SHORT FORM ORDER

INDEX No. 05-27746

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 1-4-08
CAL. DATE 6-18-08
MNEMONIC: # 001 - MG
002 - XMD

MARION THOMPSON,

Plaintiff,

- against -

TOWN OF HUNTINGTON and COMMUNITY PROPERTIES, LP.,

Defendants.

CHRISTOPHER J. CASSAR, P.C.
Attorney for Plaintiff
13 East Carver Street
Huntington, New York 11743

JOHN J. LEO, ESQ., Town Attorney
By: Margaret L. Pezzino, Esq.
Attorney for Defendant Town of Huntington
Town Hall, 100 Main Street
Huntington, New York 11743

COMMUNITY PROPERTIES, L.P.,

Third-Party Plaintiff,

- against -

HUNTINGTON STATION ENRICHMENT CENTER - BOYS & GIRLS CLUB,

Third-Party Defendant.

GOLD, STEWART, KRAVATZ, BENES & STONE, LLP
Attorneys for Defendant Community Properties, LP.
1025 Old Country Road, Suite 301
Westbury, New York 11590

Upon the following papers numbered 1 to 46 read on this motion and cross motion for summary judgment interest ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 16 ; Notice of Cross-Motion and supporting papers (002) 17 - 30 ; Answering Affidavits and supporting papers 31 - 32; 33 -34; ; Replying Affidavits and supporting papers 35 -37; 38 - 40 ; Other 41-42 & 43-44-Deft's Mem/Law; 45-Pius affidavit; 46 Coppola affidavit; (and after hearing counsel in support and opposed to the motion)it is,

ORDERED that this motion (001) by the defendant, Town of Huntington, pursuant to CPLR 3212 for summary judgment dismissing the complaint and cross-claims asserted against it, is granted and the complaint and the cross-claims asserted against it are dismissed with prejudice and are severed from the action which is to continue; and it is further

ORDERED that this cross-motion (002) by the defendant, Community Properties, L.P. (hereinafter Community Properties), pursuant to CPLR 3212 for summary judgment dismissing the complaint, is denied.

This is an action wherein the plaintiff, Marion Thompson, seeks damages for injuries allegedly arising out of a slip and fall incident which occurred on March 19, 2005 on a sidewalk located at 1264 New York Avenue/East 2nd Street, Town of Huntington, County of Suffolk, New York, as she was coming from the Huntington Station Enrichment Center-Boys and Girls Club (hereinafter HSEC). The Town of Huntington (hereinafter the Town) has been named as a defendant along with Community Properties, the owner of premises where HSEC is located.

A cross-claim has been asserted by Community Properties against the Town for common-law indemnification and contribution. A cross-claim has been asserted by the Town against Community Properties for judgment over. A third party action was commenced by the defendant Community Properties against its tenant the HSEC.

The Town seeks summary judgment dismissing the complaint on the basis that the Notice of Claim was defective in failing to apprise the Town of the accurate location of the alleged defect in that it set forth that on "March 19, 2005..., the claimant was traversing the sidewalk in front of the Huntington Station Boys & Girls Club, located at 1260 New York Avenue, Huntington Station;" the bill of particulars set forth that the accident occurred on the "sidewalk in front of the Huntington Station Boys & Girls Club, located at 1264 New York Avenue, Huntington Station; that she testified at her 50-h hearing that the accident occurred "in front of the Boys and Girls Club"; and that it was not until her examination before trial on August 7, 2007, that it was learned that the plaintiff's accident did not occur on the sidewalk in front of the Boys and Girls Club on New York Avenue, but on East 2nd Street, as she testified that she fell on the sidewalk along the side street, on the sidewalk running along the side of premises owned by the co-defendant.

The Town also seeks summary judgment on the basis that the plaintiff did not and cannot prove that the defendant Town received prior written notice of the alleged sidewalk defect, and further asserts that if there is a factual issue with regard to notice, that the defect on the sidewalk is trivial, presented no hazard, and is not actionable.

In support of its motion, the Town has submitted, inter alia, a copy of the summons and complaint, answers, bill of particulars; copy of the Notice of Intention to File a Claim; copies of the plaintiff's testimony at the 50-h hearing and examination before trial; the affidavits of Audrey Jaramillo and Derek Baiz; a memorandum of law; a copy of the transcript of the examination before trial of Robert Pilnick and multiple photocopies of photographs.

