SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X **TRIAL/IAS PART 21**

JEAN ROBERT LAHENS and MARGARET LAHENS,

Plaintiffs,

Index No. 22200/10

- against -

Mot. Seq. # 01
Mot. Date 2-28-11

THE TOWN OF HEMPSTEAD, COUNTY OF NASSAU and MARK BLACK,

Submit Date 7-28-11

Defendants.

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The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1
Answering Affidavit 2,3
Reply Affidavit..... 4

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Defendant, County of Nassau, (hereinafter "County") moves by notice of motion for the following relief: an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and any and all cross-claims.

The plaintiff contends that he was injured when he tripped and fell on the sidewalk in front of 1004 Ditmas Avenue, Uniondale, NY, on April 21, 2010. The theory of liability against the County is negligence in the ownership, maintenance and repair of an allegedly dangerous and defective sidewalk.

The County has submitted an affidavit executed by John Dempsey, a Civil Engineer II, employed by the Nassau County Department of Public Works. He states that he searched the records of the Department of Public Works concerning the sidewalk in question. Based upon this search and his own personal knowledge, he states that the sidewalk in question is not under the jurisdiction of the County. He also states that the County did not repair the area or contract for work.

The County argues that it has made a *prima facie* showing that it is entitled to summary judgment since it does not own, maintain, or repair the location of the accident. It further argues that it did not receive prior written notice of the defective condition pursuant to Administrative Code of Nassau County §12-4.0, a condition precedent to instituting an action. This statute provides that no civil action may be maintained against the County for damages or injuries to persons sustained by reason of a defective highway, street, or sidewalk unless written notice of the defect was given to the County.

In support of this argument, the County submits an affidavit of Veronica Cox, an employee of the Claims Management Bureau of the Nassau County Attorney's Office. Ms. Cox states that she reviewed the records of written notices and notices of claim maintained by the County Attorney's Office for the five-year period prior to the date of the incident and that there were no written notices or notices of claim concerning the defective condition on the sidewalk abutting Ditmas Drive in front of 1004 Ditmas Avenue, Uniondale, New York. Mr. Dempsey also attested that he searched the Department of Public Works records for prior written notice for the last five years prior to the incident and found none.

Both defendant Mark Black (hereinafter "Black") and plaintiffs Jean Robert Lahens and Margaret Lahens oppose the application. Defendant Town of Hempstead did not submit opposition.

Defendant Black argues boilerplate language that a municipality is responsible for the sidewalk on which the accident occurred and any alleged repairs made thereto, and not the abutting landowner. He additionally argues that the motion is premature as discovery has not been completed.

Plaintiffs argue that the affidavits submitted in support of the County's motion are insufficient to establish *prima facie* entitlement to summary judgment. Additionally, plaintiffs argue that because none of the defendants have admitted that they own and maintain the sidewalk in question, an issue of fact exists to defeat the motion.

Based on the foregoing, the decision of the court is as follows:

"It is well settled that a 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, 144 N.E.2d 387, 165 N.Y.S.2d 498 [1957]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]; *Zuckerman v City of New York,* 49 NY2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]; *Bhatti v Roche,* 140 AD2d 660, 528 N.Y.S.2d 1020 [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, 390 N.E.2d 298, 416 N.Y.S.2d 790 [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, 479 N.E.2d 229, 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 (*Zuckerman v City of New York*, 49 NY2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [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, 529 N.Y.S.2d 134 [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, 595 N.Y.S.2d 236 [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, 144 N.E.2d 387, 165 N.Y.S.2d 498 [1957], supra)." *Recine v. Margolis,* 24 Misc. 3d 1244A; 901 N.Y.S.2d 902

The court finds that the County made a *prima facie* showing that summary judgment should be granted as a matter of law. The affidavits of John Dempsey and Veronica Cox is sufficient evidence to establish the absence of a material fact (*Mimoun v. Bartlett*, 200 A.D.2d 721). Therefore, it was incumbent upon the parties opposing the application to come forward with competent evidence to demonstrate the existence of a material issue of fact. The plaintiffs and defendant Black have not met this burden.

Additionally, where, as here, a municipality has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by an improperly maintained [sidewalk] unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies. (*Leiserowitz v City of New York*, 81 AD3d 788 [2nd Dept. 2011]; *De La Reguera v City of New York*, 74 AD3d 1127 [2nd Dept. 2010]; *Schleif v City of New York*, 60 AD3d 926 [2nd Dept. 2009]; *Smith v Town of Brookhaven*, 45 AD3d 567 [2nd Dept. 2007]; *see, Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]; *Poirer v City of Schenectady*, 83 NY2d 310, 314-315 [1995])

There are, however, two exceptions to this rule: (1) "where the locality created the defect or hazard through an affirmative act of negligence" which "immediately results" in the existence of a dangerous condition;" and (2) "where a 'special use' confers a special benefit upon the locality" (*see, Amabile v City of Buffalo, supra,* at p. 474; *see, San Marco v Village/Town of Mount Kisco*, 16 NY3d 111 [2010]; *Yarborough v City of New York*, 10 NY3d 726 [2008]; *Oboler v City of New York*, 8 NY3d 888, 890 [2007]; *Delgado v County of Suffolk*, 40 AD3d 575, 576; *see also, Pluchino v Village of Walden*, 63 AD3d 897; *Diaz v City of New York*, 56 AD3d 599 [2nd Dept. 2008]).

The County has established its *prima facie* entitlement to judgment as a matter of law by submitting an affidavit of Veronica Cox which demonstrated that the County did not have any

prior written notice of the alleged defect (*Koehler v Inc. Village of Lindenhurst*, 42 AD3d 438 [2nd Dept. 2007]; *see, Selburn v City of Poughkeepsie*, 28 AD3d 468, 469 [2nd Dept. 2006]). Consequently, it is incumbent upon those parties opposing the application to submit competent evidence that the municipality affirmatively created the alleged defect (*Koehler v Inc. Village of Lindenhurst, supra; Adams v City of Poughkeepsie*, 296 AD2d 468, 469 [2nd Dept. 2002]). Again, neither party opposing the motion addressed this issue of satisfying a condition precedent in their opposition papers.

Finally, contrary to Defendant Black's position in opposing this motion, seeking summary judgment in this case is not premature. Pursuant to CPLR § 3212, incomplete discovery will not necessarily bar summary judgment. *Rainford v. Han*, 18 A.D.3d 638 (2d Dept. 2005) A motion for summary judgment will not be denied based on a "mere hope or speculation" that discovery may uncover evidence sufficient to defeat the motion. *Kimyagarov v. Nixon Taxi Corp.*, 45 A.D.3d 736 (2d Dept. 2007). Additionally, defendant Black has failed to provide an evidentiary basis that suggests discovery may lead to relevant evidence. *id.*

Accordingly, it is

ORDERED, that defendant, County of Nassau's application for an order granting summary judgment on the issue of liability as against it, is **GRANTED**; and it is further

ORDERED, that any and all cross-claims against County of Nassau are hereby dismissed.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
August 22, 2011

ENTER:

HON. JEFFREY S. BROWN
J.S.C.

ENTERED
AUG 24 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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