SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE TRIAL/IAS PART 18

_____X

ARLEEN ACKERMAN,

Plaintiff,

-against-

THE INCORPORATED VILLAGE OF LYNBROOK,

Defendant.

Index No. 010638/10
Motion Sequence...01
Motion Date... 09/06/11
XXX

_____X

Papers Submitted:
Notice of Motion.....x
Affirmation in Opposition.....x

Upon the foregoing papers, the Defendant, THE INCORPORATED VILLAGE OF LYNBROOK's (hereinafter "Village") motion seeking an order awarding summary judgment pursuant to CPLR § 3212 dismissing the Plaintiff's complaint, is determined as hereinafter provided.

The Plaintiff seeks damages for injuries she alleges she sustained in a slip and fall accident on the Village owned and maintained park, Greis Veterans Memorial Park.

The Plaintiff commenced the underlying action by filing a summons and

complaint in June, 2010, alleging that the Defendant was negligent in that it was culpable by allowing mud, sand and foreign matter to accumulate in a certain area within the park grounds, thereby creating a dangerous and defective condition. The Plaintiff alleges that she tripped and fell in the subject area in June, 2009, and sustained a fracture of her left ankle.

On June 21, 2009 at 10:00 a.m., the Plaintiff was attending a school event for her fiance's son at Greis Veterans Park in Lynbrook, New York. The weather conditions were rainy and it had rained the previous day. The Plaintiff attempted to walk towards the swing sets and play area and she initially made her progress by using the park walkways. Then, taking a "more direct" route, she stepped off the walkway to cut across the field and into the muddy area where she fell.

The Plaintiff contends that the Defendant created the hazard as its employees parked their Village issued vehicles in the subject area and consequently, oil leaked and became "embedded" in the soil, creating a "tripping hazard". The Plaintiff also argues that the Defendant should have taken certain corrective measures, particularly since the Village Department of Public Works ("DPW") superintendent testified that he was aware that the situs of the accident was "poorly drained". As such, the Plaintiff argues, the Village had actual and constructive notice of the hazard and it therefore failed to maintain the area in a reasonably safe manner.

The Plaintiff submits the following as evidence: copies of the pleadings, the transcript of the Examination Before Trial of Phillip Healy, the Village of Lynbrook DPW

superintendent, pictures of the subject area taken in August, 2009, and the Plaintiff's affidavit.

The Defendant argues that the alleged hazardous condition was caused by rain. While admitting that the ground area is a low lying area where water accumulates, the park erected pathways leading to various playgrounds in the park. Additionally, pursuant to the Village Law, there were no prior written complaints regarding any such dangerous condition, nor were there any reports of any prior injuries resulting from the alleged dangerous condition. The Plaintiff assumed the risk by choosing to veer off the walkways and step into the mud, which she observed prior to stepping in it. As such, the Village had no actual or constructive knowledge and it did not create the condition.

In support of its application, the Defendant submits as evidence the the pleadings, the transcripts of the Plaintiff's 50-h hearing held on September 23, 2009, the transcript of the Plaintiff's Examination Before Trial held on February 14, 2011, Mr. Healy's EBT transcript, and certified meteorological records referencing the weather conditions of the geographical location on the date of the subject accident.

A Court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to summary judgment as a matter of law (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter, its task is to determine whether or not

there exists a genuine issue for trial (*Miller v. Journal-News*, 211 A.D.2d 626 [2d Dept. 1995]).

The moving party's burden seeking summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of a material issue of fact (*Ayotte v. Gervasio*, 81 N.Y.2d 1062 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra*; *Miceli v. Purex*, 84 A.D.2d 562 [2d Dept. 1981]).

Once this initial burden has been met by the movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form, sufficient to create material issues of fact requiring a trial. Mere conclusions and unsubstantiated allegations or assertions are insufficient (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]) even if alleged by an expert (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 *supra*; *Aghabi v. Serbo*, 256 A.D.2d 287 [2d Dept. 1998]).

A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie case that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (See *Sloane v. Costco Wholesale Corp.*, 49 A.D.3d 522 [2d Dept. 2008]).

It is well settled that to constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit

defendant's employees to discover and remedy it (*see Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837[1986]). It is also well settled that a property owner who has actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of that condition (*see Petri v. Half Off Cards,* 284 A.D.2d 444 [2d Dept. 2001]); *Osorio v. Wendell Terrace Owners Corp.*, 276 AD2d 540 [2nd Dept. 2000]; *Benn v. Municipal Hous. Auth. for City of Yonkers,* 275 A.D.2d 755 [2d Dept. 2000]).

The Defendant, through the testimony of Mr. Healy, has established that there were no prior complaints or noted incidents of any ongoing or recurring condition regarding the subject ground area. According to the climatic weather chart presented, the precipitation was either still in progress about the time of the accident as the chart clearly indicates that there was T (trace) amount of precipitation at 9:51 a.m. on June 21, 2009. As such, it was either raining at that time or ceased raining immediately prior which support the Defendant's argument that it did not create the alleged dangerous condition.

In a case where a plaintiff sustained a similar injury under similar circumstances, that court noted that the plaintiff chose to play golf even where she was aware of the open and obvious muddy condition on the golf course. (see *Carracino v. Town of Oyster Bay,* 247 A.D.2d 501 [2d Dept. 1998]). Here, the record indicates that the muddy condition was not concealed and that the Plaintiff was fully aware of its existence prior to making a conscious choice to walk through it:

"...Q. How close were you to that grassy, muddy area when you first noticed the mud?
A. It didn't look like dangerous mud... Close by. Would that be five feet? Close by....
Q. In order to get to the slides and the swings, are there concrete walkways that go to the fence area?...
A. First you have to pass this area to get to the swings and sliding ponds.
Q. In order to get there, does a person have to go through the grassy.--
A. No...." (see Exhibit B., Tr. Arleen Ackerman, p. 10. ln. 9 - 25, p. 11, ln. 1-5).

In addition, courts have granted a defendant's motion for summary judgment even when defendants were aware of the conditions, evinced by their attempt to remedy the situation (see *Reiss v. Ulster County Agr. Soc.* 78 A.D.3d 679 [2d Dept. 2010], *Doria v. Village of Mamaroneck,* 12 A.D.2d 952 [2d Dept. 1961]).

The evidence also indicates that there was no prior written notice of the defect, pursuant to Village Law § 6-628. The Defendant established its prima facie entitlement to judgment as a matter of law by submitting an affidavit of Mr. Healy, which demonstrated that the Defendant did not receive prior written notice of the alleged defect. Where a municipality establishes that it has not received the requisite prior written notice, it is incumbent upon the plaintiff to submit competent evidence that the municipality affirmatively created the defect (see *Koehler v. Incorporated Village of Lindenhurst,* 42 A.D.3d 438 [2d Dept. 2007]).

The Village has established its prima facie entitlement to judgment as a matter of law by submitting the deposition testimony of the DPW superintendent which demonstrated that the Village did not have constructive or actual knowledge of the alleged

defect. Nor did the Village create the alleged defect.

As previously stated herein, once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter. Mere conclusory statements, expressions of hope, or unsubstantiated assertions are insufficient to defeat the motion (*Leonard v. Kinney Sys.*, 199 A.D.2d 470 [2d Dept. 1993]). Here, the Plaintiff offers no evidence to support the proposition that the hazardous condition existed prior to her accident. Her attempts to cite Mr. Healy's knowledge of the area being poorly drained to support this argument is unavailing. There is no expert evidence to support the argument that the condition existed in a manner that the Plaintiff described and/or that such was/is a recurring condition. Further, there is no evidence to suggest that the remedial measures that the Plaintiff sets forth in opposition, are even warranted, or appropriate.

The Court has reviewed the cases cited by the Plaintiff in support of her opposition, and has determined them to be distinguishable from the case at bar. In *Keating v. Town of Burke*, 86 A.D.3d 660 (3rd Dept. 2011), a case on which the Plaintiff relies to support its argument that the Defendant failed to maintain the property in a "reasonably safe manner", the court noted that the proof submitted by the defendant, Town, on its motion, was insufficient. Further, the case of *Adler v. Suffolk County Water Authority, 306* A.D. 229 (2d Dept. 2003), is also distinguishable as the defendant, water authority, actually installed the

instrumentality involved in that plaintiff's accident.

Moreover, the Plaintiff's own testimony presents a larger issue. Generally, the court's role in a motion for summary judgment is not one of resolving issues of credibility. However, courts have held that any inconsistencies that may exist between the deposition testimony of the plaintiff and the plaintiff's affidavit submitted in opposition to the summary judgment motion, generally present credibility issues for trial (see *Knepka v. Tallman,* 278 A.D.2d 811 [4th Dept.2000]; *Yaziciyan v. Blancato,* 267 A.D.2d 152 [1st Dept. 1999]). However, it has also been established that where self-serving affidavits submitted by a plaintiff in opposition clearly contradict plaintiff's own deposition testimony and can only be considered to have been tailored to avoid the consequences of earlier testimony, they are insufficient to raise a triable issue of fact to defeat the defendants' motion for summary judgment (see *Phillips v. Bronx Lebanon Hosp.,* 268 A.D.2d 318 [1st Dept 2000]; see also *Wright v. South Nassau Communities Hosp.* 254 AD2d 277 [2nd Dept. 1998]).

The Plaintiff's summary of her affidavit as set forth in her opposition, clearly contradicts her earlier statements in her 50-h hearing:

> "...I traversed a large section of the park before I reached a point that was so unusually muddy and like nothing I had ever seen before in a park area. Had I seen the muddy condition, I would not have walked in it....." (see Affirmation in Opposition, Exhibit E).

Affidavit testimony that is obviously prepared in support of ongoing litigation that directly contradicts deposition testimony previously given by the same witness, without any explanation accounting for the disparity, creates only a feigned issue of fact, and is

insufficient to defeat a properly supported motion for summary judgment (see *Telfeyan v. City of New York,* 40 A.D.3d 372 [1st Dept. 2007]).

In opposition, the Plaintiff failed to raise a triable issue of fact as to whether the Defendant affirmatively created the alleged defect or had constructive or actual knowledge of the defect. Further, there is no evidence to support that the Defendant failed to maintain the park in a reasonably safe manner.

Accordingly, it is hereby

ORDERED, that the Defendant's motion seeking an order granting summary judgment pursuant to CPLR § 3212 is **GRANTED** and the complaint is **DISMISSED**.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
November 23, 2011

Hon. Randy Sue Marber, J.S.C.
XXX