SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

ANTHONY A. CAPETOLA,

Plaintiffs,

-against-

MOTION SEQ. NO.: 001, 002
MOTION DATE: 1/17/12

COUNTY OF NASSAU and NASSAU COUNTY DEPARTMENT OF PARKS, RECREATION AND MUSEUMS,

INDEX NO.: 13945/08

Defendants.

The following papers having been read on the motion (numbered 1-7):

Notice of Motion Seq. No. 001.....1
Notice of Motion for Summary Judgment Seq. No. 002.....2
Affirmation in Opposition.....3
Defendants Expert's Affidavit.....4
Affirmation in Opposition.....5
Reply Affirmation.....6
Reply Affirmation.....7

This motion by the plaintiff Anthony A. Capetola for an order pursuant to CPLR 3101, 3124, and 3126 striking the defendants County of Nassau and Nassau County Department of Parks, Recreation and Museums' ("County") Answer or ordering them to provide outstanding discovery is determined as provided herein.

This motion by the defendant County of Nassau for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint against it is determined as provided herein.

The plaintiff in this action seeks to recover damages for personal injuries he allegedly suffered as the result of his fall on property owned by the County, more specifically, a defective blacktop, walkway, curb, parking lot and/or drywell drain 70-75 feet south of the circular driveway entrance to "The Carltun" a/k/a "Carltun on the Park" located in Eisenhower Park in East Meadow, New York at approximately 8:30 PM on February 27, 2008.

The plaintiff seeks sanctions based upon the County's failure to provide discovery or at least production thereof. More specifically, he seeks post-event repair records, if any, as well as copies of any and all records relating to any repair, maintenance, inspection, modification, renovation, construction and/or repair work performed by the County of Nassau or the Nassau County Department of Public Works at the subject premises for ten years preceding his accident up to and including the present date.

The County seeks summary judgment dismissing the complaint based upon: the lack of prior written notice (Nassau County Administrative Code § 12-4.0[e]) as well as the lack of evidence that it caused the condition via a recent repair or that it had constructive notice of the defect; plaintiff's assumption of the risk; and, the trivial, open and obvious nature of the defect that caused the plaintiff's fall.

In view of the fact that the plaintiff's accident occurred in February at 8:30 PM at which time it was dark out, the doctrine of "open and obvious" does not apply. In addition, the "doctrine of assumption of the risk" defense has not been plead and will not be considered. Charnovesky v City of New York, 283 AD2d 385 (2nd Dept 2001), lv den., 96 NY2d 720 (2001); see also, Green v City of New York, 308 AD2d 408 (1st Dept 2003), lv den., 1 NY3d 505 (2004). In any event, it would not apply here. See, Trupia ex rel. Trupia v Lake George Central School Dist., 14 NY3d 392 (2010). While that doctrine is of enormous value with respect to athletic and recreative activities, it nevertheless must be "closely circumscribed" outside of this limited context so as not to seriously undermine and displace the doctrine of comparative causation. Trupia ex rel. Trupia v Lake George Central School District, supra, at p. 395-396, citing CPLR 1411; Arbegast v Board of Educ. of South New Berlin Cent. School, 65 NY2d 161 (1985).

General Municipal Law § 50-e(4) provides that liability may not be imposed upon a municipality for "the defective unsafe, dangerous or obstructed condition of any street, highway, bridge, culvert, sidewalk or crosswalk or the existence of snow or ice thereon . . ." absent notice, if required. Pursuant to Nassau County Administrative Code § 12-4.0(e), no civil action may be maintained against the County for injuries sustained by reason of, inter alia, a sidewalk, street or parking field defect "unless written notice of such defect was 'made in writing by certified or registered mail directed to the Office of the County Attorney, One West Street, Mineola, New York, 11501.' " Denney v County of Nassau, __ AD3d __, 2012 WL 833204 (2nd Dept 2012), quoting Nassau County Administrative Code § 12-4.0(e). "Prior written notice provisions are always strictly construed and,

absent prior written notice of a dangerous or defective condition where a written notice statute is in effect, a municipality cannot be held liable for injuries." Vardoulias v County of Nassau, 84 AD3d 787, 788 (2nd Dept 2011) lv den., 17 NY3d 711 (2011), Amabile v City of Buffalo, 93 NY2d 471, 474 (1999). Furthermore, "[a]ctual notice is not an exception to the prior written notice requirement." See, Harvey v Moneteforte, 292 AD2d 420 (2nd Dept 2002). There are however two exceptions to this rule, i.e., "where the locality created the defect or hazard through an affirmative act of negligence and 'where a special use' confers a special benefit upon the locality." Amabile v City of Buffalo, 93NY3 471, 474. "[T]he affirmative negligence exception is 'limited to work by the [municipality] that immediately results in the existence of a dangerous condition.' " Yarborough v City of New York, supra, at p. 728, citing Oboler v City of New York, 8 NY3d 888, 889 (2007), 27 Misc 3d 1201(A) (Supreme Court Nassau County 2010).

Pursuant to the affidavit of Veronica Cox of the Bureau of Claims and Investigations of the Office of the Nassau County Attorney and the testimony of Donald Lind, Supervisor of Eisenhower Park at the time of the plaintiff's accident, the County has established that it did not have prior written notice of the defective condition which is alleged to have caused the plaintiff's fall. See Moxey v County of Westchester, 63 AD3d 1124 (2nd Dept 2009); see also, Monteleone v Incorporated Village of Floral Park, 74 NY2d 917 (1986). Where, like here, a municipality establishes that it lacked prior written notice, the burden shifts to the plaintiff to demonstrate the applicability of one of the two recognized exceptions to the rule. Yarborough v City of New York, 10 NY3d 726, 728 (2008), citing Amabile v City of Buffalo, supra, at p. 474.

Having reviewed photographs of the accident site, the plaintiff's expert physical engineer Daniel W. Haines opines, inter alia, that: "the hole, crack and deformation of the asphalt are the result of improper backfill and restoration at the time of a prior repair [and] that the dangerous roadway condition is a result of the County of Nassau's failure to properly inspect and maintain the street and during a restoration project, to properly backfill within good and accepted industry standards, causing settling and separation." He attests:

> [h]is inspection of the photographs reveals that the pavement around the hole is significantly depressed supporting that the subsurface was not properly backfilled and/or compacted. Water accumulating in the depression and seeping into crack between the

> layers of asphalt served to deteriorate the asphalt in cold weather. The hole in question developed in the same manner, from accumulations of water within the depression, seeping into the roadway separation and deteriorating the asphalt over time with cold weather and pressure. The failure to properly backfill and compact the street created a severely deteriorated roadway surface **over time** (emphasis added).

Mr. Haines' opinion is that the plaintiff has established the existence of an issue of fact as to whether the County's affirmative act of negligence in its design and construction of the parking field created the dangerous condition which proximately caused his fall. While the plaintiff's expert opines that the defect evolved "overtime" as a result of the County's negligent work at the site and is traceable to the County's negligence, he has not opined that the County's work immediately resulted in the existence of the dangerous condition, which is required. Plaintiff cannot demonstrate that the un-level condition depicted in the photographs was the direct or immediate result of an affirmative act (as opposed to the passage of time; e.g., from the deterioration of the asphalt surrounding the concrete patch). See Yarborough v City of New York, 10 NY3d 726, 728; Oboler v City of New York, 8 NY 3d 888, 889; Smith v Village of Rockville Centre, 57 AD3d 649.

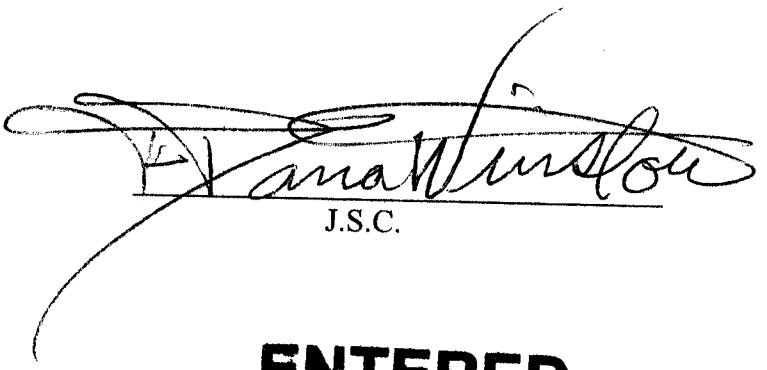
The evidence submitted is too scant and tenuous to permit an inference of affirmative negligence. There are no work orders, records, logs, invoices, or witnesses with personal knowledge. Troubling to the Court is the possibility that the defendant may be, in some way, responsible for the dearth of information regarding the creation of the condition. The Court cannot, however, rely on speculation to deny summary judgment.

Since the plaintiff has not met his burden, the expert affidavit of licensed Professional Engineer Peter Pomeranz submitted by the County need not be considered, except as supportive of defendant's position. Mr. Pomeranz attests that his review of the site on September 8, 2011, as well as photographs thereof, lead him to conclude that the catch basin has been there for at least 30 or 40 years and that the wear and tear of vehicular traffic over a long period of time caused the condition of the site. In any event, conspicuously absent from his affidavit is any reference to whether any work was done by the County or on the County's behalf at or near the time of the plaintiff's accident. In fact, quite to the contrary it belies such an assertion.

In view of the foregoing, the defendants' motion for summary judgment dismissing the complaint is **granted** and the plaintiff's motion is **denied** as moot. The court notes that while the County has not produced pre-event repair records either, it has represented that none is known to exist at this time.

This constitutes the Order of the Court.

Dated: March 28, 2012



J.S.C.