Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Maryann Christiansen,

Plaintiff,

-against-

Long Island Railroad and Town of Smithtown,

Defendants.

Clerk of the Court

Motion Sequence No.: 003; MG
Motion Date: 9/29/10
Submitted: 11/12/10

Index No.: 18589/2007

Attorney for Plaintiff:

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Attorney for Defendants
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Attorney for Defendant
Town of Smithtown:

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Upon the following papers numbered 1 to 14 read on this motion by defendant Town of Southampton for summary judgment: Notice of Motion and supporting papers, (003) 1 - 8 (including untabbed exhibits); Answering Affidavits and supporting papers, 9 - 12; Replying Affidavits and supporting papers, 13 - 14.

The complaint of this action sounding in negligence arises out of a slip and fall incident wherein the plaintiff pedestrian, Maryann Christiansen, asserts that on October 16, 2006 she was caused to slip and fall in a parking lot by the north side of the Long Island Railroad station located in Kings Park, New York due to a dangerous and defective condition. In her verified bill of particulars, the plaintiff claims that there were rocks, rubble and loose debris in the parking lot, which surface was unlevel, broken and defective and which was caused and created and permitted to remain by the defendants. The plaintiff testified that while she was walking near the platform, the ground felt slippery and she just went down. She wiped pebbles off of her clothes and self when she got up. She further testified that there were pebbles, gravel and sand in the particular area which caused her to fall. There was no testimony submitted in which the plaintiff testified that the parking lot was uneven and broken causing her to fall. The Town of Smithtown has asserted cross-claims against the Long Island Rail Road for indemnification and contribution. The Long Island Rail Road has asserted cross-claims against the Town of Smithtown for contribution and common law and contractual indemnification.

To prove a *prima facie* case of negligence in a slip 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. 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 (see, Bradish v. Tank Tech Corp., 216 AD2d 505 [2nd Dept., 1995]; Dima v. Breslin Realty, Inc. et al, 240 AD2d 359 [2nd Dept., 1997]: Stumacher v. Waldbaum, 274 AD2d 572 [2nd Dept., 2000]). The defendant, as the movant in this case, is required to make a *prima facie* showing affirmatively establishing the absence of notice as a matter of law (see, Kucera v. Waldbaums Supermarkets, 304 AD2d 531 [2nd Dept., 2003]; Dwoskin v. Burger King Corp., 249 AD2d 358 [2nd Dept., 1998]). Liability can be predicated only upon failure of the defendant to remedy the danger after actual or constructive notice of the condition (see, Piacquadio v. Recine Realty Corp., 84 NY2d 967 [1994]). In New York, to establish a *prima facie* case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. In order to establish the third element, proximate cause, plaintiff must show that defendant's negligence was a substantial factor in bringing about the injury. If defendant's negligence were a substantial factor, it is considered to be a "proximate cause" even though other substantial factors may also have contributed to plaintiff's injury (see, Spiegel v. Fine Paint Co. 2006 NY Misc. LEXIS 2549, 236 NYLJ 51 [Sup. Ct. Nassau County 2006]). Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (see, Espinal v. Melville Snow Contractors, Inc., 98 NY2d 136 [2002]; Darby v. Compagnie Natl. Air France, 96 NY2d 343 [2001]).

The defendant Town of Smithtown now moves for summary judgment dismissing the complaint and cross-claims assert against it on the asserted bases that it did not have prior written notice of the condition complained of, that the Town did not place the stone which the plaintiff claims caused plaintiff's accident, and that the Town did not exercise any maintenance or have control or responsibility for clean up while the work was being performed at the station by The Long Island Railroad.

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 (see, Sillman v. Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (see, Winegrad v. N.Y.U. Medical Center, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see, Winegrad v. N.Y.U. Medical Center, 64 NY2d 851 [1985]). 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 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (see, Joseph P. Day Realty Corp. v. Aeroxon Prods., 148 AD2d 499 [2nd Dept., 1989]) 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 (see, Castro v. Liberty Bus Co., 79 AD2d 1014 [2nd Dept., 1981]). Summary judgment shall be granted only 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 (see, Friends of Animals v. Associated Fur Mfrs., 46 NY2d 1065 [1979]).

In support of this motion the defendant Town of Smithtown has submitted, *inter alia*, an attorney's affirmation; the affidavit of Vincent Puleo dated March 27, 2009; a copy of the summons and complaint; defendants' answers; a copy of the verified bill of particulars; a copy of a Notice of Claim; a Long Island Railroad accident report dated 10-16-06; a copy of the Long Island Rail Road Parking Program Agreement for Kings Park Station dated May 29, 2003 with the Town of Smithtown; an unsigned, undated letter to Mr. Ryan from C.A. Kaspszak, Principal Engineer of Track; copies of the transcripts of the examinations before trial of MaryAnn Christiansen dated June 3, 2008 (unsigned), Charles J. Barrett on behalf of the Town of Smithtown dated June 13, 2008, Richard Toussaint on behalf of the Long Island Rail Road dated August 25, 2009 (unsigned); and plaintiff's prior submissions opposing the previous motion.

In opposition to this motion, the plaintiff previously submitted, *inter alia*, an attorney's affirmation; copy of the order dated January 26, 2010 (Rebolini, J) (*inter alia*) denying the Town of

Smithtown's motion for summary judgment as premature and granting the plaintiff's cross-motion for production of a witness for deposition; a copy of the transcripts of the examination before trial of Daniel Ryan on behalf of the Town of Smithtown dated February 22, 22010 (unsigned) and Luigi Meccariello on behalf of the Long Island Rail Road dated May 17, 2010 (unsigned).

As noted, unsigned transcripts are submitted by the Town of Smithtown for Mary Ann Christiansen and Richard Toussaint and by the plaintiff (transcripts of Daniel Ryan and Luigi Meccariello). Said unsigned transcripts are not in admissible form pursuant to CPLR §3212 and are not accompanied by an affidavit pursuant to CPLR §3116 and, therefore, are not considered on this motion for summary judgment.

The Code of the Town of Smithtown §245-13 states that "[n]o civil action shall be maintained against the Town of Smithtown for damages or injuries to person...sustained by reason of any highway, bridge, culvert, sidewalk, sewer, manhole or appurtenance or curb being defective, out of repair, unsafe, dangerous or obstructed...unless written notice of such defective, unsafe, dangerous or obstructed condition shall be filed with the Town Clerk at least 15 calendar days prior to the event giving rise to the alleged claim" (LiFrieri v. Town of Smithtown, 72 AD3d 750 [2nd Dept., 2010]). A parking lot is considered a highway within the meaning of the statute (see, Bang et al v. Town of Smithtown, 291 AD2d 516 [2nd Dept., 2002]). In Stratton et al v. City of Beacon et al, 91 AD2d 1018 ([2nd Dept., 1983]), the court stated that in People v. County of Westchester, 282 NY 224, the Court of Appeals quoted with approval from Elliot on Roads and Streets, section 3 at page 4, as follows: "If a way is one over which the public have a general right of passage, it is, in legal contemplation, a highway. As the word parking implies, a municipal parking lot is primarily a place where vehicles are left stationary and unattended. Nevertheless, it is essential to the use for which it is provided that both cars and pedestrians have passageway on and through it.... Therefore, the municipal parking lot was one over which the public has a general right of passage and is thus within the meaning of the term 'highway.'"

