Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Yatta Kollie, an infant by her mother and natural guardian, Lila Kollie,

Plaintiffs,

-against-

Marta Canales, Hugo O. Castro, Town of Islip, Bay Shore Union Free School District and Suffolk Transportation Service, Inc.,

Defendants.

Index No.: 44009/2009

Motion Sequence No.: 003; MD
Motion Date: 1/4/10
Submitted: 7/14/10

Motion Sequence No.: 004; MD
Motion Date: 2/26/10
Submitted: 7/14/10

Attorneys [See Rider Annexed]

Upon the following papers numbered 1 to 23 read on this motion to dismiss and motion for summary judgment: Notice of Motion and supporting papers, 1 - 6, 7 - 14; Answering Affidavits and supporting papers, 15 - 17; Replying Affidavits and supporting papers, 18 -19, 20 - 22; Other, memorandum of law, 23.

This action was commenced to recover damages, personally and derivatively, for personal injuries allegedly sustained by the infant plaintiff, Yatta Kollie, on March 17, 2009 when she tripped and fell on the sidewalk located in front of 1367 Lombardy Boulevard, Bay Shore, New York. The complaint alleges, *inter alia*, that the defendant Town of Islip (Town) is liable for the infant plaintiff's injuries based on its failure to maintain the sidewalk in a reasonably safe condition. The complaint further alleges that the defendant Bay Shore Union Free School District (School District) and the defendant Suffolk Transportation Service, Inc. (STS) are liable for the infant plaintiff's injuries because they "deviat[ed] from the assigned bus stops and failed to drop students at their assigned school bus stops."

School District and STS move to dismiss the complaint pursuant to CPLR §3211, but their notice of motion adds language more suited to a motion for summary judgment. In addition, the affirmation submitted by counsel for the defendants indicates that the grounds are "that the plaintiffs have failed to state a cause of action against the moving defendants and that no triable issues of fact exist as against said moving defendants." Because this motion has been made returnable before

disclosure has commenced, because the affidavit of service for the motion states that it is a motion to dismiss and because the moving defendants failed to submit the pleadings herein pursuant to CPLR §3212(b), the Court in its discretion will treat the motion as having been made pursuant to CPLR §3211 (a) (7).

In considering a motion to dismiss the complaint for failure to state a cause of action pursuant to CPLR §3211(a)(7), the Court is limited to examining the pleading to determine whether it states a cause of action (see, Guggenheimer v. Ginzburg, 43 NY2d 268 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the [pleader] (see, Delbene v. Estes, 52 AD3d 647 [2nd Dept., 2008] *app dism* 11 NY3d 808 [2008]; Danna v. Malco Realty, Inc., 51 AD3d 621 [2nd Dept., 2008]; Matter of Board of Educ., Lakeland Cent. School Dist. of Shrub Oak v. State Educ. Dept., 116 AD2d 939 [3rd Dept., 1986]). If from the four corners of the complaint factual allegations are discerned which taken together manifest any cause of action cognizable at law, the motion will fail, regardless of whether the [pleader] will ultimately prevail on the merits (see, Delbene v. Estes, 52 AD3d 647 [2nd Dept., 2008]; Danna v Malco Realty, Inc., 51 AD3d 621 [2nd Dept., 2008]; Bovino v Village of Wappingers Falls, 215 AD2d 619 [2nd Dept., 1995]).

The plaintiffs' complaint alleges that School District allowed and permitted its agent, STS, to deviate from its assigned bus stop routes and that STS did so deviate from those routes and failed to drop the infant plaintiff at her designated bus stop, resulting in her injuries. Schools have a duty of care "while children are in its physical custody or orbit of authority, or if a specific statutory duty has been imposed, and if the school chooses to provide transportation services it must do so in a careful and prudent manner including establishing safe bus stops" (Chainani v. Board of Education of the City of New York, 87 NY2d 370 [1995]; Pratt v Robinson, 39 NY2d 554 [1976]). The Court finds that a cognizable cause of action has been plead against the defendants. Accordingly, the motion is denied.

The Town now moves for summary judgment dismissing the complaint and any cross claims against it. The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (see, Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]). The burden then shifts to the party opposing the motion which "must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact" (Rebecchi v. Whitmore, 172 AD2d 600 [2nd Dept., 1991]; see, Roth v. Barreto, 289 AD2d 557 [2nd Dept., 2001]; O'Neill v. Fishkill, 134 AD2d 487 [2nd Dept., 1987]). To prove a *prima facie* case of negligence in a premises liability 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 [2nd Dept., 1995]; see, Gaeta v. City of New York, 213 AD2d 509 [2nd Dept., 1995]).

The Town has moved for summary judgment on the ground that it cannot be held liable unless the plaintiff establishes that the Town received prior written notice of the alleged defective

condition pursuant to Town of Islip Code §47A-3. The statute provides that "no civil action shall be maintained against the Town ... unless written notice of such defective, unsafe dangerous or obstructed condition ... was actually given to the Town Clerk or the Commissioner of the Department of Public Works ...". Where, as here, a municipality has enacted a prior written notice statute, pursuant to Town Law, Article 65 it may not be subjected to liability for personal "injuries caused by an improperly maintained roadway unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies" (Wilkie v. Town of Huntington, 29 AD3d 898 [2nd Dept., 2006], citing Amabile v. City of Buffalo, 93 NY2d 471 [1999]; see, Lopez v. G&J Rudolph, 20 AD3d 511 [2nd Dept., 2005]; Ganzenmuller v. Incorporated Vil. of Port Jefferson, 18 AD3d 703 [2nd Dept., 2005]). Actual or constructive notice of a defect does not satisfy this requirement (see, Wilkie v Town of Huntington, 29 AD3d 898 [2nd Dept., 2006]).

In support of its motion, the Town has submitted an affidavit from Frederick W. Hoeffner, the Deputy Commissioner of the Department of Public Works for the Town. He swears therein that his office is responsible, pursuant to the law, for keeping records of all written notices of defects received, that in his official capacity he caused a search of the records for written notices regarding the alleged condition at the alleged location of this occurrence and that the records contain no prior written notice(s) regarding the alleged defective condition at the location prior to this incident. Mr. Hoeffner further swears that his search of the records confirms that the Town owns the sidewalk where this accident is alleged to have occurred.

The Town has failed to establish its *prima facie* entitlement to summary judgment regarding liability in this action. The relevant statute provides that written notice may be provided to either the Town Clerk or the Department of Public Works. The defendant has not submitted any evidence regarding a search of the records of the Clerk's office. Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]).

In addition, there are issues of fact as to whether the Town created the defective condition which is the subject of this action (see, Amabile v City of Buffalo, 93 NY2d 471 [1999]). In response to the plaintiffs' opposition claiming that the Town has not established its *prima facie* entitlement to summary judgement on this issue, the Town submits a second affidavit by Deputy Commissioner Hoeffner. However, it is well settled that a movant may not remedy basic deficiencies in its *prima facie* showing of entitlement to summary judgment by submitting evidence in reply (see, Rengifo v. City of New York, 7 AD3d 773 [2nd Dept., 2004]). As such, the Court cannot consider such evidence in determining the movant's entitlement to summary judgment (see, Rengifo v. City of New York, *id.*; Constantine v. Premier Cab Corp., 295 AD2d 303 [2nd Dept., 2002]). Moreover, there are issues of fact regarding the presence of the alleged defects in the sidewalk and whether they were present for a sufficiently long time to have required the defendant to have taken action in the exercise of reasonable care (see, Gordon v. American Museum of Natural History, 67 NY2d 836 [1986]; Morrissey v Torino, 305 AD2d 561 [2nd Dept., 2003]; Capone v. Schaible, 211 AD2d 661 [2nd Dept., 1995]).

Accordingly, it is

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the defendants Bay Shore Union Free School District and Suffolk Transportation Service, Inc. for an order pursuant to CPLR §3211 dismissing the complaint is denied; and it is further

ORDERED that this motion by the defendant Town of Islip for an order pursuant to CPLR §3212 granting summary judgment dismissing the complaint and any cross claims against it, is denied.

Dated: August 31, 2010

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**

RIDER

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Clerk of the Court