**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU**

**PRESENT: HON. ANTHONY L. PARGA**
**JUSTICE**

----------X **PART 6**

CARL RAUSCHENBACH,

INDEX NO.: 10975/10

Plaintiff,

-against-

MOTION DATE: 09/25/13
SEQUENCE NO.: 02, 03

COUNTY OF NASSAU and TOWN OF HEMPSTEAD,

Defendants.

----------X

Notice of Motion, Affs & Exs..... 1
Affirmation in Opposition & Exs..... 2
Reply Affirmation & Exs..... 3
Notice of Cross-Motion, Affs & Exs..... 4
Affirmation in Opposition & Exs..... 5
Affirmation in Opposition & Exs..... 6
Reply Affirmation & Exs..... 7

---

Upon the foregoing papers, the motion by defendant, County of Nassau, for summary judgment, pursuant to CPLR §3212, is granted. The cross-motion by defendant, Town of Hempstead, for summary judgment, pursuant to CPLR §3212, is denied as untimely.

This is an action for personal injuries allegedly sustained by the plaintiff as a result of an accident which occurred on Lido Boulevard, west of the Loop Parkway, while the plaintiff was riding his bicycle. It is alleged that plaintiff was caused to fall from his bicycle and sustain injuries after striking a wedge-shaped pot hole in Lido Boulevard.

Defendant County of Nassau (hereinafter County) moves for summary judgment on the grounds that it did not create the alleged defect in the roadway nor did it have constructive notice of the defect. In support of its motion, defendant County submits, *inter alia*, the plaintiff's 50H hearing transcript, the plaintiff's deposition transcript, the deposition transcript of County witness, Thomas Caliguri, Jr., photographs, an affidavit of its expert, George Volkman, and an

affidavit of County employee with the Department of Public Works, Donna Boyle, who is responsible for maintaining the Map of Nassau County Roads.

The County's witness, Thomas Caliguri, Jr. testified that he has been a highway supervisor for 12 years. He admitted that the area of Lido Boulevard in the vicinity of the accident in under the jurisdiction of the County. Mr. Caliguri testified that he checks the roadways every day of the week and his duties including filling pot holes. Mr. Caliguri testified that he travels Lido Boulevard every day and looks for debris, potholes, hazards, and obstructions. Mr. Caliguri testified that he first saw the pothole that caused plaintiff's accident on June 2, 2009, a few days after plaintiff's accident. He also testified that the County patched the pothole on the same day. Mr. Caliguri had been on vacation the week before plaintiff's accident, but testified that he never saw the pothole at issue prior to June 2, 2009. In addition, he searched the records of the Department of Public Works and did not find any prior complaints, written or otherwise, about the pothole in question. Mr. Caliguri also testified that the County had performed some repair work on Lido Boulevard in December 2008 and January 2009, five months prior to plaintiff's accident.

George Volkman, an expert in the field of engineering who was hired by the County, submits an affidavit in which he attests, *inter alia*, that the pothole which caused plaintiff's accident was created rapidly as the result of spalling. He also opined that a contributing factor to the damage to the pavement was the malfunction or faulty operation of the public water facilities underlying the pavement, which are maintained by defendant Town of Hempstead.

Susan Boyle, a civil engineer III with the County Department of Public Works, also submits an affidavit in which she attests that Nassau County did not build that portion of Lido Boulevard which encompasses the subject location.

The County contends that it did not create the alleged defective condition and that it did not have prior written notice, constructive notice, or actual notice of the alleged defective condition. The County established that its employees traveled Lido Boulevard daily searching for defects, that Mr. Caliguri searched Lido Boulevard prior to his vacation one week before plaintiff's accident and did not see the pothole at issue, and that the County did not cause or create the condition. Contrary to plaintiff's contentions in opposition, defendant County has

established a prima facie showing of entitlement to summary judgment. (*Moxey v. County of Westchester*, 63 A.D.3d 1124, 883 N.Y.S.2d 80 (2d Dept. 2009)). "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." (*Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 501 N.Y.S.2d 646 (1986); *Loughren v. County of Ulster*, 75 A.D.3d 976, 906 N.Y.S.2d 384 (3d Dept. 2010)). Further, a municipality is only liable for affirmatively creating a defective condition if the work performed "immediately results in the existence of a dangerous condition." (*Yarborough v. City of New York*, 10 N.Y.3d 726, 853 N.Y.S.2d 261 (2008); *Oboler v. City of New York*, 8 N.Y.2d 888, 832 N.Y.S.2d 871 (2007)).

In opposition, plaintiff submits, *inter alia*, the affidavit of professional engineer, Thomas R. Parisi, P.E., in which Mr. Parisi opines that the wedge shaped pothole which caused the plaintiff's fall existed for at least four months prior to the plaintiff's accident. He also opines that "the underlying cause for the pothole existed from the first day when the roadway over the water main pipes was cast, since it most likely was cast over the water main trench which was not properly compacted and resulted in and allowed transverse cracks to develop." Mr. Parisi further opines that a failure to seal the transverse cracks allowed water infiltration which causes spalling to develop. Plaintiff contends that the County did have constructive notice of the defect at issue, that the records of the County's prior repairs to Lido Boulevard don't specifically identify which potholes were filled prior to plaintiff's accident, and that the County's work records do not reflect the repair made to the wedge-shaped pothole after the accident.

Contrary to plaintiff's contentions, none of the evidence submitted by the plaintiff demonstrates that the County had constructive notice of the wedge-shaped pothole at issue or creates a question of fact sufficient to defeat the County's prima facie showing of entitlement to summary judgment. The affidavit of Mr. Parisis fails to raise a question of fact as to whether the County had constructive notice of the accident, and Mr. Parisi's conclusory statement that the pothole existed for at least four months prior to the accident is insufficient to raise a question of fact. Mr. Parisi fails to offer any basis for this opinion, and the google earth photos, which are not in admissible form, also fail to demonstrate that the condition which is alleged to have caused

plaintiff's accident existed for four months prior to plaintiff's accident or that the County had constructive notice of the defect. An expert affidavit which is speculative and conclusory is insufficient to raise genuine issued of material fact. (Ioffe v. Hampshire House, 21 A.D.3d 930, 800 N.Y.S.2d 757 (2d Dept. 2005); Robinson v. Trade Link Am., 30 A.D.3d 616, 833 N.Y.S.2d 243 (2d Dept. 2007); *Aparicio v. Goldberg*, 94 A.D.3d 502, 942 N.Y.S.2d 58 (1st Dept. 2012); *Filanowicz v. Guarino*, 27 A.D.2d 666, 276 N.Y.S.2d 656 (2d Dept. 1967)). "Mere surmise, suspicion, speculation, and conjecture are insufficient to defeat a motion for summary judgment." (*Fredette v. Town of Southampton*, 95 A.D.3d 939, 943 N.Y.S.2d 760 (2d Dept. 2012); *Grassi & Co., CPAs, P.C. v. Janover Rubinroit, LLC*, 82 A.D.3d 700, 918 N.Y.S.2d 503 (2d Dept. 2011)).

Accordingly, the County's motion for summary judgment is granted, and plaintiff's action, together with any cross-claims, is hereby dismissed as against defendant County only.

Turning next to defendant Town of Hempstead's cross-motion for summary judgment, same shall not be considered by the Court as it was not timely made. The Town of Hempstead (hereinafter "Town") cross-moved for summary judgment on August 12, 2013, the date of submission of the County's motion, which thereafter had to adjourned accordingly. The plaintiff's note of issue was filed on January 4, 2013 and the certification order expressly states that: "Motions for summary judgment must be filed within (60) days of the filing of the Note of Issue...." Defendant County filed its motion on March 1, 2013 and the Town subsequently requested five (5) adjournments of the County's motion, over a five month period, prior to filing the within cross-motion seven months after the note of issue filing. The Town offers absolutely no explanation for the late filing and has failed to offer any cause, let alone good cause, for the delay in bringing its summary judgment motion.

In *Brill v. City of New York*, the Court of Appeals held that CPLR §3212(a) "requires a showing of good cause for the delay in making the motion - a satisfactory explanation for the untimeliness - rather than simply permitting meritorious, non-prejudicial filings, however tardy." (*Brill v. City of New York*, 2 N.Y.3d 648, 814 N.E.2d 431 (2004); *Andrea v. Arnone*, 5 N.Y,3d 514, 806 N.Y.S. 453 (2005); *Micelli v. State Farm Mutual Auto. Ins. Co.*, 3 N.Y.3d N.E.2d 995 (2004); *Brewi-Bijoux v. City of New York*, 73 A.D.3d 1112, 900 N.Y.S.2d 885 (2d Dept. 2010); *Mayorquin v. AP Development*, 92 A.D.3d 849, 939 N.Y.S.2d 129 (2d Dept. 2012); *Deberry-*

*Hall v. County of Nassau*, 88 A.D.3d 634, 930 N.Y.S.2d 266 (2d Dept. 2011); *Finger v. Saal*, 56 A.D.3d 606, 870 N.Y.S.2d 32 (2d Dept. 2008)). The Court of Appeals also held that "no excuse at all or a perfunctory excuse, cannot be 'good cause.'" (*Brill v. City of New York*, 2 N.Y.3d 648, 814 N.E.2d 431 (2004)). Since defendant Town failed to move for summary judgment within the sixty (60) days called for within the certification order and has offered no reason for failing to timely file its motion, this Court is without discretion to reach the merits of the motion for summary judgment. (*Mayorquin v. AP Development*, 92 A.D.3d 849, 939 N.Y.S.2d 129 (2d Dept. 2012); *Brill v. City of New York*, 2 N.Y.3d 648, 814 N.E.2d 431 (2004)). While the court may consider an untimely cross-motion where a timely motion for summary judgment was made on nearly identical grounds, the Town's motion is not made on nearly identical grounds, and this Court will not countenance the Town's repeated delay in the filing of its cross-motion without excuse aside from its own dormancy, apathy, and/or incompetence. (*See, Grande v. Peteroy*, 39 A.D.3d 590, 833 N.Y.S.2d 615 (2d Dept. 2007); *Perfito v. Einhorn*, 62 A.D.3d 846, 879 N.Y.S.2d 545 (2d Dept. 2009)).

Accordingly, the Town's motion for summary judgment is denied in its entirety.

This constitutes the decision and Order of this Court. Any request for relief not expressly granted herein is denied.

Dated: November 19, 2013

Anthony L. Parga, J.S.C.

Cc: Sullivan Papain Block
McGrath & Cannavo, P.C.
1140 Franklin Avenue
Garden City, NY 11530

Nassau County Attorney's Office
One West Street
Mineola, NY 11501

Joseph J. Ra, Town Attorney
Attn: Donald Lohr
Town of Hempstead
Hempstead Town Hall
Hempstead, NY 11550