| **O'Brien v A.L.A.C. Contr. Corp.** |
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| 2015 NY Slip Op 30552(U) |
| April 10, 2015 |
| Supreme Court, Suffolk County |
| Docket Number: 11-23793 |
| Judge: W. Gerard Asher |
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[* 1]

SHORT FORM ORDER

INDEX No. 11-23793
CAL. No. 14-01263OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

***PRESENT:***

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 11-18-14 (#002)
MOTION DATE 12-15-14 (#003 & #004)
ADJ. DATE 1-20-15
Mot. Seq. # 002 - MG
# 003 - MotD
# 004 - MD

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TIMOTHY O'BRIEN,

Plaintiff,

- against -

A.L.A.C. CONTRACTING CORP., TOWN OF BROOKHAVEN and M.E. TOT, INC.,

Defendants.

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M.E. TOT, INC.,

Third-Party Plaintiff,

- against -

COUNTY OF SUFFOLK,

Third-Party Defendant.

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Upon the following papers numbered 1 to 129 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-12, 13-42, 43-57 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 58-60, 61-77,78-84, 85-89, 90-91, 92-93, 94-97, 98-104, 105-106 ; Replying Affidavits and supporting papers 107-108, 109-110, 111-112, 113-114, 115-116, 117-118, 119-120, 121-122, 123-125, 126-127, 128-129 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that these motions are consolidated for the purposes of this determination; and it is further

***ORDERED*** that the motion by defendant Town of Brookhaven ("Town") for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and any cross-claims insofar as asserted against it is granted; and it is further

***ORDERED*** that the motion by defendant/third-party plaintiff M. E. Tot, Inc. ("Tot") for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and any cross-claims insofar as asserted against it or, alternatively, granting conditional judgment over on its cross-claims against defendants ALAC and the Town and on its third-party complaint against third-party defendant County of Suffolk is granted to the extent that defendant Tot is granted a conditional order of liability over and against the defendant ALAC on its cross claims and on its third-party complaint against the third-party defendant County; and it is further

***ORDERED*** that the motion by third-party defendant County of Suffolk ("County") for an order pursuant to CPLR 3212 granting summary judgment dismissing the third-party plaintiffs complaint and all cross and counter claims insofar as asserted against it is denied.

This an action for damages for personal injuries allegedly suffered by the plaintiff as a result of an accident which occurred on October 18, 2010. It is alleged that on that date, at approximately 12:30 p.m., in front of the premises known as 470 East Main Street, Patchogue, in the Town of Brookhaven, the plaintiff fell after he stepped on an uneven portion of sidewalk, where the sidewalk meets the adjacent parking lot asphalt.

Defendant Town now moves for summary judgment dismissing the complaint, and all cross-claims and counterclaims asserted against it, on a number of grounds, including a lack of prior written notice. In support of the motion, it submits, *inter alia*, its attorney's affirmation, the pleadings, the transcripts of the 50-h hearing and the depositions of plaintiff, the transcript of deposition of Matthew Boffolias a witness for defendant A.L.A.C. Contracting Corp. ("ALAC."), the transcript of deposition of Stanley Humin as a witness for defendant County, the transcript of deposition of Justin Hipperling as a witness for defendant County, the affidavit of Linda Sullivan, sworn to September 19, 2014, and the affidavit Marie Angelone, sworn to September 29, 2014.

Defendant/third party plaintiff Tot also moves for summary judgment dismissing the complaint and all cross-claims and counterclaims asserted against it, or alternatively, granting conditional judgment over on its cross-claims against defendants ALAC and the Town and on its third-party complaint against third-party defendant County. In support of the motion, it submits, *inter alia*, its attorney's affirmation, the pleadings, the transcripts of the 50-h hearing and the depositions of plaintiff, the transcript of

deposition of Matthew Boffolias a witness for defendant ALAC Contracting Corp., the transcript of deposition of Zigmund Flom as a witness for defendant/third-party plaintiff Tot, the transcript of deposition of Stanley Humin as a witness for defendant County, four photographs, a copy of a contract between defendant ALAC and third-party defendant County dated March 31, 2009, and a copy of a letter dated April 18 2011 from William Hillman, Chief Engineer of the County to Anthony Labriola, vice-president of ALAC.

Third-party defendant County also moves for summary judgment dismissing the third-party complaint and all cross-claims and counterclaims against it on a number of grounds, including a lack of prior written notice. In support of the motion, it submits, *inter alia*, its attorney's affirmation, the pleadings, the transcripts of the 50-h hearing and the depositions of plaintiff, the transcript of deposition of Matthew Boffolias a witness for defendant ALAC, the transcript of deposition of Stanley Humin as a witness for defendant County, the transcript of deposition of Justin Hipperling as a witness for defendant County, a copy of Stanley Humin's work diary and the affidavit Timothy Laube, sworn to November 10, 2014.

Plaintiff has filed attorney's affirmations in opposition to each of the motions. Plaintiff has also submitted the inspection report/affidavit of Richard Robbins, R.A., a consulting architect, as well as his affidavit, sworn to on January 5, 2013. The defendants and the third-party defendant have all filed attorney affirmations in opposition to the other parties motions.

Plaintiff testified that on the date of the accident he was walking from his house on Main Street in Patchogue toward the library. He was walking on the sidewalk on the side closest to the stores and he walked close to the side of the sidewalk. Plaintiff claimed that he walked on the edge of the sidewalk because he was terrified of walking close to the street. His left foot was on the sidewalk and part of it was on the side of the sidewalk. While he was walking on the edge of the sidewalk, his foot went down sideways. He fell from the side of the sidewalk onto the blacktop. It was quick and he did not know what was happening. He landed on his right arm and side. His fall was the result of his foot and shoe being on the side of the sidewalk. There were no cracks or bumps in the sidewalk and it was not raised. He did not trip and he was not pushed.

Matthew Boffoli testified as a witness for defendant ALAC. He was employed by ALAC as the project manager for the County Road 80 Project, which included work at 470 East Main Street (the site of the accident), where ALAC was hired to install a five foot sidewalk. The project was performed pursuant to a contract with the Suffolk County Department of Public Works. The sidewalk was ultimately not installed flush with the adjacent parking lot, which was lower than the sidewalk. After installing the sidewalk, ALAC later, at the request of the County, reconstructed a section of the parking lot that was adjacent to the sidewalk. The parking lot was reconstructed to remain lower than the sidewalk. Boffoli and Stanley Humin, the Suffolk County engineer assigned to the project, discussed the issue of the height differential between the sidewalk and parking lot. The conversation occurred before ALAC finished the blacktop. The County wanted the parking lot lower because they were concerned about vehicles backing onto the newly constructed sidewalk and injuring a pedestrian. Boffoli noted on his September 1, 2010 daily report that he left a three inch reveal (height differential) of the sidewalk to deter vehicles from backing onto the sidewalk. He stated that in his opinion the lowering of the parking

lot in relation to the sidewalk did not create a hazard for persons on the sidewalk.

Stanley Humin testified on behalf of the County. He was employed as a junior civil engineer by the County, and he was assigned to the project on Montauk Highway (County Route 80) which included the area in front of 470 East Main Street in Patchogue in 2010. He would visit the project several times a week to review notes, inspection reports, and consult with the resident engineer about the day to day operations. He stated that there was a height differential between the edge of the sidewalk and the parking lot. This was done intentionally to shed water from the parking lot into drains and to keep cars from backing up from the parking lot onto the sidewalk. The height differential or reveal was not something that a contractor could do on its own accord, and he acknowledged that ALAC did not decide on its own to create a four inch reveal. With regard to the decision involving ALAC, he did speak to Matt Boffoli at ALAC about his concern that vehicles would back over the sidewalk and break it and, and that pedestrians were unprotected because it was such a narrow parking lot. It was as a result of this conversation that ALAC did the reveal.

Zigmund Flom testified as a witness for defendant Tot. He is the president of Tot, which owns a strip of stores at the 470 East Main Street location. A new sidewalk was constructed outside of the stores in 2010. When the sidewalk was first constructed, he thought it was about four and a half inches higher than the parking lot. He contacted the Town of Brookhaven to find out who was in charge of the project, and was informed that it was the Suffolk County Department of Public Works. After complaints from him about a water drainage issue and the height differential between the sidewalk and parking lot, additional work was done on the parking lot. Parts of the parking lot were brought up to meet the sidewalk. When it was completed the difference, in his opinion, was less than an inch. However, upon being shown pictures of the sidewalk and parking lot after the work was completed, he stated the height differential to be one and a half inches to one and three quarters inches.

Plaintiff also submitted the inspection report of Richard Robbins, R.A., a consulting architect, as well as his affidavit. In his inspection, he notes that the sidewalk is constructed of concrete, the parking lot of asphalt. The surface of the parking lot is one and three quarters inches lower than the parking lot. In his opinion, as one traverses the sidewalk, the difference in elevation between the sidewalk and parking lot is not apparent. The photographs included indicate that the black color of the asphalt carries over to the edge of the sidewalk, obscuring the border between the two. It is alleged that this dangerous condition is consistent along the entire length of the sidewalk. He opines that the plaintiff's fall and ensuing injuries were caused by a defective, unsafe and hazardous condition of a difference in elevation between the sidewalk and parking lot which is not apparent to pedestrians. He also states that the condition violates the NY State Property Management Codes and the nationally recognized American Standard Practice for Safe Walking Surfaces (ASTM F 1637-95) by the American Society for Testing and Materials.

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 (***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [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. Med. Ctr.***, *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, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

The defendant Town has made a prima facie showing of its entitlement to judgment as a matter of law by demonstrating that it lacked prior written notice of the allegedly defective condition that caused the subject accident.

> Section 84.1 A of the Brookhaven Town Code states as follows:
> Prior written notice required. No civil action shall be commenced against the Town of Brookhaven or the Superintendent of Highways for damages or injuries to persons or property sustained by reason of the defective, out-of-repair, unsafe, dangerous or obstructed condition of any highway, street, sidewalk...of the Town of Brookhaven, unless, previous to the occurrence resulting in such damages or injuries, written notice of such defective, out-of-repair, unsafe, dangerous or obstructed condition, specifying the particular place and location was actually given to the Town Clerk or Town Superintendent of Highways and there was a failure or neglect within a reasonable time, after the giving of such notice, to repair or remove the defect, danger or obstruction complained of.

"A municipality that has adopted a prior written notice law cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies" (***Barnes v Incorporated Vil. of Port Jefferson***, 120 AD3d 528, 529, 990 NYS2d 841[ 2d Dept 2014]; ***Carlucci v Village of Scarsdale***, 104 AD3d 797, 961 NYS2d 318 [2d Dept 2013]; ***Wilkie v Town of Huntington***, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006], citing ***Amabile v City of Buffalo,*** 93 NY2d 471, 693 NYS2d 77 [1999]; ***Lopez v G&J Rudolph***, 20 AD3d 511, 799 NYS2d 254 [2d Dept 2005]). "The only two recognized exceptions to a prior written notice requirement are the municipality's affirmative creation of a defect or where the defect is created by the municipality's special use of the property" (***Gonzalez v Town of Hempstead***, 124 AD3d 719, 2 NYS3d 527 [2d Dept 2015]; ***Forbes v City of New York***, 85 AD3d 1106, 1107, 926 NYS2d 309 [2d Dept 2011]). The testimony and affidavit of Marie Angelone, as well as the affidavit of Linda Sullivan establish that there was no prior written notice filed with either the town clerk's office or with the highway department, as required by the Town ordinance.

In response, none of the other parties herein has raised an issue of fact with regard to the Town's motion. The claim that the Town is potentially liable based upon its duty to maintain the sidewalk pursuant to Highway Law §140 fails. The alleged negligence is a result of the height differential between the sidewalk and the parking lot, both of which were built, at the County's direction, by

defendant ALAC. There is no claim that the sidewalk is in disrepair. There is also no evidence that the County informed the Town that the sidewalk construction project had been completed, which could have triggered the Town's duty to maintain under Highway Law §140. Furthermore, as indicated by the letter dated April 18, 2011 from William Hillman, Chief Engineer of the County to Anthony Labriola, vice-president of ALAC, the County did not accept the CR 80 project as complete until April 6, 2011. Therefore, the County was still in control of the project at the time the accident occurred on October 18, 2010. Defendant/third-party plaintiff Tot also raises the claim that the Town's three year search of it records for prior written notice is insufficient. This is simply unsupported by the case law (*see* ***Pallotta v City of New York***, 121 AD3d 656, 993 NYS2d 726 [2d Dept 2014] (a search of the relevant records covering the period of two years prior to the date of the accident sufficient to establish prima facie entitlement to summary judgment); ***Foley v County of Suffolk***, 80 AD3d 658, 660, 915 NYS2d 157 [2d Dept 2011](a search of Brookhaven Town records for three years prior to date of the accident sufficient to establish Town's prima facie entitlement to summary judgment). Defendant Tot also ignores the simple fact that the accident occurred approximately seven weeks after the construction of the new sidewalk walk was completed. Accordingly, the Town is entitled to summary judgment dismissing the complaint and all cross claims asserted against it.

A contractor may be liable for an affirmative act of negligence that results in the creation of a dangerous condition upon a public street or sidewalk (***Santelises v Town of Huntington***, 124 AD3d 863, 865, 2 NYS3d 574 [2d Dept 2015]; ***Reyderman v Meyer Berfond Trust # 1***, 90 AD3d 633, 935 NYS2d 28 [2d Dept 2011]). It is uncontradicted that the defendant ALAC, pursuant to its contract with the County designed and built the sidewalk and parking lot at the behest and direction of the County. The Court further finds that the plaintiff through the submitted testimony and his expert's affidavit, has raised an issue of fact with regard to whether or not these defendants are responsible for plaintiff's injuries resulting from a negligent design and/or construction of the sidewalk and parking lot.

It is axiomatic that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005]). As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (*see* ***Dugue v 1818 Newkirk Mgt. Corp.***, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]; ***Millman v Citibank, N.A.***, 216 AD2d 278, 627 NYS2d 451 [2d Dept 1995]; *see also* ***Butler v Rafferty***, 100 NY2d 265, 762 NYS2d 567 [2d Dept 2003]).

It has been alleged by the defendants that the condition of the sidewalk and parking lot was not dangerous or defective. A property owner may not be held liable in damages for trivial defects on a sidewalk, not constituting a trap or a nuisance, over which a pedestrian might merely stumble, stub a toe, or trip (*see* ***Outlaw v Citibank, N.A.***, 35 AD3d 564, 826 NYS2d 642 [2d Dept 2006]; ***Hargrove v Baltic Estates***, 278 AD2d 278, 717 NYS2d 320 [2d Dept 2000]). In determining whether a defect is trivial, a court must examine all of the facts presented, including the "width, depth, elevation, irregularity and appearance of the defect along with time, place and circumstance of the injury" (***Trincere v County of Suffolk***, 90 NY2d 976, 665 NYS2d 615 [1997] *quoting* ***Caldwell v Village of Is. Park***, 304 NY 268, 107 NE2d 441 [1952]; ***Zalkin v City of New York***, 36 AD3d 801, 828 NYS2d 485 [2d Dept 2007]). Generally, the issue of whether a dangerous or defective condition exists depends on the particular facts

of each case, and is properly a question of fact for the jury (*see* ***Taussig v Luxury Cars of Smtihtown, Inc.***, 31 AD3d 533 818 NYS2d 593 [2d Dept 2006]; ***Trincere v County of Suffolk***, *supra*). Here, as noted above, there is an issue of fact as to the creation of a dangerous condition which is best left to a jury as the finder of fact.

Defendant/third-party plaintiff Tot, the owner of the parking lot, now moves for summary judgment dismissing the complaint and all cross-claims and counterclaims asserted against it, or alternatively, granting conditional judgment over its cross-claims against defendants ALAC and Town and on its third-party complaint against third-party defendant County.

As already noted, the Town is entitled to summary judgment dismissing the complaint and any cross-claims insofar as asserted against it. Tot alleges, based on the record before the Court, that while it was aware of all the work being done to the sidewalk and parking lot, the County, through its contractor, controlled the design and construction of the project and created the condition which allegedly caused the plaintiff's fall. A court may render a conditional judgment on the issue of indemnity pending determination of the primary action in order that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed provided that there are no issues of fact concerning the indemnitee's active negligence (*see* ***Gil v Manufacturers Hanover Trust Co.***, 39 AD3d 703; 832 NYS2d 455 [2d Dept 2007]; ***State of New York v Travelers Prop. Cas. Ins. Co.***, 280 AD2d 756;720 NYS2d 589 [3d Dept 2001]).

The key element of a cause of action for common-law indemnification is not a duty running from the indemnitor to the injured party, but rather, a separate duty owed the indemnitee by the indemnitor (*see* ***Raquet v Braun***, 90 NY2d 177, 183, 659 NYS2d 237 [1997]; ***Lovino, Inc. v Lavallee Law Offs.***, 96 AD3d 909, 946 NYS2d 875). " 'Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine' " (***Henderson v Waldbaums***, 149 AD2d 461, 462, 539 NYS2d 795, quoting ***Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.***, 109 AD2d 449, 453, 492 NYS2d 371; *see* ***Metadijia Atanasoki v Braha Industries, Inc.***, 124 AD3d 705, 2 NYS3d 524 [2d Dept 2015]; ***Desena v North Shore Hebrew Academy***, 119 AD3d 631, 989 NYS2d 505 [2d Dept 2014]; ***Konsky v Escada Hair Salon, Inc.***, 113 AD3d 656, 978 NYS2d 342 [2d Dept 2014]).

Indemnity "may be based upon an express contract, but more commonly the indemnity obligation is implied ... based upon the law's notion of what is fair and proper as between the parties" (***Mas v Two Bridges Assoc.***, 75 NY2d at 690, 555 NYS2d 669 [1990]; *see* ***Lovino, Inc. v Lavallee Law Offs.***, *supra*). In the absence of an express contract for indemnity, the third-party plaintiffs must show that they would be compelled to respond in damages for the wrongful act of another, as when a party is held vicariously liable for another's negligence (*see* ***Jakobleff v Cerrato, Sweeney & Cohn***, 97 AD2d 786, 786–787, 468 NYS2d 894 [2d Dept 1983]).

Based upon the record herein and its total lack of control over the design and construction of the sidewalk and parking lot, defendant Tot is granted a conditional order of liability over and against the defendant ALAC, and on its cross claims and on its third-party complaint against the third-party

defendant County.

The County also moves for summary judgment, alleging lack of prior written notice, that the alleged defect claimed by the plaintiff was not dangerous or defective, that plaintiff was unable to identify the cause of his fall and that the County had no duty to maintain the sidewalk in question.

These claims are easily disposed. "A municipality that has adopted a prior written notice law cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies" (***Barnes v Incorporated Vil. of Port Jefferson***, *supra).* "The only two recognized exceptions to a prior written notice requirement are the municipality's affirmative creation of a defect or where the defect is created by the municipality's special use of the property" (***Gonzalez v Town of Hempstead***, *supra).* The record herein clearly raises an issue of fact as to whether or not the County, through its contractor, defendant ALAC, created the alleged dangerous condition that caused the plaintiff's accident. This Court has already found there to be an issue of fact as to whether a dangerous condition existed (*see* ***Trincere v County of Suffolk***, *supra*). Furthermore, plaintiff, in his deposition testimony, identified the cause of his fall. Finally, it has been established that the County did not accept the CR 80 project as complete until April 6, 2011. Thus the County was still in control of the project at the time the accident occurred on October 18, 2010. In view of the foregoing and the relevant law, the County's motion for summary judgment is denied in all respects.

Dated: April 10, 2015

W. Gerard Asher
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**