SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

Sequence No.: *001, 002 & 003*
Index No.: 009680/06

PATSY MORGAN and WESTER MORGAN.

Plaintiffs.

- against -

WINDHAM REALTY LLC, COLORS OF COLD SPRING HARBOR SALON & MAKEUP STUDIO, THE FRANCIS COMPANY, L.P. and TALBOTS, INC.

Defendants.

THE FRANCIS COMPANY, L.P. and TALBOTS, INC.

Third-Party Plaintiffs.

- against -

CORPORATE SERVICE NETWORK, INC.

Third-Party Defendant.

THE FRANCIS COMPANY, L.P. and TALBOTS, INC.

Second Third-Party Plaintiffs.

- against -

BLACKTOP UNLIMITED, INC.

Second Third-Party Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Notice of Cross-Motions and Affidavits Annexed	X
Answering Affidavits	X
Replying Affidavits	X

Motion (seq. No. 1) by the attorneys for the defendants Windham Realty LLC and Colors of Cold Spring Harbor, Inc., incorrectly sued herein as Colors of Cold Spring Harbor Salon & Makeup Studio, for an order pursuant to CPLR 3212 dismissing the complaint against them is

granted. Cross motion (seq. No. 2) for an order pursuant to CPLR § 3212 granting the defendants/third-party plaintiffs the Francis Company, L.P. and Talbots, Inc. summary judgment and dismissing plaintiffs' complaint and all cross-claims and/or counterclaims against them is granted. Cross motion (seq. No. 3) for an order pursuant to CPLR 3212 granting the defendant Blacktop Unlimited, Inc., summary judgment and dismissing plaintiff's complaint and any and all cross claims and/or counterclaims against them and for an order denying the motion fo summary judgment by the defendants Windham Realty LLC and Colors of Cold Spring Harbor Salon & Makeup Studio is determined as hereinafter set forth.

The within action arises out of an accident that occurred on August 30, 2003 when the plaintiff alleges she slipped and fell in a parking lot between Talbot's and Colors in Cold Spring Harbor, N.Y.

Francis Company, L.P. and Talbots, Inc. (hereinafter Talbots), defendants/third-party plaintiffs commenced a third-party action against the third-party defendant Corporate Service Network, Inc. No answer was served by Corporate Service Network, Inc. Talbots then commenced a second third-party summons and complaint against Blacktop Unlimited Inc., the second third-party defendants. Defendant Colors is located at 28 Main Street in Cold Spring Harbor. Colors leases the property which is a two-story building from defendant Windham. The lease began in 2002. Windham owned the building since 2001.

Plaintiff testified it was a sunny day when the accident occurred (Morgan Deposition, p. 10). She stated her accident occurred in a driveway between Talbots and Colors. Plaintiff arrived in New York from Athens, Georgia on the day of her accident. She and her daughter drove to the Color Hair Salon and parked in the parking lot directly behind that location. Plaintiff's granddaughter was also with her at that time. All three people entered the salon through the rear entrance. Plaintiff and her granddaughter then exited the front entrance five minutes later, to walk around town (Morgan Deposition, pgs. 11-14). They then returned to the salon and met plaintiff's daughter. The three of them then went up from Color's side entrance up the hill, she described as a "slope" and entered Talbots through its rear entrance . Plaintiff was wearing shoes, she described as "[t]hey're called slides. Open toe, open heel" (Morgan Deposition, pgs. 66-69). She exited the rear entrance of Talbot's and was walking across the driveway on the way back to her daughter's car when her accident happened (Morgan Deposition, p. 74). Plaintiff stated the accident occurred in the driveway, which was made of a "rich black, I guess asphalt." Plaintiff had no difficulty walking in the driveway from the side entrance of Colors to Talbots (Morgan Deposition, p. 74) and did not notice any debris on the ground in that area (Morgan Deposition, pgs. 49-50). Plaintiff's daughter and granddaughter were already at the car when plaintiff had her accident (Morgan Deposition, pgs. 77-80). Plaintiff stated she was watching her granddaughter (Morgan Deposition p. 22) and looking at the car while she was walking across the driveway. She claimed her both feet "slid" and that she went down on her tailbone (Morgan Deposition, pgs. 85-87). While she was on the ground, plaintiff did not notice anything about the area that may have caused her to fall (Morgan Deposition, p. 50).

Where plaintiff is unable to identify the condition which caused her to suffer her injuries, she may not recover based upon speculation. (See, Visconti v. 110 Huntington Assocs., 272 A.D.2d 420.

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. Sillman v. Twentieth Century Fox Films Corp., 3 N.Y.2d 395, 404. A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. Alvarez v. Prospect Hospital, 66 N.Y.2d 320; Winegrad v. New York University Medical Center, 64 N.Y.2d 851; Fox v. Wyeth Laboratories, Inc., 129 A.D.2d 611; Royal v. Brooklyn Union Gas Co., 122 A.D.2d 133. The Windham, Colors and Talbot's defendants have made an adequate *prima facie* show of entitlement to summary judgment.

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. Friends of Animals, Inc. v. Associated Fur Mfgrs., Inc., 46 N.Y.2d 1065. Conclusory statements are insufficient. Sofsky v. Rosenberg, 163 A.D.2d 240, *aff'd* 76 N.Y.2d 927; Zuckerman v. City of New York, 49 NY2d 557; *see,* Indig v. Finkelstein, 23 N.Y.2d 728; Werner v. Nelkin, 206 A.D.2d 422; Fink, Weinberger, Fredman, Berman & Lowell, P.C. v. Petrides, 80 A.D.2d 781, *app dism.* 53 N.Y.2d 1028; Jim-Mar Corp. v. Aquatic Construction, Ltd., 195 A.D.2d 868, *lv app den.* 82 N.Y.2d 660.

In opposition to the within motion for summary judgment the attorneys for the plaintiffs refer to deposition testimony of Ms. Schenck, the owner and vice-president of Colors. She testified that her employees have performed cleaning or shoveling work when snow covered the parking lot behind Colors (Schenck Deposition, pgs. 19-20). She testified that prior to August, 2003, paving had been done. She described the paving as being black, like a seal coat. She does not know who did the paving. She never witnessed the work being performed. "It covered the driveway, Talbot's and our two spaces" (Schenck Deposition, p. 20, line 13-14). "We came to work one day and it was all coated" (Schenck Deposition, p. 21, lines 15-16). She does not know when or what time of year the black seal was applied. According to Windham since it owned the building no contractors were hired to level, pave or seal the property. Ms. Schenck also testified that when it rained cars would have a difficult time. Sometimes she would hear their wheels spin. Allegedly somebody fell in Talbot's parking lot subsequent to the repaving. Again, she does not remember the date. Ms. Schenck asserts she notified Talbot's and the landlord both orally and in writing of the alleged slippery condition. She has no record of when the alleged notice was communicated. Defendants Talbot and Windham deny ever receiving any notice. Assuming, *arguendo*, Ms. Schenck notified Talbot's and Windham that car wheels spun when it rained, there is no evidence that a pedestrian slipped on the pavement while walking either in the rain or on a sunny day. While plaintiff has asserted that an "extremely slippery asphalt sealant" was the sole cause of the alleged incident, plaintiff failed to present any evidence in admissible form to establish that the driveway and/or parking lots were improperly paved and/or sealed. Plaintiff

attempts to establish the driveway was improperly resurfaced by relying on the testimony of Ms. Schenck of Colors. Ms. Schenck is not an expert and her testimony cannot be used as such. The fact that she may have observed a vehicle experiencing difficulty in either ascending or descending the driveway when it was raining cannot be the basis to establish that the driveway was improperly constructed and/or resurfaced. The attorney for the plaintiff's assertions that ". . . it is amply clear from the plaintiff's testimony that the defendants' gross negligent conduct in permitting a dangerously steep, sharp decline on their driveway coupled with their creation of an intensely slippery condition created by the rich, black asphalt sealant were the proximate causes of Mrs. Morgan's injurious slip and fall on the defendants' premises. The combination of these dangerous factors caused both of Mrs. Morgan's feet to very rapidly, unexpectedly and simultaneously slip out from under her, thereby causing her significant injuries." (Rothman affirmation in opposition dated February 5, 2008, ¶ 11) are conclusory and not sufficient to defeat a motion for summary judgment (*See,* Spodek v. Park Property Devel. Assoc., 263 A.D.2d 478). "'[A]verments merely stating conclusions, of fact or of law, are insufficient' to 'defeat summary judgment' " (Banco Popular North America v. Victory Taxi Management, Inc., 1 N.Y.3d 381, 383 [2004], quoting from Mallad Constr. Corp. v. County Fed. Sav. & Loan Assn., 32 N.Y.2d 285, 290. Expressions of hope or unsubstantiated allegations or assertions are insufficient to raise a triable issue of fact (*see,* Billordo v. E.P. Realty Associates, 300 A.D.2d 523; *see,* Zuckerman v. City of New York, 49 N.Y.2d 557, 562; Dunlap v. Levine, 271 A.D.2d 396). Plaintiff has failed to identify any defect with the driveway in or about the area where the accident occurred. (See, Visconti v. 110 Huntington Associates, L.P., supra). Plaintiff herself testified that even though she remained on the ground for almost an hour, she did not observe anything in the area that caused her to fall (Morgan Deposition p. 22, 25). Further, 15 minutes earlier she had passed through the same general vicinity. Neither the plaintiff, her representatives, her attorneys nor any expert ever inspected the driveway to determine the existence of any allegedly defective condition. There is no documentary evidence (inspection report or expert report) to demonstrate the reason the plaintiff slipped on the driveway. Plaintiff's own testimony was that it was "a nice, sunny day when the accident occurred."

The plaintiff failed to raise a triable issue of fact as to the cause of the accident. "Since it is just as likely that the accident could have been caused by some other factor such as a misstep or loss of balance, any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation" (Teplitskaya v. 3096 Owners corp., 289 A.D.2d 477, 479; *see, also,* Rodriguez v. Cataro, 17 A.D.3d 658). The defendants have established their entitlement to summary judgment. The record is devoid of any probative evidence that there were defective conditions on the defendants' property which caused the plaintiff to fall and that the defendants knew or should have known of any such condition. Kuchman v. Olympia & York, USA, 238 A.D.2d 381.

The defendants' applications for summary judgment are granted. The complaint is dismissed. The attorneys for Blacktop Unlimited Inc., the second third party defendant adopted and incorporated the arguments of the Talbot defendants in support of its motion (seq. No. 3) for summary judgment. In light of the dismissal of the plaintiffs' complaint against defendants

Windham Realty LLC, Colors, the Francis Company and Talbot's Inc., motion (seq. No. 3) by second third-party defendant Blacktop Unlimited, Inc. is moot. All proceedings under index no. 9680/06 are terminated.

So Ordered.

A.J.S.C.

Dated: May 21, 2008