Hill v Town of Brookhaven
2020 NY Slip Op 34977(U)
January 9, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 16-617791
Judge: Vincent J. Martorana

SHORT FORM ORDER

INDEX No. 16-617791
CAL. No. 19-00097OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY

PRESENT:

Hon. VINCENT J. MARTORANA
Justice of the Supreme Court

MOTION DATE 5-16-19 (003)
MOTION DATE 6-6-19 (004, 005, 006, 007 & 008)
ADJ. DATE 7-11-19
Mot. Seq. # 003 - MD # 006 - XMD
004 - MG # 007 - MG
005 - XMD # 008 - MD

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ANNE HILL,

Plaintiff,

- against -

TOWN OF BROOKHAVEN, PETER N. KROMHOUT, DEVENDRA K. INC., 378-382 MAIN STREET, LLC, and 96 ROCKINGHAM INC., d/b/a BUCKLEY'S IRISH PUB,

Defendants.

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Upon the following papers numbered read on these e-filed motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendant Town of Brookhaven, dated April 12, 2019; by defendant 378-382 Main Street LLC, dated May 3, 2019; by defendant Peter Kromhout, dated May 14, 2019; by defendant 96 Rockingham Inc., d/b/a Buckley's Irish Pub, dated May 15, 2019; Notice of Cross Motion and supporting papers by defendant Peter Kromhout, dated May 8, 2019; by defendant Devendra K. Inc., dated May 15, 2019; Answering Affidavits and supporting papers by plaintiff, dated June 12, 2019 Replying Affidavits and supporting papers by defendant Peter Kromhout, dated May 11, 2019; defendant 96 Rockingham Inc., d/b/a Buckley's Irish Pub, dated July 3, 2019; by defendant Devendra K. Inc., dated July 8, 2019; by defendant 378-382 Main Street LLC, dated July 9, 2019, by defendant Town of

Brookhaven, dated July 10, 2019; Other by defendant Devendra K. Inc., dated May 20, 2019; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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

ORDERED that the motion (003) by defendant Town of Brookhaven for summary judgment dismissing the complaint and the cross claims against it is denied; and it is further

ORDERED that the motion (004) by defendant 378-382 Main Street LLC for summary judgment dismissing the complaint and the cross claims against it is granted; and it is further

ORDERED that cross motion (005) by defendant Peter Kromhout for summary judgment in his favor as to his cross claims against defendant Town of Brookhaven is denied; and it is further

ORDERED that the cross motion (006) by defendant Devendra K. Inc. for summary judgment dismissing the complaint and the cross claims against it is denied; and it is further;

ORDERED that the motion (seq. 007) by defendant Peter Kromhout for summary judgment dismissing the complaint and the cross claims against him is granted; and it is further

ORDERED that the motion (seq. 008) by defendant 96 Rockingham Inc., d/b/a Buckley's Irish Pub for summary judgment dismissing the complaint and the cross claims against it is denied.

Plaintiff Anne Hill commenced this action to recover for personal injuries she allegedly sustained at approximately 9:00 p.m., on April 8, 2016, at a parking lot located in the rear of the premises known as 386 Montauk Highway and 386D Montauk Highway in Center Moriches, New York (also known as 386 Main Street, in Center Moriches, New York). The accident allegedly occurred when plaintiff tripped and fell on a raised edge of a manhole cover, which was located over a septic tank. By the bill of particulars, plaintiff identifies that the accident occurred "approximately 43' of the south of the rear entrance to Moriches Community Center and Buckley's Irish Pub sharing the building with the address of 386 and 386D Montauk Highway and additionally approximately 218' northeast of the southeast corner of Canal Street on the westerly side entrance to the subject to the subject parking lot as well as 230' southwest of the northwest corner of Union Avenue and the easterly side entrance to said parking lot." Defendant Devendra K. Inc. admits that it owned the premises known as 386 Main Street in Center Moriches, New York (386 Main Street). The first floor of 386 Main Street was allegedly occupied by defendant 96 Rockingham Inc., d/b/a Buckley's Irish Pub (Buckley's). Defendant 378-382 Main Street LLC admits that it owned the premises known as 378 Main Street in Center Moriches, New York (378 Main Street). Defendant Peter Kromhout admits that he owned the premises known as 390 Main Street in Center Moriches, New York (390 Main Street). By the complaint, as amplified by the bill of particulars, plaintiff alleges that defendants were negligent in, among other things, causing a height differential to exist between the subject manhole cover and the surrounding ground, in creating a hazard, in causing and permitting the edges of the subject manhole cover to be raised and tilted, and in failing to secure the subject manhole cover.

The Town now moves for summary judgment dismissing the complaint and the cross claims against it. The Town argues, in part, that it owed no duty to plaintiff on the grounds that it did not create, design, install, own, manage, control, or maintain the subject manhole cover. In the alternative, the Town contends that the complaint against it must be dismissed, because it had no prior written notice of the subject defect. In support of its motion, the Town submits, inter alia, the transcripts of plaintiff's General Municipal Law § 50-h and deposition testimony, the transcripts of the deposition testimony of Peter Kromhout, Lilita Singh, and George Mistler, and the affidavits of Marie Angelone and Linda Sullivan.

378-382 Main Street LLC moves for summary judgment dismissing the complaint and the cross claims against it, contending that it did not own, occupy, or control the accident site. In support of its motion, 378-382 Main Street LLC submits, among other things, the transcripts of plaintiff's General Municipal Law § 50-h and deposition testimony, the transcript of Singh's deposition testimony, and the affidavit of Frank Ferrantello.

Kromhout moves for summary judgment dismissing the complaint against him and the cross claims against him. He contends that plaintiff was injured on property which he did not occupy, control, maintain, manage, supervise, or make special use of. In support of his motion, Kromhout submits, among other things, the transcript of his deposition testimony, the transcript of plaintiff's deposition testimony, and the affidavit of Matthew Crane.

Kromhout cross-moves for summary judgment in his favor as to his cross claims against the Town. He contends, among other things, that the Town breached its lease agreement by failing to procure insurance, and that he is entitled to indemnification, a defense, and contribution from it. In support of his cross motion, Kromhout submits, among other things, a copy of a lease agreement dated September 18, 1975.

Devendra K. Inc. cross-moves for summary judgment dismissing the complaint and the cross claims against it. Devendra K. Inc. contends that it was an out-of-possession owner with no control over the subject parking lot, and that triable issues of fact remain as to whether the Town created the alleged defect. In support its cross-motion, Devendra K. Inc. submits, among other things, a copy of a lease agreement dated July 27, 2010, and riders and amendments to this lease agreement, and the transcript of James Cantwell's deposition testimony.

Buckley's moves for summary judgment dismissing the complaint and the cross claims against it. Buckley's contends that it did not owe a duty to plaintiff, as it did not own, operate, maintain, supervise, or control the subject parking lot or the subject manhole cover. Buckley's contends that the Town owned the subject parking lot, and that the Town was obligated to maintain it. In support of its motion, Buckley's submits, among other things, the transcripts of plaintiff's General Municipal Law § 50-h and deposition testimony, the transcript of Cantwell's deposition testimony, and copies of a lease agreement dated July 27, 2010, along with riders and amendments to this lease agreement, a lease agreement dated July 21, 1977, and the Town's response to Buckley's notice to admit.

Plaintiff opposes the motions by the Town, 378-382 Main Street LLC Kromhout, and Buckley's, and the cross motions by Kromhout and Devendra K. Inc. She contends, among other things, that defendants have failed to eliminate triable issues of fact as to who was responsible for maintaining the subject manhole cover and the subject parking lot. Plaintiff also argues that triable issues of fact exist as to whether the Town affirmatively created the alleged defect, and whether the alleged defect resulted from the Town's special use of the parking lot. In support of her opposition, plaintiff submits, among other things, the transcripts of her General Municipal Law § 50-h and deposition testimony, the transcripts of Mistler's, Cantwell's, Singh's, and Kromhout's deposition testimony, her affidavit, and the affidavit of Harold Krongelb.

According to plaintiff's statutory hearing and deposition testimony, the accident occurred when her foot came into contact with a raised portion of the side of the subject manhole cover, which was surrounded by asphalt. Plaintiff testified that the subject manhole cover was partially tilted, and that it appeared to be missing two bolts. She allegedly first observed the subject manhole cover after her fall. At her statutory hearing, plaintiff testified that the raised portion of the subject manhole cover was approximately five inches above the asphalt surface. However, at her deposition, plaintiff testified that the raised portion of the subject manhole cover was approximately two or three inches above the asphalt.

Singh appeared for a deposition as a representative of Devendra K. Inc. She testified that she is the secretary of Devendra K. Inc. She further testified that Devendra K. Inc. purchased 386 Main Street in 1986, and that it never conducted a business at the premises. According to her testimony, Devendra K. Inc. obtained an ownership interest in the parking lot behind 386 Main Street at the time of the sale.

According to Singh's testimony, a fire took place at 386 Main Street in July of 2005, which destroyed the existing building. Singh first testified that the premises was rebuilt in 2013, but later stated that the construction of the new two-story building was completed by 2011. She also stated that Devendra K. Inc. hired a contractor to install a sanitary system to service 386 Main Street at the time that the new building was constructed. Devendra K. Inc. allegedly did not hire any company to clean out the septic system.

Singh testified that the second floor of 386 Main Street is occupied by three commercial tenants, and such tenants entered into separate lease agreement with Devendra K. Inc. She stated that she did not recall the names of the second-floor tenants, or for how long they have been tenants at the premises. She allegedly did not recall whether any of these tenants were required to maintain the parking lot pursuant to their respective lease agreements. According to her testimony, she did not visit 386 Main Street on a regular basis. Singh testified that she did not receive any complaints regarding any cesspool covers behind 386 Main Street prior to the date of the subject accident, and that Devendra K. Inc. hired a contractor to repair a cesspool cover in the in the parking lot in the rear of 386 Main Street in June of 2016.

Singh appeared for a subsequent deposition as a representative of 378-382 Main Street LLC. Singh testified that she is a member of 378-382 Main Street LLC and that she served as the sole landlord for 378 Main Street. She also testified that 378-382 Main Street LLC never occupied the building. There allegedly were no manholes in the parking lot behind the building known as 378 to 382 Main Street in Center Moriches, New York (378 to 382 Main Street). According to her testimony, 378 to 382 Main Street was connected to a cesspool, which was located in the rear of building underneath cement. Singh clarified that the cesspool servicing 378 to 382 Main Street was not located in a parking lot.

Cantwell testified that he is president of Buckley's. According to Cantwell's testimony, Buckley's occupied the first floor of 386 Main Street since 2012. Cantwell testified that a sanitary system was installed in the parking lot behind 386 Main Street before Buckley occupied the premises in 2012. He stated the sanitary system, which consisted of approximately 10 to 12 cesspools, serviced both stories of 386 Main Street. He further testified that access to those cesspools could be gained through manhole covers in the rear parking lot. Buckley's allegedly hired an entity to service its cesspool. Cantwell allegedly did not recall the name of the tenants occupying the second floor of 386 Main Street.

Kromhout testified that he owned 390 Main Street from 1980 until 2017. Kromhout further testified that he purchased it from George Nicola in 1980. According to his testimony, Kromhout never entered into a written agreement to assign any lease agreement between Nicola and the Town to himself. Kromhout stated that he operated a television repair business at 390 Main Street until 2005, when a fire occurred on the premises, which destroyed the building. He testified that 390 Main Street was never connected to a sanitary system that led to the rear parking lot area. He further testified that no one from his business either performed maintenance work on the subject manhole cover or hired anyone to perform such work.

Mistler stated that he has been employed as a highway labor crew leader in the Town's Highway Department since May 2011. He further stated that his responsibilities include maintenance of the roadways for the geographic location known as Unit 11, which includes the subject parking lot. According to Mistler's testimony, his

assignments on a given date were determined by requests from residents in the form of complaints or work orders, and requests from his supervisor. Mistler stated that there would be a written notation on a given work order indicating whether work was performed pursuant to it.

Mistler further stated that the Town did not perform regular inspections of the subject parking lot. He testified that the only work performed by the Town itself on the subject parking lot included plowing and sanding in the winter, cleaning up fallen trees, and maintaining the storm drains. When asked about the Town's snow removal efforts at the subject parking lot, Mistler stated he has never observed any damage to any of the manhole covers as a result of snow plowing efforts in the subject parking lot.

According to Mistler's testimony, the Town did not perform any maintenance work with regard to the cesspool covers or the sanitary or septic system running underneath the subject parking lot. Mistler testified that the Town never replaced or put in any type of bolts in any of the cesspool covers in the subject parking lot from the time that it was paved up to and including the date of the accident. He stated that he did not know if the Town hired a contractor to perform any work with regard to the subject cesspool cover after the date of the accident.

Mistler testified that although the Town repaired the asphalt in the subject parking lot itself, it hired a contractor known as Bimasco to pave the subject parking lot in October of 2013. According to Mistler's testimony, he was not aware of any other repaving work performed on the subject parking lot. When asked about the process of repaving the subject parking lot in October of 2013, Mistler stated that Bimasco first removed the existing parking lot surface before replacing it with a new surface. Mistler admitted that he neither examined any of the cesspool covers at the time that the old surface was removed nor observed how the asphalt was placed immediately surrounding the cesspool covers. He further testified that he did not know if any of the cesspool covers were moved or dislodged during the course of the removal of the existing surface or the paving of the new asphalt surface. Mistler allegedly did not recall the individual from the Highway Department who approved the repaving work.

Angelone avers that she has been employed by the Town's Highway Department as a neighborhood aide since 2005. She stated that her responsibilities include searching the Highway Department's records for work orders or prior written notices regarding accident locations, which are kept in the regular course of its business. She also states that she is responsible for searching the Highway Department's records, which are maintained and kept in its regular course of business, to ascertain whether the Town owns, maintains, controls, designs or exercises jurisdiction over incident locations. According to her affidavit, she conducted a search of the records maintained by the Town's Highway Department in the regular course of its business for prior written complaints and work orders for all cesspool covers in the parking lot behind 386 Main Street, including but not limited to complaints or work orders regarding the cesspool cover at the subject location, over the five-year period prior to and including the date of the accident. Angelone contends that her search revealed no written complaints or notifications, or prior notices of claim to the Town regarding any cesspool cover at the subject location. She also contends she has searched the Highway Department's records regarding the creation, ownership, maintenance, management, installation, design, and control of the cesspool covers in the parking lot behind 386 Main Street, including the cesspool cover at the subject location. Angelone concludes that her search revealed that the Town did not own, create, maintain, manage, or control the cesspool covers on the date of plaintiff's accident or presently.

Sullivan states that she has been employed as an office assistant in the Town Clerk's Office. She contends that her duties include the logging of written notices of defects, and conducting searches of the Town Clerk's records. She avers that she has conducted a search of the log book, the index record book, and the files maintained and kept by the Town's Clerk in the regular course of its business for prior written complaints regarding cesspool covers located in the parking lot behind 386 Main Street, including but limited to complaints regarding any cesspool

cover at the subject location for the five years prior to and including the date of the accident. She concludes that her search revealed no written complaints, notifications, or prior notices of claim at the accident site.

Ferrantello states that he is a land surveyor. He avers that he has performed a boundary survey of the properties known as 386 Main Street and 378 to 382 Main Street. He states that he, among other things, visited the location, and reviewed the deeds of the properties. He concludes within a reasonable degree of surveying certainty that the subject manhole cover was located entirely within 386 Main Street, and that it did not service 378 to 382 Main Street.

Crane states that he has been a land surveyor since 1994. He states, among other things, that he inspected the alleged accident site, the property line between 386 Main Street and 390 Main Street, and 390 Main Street, and reviewed photographs of the alleged accident site. He avers that he conducted a survey on April 10, 2019 to determine the common property line between 386 and 390 Main Street in connection with the alleged accident site. He concludes within a reasonable degree of certainty in the field of surveying that the accident site was entirely located within 386 Main Street, and was not located within 390 Main Street.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 87 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once the movant demonstrates a prima facie entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion 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* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557; 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]). The failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*). In deciding the motion, the court must view all evidence in the light most favorable to the nonmoving party (*see* ***Matter of New York City Asbestos Litig.***, 33 NY3d 20, 99 NYS3d 734 [2019]; ***Vega v Restani Constr. Corp.***, *supra*).

Liability for a dangerous condition on real property ordinarily must be predicated on ownership, occupancy, control, or special use of the property (*see* ***Greenbaum v Bare Meats, Inc.***, ___ AD3d ___, 2019 NY Slip Op 08823 [2d Dept 2019]; ***Arshinov v GR 10-40, LLC***, 176 AD3d 1019, 108 NYS3d 892 [2d Dept 2019]; ***Dalpiaz v McGuire***, 176 AD3d 779, 107 NYS3d 890 [2d Dept 2019]; ***Reeves v Welcome Parking Ltd. Liab. Co.***, 175 AD3d 633, 107 NYS3d 371 [2d Dept 2019]). Absent ownership, occupancy, control, or special use, a party generally cannot be held liable for alleged injuries caused by a dangerous or defective condition on property (*see* ***Dalpiaz v McGuire***, *supra*; ***Reeves v Welcome Parking Ltd. Liab. Co.***, *supra*; ***Bartlett v City of New York***, 169 AD3d 629, 91 NYS3d 718 [2d Dept 2019]). To impose liability on an abutting landowner based on the principle of special use, such a landowner must put 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" (***Breland v Bayridge Air Rights, Inc.***, 65 AD3d 559, 560, 884 NYS2d 143 [2d Dept 2009], quoting ***Noia v Maselli***, 45 AD3d 746, 746, 846 NYS2d 326 [2d Dept 2007]; ***Ruffino v New York City Tr. Auth.***, 55 AD3d 817, 865 NYS2d 667 [2d Dept 2008]; ***Beda v City of New York***, 4 AD3d 317, 772 NYS2d 339 [2d Dept 2004]). Special use cases generally involve the installation of an object in the street or sidewalk or some variance in construction thereof (*see* ***Hernandez v Ortiz***, 165 AD3d 559, 86 NYS3d 42 [1st Dept 2018]; ***Yee v Chang Xin Food Mkt.***, 302 AD2d 518, 755 NYS2d 262 [2d Dept 2003]; ***Minott v City of New York***, 230 AD2d 719, 645 NYS2d 879 [2d Dept 1996]).

A landowner, or a party in possession or control of real property, has a duty to maintain its property in a reasonably safe condition (*see* ***Kellman v 45 Tiemann Assoc.***, 87 NY2d 871, 638 NYS2d 937 [1995]; ***Pilgrim v Avenue D Realty Co.***, 173 AD3d 788, 99 NYS3d 688 [2d Dept 2019]; ***Caban v Kem Realty, LLC***, 172 AD3d 1302, 101 NYS3d 422 [2d Dept 2019]). To be entitled to summary judgment in a trip-and-fall case, a real property owner, or a party in possession or control of real property, has the initial burden of making a prima facie showing that it neither created the allegedly dangerous condition nor had have actual or constructive notice of its existence (*see* ***Pilgrim v Avenue D Realty Co.***, *supra*; ***Chang v Marmon Enters., Inc.***, 172 AD3d 678, 99 NYS3d 397 [2d Dept 2019]; ***Bennett v Alleyne***, 163 AD3d 754, 81 NYS3d 504 [2d Dept 2018]). A defendant has constructive notice of a dangerous condition on its premises when the condition is visible and apparent, and has existed for a sufficient length of time to afford it a reasonable opportunity to discovery and correct the dangerous condition (*see* ***Fortune v Western Beef, Inc.***, ___ AD3d ___, 2019 NY Slip Op 08656 [2d Dept 2019]; ***Williams v Island Trees Union Free Sch. Dist.***, ___ AD3d ___, 2019 NY Slip Op 08443 [2d Dept 2019]; ***Gani v Avenue R Sephardic Congregation***, 159 AD3d 873, 72 NYS3d 561 [2d Dept 2018]). To meet its initial burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's accident (*see* ***Coelho v S & A Neocronon, Inc.***, ___ AD3d ___, 2019 NY Slip Op 08652 [2d Dept 2019]; ***Falco-Averett v Wal-Mart Stores, Inc.***, 174 AD3d 506, 101 NYS3d 642 [2d Dept 2019]; ***Reed v 64 JWB, LLC***, 171 AD3d 1228, 98 NYS3d 636 [2d Dept 2019]). Nonetheless, an out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises, and has a duty imposed by statute or assumed by a contract or course of conduct (*see* ***Robbins v 237 Avenue X, LLC***, 7 AD3d 799, 2019 NY Slip Op 08237 [2d Dept 2019]; ***Behluli v 228 Hotel Corp.***, 172 AD3d 1151, 98 NYS3d 873 [2d Dept 2019]; ***Crosby v Southport, LLC***, 169 AD3d 637, 94 NYS3d 109 [2d Dept 2019]). Thus, the court must consider not only the terms of the lease agreement, but also the parties' course of conduct, including the landowner's ability to access the premises to determine whether the landlord surrendered control over the premises as to extinguish his or her liability as a matter of law (*see* ***Gronski v County of Monroe***, 18 NY3d 374, 940 NYS2d 518 [2011]).

Kromhout and 378-382 Main Street LLC established their prima facie entitlement to summary judgment dismissing the complaint against them. Kromhout and 378-382 Main Street LLC submitted sufficient evidence to demonstrate, prima facie, that they did now own, occupy, control, or make special use of the subject parking lot where the accident occurred (*see* ***Dalpiaz v McGuire***, *supra*; ***Bartlett v City of New York***, *supra*; ***Slavin v Village of Sleepy Hollow***, 150 AD3d 924, 54 NYS3d 107 [2d Dept 2017]; ***Dobies v Girl Scouts of Westchester Putnam, Inc.***, 84 AD3d 724, 922 NYS2d 792 [2d Dept 2011]). In support of their respective motion or cross motion, Kromhout and 378-382 Main Street LLC submitted an affidavit of a land surveyor, which indicated that the subject manhole cover was located entirely within the premises known as 386 Main Street. According to Kromhout's testimony, 390 Main Street was never connected to a sanitary system that led to the rear parking lot area, and no one from his business ever performed or hired anyone to perform any type of maintenance work with respect to the subject manhole cover. Singh's testimony indicated that 378-382 Main Street LLC was not connected to the cesspool located underneath the subject manhole cover. The opposing parties failed to raise a triable issue of fact (*see* ***Dalpiaz v McGuire***, *supra*; ***Bartlett v City of New York***, *supra*; ***Slavin v Village of Sleepy Hollow***, *supra*). In light of the determination as to Kromhout and 378-382 Main Street LLC's liability, the cross claims against them are also dismissed.

As to Devendra K. Inc. it failed to establish, prima facie, that it was an out-of-possession landlord with respect to the subject parking lot (*see* ***Monopoli v Food Emporium, Inc.***, 135 AD3d 716, 23 NYS3d 322 [2d Dept 2016]; ***Lalicata v 39-15 Skillman Realty Co., LLC***, 63 AD3d 889, 882 NYS2d 185 [2d Dept 2009]; ***Massucci vAmoco Oil Co.***, 292 AD2d 351, 738 NYS2d 386 [2d Dept 2002]). Although Devendra K. Inc. submitted evidence that it never operated a business out of 386 Main Street, its submissions failed to eliminate triable issues of fact as

to whether it lacked control or a contractual obligation to maintain the subject parking lot (*see* ***Monopoli v Food Emporium, Inc.***, *supra*; ***Lalicata v 39-15 Skillman Realty Co., LLC***, *supra*; ***Massucci vAmoco Oil Co.***, *supra*). Moreover, Singh admitted that Devendra K. Inc. hired a contractor to repair a cesspool cover in the rear of the subject parking lot after the date of the accident. Although evidence of a subsequent remedial measure is not admissible to resolve the issue of Devendra K. Inc.'s negligence, it is admissible to the extent that it relevant to the disputed issue of whether Devendra K. Inc. had control of the subject parking lot (*see* ***Yanovskiy v Tim's Diagnostic's Auto Ctr.***, 170 AD3d 1089, 96 NYS3d 255 [2d Dept 2019]; *see generally* ***Soto v CBS Corp.***, 157 AD3d 740, 69 NYS3d 61 [2d Dept 2018]; ***Del Vecchio v Danielle Assoc., LLC***, 94 AD3d 941, 942 NYS2d 217 [2d Dept 2012]). Further, material issues of fact exist as to whether the installation of the septic system constituted a special use of subject parking lot, and whether the alleged defect was created or caused to occur through its special use (*see* ***Llanos v Stark***, 151 AD3d 836, 57 NYS3d 502 [2d Dept 2017]; ***Simmons v Berkshire Equity, LLC***, 149 AD3d 1119, 53 NYS3d 335 [2d Dept 2017]; ***Dos Santos v Peixoto***, 293 AD2d 566, 742 NYS2d 66 [2d Dept 2002]; ***Reid v City of New York***, 36 AD3d 784, 828 NYS2d 224 [2d Dept 2007]).

The Court notes that Devendra K. Inc.'s surreply, improperly denominated as a supplemental affirmation in support of its cross motion for summary judgment, was not considered, as it is not properly before the Court (*see* CPLR 2214 [c]). In any event, the information contained in the surreply papers was insufficient for Devendra K. Inc. to establish satisfy its prima facie burden. Its submissions were insufficient to determine whether the lease dated February 10, 1976 was operative (*see* General Obligations Law § 5-905), and whether it governed the subject parking lot at the time of the accident. General Obligations Law § 5-905 provides, in pertinent part, that an automatic lease provision is inoperative unless the lessor provides "written notice, served personally or by registered or certified mail, calling the attention of the tenant to the existence of such provision in the lease" at least fifteen days and not more than thirty days prior to the time specified in the lease for providing notice to quit the premises. No evidence was submitted to indicate that the Town was provided with the requisite to notice for the automatic renewal provision to become operative (*see* General Obligations Law § 5-905).

Buckley's also failed to establish its prima facie entitlement to summary judgment dismissing the complaint against it, because triable issues of fact exist as to whether it controlled or maintained the area of the property where the accident occurred (*see* ***Cohen-Kieck v Metropolitan Transp. Auth.***, 137 AD3d 1193, 28 NYS3d 446 [2d Dept 2016]; ***Riccardi v County of Suffolk***, 110 AD3d 864, 972 NYS2d 718 [2d Dept 2013]). Contrary to Buckley's contention, it cannot rely upon the lease dated July 19, 1977 to demonstrate the Town's obligation to maintain the subject parking lot on the date of the accident. No evidence was submitted to indicate that the Town was provided with the requisite notice for the automatic renewal provision to become operative (*see* General Obligations Law § 5-905). Further, Buckley's failed to eliminate triable issues of fact as to whether its use of the area where the accident occurred was a special use, and whether that special use caused the defect in the subject parking lot that allegedly caused plaintiff's fall (*see* ***Llanos v Stark***, *supra*; ***Simmons v Berkshire Equity, LLC***, *supra*; ***Dos Santos v Peixoto***, *supra*; ***Reid v City of New York***, *supra*; ***Dos Santos v Peixoto***, *supra*). Cantwell's deposition testimony failed to eliminate triable issues of fact as to whether Buckley's derived a special benefit from the location of the defect which was unrelated to the public use and which contributed to the defect (*see* ***Llanos v Stark***, *supra*; ***Alleyne v City of New York***, 89 AD3d 970, 933 NYS2d 348 [2d Dept 2011]). His deposition testimony indicates that the restrooms located inside of Buckley's were connected to cesspools, which could be accessed through a manhole cover located in the parking lot behind Buckley's. Further, Buckley's submits, in support of its motion, the lease agreement between it and Devendra K. Inc. which indicates that Buckley's is responsible for cesspool cleaning.

The Court now turns to the Town's motion for summary judgment dismissing the complaint against it. A municipality that has enacted a prior written notice provision may not be held liable for alleged injuries caused by a dangerous condition which come within ambit of such a law unless it has received prior written notice of the

alleged dangerous condition, or an exception to the prior written notice requirement applies (*see* ***Kabia v Town of Yorktown***, 175 AD3d 1395, 108 NYS3d 178 [2d Dept 2019]; ***Osman v Town of Smithtown***, 175 AD3d 1313, 108 NYS3d 146 [2d Dept 2019]; ***Gutierrez-Contreras v Village of Port Chester***, 172 AD3d 1333, 101 NYS3d 149 [2d Dept 2019]). Town of Brookhaven Code § 84-1 provides, in pertinent part, that no civil action shall be commenced against the Town for personal injuries sustained as a result of a dangerous condition on a highway unless prior written notice of such dangerous condition was actually given to the Town Clerk or the Town Superintendent of Highways. Although this section of does not expressly provide that the prior written notice requirement applies to municipal parking lots, courts have held that a public parking lot falls within the definition of a highway within the meaning of local ordinances (*see e.g.*, ***Groninger v Village of Mamaroneck***, 17 NY3d 125, 927 NYS2d 304 [2011]; ***Walker v Incorporated Vil. of Freeport***, 52 AD3d 697, 860 NYS2d 188 [2d Dept 2008]; ***Shannon v Village of Rockville Ctr.***, 39 AD3d 528, 834 NYS2d 537 [2d Dept 2007]). However, the prior written notice requirement does not apply where (1) the municipality affirmatively created the alleged dangerous condition through an act of negligence, or (2) a special use resulted in a special benefit to the locality (*see* ***Osman v Town of Smithtown***, *supra*; ***Liverpool v City of New York***, 163 AD3d 790, 83 NYS3d 64 [2d Dept 2018]; ***Trela v City of Long Beach***, 157 AD3d 747, 69 NYS3d 58 [2d Dept 2018]). The affirmative negligence exception is limited to work performed by the municipality that immediately resulted in the existence of a dangerous condition (*see* ***Yarborough v City of New York***, 10 NY3d 726, 853 NYS2d 261 [2008]; ***Gutierrez-Contreras v Village of Port Chester***, *supra*; ***Liverpool v City of New York***, *supra*; ***Trela v City of Long Beach***, *supra*).

The Town failed to established its prima facie entitlement to judgment as matter of based on its lack of control of the accident site. The Town's submissions failed to eliminate triable issues of fact as to whether it operated, maintained, or controlled the area of the subject parking lot where plaintiff fell (*see* ***Cohen-Kieck v Metropolitan Transp. Authority***, *supra*; ***Riccardi v County of Suffolk***, *supra*). Although the Town submitted evidence that it did not create, own, maintain, manage, design, or control of the subject manhole cover on the date of the accident, it also submitted evidence that it performed certain work on the subject parking lot, which raised a triable issue of fact as to whether the Town assumed the duty of maintaining that portion of the subject parking lot (*see* ***Mudgett v Long Is. R.R.***, 81 AD3d 612, 917 NYS2d 220 [2d Dept 2011]). With respect to the parking lot, Town allegedly hired a contractor to repave it, performed plowing and sanding in the winter, cleaned up fallen trees, and maintained the storm drains. Further, in the response to Buckley's notice to admit, submitted in support of Buckley's motion for summary judgment, the Town admits that it owned the parking lot located in the rear of the premises known as 386 Montauk Highway and 386 D Montauk Highway.

The prima facie showing which a defendant must make a motion for summary judgment is governed by the allegations made by the plaintiff in the pleadings (*see* ***Kabia v Town of Yorktown***, *supra*; ***Osman v Town of Smithtown***, *supra*; ***Gutierrez-Contreras v Village of Port Chester***, *supra*). By the pleadings, plaintiff alleges, among other things, that the Town created the alleged defect in the parking lot that caused plaintiff's fall, and that the Town made a special use of the septic tank and subject parking lot. Thus, to establish its prima facie entitlement to summary judgement dismissing the complaint, the Town was required to demonstrate, prima facie, that it did not receive prior notice of the alleged defect, that it id did not create the alleged defect, and that it did not make a special use of the parking lot where the accident occurred (*see* ***Breest v Long Is. R.R.***, 140 AD3d 819, 33 NYS3d 420 [2d Dept 2016]; *cf.* ***Murphy v Brown***, ___ AD3d ___, 2019 NY Slip Op 08851 [2d Dept 2019]; ***Kabia v Town of Yorktown***, *supra*).

