[* 1]

SHORT FORM ORDER

INDEX No. 09-40164
CAL. No. 10-00554-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 7-29-10 (#004 & #005)
MOTION DATE 8-20-10 (#006)
ADJ. DATE 9-24-10
Mot. Seq. # 004 - MD
005 - XMD
006 - MD

MICHAEL SQUATRITO and PATRICIA SQUATRITO, Plaintiffs, - against - ATLANTIQUE HOMEOWNERS ASSOCIATION, PAMELA VAN COTT, TOWN OF ISLIP, RICHARD SCOTT CHERVENY and FIRE ISLAND HANDYMAN LLC, Defendants.	SIBEN & SIBEN, LLP Attorney for Plaintiffs 90 East Main Street Bay Shore, New York 11706 AHMUTY, DEMERS & McMANUS Attorney for Defendants Atlantique & Van Cott 200 I.U. Willets Road Albertson, New York 11507 GERALD L. LOTTO, ESQ. Attorney for Defendant Town of Islip 3330 Veterans Memorial Highway Bohemia, New York 11716 FAUST, GOETZ & SCHENKER Attorney for Defendants Cherveny & Fire Island Two Rector Street, 20th Floor New York, New York 10006

Upon the following papers numbered 1 to 108 read on this motion and cross motions for summary judgment by Notice of Motion/Order to Show Cause and supporting papers (004) 1 - 33 ; Notice of Cross Motion and supporting papers (005) 34-49; (006) 50-80 ; Answering Affidavits and supporting papers 81- 101 ; Replying Affidavits and supporting papers 102-103; 104-105; 106-108 ; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is

ORDERED that this motion (004) by the defendants, Atlantique Homeowners Association and Pamela Van Cott, pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint, is denied; and it is further

ORDERED that this cross-motion (005) by the defendant, Town of Islip, for an order granting summary judgment dismissing the complaint is denied, and it is further

ORDERED that this cross-motion (006) by the defendants, Richard Scott Cherveny and Fire Island Handyman, LLC, for an order granting summary judgment dismissing the complaint is denied.

In this consolidated action, it is claimed that the plaintiff, Michael Squatrito, sustained injury on October 29, 2006, when he was caused to trip and fall on a boardwalk located in the Hamlet of Atlantique on Fire Island, Town of Islip, County of Suffolk, State of New York, due to the negligence of the defendants arising out of the ownership, maintenance, and repair of the boardwalk. A derivative claim is asserted on behalf of Patricia Squatrito, spouse of Michael Squatrito.

The defendants, Atlantique Homeowners Association and Pamela Van Cott seek summary judgment on the basis the plaintiff does not know what caused his accident; there was nothing wrong with the decking where the plaintiff believes he fell; and that the plaintiff actually fell from a second story deck at his friend's house.

The defendant Town of Islip (Town) seeks summary judgment on the basis that it did not receive prior written notice of the claimed defect; the Town did not create the defect complained of; and the Town did not install or maintain the walkway in issue.

The defendants, Richard Scott Cherveny and Fire Island Handyman LLC, seek summary judgment on the basis that the plaintiff does not know what caused his accident; the area where the plaintiff claims to have fallen does not have any defects; and there is evidence that the plaintiff actually fell from a second story deck at his friend's house.

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 issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of motion (004), the defendants, Atlantique Homeowners Association and Pamela Van Cott, have submitted, inter alia, an attorney's affirmation; copies of the summons and complaints, answers, cross claims, bill of particulars; partial, unsigned transcripts of the examinations before trial of Michael Squatrito dated May 16, 2008, Joseph Vitlo dated May 1, 2009, Bruce Danziger dated August 8, 2008, Sean Patrick Minski dated May 13, 2009, Jonathan Buchsbaum dated May 13, 2009, Pamela Van Cott dated May 16, 2008, Richard Scott Cherveny dated October 9, 2009; photographs; affidavit of Pamela Van Cott; uncertified copy of an ambulance report; uncertified copy of a police field report; copy of Town of Islip Town Code §68-407 Roofless Deck and Patio Requirements; and Islip Town Building Code §1012.1. The unsigned partial transcripts of the examinations before trial are not in admissible form and are not accompanied by an affidavit

pursuant to CPLR 3116, and fail to comport with the requirements of CPLR 3212 and are not considered. The uncertified copies of the ambulance report and police field report are not in admissible form as required pursuant to CPLR 3212.

Pamela Van Cott avers in her affidavit that the east-west walkway connecting the community of Atlantique with the Town of Islip Marina in the area in question is a Trex walkway in part and a wooden walkway in part which was installed by and is maintained by the Atlantique Property Homeowners Association. This walkway, which is about four feet wide, was constructed over a path or right of way owned by the Town of Islip. She is not aware of any defects either before or after the accident in the area where the plaintiff claims to have fallen. She did not hear of any accidents involving someone tripping or falling in the area of the plaintiff's alleged accident prior to the incident of October 29, 2006. The Trex portion of the walkway, in the middle of the walkway where the plaintiff claims to have fallen, is approximately eleven inches high and is lower than nineteen inches, and therefore does not require a handrail. There is less than a one inch depressed area at the extreme edge of a Trex board on the walkway, but the middle of the deck, where the plaintiff claims he was walking, has no height differential. She has never experienced difficulty at night observing the walkway while walking or riding her bicycle. She does not believe that the walkway contained any defects which caused the plaintiff to fall and she does not believe the walkway was negligently maintained.

It is determined that the affidavit of Pamela Van Cott is conclusory and is unsupported by admissible evidence. It is further determined that Atlantique Property Homeowners Association and Van Cott have failed to establish prima facie entitlement to summary judgment. The motion is unsupported by an expert's report setting forth opinions and findings upon examination of the walkway to demonstrate that the walkway is in compliance with the applicable Town and State code and rules and did not contain any defects in the area where the plaintiff claims to have fallen.

In opposing this motion, the plaintiff has submitted the report of Robert L. Schwartz, a licensed professional engineer in the State of New York, wherein he sets forth certain defects found in the third wood alternative plank wherein it was approximately one inch lower than the adjacent plank located to the westerly side. He opines, however, in a conclusory manner, that the lighting was poor due to a lack of light fixtures in the area, and there were no signs or posted materials to warn of the aforementioned claimed defect.

It is additionally noted that there are factual and credibility issues to be resolved by the trier of fact. Stephen McCormack, in an affidavit submitted by the plaintiff, has raised an issue concerning claims that the plaintiff fell from his second story deck. The transcripts of plaintiffs' examinations before trial are unsigned and are not in admissible form and are not considered.

Accordingly, motion (004) is denied.

In support of cross-motion (005), the defendant, Town of Islip, has submitted, inter alia, an attorney's affirmation; affidavit of Regina F. Duffy dated July 13, 2010; affidavit of Peter Kletchka dated July 14, 2010; Notice of Claim; copy of the summons, complaint, answer, amended answer, cross claim asserted against the co-defendants; unsigned copies of the transcripts of the examinations before trial of Michael Squatrito dated May 16, 2008, Denise Murino dated May 16, 2008 on behalf of the Town of Islip, Richard Scott Cherveny dated October 9, 2009, Pamela Van Cott dated May 16, 2008 and Joseph Vitlo dated May 1, 2009; copy of Islip Town Code §47A-3 and §68-149.4 and section R312-Guards. The copies of the transcripts of the examinations before trial are unsigned and are not accompanied by an affidavit pursuant to CPLR 3116 and therefore are not considered. The affidavit of Denise Murino, employee of the Town of Islip is also unsigned and fails to

comport with CPLR 3212 and is not considered.

Peter Kletchka avers that he is employed by the Town of Islip as a Project Supervisor with the Department of Public Works and his duties include preliminary investigations for claims against the Town involving the Department of Public Works. He is familiar with all of the record keeping procedures of the Town of Islip as they pertain to notification of any and all defects involving sidewalks, among other things. He conducted a search of the records and determined that the Town of Islip did not receive any written complaints or notices of defects concerning the walkway, handrails along the walkway, or lighting at Atlantique and the vicinity thereof on Fire Island for a period of five years prior to October 29, 2006.

Regina F. Duffy, the Town Clerk for the Town of Islip, avers that she is fully familiar with all the record keeping procedures of the Town of Islip as it pertains to notification of any and all defects and Notices of Claim received by the Office of the Town Clerk. Upon conducting a thorough search of the records, she determined that the Town of Islip did not receive any written complaints or notices of defects or Notices of Claim prior to October 29, 2006 concerning the walkway, handrails or lighting in Atlantique, Town of Islip, where the plaintiff claims to have been injured.

Town Law §65-a(2) provides in pertinent part that no civil action shall be maintained against the Town for damages or injuries to person or property sustained by reason of any defective, dangerous, unsafe, out-of-repair or obstructed sidewalks, unless ... written notice thereof, specifying the particular place, was actually given to the Town Clerk or to the Commissioner of the Department of Public Works of the Town and there was a failure or neglect to cause such defective, dangerous, unsafe, out-of-repair or obstructed sidewalks to be remedied, ... or to make the place otherwise reasonably safe within a reasonable time after receipt of such notice.

A municipality may enact a statute requiring prior written notice of a defective, unsafe or dangerous condition of a sidewalk, and certain other areas, as a condition precedent to liability for injuries to person or properly caused by such condition. There are only two exceptions to the statutory rule requiring prior written notice of a defective condition (***Tekiroglu et al ve Copiague Memorial Public Library and Town of Babylon,*** 2008 NY Slip op 30527U; [Supreme Court of New York, Suffolk County 2008]). If the municipality created the dangerous condition by an affirmative act or negligence, the prior notice provision does not apply (***Wald v County of Nassau et al,*** 2009 NY Slip Op 31874U [Supreme Court of New York, Nassau County 2009], citing from ***Amabile v City of Buffalo***, 93 NY2d 471, 693 NYS2d 77 [1999]). The second exception to the prior written notice requirement is if a special use confers a special benefit upon the locality (***Amabile v City of Buffalo***, supra). Constructive notice of a defect does not satisfy the written notice requirement (***Amabile et al v City of Buffalo,*** supra). Recurrence of a condition does not abrogate the need for prior written notice (***Rosario v Laroma Construction Corp and Incorporated Village of Floral Park,*** 2009 Sip Op 30487U [Supreme Court of New York, Nassau County 2009]).

The Code, R312.1 Guards required, provides in pertinent part that for porches, balconies or raised floor surfaces located more than 30 inches above the floor or grade below shall have guards not less than 36 inches in height. The Town of Islip, however, in support of this motion, has not submitted a report from an engineer or anyone who inspected the area and walkway and is of the opinion that the walkway conformed to the applicable codes and State and Town law, or that it even inspected the walkway. The Town has not demonstrated its prima facie entitlement to summary judgment dismissing the complaint asserted against it by demonstrating through the affidavits from the Office of the Town Clerk, and the Commissioner of its Department of Public Works, that it did not cause or create the defect, or that it did not have constructive notice of the defect.

Accordingly, motion (005) is denied.

In support of cross-motion (006), the defendants, Richard Scott Cherveny and Fire Island Handyman, LLC, have submitted, inter alia, an attorney's affirmation; copies of the pleadings for the consolidated actions, answers, amended answers, cross claim asserted against the co-defendants by the Town of Islip, cross claim asserted by Atlantique Homeowners Association and Pamela Van Cott against the Cherveny defendants and plaintiffs bill of particulars; copy of the order dated December 8, 2009 (Molia, J.)discontinuing the action against Mark W. Cherveny; partial, unsigned copies of the transcripts of the examination before trial of Michael Squatrito dated May 16, 2008, Joseph Vitlo dated May 1, 2009, Bruce Danziger dated August 8, 2008, Sean Patrick Minski dated May 13, 2009, Richard Scott Cherveny dated October 9, 2009; copy of a police field report; copy of an ambulance report; photograph; and the affidavit of Pamela Van Cott. The copies of the transcripts of the examinations before trial are not signed and therefore are not in admissible form, nor is there an affidavit complying with CPLR 3116. There is no affidavit on behalf of Richard Scott Cherveny in support of this motion and the partial transcript of his examination before trial fails to comport with the requirements of CPLR 3212.

Accordingly, motion (006) is denied.

Dated: October 25, 2010

Hon. Denise F. Molia
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**