Community Properties seeks summary judgment dismissing the complaint and cross-claims on the basis that it had no actual or constructive notice of the alleged condition of the public sidewalk adjacent to the non-residential premises that it owned at the time of the alleged incident, nor did it create any such condition, and that in any event that the alleged defect is so trivial that it is not actionable.

In support of its application, Community Properties has submitted, inter alia, an attorney's affirmation; a copy of the complaint, answer, verified bill of particulars, third party complaint; copy of the transcript of the examination before trial of the plaintiff; a copy of a lease agreement between Community Properties and HSEC; copies of various photographs; and the affidavits of Barbara Coppola and Donald Pius (hereinafter Pius).

The plaintiff has submitted an attorney's affirmation in opposition to each motion.

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 (***Bradish v Tank Tech Corp.***, 216 AD2d 505,628 NYS2d 807 [2d Dept 1995]; ***Gaeta v City of New York***, 213 AD2d 509 624 NYS2d 47 [2d Dept 1995]). Liability may be imposed where a landowner or lessee creates a dangerous condition on the property (***Warren v Wilmorite, Inc.*** 211 AD2d 904 621 NYS2d 184 [3rd Dept 1995]). To be entitled to judgment as a matter of law, a defendant movant must demonstrate that the plaintiff failed to make out a prima facie case; the plaintiff's evidence must be accepted as true, and the plaintiff must be given the benefit of every favorable inference which can be reasonably drawn from the evidence (***Posner v New York City Transit Authority,*** 27 AD3d 542, 813 NYS2d 106 [2nd Dept 2006]).

The plaintiff testified at her examination before trial that Saturday, March 19, 2005, was a clear day and the roads were dry. At about 1:30 p.m., "on the corner of New York Avenue," she was walking out of the Boys and Girls Club, enroute to her car. When asked where the Boys and Girls Club was located, she replied that it was "New York Avenue" and "What is that-Third Street." She also stated, "I know it was New York Avenue, but it's on the corner." She testified that she did not know the name of the side street. She also testified at the 50-h hearing that she had walked straight ahead about three or four steps exiting the building and was on a "divot" which inclined from the sidewalk to the side door of the building when her right foot caught on the uplift or lip of the sidewalk, causing her to fall onto her left side, causing her to sustain injury.

The plaintiff's testimony at the 50-h hearing on June 20, 2005, three months after the accident, clearly described that she fell on the corner of New York Avenue and the side street while she was exiting the side door of the building. Therefore, the Town's claim that it did not have notice that the plaintiff fell on the side street coming out of the building located at 1264 New York Avenue until August 7, 2007 must fail. Also, the Notice of Intent to File a Claim sufficiently apprised the Town of the location of the accident as the sidewalk in front of the HSEC, which was indicated as being located at 1260 New York Avenue, Huntington Station, New York. Any error or failure to state that the accident occurred on the corner is deemed not to be prejudicial to the defendant Town as the statutory hearing held three months after the accident was adequate to supplement the Notice of Claim apprising the Town that the accident occurred on the corner as the plaintiff was coming out of the side door of the building (*See,* ***Lord v New York City Housing Authority,*** 184 AD2d 406, 585 NYS2d 49 [1st Dept 1991]). The Court finds that the Town acquired actual knowledge of the essential facts constituting the claim within the 90-day filing period by way of the Notice of Claim at the plaintiff's 50-h hearing

and had the opportunity to make reasonable inquiry into the location and happening of the accident (*See, GML §50-e(5);* ***Rivera v City of New York,*** 169 AD2d 387, 563 NYS2d 818 [1st Dept 1991]).

At her examination before trial, the plaintiff testified she was unable to describe the depth of the lip on which she claimed she tripped. When shown various photographs of where she claimed the incident occurred, she testified that the photographs depicted how the sidewalk looked on the date she fell, but she could not determine where she fell, just that it was where the sidewalk was lifted in the middle of the sidewalk. She knew of no complaints made to the Town or to the HSEC or to the owner of the building about the condition of the sidewalk prior to the accident.

