643 [2003]; *Associates Commercial Corp. v Nationwide Mut. Ins. Co.*, 298 AD2d 537 [2002]).

The foregoing constitutes the decision and Order of the Court.

Dated: September 28, 2007

HON. JOSEPH FARNETI
Acting Justice Supreme Court