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SHORT FORM ORDER

INDEX No. 07-487
CAL. No. 11-00510OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 006 - MG # 009 - MotD
007 - MG # 010 - MD
008 - MG

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JOAN ANN LICATO,

Plaintiff,

- against -

THE PARK AT THE VILLAGES AT MT. SINAI, PULTE HOMES OF NEW YORK, INC., THE TOWN OF BROOKHAVEN, MONTE CALVO ASPHALT CORP., HENDERSON AND BODWELL ENGINEERS and DAVID W. GRIFFITH, ARCHITECT,

Defendants.

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Bellmore, New York 11710

VINCENT D. MCNAMARA
Attorney for Defendant The Park at the Villages
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Attorney for Defendant Pulte Homes of New York
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Upon the following papers numbered 1 to 79 read on these motions for summary judgment and to file a jury demand ; Notice of Motion/ Order to Show Cause and supporting papers (006) 1 - 22 ; Notice of Cross Motion and supporting papers (007) 23-35; (008) 36-53; (009) 55-59; (010) 60-63 ; Answering Affidavits and supporting papers 64-68; 69-71 ; Replying Affidavits and supporting papers 72-73; 74-75; 76-77; 78-79; 80-81 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (006) by the defendant, Town of Brookhaven, for summary judgment dismissing the complaint and all cross claims asserted against it is granted; and it is further

ORDERED that motion (007) by the defendant, Henderson and Bodwell Engineers, for summary judgment dismissing the complaint as asserted against it is granted; and it is further

ORDERED that motion (008) by the defendant, Timber Ridge Park at Mt. Sinai s/h/a The Park at the Villages at Mt. Sinai, for summary judgment dismissing the complaint and all cross claims asserted against it is granted; and it is further

ORDERED that motion (009) by the defendant, Montecalvo Paving Corp., for summary judgment dismissing plaintiff's complaint and all cross claims asserted against it is granted; and that

branch of the motion which sought in the alternative an order granting Montecalvo Paving Corp. leave to serve a jury demand nunc pro tunc has been rendered academic and is denied as moot; and it is further

ORDERED that motion (010) by the defendant, Timber Ridge Park at Mt. Sinai s/h/a The Park at the Villages at Mt. Sinai, pursuant to CPLR 4102 (e) granting Timber Ridge Park at Mt. Sinai leave to serve a jury demand nunc pro tunc has been rendered academic by dismissal of the complaint and cross claims asserted against is and is denied as moot.

In this action premised upon the alleged negligence of the defendants, the plaintiff, Joan Ann Licato, seeks damages for personal injuries she sustained on January 22, 2006 at approximately 6:00 p.m., while she was a pedestrian on the roadway in front of her home at 44 Louden Loop, in Mt. Sinai, New York. She was standing on or near a raised drainage grate, taking bags out of the trunk of her vehicle, when she fell on the grate. It is undisputed that Louden Loop is located in a privately owned community, and is not dedicated to the Town of Brookhaven where the community is located. The adduced testimonies establish that the subject grate was a storm drain located at the lowest point on the roadway. The grate permits storm water to flow away from the homeowners' property and into the storm drain in the street, where it finally drains into a sump. The site was designed by the engineers, Henderson and Bodwell. Pulte Homes was the owner of the development at the time of the incident. Montecalvo Asphalt Corp. applied the base layer of asphalt to the roadway, around the storm drain grate, which was in place on the date of the accident. The final top coat of asphalt had not been applied as there was ongoing construction. The development had a homeowner's association, Timber Ridge Park at Mt. Sinai Home Owners Association.

The Town of Brookhaven asserted a cross claim against all the co-defendants wherein it seeks contribution and/or indemnification on the basis of apportionment of liability. Henderson & Bodwell Engineers, LLP asserted a cross claim against all the co-defendants for judgment over on the basis of apportionment of liability. Timber Ridge Park at Mt. Sinai Home Owners Association (Timber Ridge Park) by way of its answer asserts it was incorrectly sued herein as The Park at the Villages at Mt. Sinai. Montecalvo Asphalt Corp. asserted a cross claim against all co-defendants for contribution and/or indemnification. Pulte Homes asserted cross claims against the co-defendants for contribution and/or common law indemnification. The action pending under Index No. 08-441 against Montecalvo Paving Corp. was consolidated with the instant action by stipulation of the parties dated July 17, 2008, and the claim asserted against Montecalvo Asphalt Corp. in this action was discontinued with prejudice.

The moving defendants seek summary judgment dismissing the complaint and all cross claims asserted against each of them. 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 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***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 (***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 [1980]). The opposing party 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 [1981]).

JOAN ANN LICATO

Joan Ann Licato testified at her examination before trial on April 10, 2008, to the extent that she sustained an injury on January 22, 2006 in front of her home at 44 Louden Loop located in Timber Ridge Park, when she tripped on a drain located on her walkway or driveway. She and her husband purchased the home in November 2005. They did not visit the lot, even during the construction of their home, as the development was under construction. Just before they were ready to sign the contract, they went to the house and saw the "sewer in the walkway." She stated that they complained to the builder, Pulte Homes, who sent someone to the house to look at it, but told them that there was nothing that could be done about it. She did not put a complaint in writing to Pulte. She also testified that she complained to the Town of Brookhaven Highway Department in November or December of 2005 about the location of the grate, but was advised that it was not a Town of Brookhaven road. She did not submit a written complaint to the Town of Brookhaven about the condition. Prior to her accident, she also spoke to someone with the Homeowner's Association about the sewer drain and was advised that it could not be removed.

Licato testified that the incident occurred about 5:30-6:00 p.m. She could not remember if it was light or dark out or if there was artificial lighting. At her subsequent deposition, she testified that it was dark out and that she could not recall if there were any street lamps. She had been shopping with her husband, returned home, parked the car in her driveway, opened the trunk, and began handing bags to her husband so he could take the items into the house. As she was handing him the bags, she fell on the "sewer" grating, which she then testified was located near her driveway, rather than in her driveway. She was aware that the grate was there, as she saw it every day. She testified that she never previously fell as a result of walking on or over the grate, although she had difficulty walking over it. When asked how the accident occurred, she testified that either she tripped or her heel got caught, and that she did not know if she stubbed her toe or if part of her heel got stuck in the grate. She also stated that she did not say that her heel got stuck. Prior to this incident, her heel got caught in the grate once, and about three times she slipped on the grate whether it was wet or dry. She then testified that those three times she tripped on the edge of the grate because it was raised.

At her subsequent deposition, she testified that on the date of the accident, she tripped on the edge of the grate which was on the driver's side of the car, on the corner of the grate furthest from her vehicle. She then added that she thought she tripped over the grate, that she didn't step on it, her heel didn't get caught, but she tripped. She later stated that her shoe got caught, either her shoe, her heel, her toe, when she tripped over it. She did not know the height differential between the drain cover and the roadway, and did not know if it was more than one inch when the accident occurred. She could not recall if the roadway was paved prior to her fall and stated that it was dirt and unfinished at the time of the accident. She believed there was ongoing construction and that the roadway was paved afterwards. She described her driveway as being wide enough for two cars, however, she could not estimate the length of the driveway. They had a two-car garage which she could enter her house from, however, she did not use the garage entry instead of walking on the grate on the date of the accident because she had boxes in the garage blocking her pathway.

WILLIAM CARMAN

William Carman testified on behalf of Pulte Homes of New York, Inc. He is employed by Timber Ridge Homes, LLC as vice president of land development. He had been previously employed by Pulte Homes of New York since April 2004 as land development manager, and was the contact person for all the subcontractors and work involving water, sewer, storm drains, LIPA, National Grid, earth moving projects, road paving, curbing and the infrastructure of the job. He was familiar with Louden Loop in the Villages at Mt. Sinai, which is divided into two parts, the Homes, and the Park which is for ages 55 and older. Construction had already begun at the site when he started working for Pulte, and the subcontractors, architects and engineers were already on the job. He hired no one. He reviewed contracts to see what the responsibilities were for each subcontractor. Defendant Henderson & Bodwell prepared the site plans and determined the infrastructure on the site, but did not actually design the physical premises. Clearing and grading of the land was being done. Most of the storm drains were in place, as it is necessary to have them installed early on to handle rainfall. Prior to placement of the storm drains, the Town of Brookhaven Planning Board and its engineer approved the site plans. He followed their directions. He testified that Pulte does not dictate the number of storm drains or sewers to be installed. Cardo installed the underground piping for the storm drains, the concrete box, and metal storm grates located on top of the concrete box.

After the heavy utilities were installed, including storm sewers, sanitary sewers, and curbs, the utility companies installed the electricity, gas, telephone and cablevision. Thereafter, stated Carman, a layer of base pavement was installed on the roadway while homes were being built. Surveying was done by the engineers, Henderson and Bodwell, who advised where each house was to be built by staking out the properties and determined the placement of storm drains and staked out the placement of the drains. Henderson and Bodwell had a representative, Brian Danielson, on site to determine that the drains were placed in their proper locations pursuant to surveys and the site plan. At this phase, Carman oversaw the contractors making sure that the contractors followed Henderson and Bodwell's instructions as they, were the experts. Relative to the site plan, Pulte had no input except there did come a time that Pulte Homes asked to have additional drainage structures and pipes added after determining that the existing drainage system was not handling the volume of rain water in the grass areas. Carman testified that he dealt with John Berchtold and Russell Lewis of Henderson and Bodwell, who engineered the additional drains. The inspector from the Town of Brookhaven was present during the installation of the storm drains, curbing and paving of the roadway.

Carman testified that he had a conversation with both Berchtold and Lewis with regard to relocating the drainage structure in front of the Licato house at 44 Louden Loop, lot 91, after the Licatos moved in, as they were very unhappy with its location in front of their house and repeatedly warned that they were probably going to trip over it. He explained to the Licatos that the structure was a catch basin, not a sewer. He testified that the storm drain, located in the roadway in front of the Licato house to the right side of their driveway, would have been staked out after the infrastructure was completed, including the Belgian block curbing with the curb cut. To his knowledge, no one noticed that there was a storm grate in front of the curb cut. He knew of at least one other home which has a storm drain located in front of the curb cut. He had been to Louden Loop on many occasions during the construction phase, but the first time the storm drain was brought to his attention was by Mrs. Licato, after the base coat of paving had already been installed and the storm grate was in place. Carman described the storm grate as being raised at its proper final elevation, and testified that there was a ramp to the drain cover.

Carman further testified that he told the Licatos he would attempt to have the drain re-engineered. He spoke to Henderson and Bodwell who sent an engineer to the site. The result was that it was determined that there were too many parts of the infrastructure and/or foundations in place to move the low points necessary for drainage. He explained that a catch basin or a leeching pool is always at the low point, and that it was way beyond their capabilities to move that low point where the catch basin was located. Carman testified that there were about 200 to 300 manholes and catch basins "sticking up about an inch and a half lip ramp," as that was standard at the job site. This elevation was to allow for the final coat of asphalt paving. Carman further testified that when he went to the Licato's home and inspected the drain cover, he determined that there was nothing wrong with the drain cover or the catch basin. Carman testified that he knew of no witnesses to Mrs. Licato's fall, and had reason to believe that she did not fall in front of her house based on the many conversations wherein she and her husband warned him that she was going to fall.

Carman further testified that he advised Henderson and Bodwell that they could not use a normal storm grate at 44 Louden Loop because it was situated by a driveway. A normal storm grate has a curb elevation on it and is set in the curb. So a stone grate cover without a curb elevation was installed instead. The final coating of pavement in front of the Licato house was not in place when the Licato's moved in because ongoing construction which would have destroyed the final paving due to the trucks and heavy equipment running over it. When Pulte received a final CO for a house and property, it permitted people to move into their homes. Pulte was aware of the raised drain grates as it was standard construction practice. Town specifications determined how much base, subgrade and top coat was to be installed on the road. He believed the Town of Brookhaven required three and a half inches of base coat and a half inch of top coat. Carman testified that even though Louden Loop is not a road dedicated to the Town of Brookhaven, it still had to have the approval required by the Town. Bob Claus, from Montecalvo, was present during the inspection by the Town. The inspection determined that the proper thickness of asphalt was installed, that it was put down at the proper temperatures and elevations, and that it was not applied too quickly to cause it to be stretched. The Town also inspected the drain covers installed by Cardo. During the inspection, Carman stated that he and the Town Inspector, Mike Mesiano, agreed upon the type of grate necessary on the drain due to the curb cut.

LIABILITY

In order to establish a prima facie case of negligence, a plaintiff has to demonstrate either that the defendants created the dangerous or defective condition which caused the accident, or that they have actual or constructive notice of the condition (***Dima v Breslin Realty, Inc.***, 240 AD2d 359 [2d Dept 1997]). While, 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 (*see*, ***Bradish v Tank Tech Corp.***, 216 AD2d 505 [2d Dept 1995]), the defendant, on a motion for summary judgment dismissing the complaint, 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 [2d Dept 2003]; ***Dwoskin v Burger King Corp.***, 249 AD2d 358 [2d Dept 1998]). Liability can be predicated only upon failure of the defendant to remedy the danger after actual or constructive notice of the condition (***Piacquadio v Recine Realty Corp.*** 84 NY2d 967 [1994]). 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 the defendant's employees to discover and remedy it (*see*, ***Stumacher v Waldbaum, Inc.***, 274 AD2d 572 [2d Dept 2000]; ***Moons v Wade Lupe Construction Company, Inc.*** 24 AD3d 1005 [3d Dept 2005]).

In ***Trincere v County of Suffolk,*** the Court of Appeals held that there is no "minimal dimension test" or per se rule that a defect must be of a certain minimum height or depth in order to be actionable (90 NY2d 976 [1997]) . The Court quoted the Appellate Division stating, "There is no rule that municipal liability, in a case involving minor defects in the pavement, 'turns upon whether the hole or depression, causing the pedestrian to fall, is four inches--or any other number of inches--in depth' (***Loughran v City of New York,*** 298 NY 320 [1948]; ***Wilson v Jaybro Realty & Dev. Co.,*** 298 NY 410 [1943]). Instead, whether a dangerous or defective condition exists on the property of another so as to create liability 'depends on the peculiar facts and circumstances of each case' and is generally a question of fact for the jury' (***Guerrieri v Summa,*** 193 AD2d 647 [2d Dept 1993]. Of course, in some instances, the trivial nature of the defect may loom larger than another element. Not every injury allegedly caused by an elevated brick or slab need be submitted to a jury (*see, e.g.* ***Hect v City of New York,*** 60 NY2d 57 [claim involving trivial gap between two flagstones of the sidewalk was properly dismissed]). Accordingly, a mechanistic disposition of a case based exclusively on the dimension of the sidewalk defect is unacceptable.

In opposing these motions, the plaintiff has submitted an attorney's affirmation, a copy of a photograph, and notice of approval of the subdivision at Timber Ridge Park at the Villages, Section 3, Mount Sinai, setting forth requirements for permits and construction. In the absence of any evidentiary submissions to raise a factual issue, and only the assertions by counsel for the plaintiff, who is not a party with knowledge, it is determined that plaintiff failed to raise a factual issue to preclude summary judgment being granted to the moving defendants. The plaintiff has offered no evidence as to the objective measurements of the elevation of the drain cover at the site of the accident, except for her deposition testimony. Rather, the adduced testimonies establish that there was a tapering of the underneath layer of blacktop to the top of the drain cover applied prior to the accident date and prior to the final asphalt application. Additionally, the plaintiff has not submitted an engineer's report to establish that the defendants deviated from industry standards, were negligent in the design, installation, and/or placement of the storm drain site, or that there was a violation of any codes, rules or regulations concerning the placement of the storm drain. By her own testimony, the plaintiff established that she was aware for months prior to the incident that the drain was in the roadway. Mere speculation and unsubstantiated allegations are not sufficient to raise a factual issue to defeat a motion for summary judgment (***Krich v Wall Industries,*** 118 AD2d 627 [2d Dept 1986]; ***Campbell v Tiberi et al,*** 23 Misc3d 1107A [Sup. Ct., Richmond County 2009]).

TOWN OF BROOKHAVEN

In motion (006), the Town of Brookhaven seeks summary judgment dismissing plaintiff's complaint and all cross claims asserted against it on the basis that it did not own or maintain the area where the plaintiff's accident occurred. Assuming arguendo, that it did own the roadway where the incident occurred, the Town of Brookhaven further asserts that it did not have prior written notice of the claimed defect. Lastly, the Town asserts that the plaintiff has failed to demonstrate that a defect existed. In support of its application, the Town of Brookhaven has submitted, inter alia, an attorney's affirmation; copies of the summons and complaints for both actions which have been consolidated; defendants' answers; plaintiff's verified bill of particulars; various discovery demands served by the defendants; the unsigned but certified transcripts of the examinations before trial of Joan Ann Licato dated April 10, 2008 and October 27, 2008, Herbert Schutte dated January 5, 2010, William Carmen dated May 13, 2010, Michael Mesiano dated July 1, 2010, James R. Deland, Jr. dated July 1, 2010, and John

Montecalvo dated November 8, 2010; two photographs of the subject drain; and the sworn affidavit of Suzanne Mauro dated June 20, 2010.

Where, as here, a municipality has enacted a prior written notice statute pursuant to Town Law section 65-a, it may not be subjected to liability for personal injuries caused by an improperly maintained roadway unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies (***Wilkie v Town of Huntington***, 29 AD3d 898 [2d Dept 2006], citing to ***Amabile v City of Buffalo,*** 93 NY2d 471 [1999]; ***Lopez v G&J Rudolph***, 20 AD3d 511 [2d Dept 2005]; ***Gazenmuller v Incorporated Vil. of Port Jefferson,*** 18 AD3d 703, 704 [2d Dept 2005]). Town of Brookhaven Town Code §84-1 provides that as a prerequisite to the maintenance of a lawsuit against the Town, based upon a claim of a defective roadway, the Town must have been provided with prior written notice (***Brody v Town of Brookhaven***, 207 AD2d 425 [2d Dept 1994]). Actual or constructive notice of a defect does not satisfy this requirement (***Wilkie v Town of Huntington,*** supra). An exception to the prior written notice rule exists when the municipality has caused or created a defect or dangerous condition (***Brody v Town of Brookhaven***, supra).

Here, the Town of Brookhaven has demonstrated that it neither created or caused the claimed defect, that it did not have prior written notice of the claimed defect, that it did not own or control the subject road, that it did not have jurisdiction over the subject private roadway which was not dedicated to the Town of Brookhaven, that the storm drain and its attendant structures were installed pursuant to the Code and requirements of the Town of Brookhaven, and that it owed no duty to the plaintiff. Thus, they have established prima facie entitlement to summary judgment dismissing the complaint.

Michael Mesiano testified to the extent that he has been the principal engineering inspector for the Town of Brookhaven since 2004. He was involved with the inspections at the Park at the Villages at Mount Sinai as it was being developed, and was familiar with Louden Loop. Three or four engineering inspectors from the Town of Brookhaven were assigned to inspect the locations to determine compliance with site plans. Mesiano testified that with regard to drainage structures and water runoff, he does not approve the design or determine where they are to be placed or installed. He reviewed the site plan for the property after the plan had already been approved by the Town of Brookhaven and signed off by the chairperson of the Planning Board. The plan showed where drainage structures would be located. At the inspection, he determines that the structures are placed approximately in accordance with the plan approved by the Town.

Mesiano further testified that at the end of a construction project, he signs off to release the project. This project had six different sections, each of which had to be signed off separately. A certificate of occupancy (CO) is only issued for a home or building, and a certificate of completion is issued for completion of phases of development. Prior to the issuance of a certificate of occupancy for a home, there is no inspection required regarding the drainage structures, however, the Town of Brookhaven requires one lift or rough asphalt, or three and a half inches of dense binder, or asphalt, on the road. Immediately after that paving, the sanitary sewers are "coned" off. He then stated that prior to the issuance of a certificate of occupancy on a house, a visual inspection of the storm drains is made to ensure the pipes have been podged or cemented so they do not collapse during a rain storm or over the course of time. Once this was approved, the applicant, Pulte Homes, was given a copy to give to the Building Department which then issued the certificate of occupancy. With respect to drainage inspection, he ascertained that the proper size pipe had been installed, and that things were properly cemented into the structure, if required. When inspecting the roads, he determines that they are placed

between the curbs, and that the road and curbs are in the correct locations. The issuance of a certificate of occupancy before the final lift of pavement is compliant with the rules and regulations of the Town of Brookhaven.

Mesiano testified that the survey indicates that the driveway for the Licato premises was 19.1 feet. He was not aware of any code violations relative to the location of the road drain where the plaintiff fell. The subject drain has a concrete collection box with pipes which diverted the water to a recharge basin. The top of the concrete collection box had a grate. The application of the final lift surface requires that there be a smooth and flush transition from the grate above the drainage box to the abutting and adjacent road surface. Prior to the final road surface, he believed that the transition was in place from the top of the drainage box grate to the rough asphalt lifted surface. Although he did not do cores or thickness checks, he did walk alongside the paver while the paving was being done. He stated that the location of the storm drain was in a proper location based upon his experience and the siting on the plan, as the drain appeared to be on the low spot on the road. The location of a storm drain in front of a driveway would not prevent the signing off for a certificate of occupancy. Prior to issuing the certificate of occupancy, it is required that there be an asphalt apron around the grate if it does not have its final pave. It is normal construction practice to do the lifts in two stages. Residents always like to have a brand new road when everything is done, with as few seams as possible. He thought there was about an eighteen month lapse between the two stages.

Suzanne Mauro has set forth in her supporting affidavit that she is employed as a principal clerk with the Town of Brookhaven, Department of Highway. She states that the plaintiff asserts that the site of her incident was at 44 Louden Loop, Mount Sinai, on January 22, 2006. Mauro avers that the incident location occurred at a pending subdivision which was not dedicated to the Town of Brookhaven and thus the Town of Brookhaven had no jurisdiction for the roadway and was not responsible for maintaining the roadway. She further conducted a search of the records for three years prior to plaintiff's accident for any written complaints regarding the roadway and storm drain and found that there were no prior written complaints about any defective condition.

The defendant Town of Brookhaven has demonstrated prima facie entitlement to summary judgment dismissing the complaint on the basis it received no prior notice of the condition complained of herein, it did not cause or create the claimed defect, and that the Town of Brookhaven did not have jurisdiction over the roadway as the roadway was not dedicated to the Town of Brookhaven as it was part of a private development. The Town of Brookhaven has demonstrated that it did not cause or create the defect complained of, and that it did not have control of or maintain the private roadway. It further demonstrated that there was no prior written notice of any defect concerning the storm drain; that the Town of Brookhaven found no defect in the storm drain; that the drain was properly placed at a low point for drainage; that there is nothing prohibiting a storm drain from being placed near a driveway; and that the one and a half inch thickness of the final lift was achieved in front of the Licato property around the drain cover.

The plaintiff has submitted no evidentiary proof which raises a factual issue to preclude summary judgment from being granted to the Town of Brookhaven. No engineer report has been provided by the plaintiff concerning an inspection of the site. No measurements have been provided which contradict the testimony concerning the amount of reveal or lip around the drain, or that there was a violation of any standards or codes concerning the placement of the drain proximately causing the plaintiff to fall. In

fact, the plaintiff's testimony is contradictory concerning whether her heel got caught in the grate or whether she tripped on it, or what caused her to fall.

Accordingly, motion (006) is granted and the complaint and cross claims asserted against the Town of Brookhaven are dismissed with prejudice.

HENDERSON & BOSWELL ENGINEERS

In motion(007), Henderson and Bodwell Engineers (Henderson and Bodwell) seek summary judgment dismissing the complaint on the basis that their work product was limited to design services in the nature of drainage and surveying; that at the time of the incident the roadway where the drain was located was a work in progress. The final topcoat had not yet been applied to make the pavement flush with the cover, and there was a bevel transition from the top of the manhole cover to the top of the rough coating. In support of their application Henderson & Bodwell has submitted, inter alia, a copy of the summons and complaint and their answer; a copy of the proposal for construction engineering and surveying dated July 17, 2002 to Donald Eversol; copies of the unsigned but certified transcript of the examination before trial of James R. Deland, Jr. on behalf of Henderson & Bodwell dated July 1, 2010, the unsigned and uncertified transcripts of Joan Ann Licato dated April 10, 2008, and Herbert Schutte dated January 5, 2010; the site plan for the subject property submitted to the Town of Brookhaven Planning Board, and the affidavit of James R. Deland, Jr.

James Deland, Jr. testified to the extent that he has been with Henderson and Bodwell since 1978 and is the managing partner. Deland testified that the original client on the project was Klein and Eversol, the entity which preceded Pulte Homes in the ownership of the property and project, and that it changed hands in about 2005. Once Pulte took over, John Berchtold was the project manager in dealing with Pulte Homes. He stated that the site plans were prepared by Russell Bodwell of Henderson and Bodwell, who has since retired. With regard to the planning of drainage in a development that is yet to be cleared and developed, factors such as runoff, the natural flow of water, and rainfall are considered, as regulated or set by the municipality or other government agencies, in this case, the Town of Brookhaven.

Deland continued that lot 91, or 44 Louden Loop, was depicted on the plans as lot number 154. The plan denotes a storm drain inlet in the roadway in front of 154. The surveyor from Henderson and Bodwell determined, to scale, where the actual lot would begin and where it would end. Henderson and Bodwell determined the horizontal and vertical alignment of the roads and the drainage for the development, including where storm drains or grates would be placed. Curb lines and curb cuts for driveways were determined after Pulte gave them information concerning the lot number and the information pertaining to the house selected to be placed on the lot. In 2001, it was determined where the storm drain would be placed in the design process.

Deland testified that when the storm drain was placed by lot 91, no curbs were in place. He was aware that a storm grate was in front of lot 91. Deland testified that it did not matter whether the storm drain was to the right, middle or left of lot 91 as it was set in the low point in the road. He continued that it did not matter that the road had not yet been paved. He testified that moving the storm grate three or four feet, or two or three feet to one side or the other, could have effected the gradients of the roadway all the way up to the next high points in either direction. Deland testified that relocating a storm drain once the drainage system and houses are built would incur significant cost as the drains are located at a low point. He stated there is nothing wrong with placing a storm drain grate in front of a driveway at a

low point. There are no industry standards that address location of the drains. Prior to January 22, 2006, Henderson & Bodwell received no complaints regarding the location of the storm drain.

By way of his supporting affidavit, James Deland, Jr., P.E. avers that the agreement entered into by Henderson and Bodwell provided for no administration responsibility, such as inspecting or observing construction team compliance with codes, rules or regulations, or with plans and specifications. Such reviews were reserved in the contract documents to the Suffolk County Department of Health, The Town of Brookhaven, and to the contractors and subcontractors. He states the design services provided included topographic surveys depicting locations of roads and related structures in the subject subdivision along with surface water-run-off drainage systems. Deland continued that the location of the subject drainage inlet in front of the plaintiff's driveway on Louden Loop was dictated by the topography of that road at that location, constituting a low point for collecting surface water. The location of the drain is in no way violative of an local or state building code or rule or regulation. Deland avers that it is uncontroverted that final road construction on the Louden roadway had yet to be achieved in January 2006. He continues that according to Mr. Shutte, there was a bevel or transition in elevation to establish a taper going from the top of the inlet of the manhole to the top of the road surface in the rough surface of the road, and that the design intent of the road surface construction had not yet to be achieved. Deland avers that Henderson and Bodwell had no input or control over when the residents would be permitted to occupy the subdivision prior to final completion of the roads, and that there were no design omissions or errors by Henderson and Bodwell in its design services for this project.

Henderson and Bodwell has established its prima facie entitlement to summary judgment dismissing the complaint by showing that there is no industry standard for placement of the storm drains, and that the drain in front of the Licato home was placed at the low point in the road to effectuate drainage of the storm water away from homeowner's property. The drain was not located on a walkway, nor was it located in the plaintiff's driveway. The storm drain complied with the requirements imposed by the Town of Brookhaven. In opposing this motion, the plaintiff has not provided evidence sufficient to raise a factual issue demonstrating that the storm drain was improperly located, that it was unsafe, or that it was not installed according to either the plans or the Code of the Town of Brookhaven. Without an engineering expert's opinion, plaintiff's mere conjecture and speculation fails to raise a factual issue to preclude summary judgment from being granted to Henderson & Bodwell.

Accordingly, motion (007) is granted and the complaint and any cross claims asserted against Henderson & Bodwell are dismissed.

TIMBER RIDGE

In motion (008), Timber Ridge Park at Mt. Sinai s/h/a The Park at the Villages at Mt. Sinai (hereinafter Timber Ridge) seeks summary judgment dismissing plaintiff's complaint and all cross claims asserted against it. In his affirmation, counsel further seeks summary judgment on its cross claim for indemnification against the defendants; however, such relief was not set forth in the Notice of Motion. Timber Ridge seeks summary judgment on the basis that: the condition complained of was readily observable by the plaintiff who was aware of the condition; that there was no defect which caused the plaintiff to fall; and the plaintiff has not proffered evidence of the height differential between the storm drain cover and the roadway; that the alleged height difference is trivial and did not constitute a trap or a snare causing the plaintiff to fall; that the storm drain was properly placed at the low spot of the road; that there is no Town ordinance which prohibits a storm drain from being placed in front of a

driveway; that it did not determine the placement of the drain; and that Timber Ridge received no complaints about the placement of the drain. In support of its application, Timber Ridge has submitted, inter alia, an attorney's affirmation; copies of the summons and complaints and defendants' answers; and incorporates the following exhibits submitted by the Town of Brookhaven: photographs "K" and "L", the deposition transcripts of Licato "J", Shutte "M", Carman "N", Mesiano "O", Deland "P", Montecalvo "Q".

Herbert Schutte testified on behalf of Timber Ridge that he is a resident of, and was a board member in 2005 at Timber Ridge, a community of private homes. The Park at the Villages of Mount Sinai is a homeowner's association registered with Attorney General of New York State as Timber Ridge Park at Mount Sinai Homeowners Association. In the prospectus and bylaws for the community, it was required that there be two representatives of the homes after a certain number of homes were built. Five members were appointed to the board by Pulte at that time. In January 2005, Pulte was in control of the board and hired vendors, listened to complaints, addressed issues that arose, set the dues for the members, and took care of security, snow removal, and sanitation. Pulte also had a customer service department to handle any repairs or problems concerning the homes. The homeowners association did not handle those complaints.

He continued that Pulte hired Greenview Management Company as the management company for the community. If there were problems, Greenview did not make the repairs but contacted Pulte to make repairs. If a complaint was received by the homeowners association, the complaint was directed to Greenview who kept a record of the complaints. Pulte was responsible for setting up the monthly board meetings, but was sometimes lax in doing so. The board meetings were open just to the board members. The board members kept a list of problems they wanted Pulte to address and gave that list to Pulte and Greenview Management. He did not recall any complaints about the placement of the sewer grates. He did not recall ever having a conversation with either Mr. or Mrs. Licato about the storm drains, and he did not tell Ms. Licato that the grate was not in the correct location. He believed the street lighting was in place from the beginning. Peter Brindley from Pulte advised him that the plaintiff complained all the time about the storm drain in front of her home and said she was going to fall, and eventually did fall.

Schutte further testified that the last phase of construction of the project was completed in October 2008. When he moved into his home in 2005 at 101 Louden Loop, there was a rough coat of black top on the street. He was familiar with the sewer drains on Louden Loop and stated that one was located down the street from his home. He noted that there was also a drain at 44 Louden Loop. Prior to the final paving, about two years after the installation of the rough paving, the drain at 44 Louden Loop had black top beveling down from the cover so as not to have a drop-off, as the cover was raised above the road surface. At the time, Pulte owned and maintained the roadways in the community and was responsible for the final paving of Louden Loop. The final paving was not to be completed until construction was completed. Pulte hired the paving company for the roads. He was not aware of any delays in the roadways. Bill Carman, the land development manager and Pulte employee, was in charge of management of the roadways. Carman is now employed by Timber Ridge Park which took over after the Pulte development was completed.

Shutte testified that Timber Ridge Park is the original company that sold the land and the development rights to Pulte, who, upon completion of the project, sold it back to Timber Ridge Park. In 2005 and 2006, Pulte did all the hiring for all the vendors until it turned over responsibility to the homeowners association. Greenview kept all the minutes and the books. He further added that

Henderson and Bodwell were the architect/engineers for the community who set up the entire community, including the byways within the community and the board had no dealings with them.

Timber Ridge Park at Mt. Sinai Homeowners Association demonstrated its prima facie entitlement to summary judgment dismissing the complaint by establishing that it did not own or control the premises, that it did not create the condition which caused the accident, and that it did not have actual or constructive notice of the condition or fail to act within its duties and responsibilities. Timber Ridge Homeowners Association did not control the association board which was controlled by Pulte Homes. Thus, Timber Ridge Park at Mt. Sinai Homeowners Associated owed no duty to the plaintiff and breached no duty for which liability can be imposed against them. The plaintiff has submitted no evidentiary proof which raises a factual issue to preclude summary judgment from being granted to Timber Ridge Park at Mt. Sinai Homeowners Association. Thus, that part of the application with regard to the issue of indemnification has been rendered academic, and the issue of trivial defect is not determined as the applicant is not the owner of the premises and bears no responsibility with regard to the storm drain covers.

Accordingly, motion (008) is granted and the complaint and any cross claims asserted against Timber Ridge Park at Mt. Sinai Homeowners Association are dismissed.

MONTECALVO ASPHALT CORP.

In motion (009), Montecalvo Paving Corp. seeks summary judgment dismissing the complaint and any cross claims asserted against it on the bases that it performed the paving required pursuant to the contract with Pulte Homes and that it bears no liability for the occurrence of the plaintiff's fall.

John Montecalvo testified to the extent that he is the president of Monteclavo Paving Corp. and is the only officer of the corporation. In 2005-2006, he had approximately 25 employees. Montecalvo Paving Corp. entered into a contract with Pulte Homes on about June 14, 2004 to provide paving at the Villages at Mt. Sinai. When paving in the Town of Brookhaven, Montecalvo stated that it is required that the area is first fine-graded, next the first course or a binder is applied, and then a top mix is applied as a final course. In 2005, Montecalvo had applied the binder at the project. He testified that the builder determined when the binder and the top coat went down. When he paved at the Park at the Villages of Mt. Sinai, his contact person in the field was Bill Carman, the general superintendent for Pulte Homes. He received no complaints about the paving.

Montecalvo testified that an invoice dated July 15, 2005 was for partial billing of base material at the site, which base was 100% complete in that the entire first course had been applied. He believed the final paving was completed in 2006/2007, but he had no documents to support his belief. The final course consisted of a thickness of one and a half inches of asphalt. When shown photographs identified as G, H, and I, an area in front of 44 Louden Loop, he testified that by the elevations of the asphalt, he assumed it was the top course, but by the texture of the material, he assumed it was the binder course. He stated that binder is initially put around the drain, and a top course is also applied. In applying the final course, the existing basins are met with the material, and the photographs demonstrated that the material looked like it was meeting the basins. If a job is going to sit over the winter and the builder requests, the binder course is brought up higher to allow for snow plowing and clearing of the road. The binder course is brought up by ramping up to the basins, or gradually increasing the thickness to meet the level of the basin.

Montecalvo testified that, with reference to photographs D, E, and F, that he did not see a reveal, or an area where the edge part of the basin was showing, on either the basin or the drain. A ramp of the binder eliminates any reveal on the drain basin. He continued that it is standard paving procedure to leave a reveal with the binder so that there is a place for the top course to adhere when it is applied. If a ramp were applied prior to the top course, the ramp would have to be cut and removed to apply the top course. He did not recall whether Pulte requested that the binder be ramped to the basins at this particular project. Generally, any request to do so would have been verbal. He was not on site when the roadway was being paved, but he did a visual inspection of the job after completion.

In his supporting affidavit, Montecalvo avers that Montecalvo was not responsible for the installation of drainage grates at this project, and that, pursuant to the direction of Pulte Homes-Long Island, Montecalvo did not apply the final asphalt top coat at the project until after January 22, 2006, including that which was applied to Louden Loop.

Based upon the foregoing, it is determined that Montecalvo Paving Corp. has demonstrated prima facie entitlement to summary judgment dismissing the complaint and any cross claims asserted against him. Montecalvo did not have to return for repair work after the job was completed. The job was inspected by the Town of Brookhaven which gave final approval and issued a certificate of completion for the project phase. Montecalvo testified that Pulte does not pay unless the Town inspects and signs off on the work, and that he was paid in full for the job. He received nothing in writing, but stated that it is standard procedure to get a verbal sign-off, as per the builder. He received no complaints from the Town of Brookhaven or any other entity concerning the paving performed at the site. In opposing this motion, the plaintiff failed to raise a factual issue to preclude summary judgment from being granted to Montecalvo. There have been no evidentiary submissions by the plaintiff demonstrating that Montecalvo failed to perform pursuant to his agreement with Pulte Homes; otherwise departed from that which was required pursuant to the agreement with Pulte Homes or the requirements by the Town of Brookhaven, or that it caused or created a defect, or performed in a manner other than that which was required pursuant to the contract with Pulte Homes.

Accordingly, that part of motion (009) by Montecalvo Paving Corp. for summary judgment dismissing the complaint and all cross claims asserted against it is granted with prejudice.

Dated: February 10, 2012

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

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