The affidavit of an official charged with the responsibility of keeping an indexed record of all notices of defective conditions received by [a town] is sufficient to establish that no prior written notice was filed (***Scafidi v Town of Islip,*** 34 AD3d 669, 824 NYS2d 410 [2nd Dept 2006]). The affidavit of Audrey Jaramillo, clerk typist for the Town, indicates that a search of the records filed in the Town Clerk's Office reveals that no written notice or complaints were received by the Town regarding the sidewalk located in front of and alongside of 1264 New York Avenue, Huntington Station, New York, for a three year period prior to the accident. Derek Baiz, a highway project assistant within the office of the Superintendent of Highways of the Town has also averred that a search of the records maintained by that office revealed that for a three year period prior to the accident there were no records found concerning complaints or written notice of any defects regarding the sidewalk located in front of and alongside 1264 New York Avenue, Huntington Station, New York.

Robert Pilnick testified at his examination before trial that he is currently the administrator of the curb and sidewalk program in the traffic and safety department of engineering and receives calls and has the records of any calls for complaints about the curbs and sidewalks maintained prior to the accident, but was working as an executive assistant to the Town Attorney at the time of the accident. He testified that the curbs and sidewalks and aprons are the responsibility of the abutting property owner pursuant to Town Code Section 176-16, as amended in 2006. He testified that as far as he knew, that in 2005, the Town was not responsible for maintaining sidewalks in any commercial district within the Town. He had no records that reference the sidewalk at issue for any complaints or work being done.

Based upon the foregoing, the Town has demonstrated prima facie entitlement to summary judgment dismissing the complaint for lack of actual or constructive notice to it (*see,* ***Gorman v Town of Huntington,*** 47 AD3d 30, 844 NYS2d 421 [2nd Dept 2007]).

The plaintiff, by way of an attorney's affirmation, argues that under the Town Code and New York State Town Law, written notice is not required when a special use confers a benefit upon the municipality, citing ***Amabile v City of Buffalo,*** 93 NY2d 471, 693 NYS2d 77 [1999]. In ***Amabile,*** supra, where the plaintiff sustained injury when she fell on a defective sidewalk,

the Court held that constructive notice of a sidewalk defect could not satisfy the written notice required by the prior notification statute, and that plaintiff's claims did not fall within either of two recognized exceptions to the notification requirement: the defendant did not create the defect through an affirmative negligent act and there was no special use of the sidewalk by the defendant.

In ***Wilkie v Town of Huntington,*** 29 AD3d 898, 816 NYS2d 148 [2nd Dept 2006], the Court stated where a municipality has enacted a prior written notice statute, it cannot be liable for injuries caused by an improperly maintained roadway unless it has received prior written notice of the defect or an exception to the prior written notice applies; actual or constructive notice of a defect does not satisfy this requirement (citing, ***Amabile v City of Buffalo***, supra). The Court further set forth that an exception to the prior written notice requirement exists when a municipality creates the subject defect through an affirmative act of negligence. However, the plaintiff in the instant action has submitted no evidence to raise a triable issue of fact concerning whether the Town had prior written notice of the claimed defect or that the Town created the claimed defect. Thus remaining is the issue of special use.

"One exception to the prior written notice requirement is the special use doctrine. This doctrine authorizes the imposition of liability against any entity that installs an object onto the sidewalk or roadway, for injuries arising out of circumstances where the entity has been permitted to interfere with a street solely for private use and convenience which is in no way connected with the public use. Liability may be imposed since the special user has exclusive access to and control of the special use structure or appurtenance. This creates a duty to properly maintain the structure or appurtenance in a reasonably safe condition" (***Posner v New York City Transit Authority,*** supra).

The plaintiff argues that "special use" confers a benefit upon the municipality, and relates to situations where the landowner whose property abuts a public street or sidewalk derives a special benefit from that property, and that in the instant action the Town receives a special benefit from the premises and sidewalk where the injury occurred in that the premises were being occupied by the HSEC which provides a plethora of activities and counsel for the community's youth.

However, the plaintiff's claim of "special use" is conclusory and unsupported by any probative evidence demonstrating that the premises and sidewalk in front of the HSEC is for the benefit or special use of the Town. The plaintiff's claims are both inferential and conclusory (***Massa v City of New York,*** 201 Misc 259, 109 NYS2d 141 [Spec. Term Bronx County 1952] and fail to demonstrate that connection between the sidewalk and the alleged special use by the Town (ie., cast iron cover over a survey monument installed in a sidewalk, *see,* ***Filsno v City of Rochester,*** 10 AD2d 663, 196 NYS2d 311 [4th Dept 1960]; wherein the city had use of a shutoff pile on the waterline installed in the sidewalk, *see,* ***Smith v City of Corning,*** 14 AD2d 27, 217 NYS2d 149 [4th Dept. 1961]; a metal sewer grating in a gutter area is a 'special use' not requiring prior written notice, *see,* ***Di Lorenzo v Village of Endicott***, 70

Misc.2d 159, 333 NYS2d 456 [Sup. Ct. Broome County 1972]; special use applies to a dangerous condition inherent in the placement of a fixture or appurtenance which served some existing municipal function, but is properly applicable to the remnants of a long-abandoned fire hydrant, *see*, ***Waters v Town of Hempstead,*** 166 AD2d 584, 560 NYS2d 870 [2nd Dept 1990]; and, because signs controlling vehicular traffic are an integral part of providing safe streets and thus specifically installed for the benefit of a particular party, sign posts and anchors cannot be considered a special use, *see*, ***Bisculo v City of New York,*** 186 AD2d 84, 588 NYS2d 26 [1st Dept 1992]).

The plaintiff has not demonstrated a nexus between the occurrence of the plaintiff's trip and fall and the plaintiff's claim that the Town made a "special use" of the sidewalk at issue, or that the "special use" of the sidewalk conferred a special benefit on the Town (*see,* ***Lopez v Town of North Hempstead,*** 20 AD3d 511, 799 NYS2d 254 [2nd Dept 2005]). The plaintiff has failed to demonstrate how the operation of the HSEC constitutes a special use of the sidewalk. The plaintiff has failed to raise a triable issue and the plaintiff's conclusory assertions of "special use" of the sidewalk are unsupported by any record, let alone a sufficient record that would permit the application of the "special use" doctrine such as to bar summary judgment. Therefore, the plaintiff's claim that no prior notice of the claimed defect is necessary in that the Town receives a special benefit or has special use of the sidewalk is without merit.

Accordingly, motion (001) by the Town for dismissal of the complaint and cross-claims asserted against it is granted and the complaint and cross-claims are dismissed with prejudice and are severed from the action which is to continue.

Community Properties is the owner of the building which the defendant HSEC leased, which building is adjacent to the sidewalk where the plaintiff claims to have slipped and fallen. It seeks summary judgment dismissing the complaint because the lease required HSEC to maintain and repair the sidewalk adjacent to the building and it had no actual or constructive notice of the claimed defect; that it was an out-of-possession landlord and not responsible for the condition of the sidewalk; that HSEC solely occupied the premises at the time of the accident and that the claimed defect was so trivial in nature so as to be non-actionable as a matter of law. It also argues that HSEC has failed to answer or otherwise appear in the third-party action.

Community Properties has submitted the affidavit of Barbara Coppola who states she is employed by First Judicial Claims Service, Inc., a company whose business includes private investigations and other litigation support activities conducted on behalf of insurance carriers in connection with claims make upon insurance policies and litigation commenced against insurance carriers and/or their policyholders. Her affidavit is submitted with copies of the color photographs submitted by Community Properties and states that the plaintiff tripped where four sidewalk slabs meet and that the height differential between the northwest sidewalk slab and the groove between it and the northeast slab was one inch in photos 13 and 14; in photos 15-18, the height differential between the corner of the northwest slab and the groove at the

intersection of all four slabs was less than one inch to one inch at most; and in photos 19 and 20, the differential height between the northwest slab and the groove at the intersection of the northwest slab and the southwest slab was approximately one-half inch and certainly less than one inch. Community Properties argues that such defect is so trivial that it is not actionable.

In ***Trincere v County of Suffolk,*** 90 NY2d 976. 665 NYS2d 615 [1997], the Court held that there is no "minimal dimension test" or per se rule that a defect must be of a certain minimum height or depth in order to be actionable. The Court quoted the Appellate Division stating, "There is no rule that municipal liability, in a case involving minor defects in the pavement, 'turns upon whether the hole or depression, causing the pedestrian to fall, is four inches--or any other number of inches--in depth' (***Loughran v City of New York,*** 298 NY 320, 1948 NY Lexis 786 [1948]; ***Wilson v Jaybro Realty & Dev. Co.,*** 298 NY 410, 40 NYS2d 186 [1943]). Instead, whether a dangerous or defective 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' (***Guerrieri v Summa,*** 193 AD2d 647, 598 NYS2d 4 [2nd Dept 1993]. Of course, in some instances, the trivial nature of the defect may loom larger than another element. Not every injury allegedly caused by an elevated brick or slab need be submitted to a jury (*see, e.g.* ***Hect v City of New York,*** 60 NY2d 57 [claim involving trivial gap between two flagstones of the sidewalk was properly dismissed]). However, a mechanistic disposition of a case based exclusively on the dimension of the sidewalk defect is unacceptable. After examination of the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance of the injury' (***Caldwell v Village of Island Park,*** 304 NY 268), the Court correctly concluded that no issue of fact was presented. In view of this disposition, we need not reach appellants remaining arguments."

Generally, the issue of whether a dangerous or defective condition exists depends on the circumstances of each case, and is properly a question of fact for the jury (***Maxson v Brentwood Union Free School District,*** 31 AD2d 506, 818 NYS2d 567 [2nd Dept 2006]). However, a property owner may not be held liable for trivial defects not constituting a trap or a nuisance over which a pedestrian might merely stumble, stub his or her toes, or trip (*see,* ***Hargrove v Baltic Estates,*** 278 AD2d 717 NYS2d 3210 [2nd Dept 2000]). In determining whether a defect is trivial, a court must examine all of the facts presented, including the 'width, depth, elevation, irregularity, and appearance of the defect, along with the time, place and circumstance of the injury (*see,* ***Friedman v Beth David Cemetery,*** 19 AD3d 365, 796 NYS2d 176 [2nd Dept 2005]).

In the instant action, considering the dimensions and appearance of the subject defect, and taking into account its location by the doorway of the HSEC, this Court cannot conclude as a matter of law that the defect was so trivial in nature that it could not give rise to liability on the part of the defendant Community Properties.

The argument proffered by Community Properties that the defect was open and obvious does not negate the defendant's duty to maintain its' premises in a reasonably safe condition,

but rather, may raise an issue of fact as to the plaintiff's comparative negligence (*see,* ***Femenella v Pellegrini Vineyards, Inc.,*** 16 AD3d 546, 792 NYS2d 122 [2nd Dept 2005]; ***Cupo v Karfunkel et al,*** 1 AD3d 48 [2nd Dept 2003]).

Community Properties has submitted the affidavit of Pius, wherein he states he is a limited partner of Community Properties and also performs some administrative duties, including dealing with tenants who lease properties from Community Properties as owner of the premises. He states that Community Properties did not have possession of the premises continuously on March 19, 2005 as the building was solely occupied by its tenant HSEC pursuant to a written lease. Pius further states that he traveled to the premises on or about March 2006, walked around the sidewalks of the premises, and saw no defect which should have caused a slip and fall, and that he took photographs which he attached as exhibits 2 and 3. He also states that prior to the accident he visited the premises approximately once every two months to speak with Dee Thompson, the director of the HSEC, and was at the premises within two months before the date of the alleged accident, walked the premises and did not notice any height differential in the sidewalk or any defect. Pius further states that Community Properties had no actual or constructive notice of an alleged defect on East 2nd Street, the condition was not observed by him, and that Community Properties was an out-of-possession landlord and repair of the walkways was the responsibility of the HSEC Club pursuant to the lease agreement.

The lease agreement between Community Properties and HSEC, dated May 1, 2001, reveals the parties entered into a ten year lease. The lease, at paragraph 5, provides that the "tenant shall be responsible for and pay for: metered water, exterior landscape maintenance (including walkways and parking, snow and leaf removal...." At paragraph 10 the lease provides that "[t]he landlord or its agents shall have the right to enter the demised premises at reasonable hours in the day or night to examine the same, or to run telephone or other wires, or to make such repairs, additions or alterations as it shall deem necessary for the safety, preservation or restoration of the improvements, or for the safety or convenience of the occupants or users thereof (there being no obligation, however, on the part of the Landlord to make any such repairs, additions or alterations), ..."

"To establish a prima facie case of negligence, the plaintiffs must demonstrate (1) that the defendants owed them a duty of reasonable care, (2) a breach of that duty, and (3) a resulting injury proximately caused by the breach (*see,* ***Boltax v Joy Day Camp,*** 67 NY2d 617, 499 NYS2d 660 [1986]; ***Solomon v City of New York,*** 66 NY2d 1026, 499 NYS2d 392 [1985]). An owner or tenant in possession of realty owes a duty to maintain the property in a reasonably safe condition (*see,* ***Basso v Miller,*** 40 NY2d 233;386 NYS2d 564 [1976]). The determinative factor is one of possession or control (*see,* ***Huth v Allied Maintenance Corp***, 43 AD2d 634, 532 NYS2d [2nd Dept 1988]; ***McGill v Caldors, Inc.*** 135 AD2d 1041, 522 NYS2d 976 [3rd Dept 1987]). It is well established that a plaintiff who has fallen as a result of a defect in pavement also must prove notice, either actual or constructive, in order to recover (*see,* ***Putnam v Stout,*** 38 NY2d 607, 381 NYS2d 848 [1976]). Photographs which accurately depict the area in which the plaintiff fell may be adequate for a trier of fact to infer that a

defendant had constructive notice of the defect (*see,* ***Batton v Elghanayan,*** 43 NY2d 898, 403 NYS2d 717 [1978]; *see also,* ***Taylor v New York City Transit Authority,*** 48 NY2d 903, 424 NYS2d 888 [1979])" (***Farrar, et al v Teicholz, et al***, 173 AD2d 674, 570 NYS2d 329 [2nd Dept 1991]).

Based upon the foregoing, Community Properties has not demonstrated prima facie entitlement to summary judgment dismissing the complaint. There are factual issues with regard to whether Community Properties was an out-of-possession landlord in that it retained the right of entry onto the property pursuant to the lease agreement. Pius states that he was at the premises less than two months before the date of the alleged accident, walked the premises and did not notice any height differential or any defect in the sidewalk. Although the lease agreement provided that the tenant HSEC was to maintain and repair the walkways pursuant to the lease, and although HSEC was the only tenant in the building where the subject sidewalk was located, the fact that Pius was at the premises inspecting it raises a factual issue as to whether Community Properties maintained control over the premises. When a landlord retains control over a portion of the premises, it is liable for injuries resulting from the faulty condition of those premises. An owner or tenant in possession of realty owes a duty of reasonable care to maintain the property in a safe condition. The issue is one of possession or control (***Hoberman v Kids "R" Us, Inc. et al,*** 187 AD2d 187, 593 NYS2d 39 [1st Dept 1992]). "An owner cannot escape his duty of exercising reasonable care to maintain his property adjoining a highway in reasonably safe condition unless he parts with the entire possession and control of the premises; if the owner transfers either title or possession in part only, he does not escape the burden (***Magid v The City of New York and Another,*** 234 AD2d 38, 254 NYS2d 236 [1st Dept 1931]). Whether Community Properties engaged in a course of conduct indicating that it exercised any control over the sidewalk is a factual issue which has not been resolved by the defendant's own submissions.

As for 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 to discover and remedy it (***Hoberman v Kids "R" Us, Inc. et al,*** supra). Pius opines in his affidavit that he saw no defect which should have caused a slip and fall, and that he took photographs which he attached as exhibits 2 and 3. The photographs and his opinion that he saw no defect which "should have caused a slip and fall" raise a factual issue as to whether the photographed defect submitted to this Court was sufficient to cause the plaintiff to slip and fall in light of the entirety of the facts and circumstances, and whether Community Properties had constructive notice of the defect.

Accordingly, motion (002) by Community Properties for summary judgment dismissing the complaint is denied.

Dated: August 26, 2008

J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION