STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

SCOTT E. JANUS,

Plaintiff,

- against

DECISION AND ORDER
INDEX NO. 2015-802043

BERN-STAN-ZYG DEVELOPMENT CORPORATION, and
TOWN OF CHEEKTOWAGA,

Defendants.

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES:

LAW OFFICE OF RICHARD G. BERGER
Richard G. Berger, Esq., Of Counsel
Attorneys for Plaintiff

GOLDBERG SEGALLA LLP
Meghan M. Brown, Esq., Of Counsel
Attorneys for Defendant, Bern-Stan Development Corporation

CHELUS HERDZIK SPEYER & MONTE P.C.
Kevin Loftus, Jr., Esq., Of Counsel
Attorneys for Defendant, Town of Cheektowaga

WALKER, J.

On May 4, 2018, Defendant, Bern-Stan-Zyg Development ("Development"), applied, pusuant to CPLR §§ 3212 and 2004 for summary judgment, dismissing the Complaint and all cross-claims against it, and for permission to file the instant motion. On May 11, 2018, Defendant, Town of Cheektowaga (the "Town"), also applied for summary judgment seeking

dismissal of the Complaint and all cross-claims against it, but the Town neither characterized its motion as a cross-motion, nor did it seek permission to file it.

Preliminary, and with respect to Development's application to make the instant motion, the Court issued a Scheduled Order, dated October 24, 2017, which directed the following, in relevant part:

> **ORDERED,** that . . . Plaintiff shall file the Trial Note of Issue and Statement of Readiness on or before January 31, 2018; and it is further
>
> **ORDERED,** that any motions for summary judgment shall be filed and served within sixty (60) days of filing of the Trial Note of Issue . . . .

To date, Plaintiff has not filed the Trial Note of Issue and Statement of Readiness, despite having been ordered to do so. Accordingly, Development's deadline to make a dispositive motion has not been triggered under the terms of the October 24, 2017 Scheduling Order.

However, on April 18, 2018, this Court amended its Rules applicable to, *inter alia*, the filing of summary judgment motions. The Amended Rules, as applicable to the time within which to file dispositive motions, provide as follows:

> The Court requires strict adherence to Scheduling Orders. The time within which to file dispositive motions shall not be enlarged by a parties' failure to timely file the Trial Note of Issue and Statement of Readiness. Accordingly, the deadline by when dispositive motions shall be served and filed shall run from the date the Trial Note of Issue was ordered to be filed, not the date it was actually filed (*see Gibbs v. St. Barnabas Hospital,* 16 NY3d 74, 81 [2010] ["The failure to comply with deadlines not only impairs the efficient functioning of the courts and the adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conduct of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines

> breeds disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution"]).

According to the Amended Rules, Development (and the Town) should have filed their respective motions no later than April 2, 2018.

In light of the facts that the Court amended its Rules after it issued the October 24, 2017 Scheduling Order and the trial of this matter is not scheduled to commence until April 1, 2019, the Court shall consider Development's application as timely. Having decided to do so, it shall also consider the Town's application, despite that the Town did not request permission to file a late dispositive motion.

BACKGROUND

This action arises out of Plaintiff's claim that he suffered personal injuries as a result of a motorcycle accident, which was allegedly caused by the Defendants' negligence.

Development owns the real property located in the Town of Cheektowaga at 2912 William Street (the Property"), which is improved with the IV Stallions Bar (the "Bar") and an associated paved parking lot (the "Parking Lot").

On the evening of November 5, 2013, as Plaintiff was leaving the Bar, the front tire of the motorcycle he was operating came into contact with the edge of a sanitary sewer grate (the "Grate") located in the Parking Lot, causing him to lose control of the motorcycle and strike a parked vehicle (the "Incident"). Plaintiff contends that he suffered personal injuries as a result of the Incident.

STANDARD OF REVIEW

To obtain summary judgment, the moving party must make a *prima facie* showing of

entitlement to judgment as a matter of law (*Ferluck AJ v. Goldman Sachs & Co.*, 12 NY3d 316, 320 [2009]). This requires sufficient evidence to shift the burden to the opposing party to produce evidentiary proof sufficient to establish the existence of genuine issues of material fact (*Id* at 320). "Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat summary judgment (*Gilbert Frank Corp. v. Fed. Ins. Co.*, 70 NY2d 966, 967 [1988] [citation omitted]).

Moreover, factual issues raised by the opposing party must be genuine, as opposed to speculative (*Trahwen LLC v. Ming 99 Cent City #7, Inc.*, 106 AD3d 1467, 1468 [4th Dept 2013]).

DEVELOPMENT'S APPLICATION

On June 15, 1995, Development granted an easement to the Town for the purposes of, *inter alia*, operating and maintaining an underground storm sewer pipeline and the Grate at the Property.

It is undisputed that the Town owns and is solely responsible for maintaining the Grate. Based on this undisputed fact, Development contends that it owed no duty to Plaintiff with respect to the Grate and therefore could not be found negligent for the Incident.

However, it is also undisputed that in or about June 2013, approximately five (5) months prior to the Incident, Development retained a paving contractor to resurface a portion of the Parking Lot, which included the area surrounding the Grate.

At the time of the Incident, there existed a drop in elevation between the surface of the Parking Lot and the Grate measuring three (3) to six (6) inches, with broken blacktop falling off in pieces at the edge of the Grate. Scott Kowal, the Town's General Crew Chief of its Sanitation Department, testified at his Examination Before Trial that such condition was "unacceptable."

Development's motion is denied, because genuine issues of material fact exist as to whether, in re-paving the Parking Lot in or about June 2013, Development created the condition which caused the Incident (*see Navetta v. Onondaga Galleries, LLC*, 106 AD3d 1468 [4th Dept 2013] [the property owner in a premises liability action bears the burden of establishing that it did not create the alleged dangerous condition]).

THE TOWN'S APPLICATION

The Town contends that its motion should be granted, because it had no prior written notice of the Grate's condition, as required by §168-2 of the Town's Code, which provides as follows:

> Conditions for maintaining civil action
>
> A. No civil action shall be maintained against the Town of Cheektowaga, any of its districts located therein or any town officer, agent or employee for damages or injuries to person or property sustained in consequence of any street, highway, bridge, culvert, sign, highway marking or device, sidewalk or crosswalk, **storm or sanitary sewer line** or appurtenance, traffic sign or signal or any town building or facility being defective, out of repair, unsafe, dangerous or obstructed or in consequence of snow and ice thereon unless it appears that written notice of such defective, unsafe, dangerous or obstructed condition or of the existence of the snow or ice on such highway, bridge or culvert was actually given to the Town Clerk or Town Superintendent of Highways of the Town of Cheektowaga 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 or to cause the snow or ice to be moved or place made otherwise reasonably safe.
>
> B. Such written notice shall be dated and signed and shall, among other things, specify the particular place and condition alleged to be out of repair, unsafe, dangerous or

> obstructed or the place and extent of the existence of the snow or ice and shall be actually given to the Town Highway Superintendent or Town Clerk (emphasis added).

It is undisputed that the Town had not received prior written notice of the Grate's condition prior to the Incident.

Plaintiff contends that the Town's motion should be denied, because the Grate cannot be construed as a "street, highway, bridge, culvert, sidewalk or crosswalk," pursuant to the notice provisions of Town Law §65-a (*see Sobotka v. Zimmerman*, 48 AD3d 1260 [4th Dept 2008] [affirming denial of summary judgment to defendant municipality and its highway department]). However, Town Code §168-2, unlike Town Law §65-a, expressly applies to "storm or sanitary sewer line[s]", rendering *Sobotka* distinguishable and not controlling.

Rather, the instant matter is more akin to the facts and circumstances of *Barnes v. City of Mount Vernon* (245 AD2d 407 [2d Dept 1997]), *Dileo v. Town of Harrison* (55 AD3d 867 [2d Dept 2008]), and *Crespo v. City of Kingston* (80 AD3d 1124 [3d Dept 2011]), all of which held that the injured plaintiffs had no causes of action against the defendant municipalities over allegedly defective storm grates, because the defendants had not received prior written notice of the alleged defects.

Finally, Plaintiff's contention that the Town should have known about the "unacceptable" condition of the Grate prior to the Incident is not supported by any admissible evidence and constitutes the type of "unsubstantiated allegations or assertions [that] are insufficient" to defeat summary judgment (*Gilbert Frank Corp.*, 70 NY2d at 967).

In light of the foregoing, it is hereby

ORDERED, that Development's motion is denied; and it is further

ORDERED, that the Town's motion is granted and the Complaint and all cross-claims against it are hereby dismissed.

This constitutes the Decision and Order of this Court. Submission of an order by the Parties is not necessary. The delivery of a copy of this Decision and Order by this Court shall not constitute notice of entry.

Dated: July 17, 2018
Buffalo, New York

HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice