

Kaplan v Town of Walkill

2018 NY Slip Op 34157(U)

November 9, 2018

Supreme Court, Orange County

Docket Number: Index No. EF006622/17

Judge: Robert A. Onofry

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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT: ORANGE COUNTY

-----X
MINZELA H. KAPLAN,

Plaintiff,

-against-

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

TOWN OF WALLKILL, TOWN OF WALLKILL
DEPARTMENT OF PUBLIC WORKS, SAM'S CLUB
#6423, SAM'S WEST, INC. d/b/a SAM'S CLUB, WAL-
MART STORES, INC. d/b/a WALMART, LOWE'S
STORE #0540, LOWE'S HOME CENTER, LLC f/k/a
LOWE'S HOME CENTERS, INC. and PCM
DEVELOPMENT COMPANY,

Defendants.

Index No. EF006622/17

DECISION AND ORDER

Motion Dates: October 10, 2018

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The following papers numbered 1 to 22 were read and considered on (1) a motion by the Defendant PCM Development Company, pursuant to CPLR §3212, to dismiss the complaint and all cross claims insofar as asserted against it; (2) a motion by the Defendants Town of Wallkill and Town of Wallkill Department of Public Works, pursuant to CPLR §3212, to dismiss the complaint and all cross claims insofar as asserted against them; and (3) a motion by the Defendants Sam's Club #6423, Sam's West, Inc., d/b/a Sam's Club, Wal-Mart Stores, Inc. d/b/a Walmart, pursuant to CPLR §3212, to dismiss the complaint and all cross claims insofar as asserted against them.

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Upon the foregoing papers, it is hereby,

ORDERED, that the motions are granted.

Introduction

On June 16, 2016, the Plaintiff Minzela Kaplan was allegedly injured when she was struck by an automobile while a pedestrian.

According to her testimony at a 50-h hearing, she was struck while walking on a access road between a store owned by the Defendants Lowe's Store #0540, Lowe's Home Centers, LLC, f/k/a Lowe's Home Centers, Inc. (hereinafter referred to collectively as "Lowe's") and a store owned by the Defendants Sam's Club #6423, Sam's West, Inc., d/b/a Sam's Club, Wal-Mart Stores, Inc. d/b/a Walmart (hereinafter referred to collectively as "Sam's Club"). The Plaintiff testified that she and her husband wanted to shop at Sam's Club, but had parked in the parking lot for Lowe's because there was no space in the parking lot for Sam's Club. Further, that the vehicle that struck her turned left out of the Sam's Club parking lot, and was in the wrong lane of travel. Finally, the Plaintiff testified, she had settled as against the driver of the vehicle, who admitted that she was distracted by a crying infant.

The Defendant PCM Development Company (hereinafter "PCM") was the developer of the area, known generally as the Galleria at Crystal Run mall.

The Plaintiff commenced this action against PCM, Lowe's, Sam's Club and the Defendants Town of Wallkill and Town of Wallkill Department of Public Works (hereinafter referred to collectively as "Town") to recover damages for personal injuries. The Plaintiff alleges, *inter alia*, that each was negligent in the design, construction and maintenance of the area at issue.

PCM, Sam's Club and the Town each move for summary judgment seeking dismissal of the complaint and all cross claims insofar as asserted against them.

The motions are granted.

Factual/Procedural Background

PCM's Motion

In support of its motion, PCM submits an affirmation from counsel, Richard Bentzen.

Bentzen notes that the depositions although scheduled, had not been conducted.

Bentzen argues that, at the time of the accident, PCM did not have any ownership or other interest in the area at issue, and had not performed any maintenance at the same since 2002. Rather, he notes, PCM had sold the property to the Defendants Lowe's and Sam's Club, and at the time of the accident, owned only a small area at the corner of North Galleria Drive leased to Safelite AutoGlass (hereinafter "Safelite") and some undeveloped land connected to the immediate south of the lot, on the opposite side of North Galleria Drive.

Thus, he argues, the action and all cross claims must be dismissed as against PCM because it did not own, operate or maintain, or exercise control of the subject property at the time of the accident.

In further support of its motion, PCM submits an affidavit from its senior counsel and managing agent, William Baker, in which Baker avers that he has personal knowledge of the entities and their relationship to the property owned, and formerly owned, by PCM.

Baker asserts that PCM does not own the road that leads to the Sam's Club and Lowe's, and did not own it on June 16, 2016. Rather, he notes, it owns only a small area at the corner of North Galleria Drive leased to Safelite.

Baker avers that, although PCM built the Galleria at Crystal Run Mall, it had sold the property occupied by Lowe's to Lowe's on June 30, 2000, and the property occupied by Sam's Club to Sam's Club on December 23, 2003.

Since the sale, he asserts, PCM had not maintained nor otherwise been involved with the road.

Appended as exhibits to PCM's motion papers are various deeds and land surveys.

The Town's Motion

The Town also moves to dismiss the action and all cross claims insofar as asserted against it.

In support of its motion, the Town submits an affirmation from Louis Ingrassia, the Town's Highway Superintendent and the Commissioner of Public Works.

Ingrassia notes that he had been employed by the Town for over 31 years, and that his affidavit was based upon his own personal knowledge and review of municipal records.

Ingrassia asserts that he is familiar with the accident site which, on the date of the accident, was located on private property. That is, he avers, the Town is not the owner of the road on which the accident occurred.

Further, he asserts, the Town did not, on or before the June 16, 2016, maintain, repair or control the road or the adjacent properties owned and occupied by the Lowe's and Sam's Club stores.

In addition, he avers, the Town did not owe an obligation, and did not assume an obligation, to maintain the area.

Finally, he notes, the Town issued final site plan approval for the property at issue on or about August 17, 1999, and a certificate of occupancy was issued on or about May 30, 2000. Thus, the approvals for the subject area were issued more than 1 year and 90 days prior to the commencement of this action.

In sum, he argues, the action and all cross claims must be dismissed as against the Town

Sam's Club's Motion

In support of its motion, Sam's Club submits an affirmation from counsel, Patricia O'Connor.

O'Connor notes, in relevant part, that the Plaintiff testified at her 50-h hearing that the vehicle that struck her was in the wrong lane of travel, and that the driver admitted that she was distracted by a crying infant at the time of the accident.

Further, O'Connor asserts, it is not disputed that Sam's Club does not own the road at issue. Rather, a survey of the road attached to the motion papers reveals that Lowe's owns the road.

Indeed, she notes, at the Preliminary Conference on the case, held on February 13, 2018, the Court directed Plaintiff's counsel was to articulate the legal theory against Sam's Club in light of the fact that it does not own the property where the accident is alleged to have taken place.

Counsel responded that the theory against Sam's Club was that it failed to provide a sufficient number of parking spaces for its customers. The Court directed Plaintiff to serve expert disclosure as to this "theory." However, O'Connor notes, the Plaintiff failed to so.

O'Connor argues that Sam's Club may not be held liable in the happening of the accident because it did not own, occupy, control and/or make special use of the road upon which the Plaintiff was allegedly injured. Further, she asserts, Sam's Club did not owe a duty to control the actions of the driver of the vehicle that allegedly struck the Plaintiff.

Finally, she argues, Sam's Club owed no legal duty to "provide extra parking spaces on its premises on the off chance that an individual would park in the Lowe's parking lot, walk across the highway, and be struck by an individual driving on the wrong side of the road."

In any event, she asserts, even if Sam's Club did owe the Plaintiff a duty of care, the accident was caused by the superseding, intervening negligence of the driver of the vehicle which allegedly struck the Plaintiff, who admitted that she was distracted at the time of the accident.

In further support of its motion, Sam's Club proffers an affirmation from Cesar Angulo, the manager of the Sam's Club store near the accident site.

Angulo avers that Sam's Club does not own, operate or control that road at issue.

The Plaintiff's Opposition

In opposition to the Town's motion, the Plaintiff submits an affirmation from counsel, Eric Parker.

