SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 48**

ELSIE REGAN AND TOM REGAN,

Plaintiff,

-against-

TOWN OF NORTH HEMPSTEAD, PHILIP D'AMICO, TERESA D'AMICO, JOSEPH TESTANI and MARIA ANNA TESTANI,

Defendants.

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INDEX NO.: 00440/07

MOTION DATE:3-18-08
SUBMIT DATE:6-12-08
SEQ. NUMBER - 001

MOTION DATE: 4-17-08
SUBMIT DATE: 6-12-08
SEQ. NUMBER - 002

The following papers have been read on this motion:

Notice of Motion, dated 2-11-08.....1
Notice of Cross Motion, dated 4-1-08.....2
Affirmation in Opposition, dated 5-15-08.....3
Reply Affirmation, dated 5-22-08.....4
Reply Affirmation, dated 6-9-08.....5

The motions by the D'Amico and Testani defendants for summary judgment pursuant to CPLR §3212 are granted. Plaintiff's complaint and all cross-claims in connection with this matter against said defendants are dismissed. The action remains as to defendant Town of North Hempstead.

The instant litigation arises from injuries allegedly sustained by plaintiff on May 4, 2006, as a result of an alleged trip and fall on a sidewalk which occurred as Elsie Regan was perambulating in the vicinity of 134 and 140 Primrose Drive in Nassau County.

The Testani defendants own abutting property, 134 Primrose Drive and the D'Amico defendant's own abutting premises 140 Primrose Drive. The sidewalk is owned and maintained by the co-defendant Town of North Hempstead.

Plaintiff alleges that she fell as a result of a defective sidewalk where the property lines of the defendants meet. The Testani defendants claim that the accident occurred in front of 140 Primrose, owned by the D'Amico's. The driveways providing access to the Testani property (134) and the D'Amico property (140), are in the vicinity of the property line. Plaintiffs contend in part, that use of the driveways contributed to the defect.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must

be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton,* 29 AD3d 975 (2d Dept. 2006); *Ciccone v Bedford Cent. School Dist.*, 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol,* 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC,* 27 AD3d 684 (2d Dept. 2006).

The law with respect to the liability of an abutting property owner for injuries sustained by a third party from a defective sidewalk can be succinctly stated.

> "Generally, liability for injuries sustained as a result of dangerous and defective conditions on public sidewalks is placed on the municipality and not the abutting landowner (*see Hausser v. Giunta*, 88 NY2d 449, 452-453 [1996]; *Bruno v. City of New York*, 36 AD3d 640 [2007]). However, an abutting landowner will be liable to a pedestrian injured by a defect in a sidewalk where the landowner negligently constructed or repaired the sidewalk, otherwise caused the defective condition, including causing the to occur by some special use of the sidewalk, or breached a specific ordinance or statute which obligated the owner to maintain the sidewalk (*see Hausser v. Giunta, supra* at 452-453; *Cannizzaro v. Simco Mgt. Co.*, 26 AD3d 401 [2006]; *Nichilo v. B.F.N. Realty Assoc., Inc.*, 19 AD3d 666 [2005]; *Packer v. City of New York*, 282 AD2d 587 [2007]". *Rocco v. Marder*, 42 AD3d 516, 517 (2d Dept. 2007).

There is no evidence here that the defective condition was created by the abutting owner defendants both of whom deny that they ever performed any work in the area of the defect. *Portanova v. Dynasty Meat Market*, 297 AD2d 792 (2d Dept. 2002). To the extent that it may be speculated that the condition was caused by tree roots that too is insufficient as it has been held that an abutting owner is not responsible for sidewalk damage caused by roots of a tree. *Jackson v. Thomas*, 35 AD3d 666 (2d Dept. 2006).

When a local ordinance or statute requires an abutting owner to maintain and repair sidewalks it will not impose tort liability in favor of others unless it specifically imposes liability for injuries resulting from a breach of that duty. *Lobel v. Rodco Petroleum Corp.*, 233 AD2d 369 (2d Dept. 1996); *see Bachman v. Town of North Hempstead*, 245 AD2d 327 (2d Dept. 1997) and *Appio v. City of Albany*, 144 AD2d 869 (3d Dept. 1988).

Town of North Hempstead Sidewalk Ordinance §48-10 requires abutting owners to keep sidewalks in good and safe repair but does not impose tort liability to third parties for failure to do so hence, the moving defendants cannot be held liable under that Ordinance.

Plaintiff's claim that the defendants may be liable because they had driveways and access aprons near where the defect occurred is not applicable here. An abutting landowner may be liable to a pedestrian passing on a public sidewalk if the owner caused the defect to occur because of some special use of the sidewalk. *Benenati v. City of New York*, 282 AD2d 418 (2d Dept. 2001); *see also Kaufman v. Silver*, 90 NY2d 204 (1997). A driveway has been held to constitute a special use. *Deans v. City of Buffalo*, 192 AD2d 1015 (4th Dept. 1992).

In order to find an abutting owner responsible for a defect based upon a special use of the public way, there must be evidence that the defect was caused by the special use of the sidewalk as a driveway or that the driveway contributed to the condition. *Benenati v. City of New York, supra*; *Thomas v. Triangle Realty*, 255 AD2d 153 (1st Dept. 1998).

In this case there is insufficient evidence that the use of the driveways created a hazard or caused the defect that resulted in the accident. *Kaminer v. Dan's Supreme Supermarket/Key Food*, 253 AD2d 657 (1st Dept. 1998).

The opposition to these motions contain only bare conclusory and speculative assertions that the driveway use created the defect and do not provide any evidence to connect the use of the driveways to the defect *Fishelberg v. Emmons Avenue Hospitality Corp.*, 26 AD3d 460 (2d Dept. 2006).

Based on the foregoing, it is evident the moving defendants did not create the defect, their special use if any of the sidewalk for access did not have a role in creating the defect, they are not responsible if the defect was caused by tree roots and the Town Ordinance does not impose tort liability to third parties and thus the complaint and any cross claims against them are dismissed.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: June 13, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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