Where a municipality has enacted a prior written notice statute pursuant to New York State Town Law Article 65, it may not be subjected to liability for personal injuries caused by an improperly maintained sidewalk or walkway or as in the instant matter, an alleged improperly maintained parking lot, unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies (see, Wilkie v. Town of Huntington, 29 AD3d 898 [2nd Dept., 2006], citing to Amabile v. City of Buffalo, [citation omitted]; Lopez v. G & J Rudolph, [citation omitted]; Gazenmuller v. Incorporated Vil. of Port Jefferson [citations omitted]). Vincent Puleo stated in his supporting affidavit that he has been the Smithtown Town Clerk since 2006 and his duties and responsibilities include maintaining records relating to written complaints as well as notices of claim filed in connection with claims occurring within the geographic boundaries of the Town of Smithtown. He further stated that, upon a search for records dated back to 2001 and

brought current to date, the search failed to reveal any complaints with respect to maintenance of the Kings Park Train Station parking lot and that no other notices of claim other than the notice filed by Maryann Christiansen were found.

Upon the proof it adduced, the Town of Smithtown demonstrated *prima facie* that it did not receive any prior written notice of the defect claimed herein. Counsel for the plaintiff has failed to raise a factual issue and argues that a parking lot is not set forth in the Town Code as a place requiring prior written notice. However, this issue has already been determined as a matter of law that it is deemed a highway. Counsel for the plaintiff further argues that the Town Superintendent received notice that construction would begin on the weekend of the plaintiff's accident and therefore actual written notice has been satisfied. However, the plaintiff has failed to raise a factual issue to demonstrate that notice of the actual condition complained of was received by the Town. Further, the notice is required to be given to the Town Clerk. "Not every written complaint to a municipal agency necessarily satisfies the strict requirements of prior written notice; any agency responsible for fixing the defect that keeps a record of such complaints does not, ipso facto, qualify as a proper recipient of such notice. Simply put, whereas a written notice of defect is a condition precedent to suit, a written request to any municipal agent other than a statutory designee that a defect be repaired is not" (Gorman v. Town of Huntington, 12 NY3d 275 [2009]). Prior written notice statutes must be strictly construed, and the written notice of a defect has to be to the statutory designee rather than to any municipal agent (see, Gorman v. Town of Huntington, 12 NY3d 275 [2009]). The plaintiff has not demonstrated a factual issue as to whether the Town Clerk of the Town of Smithtown received prior written notice of the claimed defect. Actual or constructive notice of a defect does not satisfy this notice requirement (see, Wilkie v. Town of Huntington, 29 AD3d 898 [2nd Dept., 2006]).

It is determined that the Town owed a duty of care to the plaintiff in that it was obligated to maintain and repair the parking lot at issue. However, it is further demonstrated by the admissible evidence that the LIRR was performing construction and repair of the rails at the site at the Indian Head Crossing over a weekend, which work was not being overseen by the Town of Smithtown as the work was on the rails and not on the parking lot. However, LIRR had placed a pile of blue stone, also known as ballasters, in the parking lot on the north side of the station. The plaintiff claims to have slipped on sand, pebbles and gravel.

Town employee Charles Barrett testified as set forth in this paragraph. He is presently employed by the Town of Smithtown as the deputy director of parking, building and grounds since 2003. In 1983 he was a crew leader for the Town of Smithtown and was familiar with the parking lots adjacent to the LIRR at the Kings Park Station doing clean ups. There was no one who did parking lot maintenance of the Long Island Railroad (LIRR) at Kings Park. The Town Parks Department maintained the work orders with regard to the town maintenance crew. His department