Parker notes that the Plaintiff alleged that the accident occurred on a public road, to wit: "84 Lane intersecting 300 N. Galleria Dr. Through Lane," and that all of the Defendants breached their duty to take "reasonable due diligence and care in the developing, planning, design, approval, and/or construction of their premises, stores, centers, shopping centers, and/or facilities, including and not limited to adjoining/connecting areas such as parking lots, parking areas, private and/or public highways, roadways, roads, streets, lanes, and/or thoroughfares that were within their dominion and control through public use, permissible use, statute, easement, lease, deed, contract, adverse possession, and/or ownership."

At the Plaintiff's 50-h hearing, he notes, the Plaintiff testified that she had to park in the Lowe's parking lot because the Sam's Club parking lot was full. Further, she testified, both prior to and on the date of the accident, she saw people parking in Lowe's parking lot in order to shop at Sam's Club.

Parker notes that Ingrassia (*supra*) testified that the Town did not own or maintain the road or the area of the accident. However, he asserts, Ingrassia "never indicated that he reviewed the records of the Town of Wallkill, he simply made a conclusory statement that the property was not owned or maintained by the [Town]."

In any event, Parker notes, the Plaintiff had retained an expert, Lawrence M. Levine, PE (hereafter "Levine"), who had examined the site on December 8, 2017, had reviewed numerous documents, and had written a report. Levine found, *inter alia*, that the Sam's Club parking lot violated the guidelines of the Institute of Transportation Engineers "Parking Generation Manual"

by having an inadequate amount of parking spots, to wit: he concluded that a store of Sam's Club's size should have 820 spots available, while the store at issue had only 404 parking spots. This inadequacy, Levine opines, "created a dangerous overflow effect that [was] open and obvious," and that required individuals to park in the closest foreseeable location (the Lowe's parking lot). This, Levine opined, in turn, required Sam's Club patrons to cross "a dangerous roadway based on its lack of signage, traffic signals, crosswalks, improperly placed markings, and other design defects of the roadway."

Further, Parker notes, Levine also stated that, on the date he visited the location, he saw an overgrown tree that obstructed the sight distances of vehicles leaving the Sam's Club parking lot.

Levine also reviewed correspondences between a traffic engineering firm, designers and the Town's planning board concerning a gas station that was added to the Sam's Club's parking lot in 2006. Levine noted that, at that time, there were concerns about the "trip generation numbers to Sam's Club," including that the numbers used were only half of what was used at a similar Sam's Club in Connecticut. Levine opines that, had they used proper projected numbers, they would have seen that Sam's Club had inadequate parking spaces for the volume of customers that frequented the store.

In addition, Levine noted, they only reviewed the impact of vehicle volume on the traffic signals and major intersections, and "failed to discuss the pedestrian overflow issue that plagued Sam's Club." Thus, Levine opines, the Town knew or should have known as early as 2006 that Sam's Club parking lot was inadequate.

Parker notes that the Plaintiff had requested additional disclosure to determine which party or parties actually maintained the road.

Moreover, he notes, regardless of whether the Town actually owns the road and area at

issue, pursuant to Highway Law section 189, "[a]ll lands which shall have been used by the public as a highway for the period of ten years or more, shall be a highway, with the same force and effect as if it had been duly laid out and recorded as a highway." Parker argues that the Town may be held liable for the happening of this accident under this statute if it is shown that the public used and the Town maintained the road.

Here, he notes, the Town did not come forward with any admissible evidence establishing that it did not engage in any activities that would constitute maintenance of the road.

Further, he asserts, although, in general, a municipality is afforded qualified immunity from liability arising out of its planning decisions, a municipality may be held liable when its study of a traffic condition is plainly inadequate or there is no reasonable basis for a traffic plan. Further, once a municipality is made aware of a dangerous traffic condition, it must undertake a reasonable study thereof within an eye towards alleviating the danger. Moreover, after the municipality implements a traffic plan, it is under a continuing duty to review its plan in light of its actual operation. Thus, for example, a person who is injured in a traffic accident can recover against a municipality if it is shown that its failure to install a traffic control or warning device was negligent under the circumstances, that the omission was a cause of the mishap, and that there was no reasonable basis for the municipalities inaction.

In addition, he notes, town police and fire departments responded to the property.

In sum, he argues, there are triable issues of fact as to the liability of the Town. Thus, he asserts, the Town's motion should be denied.

In any event, he argues, at a minimum, the Town's motion should be denied as premature, as no disclosure had yet occurred.

In opposition to the motion of Sam's Club, Parker notes that the witness for the same, Angulo, does not state that he reviewed the records of the Sam's Club, but rather merely makes

the conclusory statement that Sam's Club does not and did not own, operate or control the area at issue.

In any event, Parker asserts, as discussed *supra*, the Plaintiff's expert, Levine, found that Sam's Club's parking lot violated the various guidelines and had an inadequate number of parking spots. Further, he found that the STOP bar located at the exit of Sam's Club was not properly placed as per the site development plan, and that an overgrown tree obstructed the sight line of vehicles leaving Sam's Club and making a left onto the road at issue.

In addition, Levine also concluded that, had proper traffic numbers been used in relation to the gas station approval review, the parties would have seen that Sam's Club had inadequate parking.

Thus, Parkers argues, there are questions of fact whether Sam's Club was negligent, and whether such negligence resulted in a foreseeable danger that contributed to the Plaintiff's injuries. Indeed, he asserts, the road at issue was inadequately designed to accommodate pedestrian traffic, to wit: it had inadequate signage, no crosswalk, no sidewalks, and worn road markings. Further, the area had an overgrown tree which limited a driver's sight line to less than seventy feet when making a left out of Sam's Club.

Moreover, he argues, the negligence of the motorist who struck the Plaintiff cannot be held, as a matter of law, to be the superseding intervening cause of the accident. Rather, he asserts, there are issues of fact whether Sam's Club's inadequate parking lot created a dangerous situation of requiring pedestrians to cross the dangerous road at issue, and was a foreseeable and contributing factor in the accident.

In any event, he asserts, at a minimum, Sam's Club's motion should be denied as premature, since disclosure has not yet taken place.

In opposition to PCM's motion, Parker notes that PCM admitted that it owned property

that shares a parking lot with Lowe's.

In any event, Parker argues, PCM's motion should be denied as premature because disclosure has not yet taken place. Such disclosure, he asserts, could establish that PCM knew or should have known about the dangerous condition at issue, and that it maintained or controlled the road at issue.

The Town's Reply

In reply, counsel for the Town, Nicholas Pasquale, asserts that Ingrassia's affidavit was not merely conclusory and was in fact expressly stated to have been made after review of municipal records.

Further, he argues, the affidavit and the other evidence was sufficient to demonstrate, *prima facie*, that the complaint and all cross claims should be dismissed insofar as asserted against the Town.

Pasquale asserts that the case law cited by the Plaintiff's concerning the requirement that municipalities undertake studies of roads pertains only to roads owned by the same, not private roads.

Further, he argues, that the Town police and fire departments respond to a property does not render the Town liable for the road.

Similarly, he asserts, for the Plaintiff's Highway Law § 189 claim to succeed, she must allege and prove that the Town exercised dominion and control over the road for at least 10 years, which she did not.

In any event, Pasquale notes, the Plaintiff's notice of claim did not provide notice of either a Highway Law § 189 claim, or any claim arising from a tree in the area.

In sum, he argues, the complaint and all cross claims should be dismissed as against the Town.

PCM's Reply

In reply, PCM submits an affirmation from counsel, Richard Bentzen.

Bentzen argues that, in opposition to PCM's *prima facie* case, the Plaintiff failed to raise a triable issue of fact that PCM made be held liable in the happening of the accident.

For example, he asserts, although the Safelite property owned by PCM may be adjacent to the Lowe's parking lot and accessed by a driveway from that lot, there is no indication that the lot is "shared." Further, he notes, there is no suggestion that the Safelite property played any role in the accident.

Bentzen notes that the Plaintiff's expert, Levine, describes a tree that allegedly "obstructed the sight distance to the right for vehicles making left hand turns exiting SAM's CLUB onto Lowe's Road." Here, Bentzen notes, the Plaintiff testified that the vehicle which struck her turned left out of the Sam's Club lot. Thus, he argues, whether or not the driver's sight line was obstructed to the right is irrelevant to the happening of the accident.

Further, he notes, the Plaintiff testified that there was no obstruction to her view as she crossed the street, but rather that "everything was clear. I saw everything." Indeed, she testified, she was even able to see the driver's face before the impact.

In addition, Bentzen notes, Levine focuses on changes made to the Sam's Club property in 2006, and studies made at that time, including the addition of a gas station. However, he asserts, PCM sold the property to Sam's Club in 1992, almost 25 years before the accident, and sold the property to Lowe's in 2000, 15 years before the accident. Indeed, he argues, it is significant that Levine does not identify PCM even once as involved with the road at issue.

In addition, Bentzen asserts, PCM's motion is not premature, as it had already responded to the Plaintiff's disclosure demands and produced what it possessed that was responsive.

Moreover, he notes, the Plaintiff ignores that the Town offered to open its records for

inspection by the parties; an offer that was not taken up by the Plaintiff or her expert.

Finally, he argues, the Plaintiff did not demonstrate that further disclosure might lead to relevant evidence, or that facts essential to oppose PCM's motion were exclusively within its possession.

Sam's Club's Reply

In reply, Sam's Club submits an affirmation from counsel, Patricia O'Connor.

Initially, O'Connor notes, the Plaintiff had still not provided expert disclosure on her theory that the accident at issue was proximately caused by an inadequate number of parking spaces at the Sam's Club store.

Concerning the report of Levine, O'Connor argues that there is no evidence or testimony that the placement or alleged misplacement of a STOP bar had any connection whatsoever to the happening of the accident at issue. Specifically, she asserts, there isn't any indication in either the Plaintiff's testimony or the police report that the driver of the offending vehicle failed to stop or stopped at the wrong place when leaving the Sam's Club.

Further, she notes, although Levine estimated the square footage of the Sam's Club store at issue to be 164,000 square feet, he does not indicate how he arrived at this number.

Similarly, she asserts, although Levine states that the Institute of Transportation Engineers' "Parking Generation Manual" requires five parking spots per 1000 square feet "for a building like Sam's Club," he does not explain what a "building like Sam's Club" means. For example, she notes, Levine does not address the fact that the back of stores like Sam's Club house freezers, mechanical rooms, receiving, storage, bakeries, etc. and require a different parking ratio than stores where all areas are accessible to customers.

Further, she notes, Levine does provide any information as to the Institute of Transportation Engineers, and does not indicate whether the "Parking Generation Manual"

reflects an industry standard, or whether the manual was adopted by the local municipality or relied upon when the premises at issue were designed.

In addition, she notes, Levine admits that there is parking at the Sam's Club other than the 404 parking spots available in the front of the building, but does not provide the number of such additional spots.

Similarly, she asserts, Levine does not provide any evidence as to the location of the tree he identified as overgrown, or state who is responsible for same. Nor does he state how the tree has any connection to the accident at issue, which was caused by a distracted driver driving in the wrong lane, not by any alleged obstruction from a tree.

Finally, O'Connor notes, that traffic study referenced by Levine concerning the Sam's Club in Connecticut analyzed trips to the gas station at that location immediately prior to a major snow storm, and it was concluded that such numbers would not be representative of typical trip numbers to the proposed gas station at the Sam's Club at issue.

In sum, she argues, Sam's Club motion is not premature, and should be granted.

Discussion/Legal Analysis

Initially, it is noted, it is not alleged that any of the movants may be held directly or vicariously liable for the conduct of the driver of the vehicle which struck the Plaintiff.

Rather, the liability of the Defendants turns on whether the property at issue was in a dangerous or defective condition and, if so, the condition caused or contributed to the accident.

Further, it is noted, contrary to the arguments of several movants, on the record made, it cannot be held, as a matter of law, that the sole, proximate cause of the accident was the negligence of the driver. *Kalafatis v. Royal Waste Services, Inc.*, 95 A.D.3d 954 [2nd Dept. 2012]; *Ducie v. Ippolito*, 95 A.D.3d 1067 [2nd Dept. 2012]. Thus, the complaint and cross claims are not dismissed as against any Defendant on that ground.

Otherwise, in general, liability for a dangerous and defective condition on property is premised upon ownership, occupancy, control or special use of the property. *Smalls v. New York City Housing Authority Tenants Ass'n of Woodside*, 276 A.D.2d 619 [2nd Dept. 2000].

The principle of special use, a narrow exception to the general rule, imposes an obligation on the abutting landowner where he or she puts part of a public way to a special use for his or her own benefit, and the part used is subject to his or her control, to maintain the part so used in a reasonably safe condition to avoid injury to others. *Minott v. City of New York*, 230 A.D.2d 719 [2nd Dept. 1996]. Special use cases generally involve the installation of an object in the street or on the sidewalk, such as an oil cap or a runway, for the benefit of a private landowner. *Minott v. City of New York*, 230 A.D.2d 719 [2nd Dept. 1996]. The common thread in the case law is the installation exclusively for the accommodation of the owner of the premises which he was bound to repair in consideration of private advantage. The special use is a use different from the normal intended use of the public way, and thus, the special use exception is reserved for situations where a landowner whose property abuts a public street or sidewalk derives a special benefit from that property unrelated to the public use. *Minott v. City of New York*, 230 A.D.2d 719 [2nd Dept. 1996].

Here, PCM demonstrated by competent evidence in admissible form, *prima facie*, that it did not own, occupy, control or make special use of the road at issue. Rather, that it sold one adjacent property to Sam's Club, and the other adjacent property and road to Lowe's, years prior to the accident.

In opposition, the Plaintiff failed to raise a triable issue of fact as to whether PCM may be held liable in the happening of the accident, based on its ownership of other nearby property or otherwise.

Further, the Plaintiff failed to demonstrate that summary judgment is premature due to a

lack of disclosure. The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion. CPLR §3212(f); *Cortes v. Whelan*, 83 A.D.3d 763 [2nd Dept. 2011].

Thus, the motion of PCM is granted, and the complaint and all cross claims insofar as asserted against it are dismissed.

Similarly, the Town demonstrated by competent evidence in admissible form, *prima facie*, that it did not own, occupy, control or make special use of the road at issue, that it did not maintain or repair the road at issue, and that it never assumed control of the same.

In opposition, the Plaintiff failed to raise a triable issue of fact as to whether the Town may be held liable in the happening of the accident.

For example, Highway Law § 189 provides that “[a]ll lands which shall have been used by the public as a highway for the period of ten years or more, shall be a highway, with the same force and effect as if it had been duly laid out and recorded as a highway, and the town superintendent shall open all such highways to the width of at least three rods.”

In order for a private road to be deemed a public highway by use, it must be shown that, for a period of at least 10 years, the road at issue was used by the public and the municipality exercised dominion and control over the road. *Long Pond Assn., Inc. v Town of Carmel*, 87 A.D.3d 525 [2nd Dept. 2011]. Such a showing requires more than intermittent use by the public and more than occasional road work by the municipality. *Long Pond Assn., Inc. v Town of Carmel*, 87 A.D.3d 525 [2nd Dept. 2011]. Thus, “naked use” by the public is not enough. The plaintiff must further demonstrate that the municipality continuously maintained and repaired the street and, thus, assumed control thereof during the period of time in question. *Marchand v. New York State Dept. of Environmental Conservation*, 19 N.Y.3d 616 (2012).

Here, in opposition to the Town’s *prima facie* demonstration, the Plaintiff failed to raise a

triable issue of fact as to whether the Town continuously maintained or repaired the road at issue, or otherwise assumed control of the same.

Similarly, it is unclear how the fact that the Town police and fire departments respond to relevant events at the property changes this result. Obviously, the very nature of the duties of both departments requires that they respond to private property on a regular basis. It is unclear how this, without more, would render the Town liable for dangerous conditions present on such property. *Estate of Konstantatos v County of Suffolk*, 208 A.D.2d 889 [2nd Dept. 1994].

Further, to the extent that the Town approved either the road or signage for the property, without more, would not render it liable for the accident. Rather, under such circumstances, a plaintiff would need to demonstrate that the municipality also undertook the responsibility of erecting and/or maintaining the signs, etc. *Murray v. Wolff*, 242 A.D.2d 265 [2nd Dept. 1997].

Further, as a general rule, a municipality will not be held responsible for the negligent design of a highway it does not own or control. *Carlo v. Town of East Fishkill*, 19 A.D.3d 442 [2nd Dept. 2005]. Moreover, a municipality cannot be held liable for the failure to maintain in a reasonably safe condition a road it does not own or control unless it affirmatively undertakes such a duty. *Carlo v. Town of East Fishkill*, 19 A.D.3d 442 [2nd Dept. 2005].

Here, as noted *supra*, the Plaintiff failed to raise a triable issue of fact as to whether the Town assumed control of the road, or affirmatively undertook a duty to maintain it.

Finally, the Plaintiff failed to demonstrate that summary judgment is premature due to a lack of disclosure. The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion. CPLR §3212(f); *Cortes v. Whelan*, 83 A.D.3d 763 [2nd Dept. 2011]. In order to be afforded the benefits of CPLR §3212(f), it is incumbent upon counsel to demonstrate an evidentiary basis from which the court could reasonably conclude that such discovery may lead

to relevant evidence. *See, e.g., Groves v. Land's End Housing Co., Inc.*, 80 N.Y.2d 978 (1992); *Companion Life Insurance Co. of N.Y. v. Allstate Abstract Corp.*, 35 A.D.3d 519 [2nd Dept. 2006]. Here, Plaintiff failed to make the requisite showing.

In support of its motion, Sam's Club demonstrated by competent evidence in admissible form, *prima facie*, that it did not own, occupy, control or make special use of the road at issue.

In opposition, the Plaintiff failed to raise a triable issue of fact as to whether Sam's Club may be held liable in the happening of the accident. This includes whether there is a question of fact that Sam's Club failed to provide adequate parking for its store and whether such negligence was a proximate cause of the accident, or whether Sam's Club failed to erect and maintain proper signage and traffic markings on its property and whether such negligence was a proximate cause of the accident, or whether Sam's Club failed to maintain a tree on its property and whether such negligence was a proximate cause of the accident.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, that the motions are granted, and that the complaint and all cross claims are dismissed insofar as asserted against the Defendants PCM Development Company; Town of Wallkill; Town of Wallkill Department of Public Works; Sam's Club #6423; and Sam's West, Inc., d/b/a Sam's Club, and Wal-Mart Stores, Inc. d/b/a Walmart; and it is further,

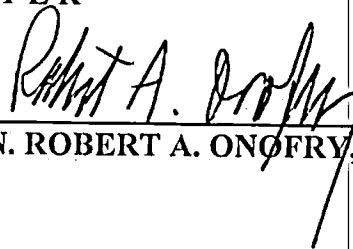
ORDERED, that the action insofar as asserted against the remaining Defendants is severed; and it is further,

ORDERED, that the remaining parties are directed to, and shall, appear, through respective counsel, for a Status Conference on Wednesday, January 16, 2019, at 9:15 a.m., at the Orange County Surrogate's Court House, 30 Park Place, Goshen, New York.

The foregoing constitutes the decision and order of the court.

Dated: November 9, 2018
Goshen, New York

ENTER



HON. ROBERT A. ONOFRY, A.J.S.C.

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