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SHORT FORM ORDER

PUBLISH

INDEX No. 12-14541
CAL. No. 15-00968OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 9-29-15 (004)
MOTION DATE 10-17-15 (005)
ADJ. DATE 2-11-16
Mot. Seq. # 004 - MG
005 - MG; CASEDISP

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MATILDE Y. CARRION LA MADRID,

Plaintiff,

- against -

LINDENHURST FIRE DEPARTMENT, INC., INCORPORATED VILLAGE OF LINDENHURST and LUIS CORREA,

Defendants.

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Upon the following papers numbered 1 to 40 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 -12; 20 - 35; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 13 - 14; 15 - 16; 36 - 37 ___; Replying Affidavits and supporting papers 16 - 17; 18 -19; 38 - 40; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED the motions herein are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Luis Correa for summary judgment in his favor dismissing the complaint and the cross claim as asserted against him is granted; and it is further

ORDERED that the motion by defendant Lindenhurst Fire Department, Inc. for summary judgment in its favor dismissing the complaint as asserted against it and defendant Luis Correa's cross claims is granted.

Plaintiff Matilde Y. Carrion La Madrid commenced this action to recover damages for personal injuries, including a fractured left arm, she allegedly suffered on September 12, 2011, at 250 North Fulton Avenue in Lindenhurst, New York after a Lindenhurst Fire Department gurney she was lying upon, while being transported to the hospital, overturned. Plaintiff alleges that the homeowner and her landlord, defendant Luis Correa, was negligent in the maintenance of his driveway and that the defendant Lindenhurst Fire Department was grossly negligent in the operation and control of the stretcher she was placed upon to be transported to the hospital. Defendant Luis Correa cross-claimed against defendant Lindenhurst Fire Department for negligence, contribution, and indemnity. Lindenhurst Fire Department cross-claimed against defendant Luis Correa for common law indemnity. Plaintiff has discontinued her action against the Incorporated Village of Lindenhurst. Issue has been joined, discovery has been completed and a note of issue was filed on May 19, 2015.

Defendant Luis Correa now moves for summary judgment in his favor dismissing the complaint as asserted against him and the Lindenhurst Fire Department's cross claim, contending that he did not create or have actual or constructive notice of the alleged dangerous condition of his driveway. In support of the motion he submits, among other things, the pleadings, an incident report, various photographs, his own deposition transcript and the deposition transcripts of plaintiff, Frank Panzarella, Dana Palermo, and Christopher Aivazian. In opposition, plaintiff and defendant Lindenhurst Fire Department submit affirmations of counsel.

Defendant Lindenhurst Fire Department also moves for summary judgment dismissing the complaint and the homeowner's cross claim against it, asserting it is immune from liability pursuant to New York Public Health Law § 3013 (1), more commonly known as the Good Samaritan Law. In support of the motion, Lindenhurst Fire Department submits the pleadings, various photographs, and the deposition transcripts of plaintiff, Frank Panzarella, Dana Palermo, Christopher Aivazian, and Louis Correa. In opposition, the plaintiff submits an affirmation of counsel.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Milewski v Washington Mut., Inc.***, 88 AD3d 853, 931 NYS2d 336 [2d

Dept 2011]). However, "the owner has no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous" (***Bluth v Bias Yaakov Academy for Girls***, 123 AD3d 866, 866, 999 NYS2d 840 [2d Dept 2014]).

Here, defendant homeowner Louis Correa has met his burden of establishing a prima facie entitlement to summary judgment. Plaintiff testified at her deposition that on September 12, 2011, she had been feeling chest pains and called for an ambulance. Plaintiff testified three paramedics answered the 1:25 a.m. call and arrived at 250 North Fulton Avenue at 1:34 a.m. After the administration of oxygen and the taking of vital signs, plaintiff was placed on a stretcher with wheels. While being transported down the driveway, the stretcher overturned. Plaintiff testified that one of the paramedics "pulled the bottom part by [her] feet very abruptly and the stretcher flipped over." She testified the stretcher tipped over in the middle of the driveway. The lighting that night was fine, and the driveway was illuminated by a light by the door, a street light and a yard light on a post. Plaintiff also testified she rented an upstairs apartment from defendant Correa for about a year prior to the incident. She testified that she had been up and down the driveway everyday for that year and never noticed any problems with the driveway. There were no holes in the driveway, it was flat and she never complained to the landlord about it. She testified, and photographs confirm, that there were no potholes or height differential where the driveway met the road.