would not be notified if the LIRR was going to do work in a parking lot and would not do clean up work for them if they were doing work on the parking lot. The main lot for the Kings Park Station is owned by the LIRR who has a contract with the Town of Smithtown to maintain the parking lot on the north side of the station. The Parks Department maintains the lot. The section denominated at 071-2 is also owned by the LIRR and is maintained by the Town of Smithtown. He did not know who owned the section denominated as 071-1, but stated that the Town is responsible for parking lot maintenance throughout the year of the railroad lots 072-2, 071.1, 071-3 and part of 071-1, however, with regard to lot 0-71-1, the Town does not maintain adjacent to the platform which includes the stairway to the platform and the front bumper line of the cars that park there. The railroad maintains that area. He recalled there being a rehabilitation conducted by the LIRR by the parking lot, but he did not recall when. He did observe a pile of at least one-inch blue stone occupying about three or four parking spaces in the north corner of the lot, unprotected by a fence or other barrier. The Engineering Department of the Town would be responsible for overseeing the paving work or other work at the parking lot being conducted by the LIRR. His department is responsible for clean up, sweeping, pothole repairing, tree trimming, removing garbage and things that are dumped, but not clean up of stones and rocks. The type of blue stone used by the LIRR is known as ballast, and if there were any in the parking lot, he would not do anything to remove them as he would not infringe on the LIRR construction area. The Town did not close off the area for any reason, but sometimes the LIRR closes off sections of a lot it is working on (although he did not testify that this was done). The Town swept the subject parking lot with the mechanized street sweeper three or four times a year, but he was not aware of the number of sweepings required pursuant to the agreement between LIRR and the Town. Power washing is not required and no other department within the Town provides power washing.

The agreement between the Town and the LIRR dated May 29, 2003 provides, at paragraph 12, that "immediately upon installation, the ownership of an Capital Improvement installed during the term of this agreement shall vest in the owner of the respective property on which the Capital Improvement is installed. The Community agrees to follow the guidelines set forth in the Plan and keep the Railroad Parking Facility and all improvements constructed or installed upon the premises by the Community or previously existing in good order and repair during the term or any extended term of this agreement." It continues, at paragraphs F and G, "LIRR, its agents, servants, employees, customers, contractors and subcontractors and the general public shall be entitled to the free and safe use of adjacent sidewalks at all times. The Community shall and will keep the sidewalks and curbs in good order, repair and condition and promptly repair any damage thereto caused in any manner whatsoever, except damage caused or created by the negligence of the LIRR and its employees. G. The Community shall erect in a prominent place on the Premises, a sign indicating to the public that it is responsible for the maintenance and operation of the Railroad Parking Facility...." Paragraph 13 A. provides that the "Community grants to LIRR and its affiliates and their employees... the right to enter the Premises from time to time as necessary in order to construct, use, inspect, operate,

maintain, repair and renew any pipe, conduit or tunnel, and any electric, communication or signal transmission lines, together with poles and guys therefor, and any other facilities of like character, as may now exist or may hereafter be placed upon, under or over the Premises...." At paragraph 13. D. it is provided that the LIRR may elect to use up to 10 reserved parking spaces free of charge at the Railroad Parking Facility. It is also noted that there is an Indemnification agreement wherein the Community is to indemnify the LIRR for all loss and liability as specified, and is to further provide insurance for commercial general liability, workers' compensation, and business liability, *inter alia*, and name the LIRR as an additional insured under the policy.

Based upon the foregoing, it is determined that the Town of Smithtown did not cause or create the condition of the ballasters, sand, gravel or pebbles in the parking area maintained by the LIRR and which condition occurred during the construction being performed on the weekend of the plaintiff's accident. The plaintiff has not raised a factual issue to preclude summary judgment on this issue by demonstrating that the Town, rather than the LIRR, was responsible for sweeping the parking lot during the construction or as it finished. Nor has a factual issue been raised to demonstrate that the Town supervised and/or controlled the work being conducted at the site. The LIRR has not opposed this motion and has not raised any factual issues to preclude summary judgment to the defendant Town or relative to their cross-claims asserted against the Town of Smithtown.

Based on the foregoing, it is

ORDERED that motion (003) by the defendant, Town of Smithtown for summary judgment in its favor dismissing the plaintiff's complaint and all cross-claims asserted against it, which is actually a motion to renew based upon the completion of discovery and denial of its previous application for summary judgment, is determined as follows: renewal is granted, the defendant Town is awarded summary judgment dismissing the plaintiff's complaint and all cross-claims asserted against, the action is severed and continued as against LIRR and the complaint and cross-claims asserted by and against the defendant Town of Smithtown are dismissed; settle judgment (see, 22 NYCRR §202.48).

Dated: December 22, 2010

William B Rebolini

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

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION