| **Davis v County of Suffolk** |
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| 2017 NY Slip Op 30174(U) |
| January 20, 2017 |
| Supreme Court, Suffolk County |
| Docket Number: 12-20210 |
| Judge: Peter H. Mayer |
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[* 1]

SHORT FORM ORDER

INDEX No. 12-20210

CAL. No. 16-00944OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

***PRESENT:***

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 10-18-16 (004, 005)
MOTION DATE 11-9-16 (006, 007)
ADJ. DATE 12-02-16
Mot. Seq. # 004 - MG
# 005 - MG
# 006 - MD
# 007 - MD; CASEDISP

STANLEY DAVIS, SR.,

Plaintiff,

- against -

COUNTY OF SUFFOLK, TOWN OF ISLIP, EXTRA SPACE STORAGE, INC., and EXTRA SPACE NORTHERN TWO, L.L.C.,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant Extra Space, dated September 22, 2016, and supporting papers 1 - 13; (2) Affirmation in Opposition by the plaintiff, dated September 27, 2016, and supporting papers 14 - 18; (3) Reply Affirmation by the defendant Extra Space, dated October 14, 2016, and supporting papers 19 -22; (4) Notice of Motion/Order to Show Cause by the defendant Suffolk County, dated September 22, 2016, and supporting papers 23 - 38 (including Memorandum of Law dated September 22, 2016); (5) Affirmation in Opposition by the plaintiff, dated October 25, 2016, and supporting papers 39 - 42; (6) Notice of Motion/Order to Show Cause by the plaintiff, October 24, 2016, and supporting papers 43 - 53; (7) Notice of Motion/Order to Show Cause by the plaintiff dated October 24, 2016, and supporting papers 54 - 66; (8) Affirmation in Opposition by the

defendant Extra Space, dated November 11, 2016, and supporting papers 67 - 68; (9) Affirmation in Opposition and Reply by the defendant Suffolk County, dated November 22, 2016, and supporting papers 69 - 70; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

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

***ORDERED*** that the motion (#004) by the defendants Extra Space Storage, Inc. and Extra Space Northern Two, LLC for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against them is granted; and it is further

***ORDERED*** that the motion (#005) by the defendant County of Suffolk for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

***ORDERED*** that the plaintiff's motion (#006), which seeks an order of the Court recusing itself from the instant proceedings is denied; and it is further

***ORDERED*** that the plaintiff's motion (#007), which seeks an order of the Court removing this action to federal court is denied.

The plaintiff commenced this action to recover damages for personal injuries allegedly sustained when his motorcycle struck a pothole at or near the entrance to the self-storage facility owned and operated by the defendants Extra Space Storage, Inc. and Extra Space Northern Two, LLC (Extra Space). It is undisputed that the plaintiff was traveling northbound on Crooked Hill Road on April 9, 2011, and that he attempted to make a left turn across the southbound lane of that roadway to enter Extra Space's self-storage facility located at 200 Expressway Drive South, Brentwood, New York (the premises). In his complaint, the plaintiff alleges that the defendant County of Suffolk (Suffolk) and the defendant Town of Islip (Town) owned, operated, managed and controlled Crooked Hill Road and the site where the subject pothole was located. The plaintiff further alleges that Extra Space owned, operated, managed and controlled the driveway at its facility where the subject pothole was located.

Extra Space and Suffolk now move for summary judgment dismissing the complaint and all cross claims against them. The Court will address the plaintiff's motion which seeks an order of the Court recusing itself, and the plaintiff's motion seeking to remove this action to federal court, before it reviews the defendants' motions, as these motions indicate that the self-represented plaintiff harbors doubts as to the undersigned's ability to fairly determine the defendants' motions.

In seeking to have the Court recuse itself, the self-represented plaintiff alleges that the undersigned is biased against him, because the Court "cannot throw out an insurance company that was already in the lawsuit," and that the undersigned indicated that he "cannot have a trial." The plaintiff's

submission reveals that said contentions involve two unrelated cases commenced by the plaintiff. In the first unrelated action, the Court properly determined that the plaintiff could not bring a direct action against a defendant's insurance company unless and until he obtained a judgment against the defendant's insured, and the insurance company failed to pay the judgment within 30 days (see Insurance Law §3420[a][2]). In the second unrelated case, the undersigned granted the plaintiff summary judgment as to liability in a wrongful death case, indicated to the plaintiff that a trial as to liability was not necessary, and advised the plaintiff to seek counsel to assist him at the inquest.

Pursuant to 22 NYCRR 100.3, a judge shall perform the duties of judicial office impartially and diligently. More specifically, 22 NYCRR 100.3 (B) mandates in relevant part:

> (1) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.
>
> *****
>
> (4) A judge shall perform judicial duties without bias or prejudice against or in favor of any person. A judge in the performance of judicial duties shall not, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon age, race, creed, color, sex, sexual orientation, religion, national origin, disability, marital status or socioeconomic status, and shall require staff, court officials and others subject to the judge's direction and control to refrain from such words or conduct.

With regard to a party's motion for the Court to recuse itself, absent a legal disqualification under Judiciary Law §14, a trial judge is the sole arbiter on the issue of recusal (*see* ***Matter of Daniel B.***, 134 AD3d 1103, 22 NYS3d 553 [2d Dept 2015]; ***York v York***, 98 AD3d 1038, 950 NYS2d 911 [2d Dept 2012]). Where the party seeking recusal fails to demonstrate that any determinations in the case were the result of bias, the Court providently exercises its discretion in declining to recuse itself from the case (*id.*; ***Hayes v Barroga-Hayes***, 117 AD3d 794, 985 NYS2d 673 [2d Dept 2014]; ***DiSanto v DiSanto***, 29 AD3d 936, 815 NYS2d 468 [2d Dept 2006]).

A Court's recusal is not warranted as a matter of law where there is no merit to the contention that the party seeking recusal will be denied a fair hearing if the court fails to recuse itself from presiding over the subject proceedings and making fact-finding determinations (*see* ***In re Susan B.***, 264 AD2d 478, 694 NYS2d 454 [2d Dept 1999]). Moreover, where there is no evidence of bias or prejudice on the part of the presiding judge, it is not an improvident exercise of discretion to deny a motion seeking recusal of the judge (***Richardson v Richardson***, 80 AD3d 32, 910 NYS2d 149 [2d Dept 2010]; ***Muller v Muller***, 221 AD2d 635, 634 NYS2d 190 [2d Dept 1995]; ***Zirkind v Zirkind***, 218 AD2d 745, 630 NYS2d 570 [2d Dept 1995]). Based upon the foregoing, inasmuch as the movant has failed to

demonstrate that he will be denied a fair hearing if the Court does not recuse itself from these proceedings, the motion seeking recusal is denied.

In seeking to have this action removed to federal court, the plaintiff alleges that "for all the mishappening," and "all parties working together against me," he cannot get a fair trial. In support of his motion, the plaintiff submits the same exhibits as those submitted in his motion for recusal. It is well settled that the removal of actions from state courts to federal courts is governed by federal statute (***Shamrock Oil & Gas Corp. v Sheets***, 313 US 100, 61 S Ct 868 [1941]. Thus, a claim may be removed to federal court only if it could have been brought in federal court originally. That is, the diversity jurisdiction and the "amount in controversy" requirements must be met, or the claim must be based upon a federal question (28 USCA §§ 1331, 1332; ***Hensley v Forest Pharmaceuticals, Inc.***, 21 F Supp 3d 1030 [ED Mo 2014]). Here, the plaintiff has not only failed to demonstrate that he will be denied a fair hearing herein. Moreover, he has failed to demonstrate that this is a matter that may be removed to federal court. Accordingly, the motion is denied.[1]

The Court now turns to Extra Space's motion which seeks summary judgment on the grounds that it does not own or operate the property where the subject pothole is located, and that it did not owe a duty to the plaintiff. 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 issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trail of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issue of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; ***Rebecchi v Whitmore***, *supra*).

In support of its motion, Extra Space submits the pleadings, copies of photographs of the accident site, the deposition transcripts of the plaintiff and one of its employees, the affidavit of a licensed surveyor, and a copy of the note of issue filed in this action. Initially, it is noted that the plaintiff opposes the motion on the ground that it is untimely. A motion for summary judgment is untimely unless made within 120 days after the filing of the note of issue, and without any showing of good cause for the delay (*see* CPLR 3212 [a]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]). Here, the plaintiff's note of issue is dated May 24, 2016, and the computerized records

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[1] The Court notes that the affidavit of service attached to Suffolk's affirmation in opposition to the plaintiff's motion for removal and in reply to the plaintiff's opposition to its motion for summary judgment is signed but not notarized, and there is no indication that the affirmation was received by the plaintiff or Extra Space. Thus, the submission has not been considered in determining these motions.

maintained by the court system indicates that it was filed on May 25, 2016. Thus, Extra Space's had until September 22, 2016 to make its motion for summary judgment. The affidavit of service submitted with said motion indicates that it was served on all parties on September 22, 2016. A motion is deemed made on the date it is served (CPLR 2211). Based on these facts, the subject motion is timely.

At his deposition, the plaintiff testified that, on the day of his accident, he was traveling to Extra Space to store the motorcycle he was riding, that he followed behind his girlfriend who was driving her motor vehicle, and that the roads were dry. He stated that he was traveling at approximately five to ten miles per hour as he made the left turn into Extra Space, that while in the turn he "hit there, there was a bunch of sand in a pothole," and that his motorcycle fell to the ground. He indicated that it was "already too late" when he first saw the subject pothole, and that his girlfriend was already in the building at Extra Space when he fell. He further testified that two sets of photographs of the accident site were taken by his girlfriend, and he circled and initialed the location of the subject pothole on those photographs.

Peter Galante was deposed on January 16, 2014 and testified that is employed as an assistant manager by Extra Space, that he was present at the premises on the day of the plaintiff's accident, and that he did not become aware that the plaintiff claimed he had fallen at the premises until two or three days after this incident. He stated that his duties as assistant manager would include running the property, maintaining the driveway, picking up garbage, and hiring outside vendors to make larger repairs to the driveway at the premises. He indicated that the photographs circled and initialed by the plaintiff show the "back" of Extra Space, that the circled area is not on Extra Space's property, and that the circled area is "in the street."

In his affidavit, Nathan Taft Corwin, III, swears that he is a New York State Licensed Surveyor, that he reviewed the plaintiff's legal claims as to the location of his fall and the photographs circled and initialed by the plaintiff at his deposition. He states that he surveyed the area of the accident site on September 19, 2016, and that he created the survey attached as an exhibit to is affidavit. He indicates that the subject pothole is "outside the property line of the premises known as 200 Expressway Drive South, Brentwood, New York," and that he can state with a reasonable degree of surveying certainty that said pothole is at least 6 to 12 inches outside said property line and located within the roadway of Crooked Hill Road.

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* ***Leibovici v Imperial Parking Mgt. Corp.***, 139 A.D.3d 909, 33 N.Y.S.3d 312, [2d Dept 2016]; ***Ruffino v New York City The respondent. Auth.***, 55 AD3d 817, 865 NYS2d 667 [2d Dept 2008]). Where these elements are not present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property (***Ruffino v New York City The respondent. Auth.***, *supra*; ***Noia v Maselli***, 45 AD3d 746, 846 NYS2d 326 [2d Dept 2007]). Suffolk's cross claim is

based on the alleged negligence of Extra Space. Thus, Extra Space has established its prima facie entitlement to summary judgment dismissing the complaint and all cross claims against it.

In opposition, the plaintiff submits his affidavit, a "notice of reply," a copy of the note of issue filed in this action, and a copy printed from the computerized records maintained by the court system. In his affidavit, the plaintiff essentially contends that Extra Space's motion for summary judgment is untimely. As set forth above, the date of the note of issue is not the date by which the Court calculates the 120-day period in which a party must move for summary judgment. In addition, the printed copy of the court system's computerized records indicates, erroneously and without importance herein, that said period ended on September 23, 2016. The plaintiff's "notice of reply" appears to indicate that he also cross-moves for summary judgment dismissing Extra Space's motion and "all claims against Plaintiff by the defendant [Extra Space]."

The only affidavit plaintiff submits with his "notice of reply" is the aforementioned affidavit in opposition wherein his sole contention is that Extra Space's motion is untimely. In addition, the subject notice is not a proper cross motion as the plaintiff never paid the required motion fee or filed it with the Court. Thus, the plaintiff's affirmative request for relief, to with, dismissing Extra Space' "claims" is not properly before the Court (CPLR 2215, ***Anderson The property., Inc. v Sawhill Tubular Div., Cyclops Corp.***, 149 AD2d 950, 540 NYS2d 82 [4th Dept 1989]). In any event, the plaintiff's request for relief is without merit. There is no procedural basis for a "motion to dismiss a motion." Moreover, it appears that the plaintiff erroneously considers Extra Space's affirmative defenses to be claims against him. To the extent that the "notice of reply" could in any way be considered a cross motion, it is denied.

In deference to the status of the self-represented plaintiff, the Court will consider the additional submission submitted by the plaintiff in opposition to Suffolk's motion for summary judgment before rendering a decision on Extra Space's motion. Suffolk now moves for summary judgment on the grounds that it does not own, operate or control the property where the subject pothole is located and, in any event, that it did not receive written notice of the alleged defect in the subject roadway. In support of its motion, Suffolk submits the pleadings, the notice of claim filed by the plaintiff, the affidavits of two of its employee's, the transcripts of the plaintiff's municipal hearing and deposition, the photographs marked by the plaintiff at his deposition, and a DVD of plans and documents relating to the construction of the Long Island Expressway (LIE) by the State of New York.

In his affidavit, Paul R. Morano swears that he is employed by the Suffolk County Department of Public Works, Highway Engineering Division, that his duties include searching the official records of the department regarding claims involving Suffolk County property, and that a diligent search of those records reveals that Suffolk does not own the portion of Crooked Hill Road where the plaintiff alleges that this accident occurred. He states that the documents provided regarding the construction of the LIE establish that the State of New York appropriated the subject portion of Crooked Hill Road on April 11, 1961, and that Suffolk has not maintained or repaired the subject portion of Crooked Hill Road after that date.

In his affidavit, Jason A. Richberg swears that he is the Clerk of the Suffolk County Legislature, and that his duties require that he maintain a copy of all written complaints concerning alleged defects on property owned by Suffolk County pursuant to the Suffolk County Charter, §C8-2A. He states that he has searched for any written complaints filed with the Clerk regarding the accident location, and that the Clerk's office is not in receipt of any written notice or complaints concerning the alleged defective condition on Crooked Hill Road.

Suffolk County Charter, §C8-2A(2)(i) provides, in pertinent part, that:

> no civil action shall be maintained against Suffolk County or any of its departments, agencies, offices, districts, boards, commissions or subdivisions for damages or injuries to a person or property sustained by reason of any (a) highways; (b) roads; (c) streets ... under the jurisdiction of the County, on account of that structure or thing enumerated above, in whole or in part, allegedly being in a defective condition, out of repair, unsafe, dangerous or obstructed or in consequence of the existence of snow or ice thereon, unless the County has received written notice within a reasonable time before said injury or property damage was sustained ... in writing by certified or registered, mail to the Clerk of the Suffolk County Legislature, who shall forward a copy to the County Attorney.

The plans and documents submitted involving the construction of the LIE establish that the location of the subject pothole is within that portion of Crooked Hill Road which was appropriated by the State of New York in April 1961, and that the State has owned, operated and controlled the location since that date. As set forth above, where the elements of ownership, operation and control over property are not present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property (***Ruffino v New York City The respondent. Auth.***, *supra*; ***Noia v Maselli***, *supra*). Here, Suffolk has established its prima facie entitlement to summary judgment dismissing the plaintiff's complaint on the ground that it does not own the accident location. In addition, while an academic issue, Suffolk has also established its prima facie entitlement to summary judgment dismissing the plaintiff's complaint based on the ground that it did not receive written notice of the alleged defective condition. Extra Space's cross claim is based on the alleged negligence of Suffolk. Thus, Suffolk has established its entitlement to summary judgment dismissing the cross claim against it.

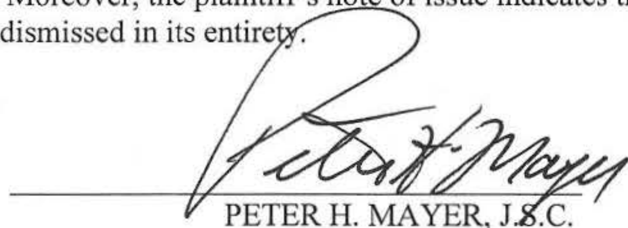
In opposition to the motion, the plaintiff submits a handwritten note dated October 25, 2016 in which he states that "I will be fighting the time. It's not my fault that they waited for the last minute to put in their paperwork. I [went] to Court on the 18th of [October] and was told time was up." Said note is not sworn to or notarized, and it is accompanied by a sheet of paper which is also not sworn to or notarized that indicates that something was faxed to the Court and the parties. The attached sheet does not indicate the date or the time that the fax was sent. Also submitted is a copy of one of the sets of photographs marked by the plaintiff at his deposition. In the copy of the photograph submitted by the plaintiff, he has marked a new spot where he now alleges that the pothole was located. The newly alleged location of the pothole is on the property owned by Extra Space.

Again, in deference to the status of the self-represented plaintiff, the Court will consider the additional submission as opposition to both motions for summary judgment made herein. As to Extra Space's motion for summary judgment, the plaintiff has failed to raise an issue of fact requiring a trial of this action. For the reasons set forth above, it is determined that Extra Space's motion was timely made. In addition, a party may not, through an affidavit submitted on summary judgment, contradict his or her own deposition testimony in order to feign an issue of fact (***Andrew T.B. v Brewster Cent. School Dist.***, 67 AD3d 837, 889 NYS2d 240 [2d Dept 2009]; ***Knox v United Christian Church of God, Inc.***, 65 AD3d 1017, 884 NYS2d 866 [2d Dept 2009]; ***Abramov v Miral Corp.***, 24 AD3d 397, 805 NYS2d 119 [2d Dept 2005]). Accordingly, Extra Space's motion for summary judgment dismissing the complaint and all cross claims against it is granted.

The court now turns to the issue of the timeliness of Suffolk's motion for summary judgment. As set forth above, despite the clerk's notes to the contrary, the 120-day period in which a party must move for summary judgment in this action ended on September 22, 2016. In addition, Extra Space's motion was timely made on September 22, 2016. The affidavit of service attached to Suffolk's motion indicates that it was served on all parties on September 23, 2016. However, it is well settled that "an untimely motion or cross motion for summary judgment may be considered by the court where ... a timely motion for summary judgment was made on nearly identical grounds" (***Derrick v North Star Orthopedics, PLLC***, 121 AD3d 741, 994 NYS2d 159 [2d Dept 2014], quoting ***Step–Murphy, LLC v. B & B Bros. Real Estate Corp.***, 60 AD3d 841, 844–845, 875 NYS2d 535 [2d Dept 2009]). Thus, it is determined that Suffolk's motion for summary judgment was timely made.

As set forth above, Suffolk has established it prima facie entitlement to summary judgment on the ground that it did not own the property where the plaintiff allegedly suffered his accident, and the plaintiff has failed to raise on issue of fact regarding the location of the subject pothole by submitting a photograph which attempts to change his deposition testimony. Accordingly, Suffolk's motion for summary judgment dismissing the complaint and all cross claims against it is granted.

The defendants state that this action has been discontinued against the defendant Town of Islip (Town), and the plaintiff does not dispute the fact. Moreover, the plaintiff's note of issue indicates that it was not served on the Town. Thus, the action is dismissed in its entirety.



Dated: January 20, 2017

PETER H. MAYER, J.S.C.