SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

DANIEL BARNETTE,

Plaintiff,

-against-

TOWN OF LAGRANGE and COUNTY OF DUTCHESS,

Defendants.

DECISION AND ORDER

Index No: 51122/19

The following papers were read on Defendant's motion for summary judgment:

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
AFFIDAVIT IN SUPPORT
AFFIDAVIT IN SUPPORT
EXHIBITS A - I

AFFIRMATION IN OPPOSITION
EXHIBITS J - K

REPLY AFFIRMATION
REPLY AFFIDAVIT

This is a negligence action in which Plaintiff seeks damages for injuries allegedly sustained when his motorcycle slid out from under him while he was making a left turn from Titusville Road on Daley Road in the Town of LaGrange. The accident occurred on May 11, 2018 at approximately 6:00 p.m. Plaintiff asserts that as he proceeded to make the left turn his motorcycle rode over a groove, pothole or fissure in the road which caused him to fall. The Town of LaGrange moves for summary judgment asserting that it does not own or control Titusville Road and that Plaintiff failed to comply with the prior written notice requirements set forth in Town Code §168-1. That provision precludes a party from maintaining a civil action against the Town based on any defective, unsafe or dangerous condition on town property unless the town was given prior written notice of the condition.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of

law. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). If a movant has met this threshold burden, to defeat the motion the opposing party must present the existence of a triable issue of fact. See Zuckerman v. New York, 49 NY2d 557, 562 (1980). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion." Yelder v. Walters, 64 AD3d 762, 767 (2nd Dept 2009).

A municipality will not be held responsible for negligent design or maintenance of a highway it does not own or control. Ernest v. Red Creek Cent. Sch. Dist., 93 N.Y.2d 664, 675 (1999). In support of its motion the Town has submitted the affidavit of its Highway Superintendent stating that the Town does not own, control or maintain Titusville Road. He further references photographs Plaintiff annexed to his Notice of Claim and states that the Town was not involved in any maintenance, repairs, paving or repaving of Titusville Road at or about the location of Plaintiff's accident. His affidavit and the affidavit of the Town Clerk further establish that the Town did not received any prior written notice of the alleged defective road condition at the location where Plaintiff fell. The foregoing in conjunction with the excerpts from Plaintiff's deposition are sufficient to establish the Town's *prima facie* entitlement to summary judgment.

In opposition, Plaintiff has submitted his affidavit, additional photographs of the accident site and the full transcript of his testimony at the GML §50-h deposition. Plaintiff testified at his deposition that prior to the accident he was driving westbound on Titusville Road with the intention of making a left turn onto Daley Road, a Town owned road. As he proceeded into the intersection he lost control of his motorcycle when it drove over grooves in the pavement. Photographs of the intersection depict two separate deep grooves approximately 8 to 10 inches wide extending over the entirety of Titusville Road and onto Daley Road. The grooves appear to be approximately 4 to 5 feet apart. Plaintiff alleges that the grooves were sufficiently below the level of the road as to cause a depression that caused him to fall. While there is no dispute that the Town does not own and is not responsible for maintaining Titusville Road, the depressions run across Titusville Road and continue across Daley Road to a sewer drain. Plaintiff maintains that an award of summary judgment is premature because he has yet to have the opportunity to conduct discovery as to what party was responsibility for creating the alleged dangerous condition in the intersection of Daley and Titusville Roads. He asserts that because the condition clearly cuts across Titusville Road and into Daley Road, the Town's mere denial of ownership or that it maintained Titusville Road provides an insufficient basis to dismiss his claims against the Town at this stage of the proceedings.

A party seeking to avoid summary judgment on the grounds that it is premature for a lack of discovery must offer an evidentiary basis to suggest that discovery may lead to relevant evidence and that facts essential to justify opposition to the motion lie exclusively within the knowledge and control of the moving party. Lopez v. WS Distribution, Inc., 34 AD3d 759 (2nd Dept 2006). The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment will be uncovered during discovery is insufficient to deny the motion. Id.

Drawing every inference in favor of Plaintiff as this court must in adjudicating a summary judgment motion, an issue of fact exists as to whether the Town may have been responsible for the pavement condition on both Daley and/or Titusville Roads. A reasonable inference can be drawn that the same party is responsible for the consistent groove patterns that traverse both roads. As the grooves are undisputedly located on the Town owned Daley Road, the court cannot say as a matter of law that the Town was not responsible for creating such grooves. While the affidavit of the Town's Highway Superintendent states that the Town was not involved in any maintenance, repairs or paving of Titusville Road at the accident location, it is silent as to the identical grooves that exist on Daley Road. Under such circumstance, the court agrees with Plaintiff that he is entitled to discovery on the issue on whether the Town was involved in the creation of the alleged defective condition. The court acknowledges that the Town Highway Superintendent submitted a reply affidavit clarifying that the Town did not hire anyone to do any work at the intersection of Daley and Titusville Roads. However, this affidavit submitted in reply does not warrant granting summary judgment prior to allowing Plaintiff to conduct discovery. The photographs of the accident site constitute evidentiary grounds to permit discovery to proceed.

It is well established that a municipality that has enacted a prior written notice statute may not be subjected to liability for injuries caused by an improperly maintained street unless it has received written notice of the defect. See Cimino v. Cty. of Nassau, 105 AD3d 883, 884 (2nd Dept 2013). However, an exception to the prior written notice requirement exists where a municipality created the defect through an affirmative act of negligence. Id. Here, Plaintiff has alleged affirmative acts of negligence on the part of the Town in claiming that it created the dangerous condition that allegedly caused his fall. As set forth above, at this stage of the litigation issues of fact exists as to whether the Town took affirmative action to cause the grooved pavement condition that Plaintiff alleged caused his accident. See generally Braver v. Vill. of Cedarhurst, 94 AD3d 933, 934 (2nd Dept 2012). Wherefore, it is

ORDERED that Defendant's motion for summary judgment is denied without prejudice to renew following discovery.

The foregoing constitutes the decision and order of the Court. The parties shall appear for a preliminary conference on November 12, 2019 at 9:15 a.m. unless a preliminary conference form is completed, signed and filed before then.

Dated: October 24, 2019
Poughkeepsie, New York

ENTER:

MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

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