The Town failed to establish its prima facie entitlement to summary judgment dismissing the complaint. Here, the Town demonstrated, prima facie, that neither the Town Clerk nor the Town Superintendent of Highway Department received prior written notice of the alleged dangerous condition (*see* ***Osman v Town of Smithtown***, *supra*; ***Cruzate v Town of Islip***, 162 AD3d 853, 80 NYS3d 305 [2d Dept 2018]; ***Beiner v Village of Scarsdale***, 149

AD3d 679, 51 NYS3d 578 [2d Dept 2017]). In support of its motion, the Town submits the affidavit of an office assistant in the Town Clerk's Office and a neighborhood aide in the Town's Highway Department, which indicate that they conducted a search of the records in their respective offices, covering the period of five years prior to and including the date of the accident, and found no prior written notice of a defective condition corresponding to the condition alleged by plaintiff (*see* ***Walker v County of Nassau***, 147 AD3d 806, 46 NYS3d 647 [2d Dept 2017]; ***Fisher v Town of North Hempstead***, 134 AD3d 670, 20 NYS3d 167 [2d Dept 2015]; ***Bachvarov v Lawrence Union Free Sch. Dist.***, 131 AD3d 1182, 17 NYS3d 168 [2d Dept 2015]).

Nevertheless, the Town failed to establish, prima facie, that it did not affirmatively create the alleged dangerous condition (*see* ***Kabia v Town of Yorktown***, *supra*; ***Trela v City of Long Beach***, *supra*; ***Toscano v Town of Huntington***, 156 AD3d 837, 68 NYS3d 81 [2d Dept 2017]). Mistler's deposition testimony indicated that the Town hired Bimasco to repave the subject parking lot, including the asphalt surrounding the subject manhole cover. Mistler admitted that he neither examined any of the cesspool covers at the time that the old surface was removed nor observed how the asphalt was placed immediately surrounding the cesspool covers. He further testified that he did not know if any of the cesspool covers were moved or dislodged during the course of the removal of the existing surface or the paving of the new asphalt surface. As there is an issue of fact as to whether the contractor hired by the Town created the subject defect during the course of the paving work of the subject parking lot, there is also an issue of fact as to whether the Town created the defect through its contractor's actions (*see* ***Santelises v Town of Huntington***, 124 AD3d 863, 2 NYS3d 574 [2d Dept 2015]; ***Tumminia v Cruz Constr. Corp.***, 41 AD3d 585, 837 NYS2d 332 [2d Dept 2007]).

As to Kromhout's cross motion seeking summary judgment in his favor as to his cross claims against the Town. a party's right to indemnification may arise out of a contract or may be implied based upon the law's notion of what is fair and proper as between the parties (*see* ***Castillo v Port Auth. of N.Y. & N.J.***, 159 AD3d 792, 72 NYS3d 582 [2d Dept 2018]; ***Lovino, Inc. v Lavallee Law Offs.***, 96 AD3d 909, 946 NYS2d 875 [2d Dept 2012]; ***DaimlerChrysler Ins. Co. v Jenneman***, 95 AD3d 928, 943 NYS2d 597 [2d Dept 2012]). With respect to contractual indemnification, a party's right to contractual indemnification depends upon the specific language of the parties of the relevant contract (*see* ***Gurewitz v City of New York***, *supra*; ***McDonnell v Sandaro Realty, Inc.***, 165 AD3d 1090, 87 NYS3d 86 [2d Dept 2018]; ***McCoy v Medford Landing, L.P.***,164 AD3d 1436, 84 NYS3d 224 [2d Dept 2018]). Absent a legal duty to indemnify, a contract for indemnification should be strictly construed as to avoid imputing any duties which the parties did not intend to assume (*see* ***Zalewski v MH Residential 1, LLC***, 163 AD3d 900, 82 NYS3d 40 [2d Dept 2018]; ***Petersen v Miller Auto Parts, Inc.***, 151 AD3d 893, 58 NYS3d 57 [2d Dept 2017]; ***Tafolla v Aldrich Mgt. Co., LLC***, 136 AD3d 1019, 26 NYS3d 194 [2d Dept 2016]). Thus, the promise to indemnify should not be found unless it can be clearly implied from the language and the purpose of the entire agreement and the surrounding circumstances (*see* ***McDonnell v Sandaro Realty, Inc.***, *supra*; ***Castillo v Port Auth. of N.Y. & N.J.***, *supra*; ***O'Donnell v A.R. Fuels, Inc.***, 155 AD3d 644, 63 NYS3d 504 [2d Dept 2017]).

Common-law indemnity is a "restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other" (***Mas v Two Bridges Assoc.***, 75 NY2d 680, 690, 555 NYS2d 669 [1990], citing ***McDermott v City of New York***, 50 NY2d 211, 428 NYS2d 643 [1980]; *see* ***Kingsbrook Jewish Med. Ctr. v Islam***, 172 AD3d 1342, 99 NYS3d 670 [2d Dept 2019]; ***Castillo v Port Auth. of N.Y. & N.J.***, *supra*). To establish a claim for common-law indemnification, a party must prove that it was not negligent, and that the proposed indemnitor was either responsible for the negligence that contributed to the accident, or in the absence of any negligence, that it had the authority to direct, supervise, and control the work giving rise to the injury (*see* ***McDonnell v Sandaro Realty, Inc.***, *supra*; ***Fedrich v Granite Bldg. 2, LLC***, 165 AD3d 754, 86 NYS3d 566, 2018 165 AD3d 754 [2d Dept 2018]; ***Poalacin v Mall Props., Inc.***, 155 AD3d 900, 64 NYS3d 310 [2d Dept 2017]). Thus, an award of summary judgment on a claim for common-law indemnification is only

appropriate where there are no triable issues of fact concerning the degree of fault attributable to the parties (*see* ***Kingsbrook Jewish Med. Ctr. v Islam***, *supra*; ***Kielty v AJS Constr. of L.I., Inc.***, 83 AD3d 1004, 922 NYS2d 467 [2d Dept 2011]; ***Aragundi v Tishman Realty & Constr. Co., Inc.***, 68 AD3d 1027, 891 NYS2d 462 [2d Dept 2009]).

