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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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ALFRED J. PANGERL,

Plaintiff,

-against-

TOWN OF NORTH HEMPSTEAD AND TOWN OF NORTH HEMPSTEAD SOLID WASTE MANAGEMENT AUTHORITY,

Defendant.

----------x

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 14
Index No.:011929/05
Motion Seq. No.: 05

DECISION AND ORDER

Papers Read on this Motion:

Defendants' Notice of Motion	05
Plaintiff's Affirmation in Opposition	xx
Defendants' Reply Affirmation	xx

Relief Requested:

In motion sequence number five, the Defendants, Town of North Hempstead and Town of North Hempstead Solid Waste Management Authority move pursuant to CPLR § 3212 for an order dismissing the Plaintiff's complaint.

Factual and Procedural Background

On May 6, 2004, the Plaintiff, Alfred Pangerl, was employed by National Gear and Piston Inc., which is a contractor to the Town of North Hempstead. National Gear and Piston, Inc. is in the business of supplying various types of truck parts to the Town (see Affirmation in Support at Exhs. A, D). On the date of the accident, the Plaintiff was making such a delivery to the premises located at 802 West Shore Road, Port Washington, New York, which is located within the Town of North Hempstead (id. at Exhs. D). This particular property includes an area for truck parking and truck repair, a garage, and an open area for the purposes of storing expended truck batteries (id. at ¶7; see also Exh. J).

A review of the Plaintiff's deposition testimony reveals that subsequent to making his delivery,

the Plaintiff was directed by a supervisor employed by the Town to pick up expended truck batteries (id. at Exh. H at p.14; see also Exh. I at p. 25). Plaintiff testified that the batteries were located under what he describes as an "open carport" or "shed" (id. at Exh. I at p. 28). The Plaintiff states that he positioned his Ford pick up truck such that the back thereof was within "3 or 4 feet" from where these batteries were located, and that he began loading them into the back of the truck (id. at Exh. at pp. 30). The Plaintiff further stated that the back portion of the truck was sitting in a puddle of water (id. at p. 32).

As to the particular circumstances surrounding his accident, the Plaintiff testified that as he was carrying a battery back to the truck he "slipped in the mud" (id. at Exh. H at pp. 26, 28; see also Exhs. A,D,I). The Plaintiff further testified that he was at this particular location the day before the subject accident and noticed the muddy conditions, but did not inform anyone of same (id. at Exh. H at p. 21).

The underlying action was thereafter commenced by the Plaintiff to recover damages for the personal injuries he allegedly sustained as a result of the "slippery, muddy and wet ground conditions in the area in which he was required to work" (id. at Exhs. A, B). The Defendants now move for summary judgment seeking dismissal of the Plaintiff's complaint.

Defendants' motion for Summary Judgment

In support of the within application the Defendants initially argue that the Town of North Hempstead has enacted a prior written notice statute under Town Law §§26-1 through 26-4, yet the Plaintiff herein has failed to plead and prove compliance therewith and accordingly the complaint must be dismissed (id. at ¶¶9, 15, 16).

Additionally, the Defendants contend that there is no evidence that the Town created said condition or that it was in possession of actual or constructive knowledge thereof (id. at

¶¶23, 26, 28). Counsel argues that while the Plaintiff's deposition testimony indicates that he was present on the subject premises on the day prior to the subject accident and observed the muddy conditions which purportedly caused him to slip and fall, he never reported the existence of such condition to any representative of the town (id. at ¶¶9, 8; see also Exh. H at p. 21). Finally, the Town argues that it was under no duty to warn the Plaintiff of the alleged dangerous condition, as same was open, obvious and previously known to the Plaintiff (id. at ¶¶34, 38).

The Plaintiff opposes the application and contends that the prior written notice requirement is inapplicable herein as the Defendants' employees created the muddy conditions which caused the Plaintiff's accident (see Affirmation in Opposition at ¶¶2, 3, 4, 7, 8, 9). In support of this contention, counsel for the Plaintiff relies principally upon the annexed deposition of Joseph Saccone, who testified that on the date of the subject accident, he was employed by the Town as a mechanic at 802 West Shore Road, Port Washington, New York (see Affirmation in Support at Exh. K). Counsel makes particular reference to that portion of the testimony wherein Mr. Saccone stated that equipment was washed in the general area of the Plaintiff's accident and that said activity could have been the reason for water to be on the ground in that area (see Affirmation in Opposition at ¶3, 4). Counsel for the Plaintiff additionally argues that the open and obvious doctrine is also inapplicable to the instant case, as the Plaintiff had no alternative route through which to gain access to the batteries he was required to retrieve (id. at ¶17).

In Reply, the Town argues that Mr. Saccone only speculated with respect to the reason for the puddle and accordingly such testimony is insufficient to demonstrate that the Defendants' created the muddy conditions alleged to have caused the Plaintiff's accident (see

Reply Affirmation at ¶¶6, 7).

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*Sillman v Twentieth Century Fox*, 3 NY2d 395 [1957]; *Alvarez v Prospect Hospital,* 68 NY2d 320 [1986]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]; *Bhatti v Roche*, 140 AD2d 660 [2d Dept 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 [1979]). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation (CPLR § 3212 [b]; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial *(Zuckerman v City of New York*, 49 NY2d 557 [1980], *supra*). It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d 513 [2d Dept 1998]). Conclusory allegations are insufficient to defeat the application and the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Toth v Carver Street Associates*, 191 AD2d 631 [2d Dept 1993]). When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material

issues of fact exist (*Sillman v Twentieth Century Fox*, 3 NY2d 395 [1957], *supra*).

As a general rule, absent a legally cognizable exception, a municipality which has promulgated a prior written notice provision is insulated from liability absent proof of prior written notice of the defective condition alleged to have caused the Plaintiff's injuries (*Amabile v City of Buffalo*, 93 NY2d 471 [1999]; *Trinidad v City of Mount Vernon*, 51 AD3d 661 [2d Dept 2008], *supra*; *Rodriguez v City of Mount Vernon*, 51 AD3d 900 [2d Dept 2008], *supra*; *Jacobs v Village of Rockville Centre*, 41 AD3d 539 [2d Dept 2007]). Prior written notice requirements may not be obviated by either actual or constructive notice of the alleged defect (*Farrell v City of New York,* 49 AD3d 806 [2d Dept 2008]; *Reich v Meltzer*, 21 AD3d 543 [2d Dept 2005]).

The Court of Appeals has articulated the following exceptions, where liability may still attach to a municipality notwithstanding that the prior written notice has not been provided: where the municipality created the alleged defective condition through an affirmative act of negligence and where a "special use" bestows upon the municipality a special benefit derived therefrom (*Amabile v City of Buffalo*, 93 NY2d 471 [1999], *supra*). A municipality may demonstrate it's *prima facie* showing of entitlement to judgment as a matter of law by establishing that it did not receive prior written notice of the alleged defective condition (*id.; Gilmore v Village of Hempstead,* 47 AD3d 676 [2d Dept 2008]; *Koehler v The Incorporated Village of Lindenhurst*, 42 AD3d 438 [2d Dept 2007]; *Silburn v City of Poughkeepsie*, 28 AD3d 468 [2d Dept 2006]). Once a municipality has met its burden, "it is incumbent upon the Plaintiff to submit competent evidence that the municipality affirmatively created the defect" (*Adams v City of Poughkeepsie*, 296 AD2d 468 [2d Dept 2002]).

In the instant matter, the Court has carefully reviewed the record as thus far developed and finds that the Town has failed to demonstrate it's entitlement to judgment as a matter of law (*id.*). In the supporting affirmation, counsel for the Defendant avers that the Town did not receive prior written notice of the alleged defect claimed to have caused the Plaintiff's injury. However, an affirmation by an attorney who does not have personal knowledge of the relevant information is an insufficient evidentiary basis upon which to grant summary judgment (*Caramanica v State Farm and Casualty Company*, 110 AD2d 869 [2d Dept 1985]; *see also Werdein v Johnson*, 221 AD2d 899 [4th Dept 1995]). Here, there is an absence in the record of any supporting affidavit from a Town employee with personal knowledge of the records maintained by the Town and whether or not a review of said records revealed the existence of any prior written notice of the alleged dangerous condition (*Koehler v The Incorporated Village of Lindenhurst*, 42 AD3d 438 [2d Dept 2007], *supra*; *Silburn v City of Poughkeepsie*, 28 AD3d 468 [2d Dept 2006], *supra*). Further, neither of the Town's two witnesses testified at their respective depositions that they conducted a search of the relevant Town records to discover whether or not any prior written notice or complaints were received by the Town relative to 802 West Shore Road, Port Washington, New York (*Adams v City of Poughkeepsie*, 296 AD2d 468 [2d Dept 2002], *supra*).

Additionally, the Court notes that while the testimony of Mr. Saccone does not in any respect resolve the matter as to the source of the puddle located near the site of the Plaintiff's accident, it does demonstrate the existence of material questions of fact as to whether the Town affirmatively created the muddy conditions which are alleged to have caused him to slip and fall. Mr. Saccone, while admittedly uncertain as to the source of the puddle, clearly testified that it could have resulted from the fact that the workers "used to wash the equipment before we

worked on it . . ." and that water in that particular area was not uncommon.

Based upon the foregoing, the motion interposed by the Town of North Hempstead and the Town of North Hempstead Solid Waste Management Authority pursuant to CPLR § 3212 for an order dismissing the Plaintiff's complaint is hereby **DENIED**. It is hereby

ORDERED, that the parties are directed to appear for trial on September 14, 2009 at 9:30 a.m. in DCM.

This constitutes the Decision and Order of the Court.

DATED: July 20, 2009
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

H:\DECISION - DISMISS\Pangerl v Town of North Hempstead.wpd