Defendant Correa testified at his deposition that he is the owner of the property located at 250 North Fulton Avenue and rented an apartment to plaintiff. His driveway was made of black asphalt and he never performed any work on it. He never noticed a height differential between the end of the driveway and the roadway and noone has ever tripped there. When shown photographs of the driveway, he testified that he sees a differential in the height between the driveway and the road and that "there is a little piece maybe of asphalt is missing there from the picture." He testified never noticed that missing piece prior to his deposition.

Frank Panzarella testified at his deposition he is a volunteer firefighter with the Lindenhurst Fire Department and an advanced emergency medical technician for critical care (EMTCC). His main duty is ambulance rescue calls. He testified he did not notice any problems or defects with the driveway at 250 North Fulton Avenue. He did not see the accident because he was returning a stair chair, used to bring plaintiff downstairs, to the ambulance. He testified he saw the stretcher lying on the ground on the edge of the driveway where the driveway meets the street. He never saw any "rut" that would cause a stretcher to tip over. Panzarella further testified that the wheels of the stretcher are the type that will swivel around if they hit something. He testified that he did not see any height differential between the driveway and the roadway.

Dana Palermo testified at her deposition that on September 12, 2011, she was a volunteer firefighter, emergency medical technician (EMT), and a commissioner with the Lindenhurst Fire Department. By affidavit in reply, she adds that in her capacity as EMT she voluntarily and without expectation or receipt of monetary compensation rendered first aid and/or emergency treatment to plaintiff. Palermo testified she was the EMT in charge of plaintiff. She testified that she did not observe any problems with the driveway where it met the road. After examining plaintiff and removing her from the home, Palermo was at the patients head and EMT Aivazian was leading the stretcher as they walked to the ambulance. She testified

she did not feel any wobbling or unevenness as the stretcher was moving down the driveway. She testified that "the left front wheel suddenly was stuck and very quickly, the part I was holding at the head started to shift to the left very quickly." She testified did not know why the stretcher shifted to the left, but it happened "exactly where the driveway met the street." After the stretcher overturned she looked for a possible cause and observed "this little piece of broken driveway" that was probably four inches wide and two inches deep. She testified that she never saw the wheel of the stretcher contact the purported defect. In written incident reports she did not mention a broken piece of the driveway; rather, she stated the area where the driveway met the road was "uneven."

Christopher Aivazian testified at his deposition that he was a volunteer EMT and he responded to rescue calls and provided pre-hospital care. He was at the foot section of the stretcher on which plaintiff was being transported, leading to the ambulance. He was walking backwards and sideways. Aivazian testified at the point where the driveway met the street he and EMT Palermo lost control of the stretcher. He testified that there was no hole or pothole where the driveway meets the street, and that he believes the stretcher turned over when the wheel or wheels met an uneven elevation, "a rut or difference in elevation at the end of the driveway." He did not see a wheel go into a rut and when shown photographs he could not identify where the height elevation was located. Looking at photographs, he estimated the height elevation was about two or three inches.

Accepting plaintiff's testimony that "the stretcher overturned in the middle of the driveway approximately half way from the house to the road," and that "the stretcher did not overturn in the beginning of the driveway or at the end of the driveway," the defendant homeowner has established that he did not create any alleged defect and did not have actual or constructive notice of any alleged defect. The evidence establishes that the middle area of the driveway was, quoting plaintiff's opposition to defendant Lindenhurst Fire Department's motion, "smooth and even."

In opposition, plaintiff argues that because the paramedics testified the accident took place closer to the end of the driveway, a factual issue exists as to whether an alleged defective condition contributed to the accident. Plaintiff, however, has not raised a triable issue of fact. A triable issue of fact must relate to a material issue in the case (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). Where the accident occurred on the driveway is not material here, because if the accident occurred in the middle of the driveway, that area has been shown to be without defect; if the accident occurred at the end of the driveway, as testified to by the EMTs, no dangerous condition or defect has been shown to exist at such location. It is well settled that "a property owner may not be held liable for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip" (***Copley v Town of Riverhead***, 70 AD3d 623, 624, 895 NYS2d 452, 453 [2d Dept 2010]; *see* ***Richardson v JAL Diversified Mgt.***, 73 AD3d 1012, 901 NYS2d 676 [2d Dept 2010]). "A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" (***Lazic v Trump Vil. Section 3, Inc.***, 134 AD3d 776, 776, 20 NYS3d 643 [2d Dept 2015]). Nevertheless, "liability does not '[turn] upon whether the hole or depression causing the pedestrian to fall . . . constitutes a trap'" (***Hutchinson v Sheridan Hill House Corp.***, 26 NY3d 66, 78, 19 NYS3d 802 [2015], quoting ***Loughran v New York***, 298 NY 320, 321-322 [1948]). "[W]hether 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" (***Trincere v County of Suffolk***, 90 NY2d 976, 977, 665 NYS2d 615 [1997]). Here, there is no evidence that the wheel of the stretcher became stuck in any driveway defect. Both EMT Aivazian and EMT Palermo testified that they never saw a wheel go into a rut and when, shown photographs, Palermo could not find a broken piece of driveway that was 2 inches by 4 inches. Evidence of an alleged defect or dangerous condition at the end of the driveway is based upon speculation, and the submitted photographs and deposition testimony do not support that any defect existed on any area of the driveway. Accordingly, the motion by defendant Luis Correa for summary judgment in his favor dismissing the complaint as asserted against him and defendant Lindenhurst Fire Department, Inc.'s cross claim is granted.

Defendant Lindenhurst Fire Department has established its prima facie entitlement to summary judgment in its favor based upon Public Health Law § 3013. That section provides:

> Immunity from liability
>
> 1. Notwithstanding any inconsistent provision of any general, special or local law, a voluntary ambulance service or voluntary advanced life support first response service described in section three thousand one of this article and any member thereof who is a certified first responder, an emergency medical technician, an advanced emergency medical technician or a person acting under the direction of an emergency medical technician or advanced emergency medical technician and who voluntarily and without the expectation of monetary compensation renders medical assistance in an emergency to a person who is unconscious, ill or injured shall not be liable for damages for injuries alleged to have been sustained by such person or for damages for the death of such person alleged to have occurred by reason of an act or omission in the rendering of such medical assistance in an emergency unless it is established that such injuries were or such death was caused by gross negligence on the part of such certified first responder, emergency medical technician or advanced emergency medical technician or person acting under the direction of an emergency medical technician or advanced emergency medical technician.

The three emergency medical technicians that responded to plaintiff's emergency call were each volunteers and rendered emergency medical assistant without the expectation of monetary compensation. Thus, the applicable standard of care here is gross negligence. To constitute gross negligence, a party's conduct must "'smack[ ] of intentional wrongdoing'" or "evince[ ] a reckless indifference to the rights of others" (***Sommer v Federal Signal Corp.***, 79 NY2d 540, 554, 583 NYS2d 957 [1992], *quoting* ***Kalisch-Jarcho, Inc. v City of New York***, 58 NY2d 377, 385, 461 NYS2d 746 [1983]; *see* ***Goldstein v Carnell Assoc., Inc.***, 74 AD3d 745, 906 NYS2d 905 [2d Dept 2010]). "Stated differently, a party is grossly negligent when it fails 'to exercise even slight care' or 'slight diligence'" (***Goldstein v Carnell Assoc., Inc.***, 74 AD3d 745, 747, 906 NYS2d 905). Here, the conduct of the EMTs cannot be considered so reckless or wantonly negligent as to be the equivalent of a conscious disregard of the rights of others (*see* ***Gold v Park Ave. Extended Care Ctr.***

Corp., 90 AD3d 833, 935 NYS2d 597 [2d Dept 2011]; ***Everett v Loretto Adult Community, Inc.***, 32 AD3d 1273, 822 NYS2d 681 [4th Dept 2006]; ***Anzolone v Long Is. Care Ctr., Inc.***, 26 AD3d 449, 810 NYS2d 514 [2d Dept 2006]).

In opposition, plaintiff contends that there has been no showing that the EMT's did not receive reimbursement for their services and that gross negligence is an issue for a jury to determine. Contrary to plaintiff's position, each of the EMTs testified that they were *volunteer* firefighters. With regard to gross negligence, plaintiff has not demonstrated that the defendant Lindenhurst Fire Department volunteers acted without even slight care or slight diligence. Accordingly, the motion by defendant Lindenhurst Fire Department, Inc. for summary judgment in its favor dismissing the complaint as asserted against it and defendant Luis Correa's cross claims is granted.

Dated: OCT 07 2016

HON. JOSEPH A. SANTORELLI
J.S.C.

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