Kromhout failed to establish his prima facie entitlement to summary judgment in his favor on his cross claim for contractual indemnification against the Town. Kromhout failed to establish, prima facie, the existence of written agreement for indemnification (*see* ***Persaud v Bovis Lend Lease, Inc.***, 93 AD3d 831, 941 NYS2d 208 [2d Dept 2012]). In support of his cross motion, Kromhout relies upon a sworn lease sworn lease dated September 18, 1975 between the alleged prior owner of 390 Main Street, George Nicola, and the Town, which contains an automatic renewal provision. Although such a lease may be considered, Kromhout fails to submit evidence as to whether the Town was provided with the statutory notice for the automatic renewal provision to become operative (*see* General Obligations Law § 5-905). Nonetheless, this lease contains no evidence that the Town intended to indemnify any party (*see* ***Seales v Trident Structural Corp.***, 142 AD3d 1153, 38 NYS3d 49 [2d Dept 2016]; ***Baillargeon v Kings County Waterproofing Corp.***, 91 AD3d 686, 936 NYS2d 298 [2d Dept 2012]; *cf.* ***Cunningham v North Shore Univ. Hosp. at Glen Cove Hous., Inc.***, 123 AD3d 650, 998 NYS2d 406 [2d Dept 2014]; ***Lubell v Stonegate at Ardsley Home Owners Assn., Inc.***, 79 AD3d 1102, 915 NYS2d 103 [2d Dept 2010]; ***Masi v Kir Munsey Park 020 LLC***, 76 AD3d 514, 906 NYS2d 88 [2d Dept 2010]).

Kromhout also failed to establish his prima facie entitlement to summary judgment on his cross claims against the Town for common-law indemnification, a defense, and contribution. As triable issue of fact remain as to the Town's negligence, a determination as to the Town's obligation, if any, for common-law indemnification is premature at this juncture (*see* ***McDonnell v Sandaro Realty, Inc.***, *supra*; ***Spinelli v Vornado Burnside Plaza, LLC***, 85 AD3d 897, 925 NYS2d 192 [2d Dept 2011]; ***Nasuro v PI Assoc., LLC***, 49 AD3d 829, 858 NYS2d 175 [2d Dep 208]). Moreover, as the Town is not an insurer, its duty to defend is no broader than its duty to indemnify (*see* ***Sawicki v GameStop Corp.***,106 AD3d 979, 966 NYS2d 447 [2d Dept 2013]; ***DiBuono v Abbey, LLC***, 83 AD3d 650, 922 NYS2d 101 [2d Dept 2011]; ***Bellefleur v Newark Beth Israel Med. Ctr.***, 66 AD3d 807, 888 NYS2d 81 [2d Dept 2009]). As Kromhout is not entitled to indemnification at this juncture, he is also not entitled to a defense (*see* ***Bellefleur v Newark Beth Israel Med. Ctr.***, *supra*; ***George v Marshalls of MA, Inc.***, 61 AD3d 925, 878 NYS2d 143 [2d Dept 2009]; ***Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership***, 304 AD2d 738, 759 NYS2d 107 [2d Dept 2003]). Further, triable issues of issues of fact as to the Town's alleged negligence preclude an award of summary judgment on the issue of the Town's obligation, if any, for contribution (*see* ***Rehberger v Garguilo & Orzechowski, LLP***, 118 AD3d 767, 988 NYS2d 70 [2d Dept 2014]; ***Markey v C.F.M.M. Owners Corp.***, 51 AD3d 734, 858 NYS2d 293 [2d Dept 2008]; ***Fleming v Custom Bldg. Systems, Inc.***, 21 AD3d 929, 800 NYS2d 643 [2d Dept 2005]).

Finally, a party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required such insurance to be procured, and that such a provision was not complied with (*see* ***Marquez v L & M Dev. Partners, Inc.***, 141 AD3d 694, 35 NYS3d 700 [2d Dept 2016]; ***Ginter v Flushing Terrace, LLC***, 121 AD3d 840, 995 NYS2d 95 [2d Dept 2014]; ***Tingling v C.I.N.H.R., Inc.***, 120 AD3d 570, 992 NYS2d 43 [2d Dept 2014]). Here,
Kromhout failed to establish his prima facie entitlement for judgment in his favor on his cross claim against the Town for breach of contract for failure to procure insurance (*see* ***Mathey v Metropolitan Transp. Auth.***, 95 AD3d 842, 943 NYS2d 578 [2d Dept 2018]; ***Marquez v L & M Dev. Partners, Inc.***, *supra*; ***Persaud v Bovis Lend Lease, Inc.***, *supra*). As set forth above, there are issues of fact as to whether the automatic renewal provision of the September 18, 1975 lease to become operative (*see* General Obligations Law § 5-905); thus, Kromhout failed to establish, prima facie, the existence of a written agreement for insurance procurement (*see* ***Persaud v Bovis Lend Lease, Inc.***, *supra*).

Accordingly the motions by 378-382 Main Street LLC and by Kromhout are granted. The motions by the Town and by Buckley's are denied, as are the cross motions by Kromhout and by Devendra K. Inc. are denied.

Dated: Riverhead, New York
January 9, 2020

VINCENT J. MARTORANA, J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION