SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

MADELYN FRANCIOSO,

Plaintiff,

- against -

PAUL R. CECERE, CHARLES MCINNIS, ANN MCINNIS, VILLAGE OF VALLEY STREAM, TOWN OF HEMPSTEAD and COUNTY OF NASSAU,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 9580/10
Motion Seq. No.: 01
Motion Date: 06/17/11

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation, Affidavit and Exhibits	1
Affirmation in Opposition and Exhibits	2
Affirmation in Opposition	3
Reply Affirmation	4

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant County of Nassau ("County") moves, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint and all Cross-Claims. Plaintiff and defendants Charles McInnis and Ann McInnis (collectively "defendants McInnis") oppose the motion.

This action arises from a motor vehicle accident which occurred on January 7, 2010, at approximately 3:50 p.m., at or near the intersection of Brown Street and Lyon Street, Valley Stream, New York. Plaintiff alleges that, while she was a pedestrian walking at the corner of Brown Street and Lyon Street, she was struck by a motor vehicle operated by defendant Paul R. Cecere.

Plaintiff further alleges in her Notice of Claim, which was filed with defendant County on March 22, 2010, that she was injured due to the negligence of defendant County in the maintenance, repair, ownership and control of the road where the subject accident occurred. Plaintiff's Verified Complaint repeats the allegations in the Notice of Claim regarding defendant County's maintenance, repair, ownership and control of Brown Street and Lyon Street, Valley Stream, New York. Plaintiff further alleges in said Verified Complaint that defendant County negligently caused a dangerous and defective condition to exist on the roadway which caused plaintiff's accident.

Defendant County argues that it does not have jurisdiction over Brown Street and Lyon Street, Valley Stream, New York. In support of said argument, defendant County submits the Affidavit of Anthony DiPrima, a Highway Maintenance Supervisor in the Nassau County Department of Public Works. In his affidavit, Mr. DiPrima states, "I attest based on my experience as an employee of the County of Nassau as well as my review of records maintained by the County of Nassau as follows: 1. Lyon Street in Valley Stream, New York is not under the jurisdiction of the County of Nassau and the County of Nassau does not maintain Lyon Street. 2. The County of Nassau did not perform any repair work or hire any contractors and/or subcontractors to perform work on Lyon Street in Valley Stream. 3. Brown Street in Valley Stream is not under the jurisdiction of the County of Nassau and the County of Nassau does not maintain it. 4. The County of Nassau did not perform any repair work or hire any contractors and/or subcontractors to perform work on Brown Street." Defendant County submits that a municipality cannot be held liable for negligence design or maintenance of a roadway it does not own or control in any way.

In opposition to the instant motion, plaintiff asserts that, with respect to the liability on the part of defendant County, plaintiff alleges negligent design and maintenance of the intersection at issue. Plaintiff argues that the statements in the Affidavit of Anthony DiPrima, provided in support of defendant County's motion, are completely conclusory. Defendant County claims that said Affidavit "does not describe what steps were taken for the affiant to reach his conclusions" and "[i]t does not provide copies of any documents that support his conclusions."

Plaintiff adds, "[o]f particular importance is the fact that all three governmental entities, the County of Nassau, the Village of Valley Stream and the Town of Hempstead, all specifically denied the allegations in the Verified Complaint that they managed, owned, operated, controlled, maintained, administered or repaired the area where the accident occurred." *See* Plaintiff's Affirmation in Opposition Exhibits E, F and G. Plaintiff further states that, "[o]bviously one, or perhaps more than one, of these entities managed, owned, operated, controlled, maintained, administered or repaired this intersection on this public roadway. If all of the governmental entity defendants were not denying all of these allegations and discovery had made it clear that Nassau County was not responsible for this roadway, then plaintiff would not be opposing this motion; however, at this early stage of discovery, plaintiffs (*sic*) must oppose this motion because it is premature." Plaintiff argues that, since "all of the governmental entity defendants are denying these liability issues, none of the defendants has (*sic*) provided discovery responses and the only 'evidence' suggesting that the moving defendant is not responsible for the design of this roadway is the conclusory affidavit of one of its employees," granting summary judgment at this juncture would be "fundamentally unfair to plaintiff."

Also in opposition to the instant motion, defendants McInnis argue that "the motion is premature, as depositions have not even been held. As per CPLR 3212(f), the Court has the discretion to deny a motion pending proper and necessary disclosure. Depositions will narrow down and provide information and data as to what searches were undertaken by the County and/or Town."

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. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). 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. *See Friends of Animals, Inc. v.*

Associated Fur Mfrs., Inc., 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (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. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. 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. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

Given the facts and argument before it, the Court finds that defendant County's motion for summary judgment is premature in that no discovery and/or depositions have taken place, with said discovery perhaps shedding light on the issue of which governmental entity managed, owned, operated, controlled, maintained, administered or repaired the area where the accident occurred. The affidavit of Anthony DiPrima on its own fails to provide the Court with sufficient information from which to make a fully informed legal decision.

It is settled that "[a] party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment." *See Valdivia v. Consolidated Resistance Co. of America, Inc.*, 54 A.D.3d 753, 863 N.Y.S.2d 720 (2d Dept. 2008); *Venables v. Sagona,* 46 A.D.3d 672, 848 N.Y.S.2d 238 (2d Dept. 2007). *See generally*

Gruenfeld v. City of New Rochelle, 72 A.D.3d 1025, 2010 WL 1716148 (2d Dept. 2010); *Gonzalez v. Nutech Auto Sales,* 69 A.D.3d 792, 891 N.Y.S.2d 910 (2d Dept. 2010); *Elliot v. County of Nassau*, 53 A.D.3d 561, 862 N.Y.S.2d 90 (2d Dept. 2008).

Therefore, based upon the foregoing, defendant County's motion, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint and all Cross-Claims is hereby **DENIED with leave to renew** upon completion of discovery.

All parties shall appear for a Compliance Conference, in Nassau County Supreme Court, IAS Part 32, at 100 Supreme Court Drive, Mineola, New York, on September 13, 2011, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
August 3, 2011