SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 18

X

FRANK DEMATO,

Plaintiff,

Index No.: 023968/09
Motion Sequence...01
Motion Date...08/31/11

-against-

THE COUNTY OF NASSAU, CARLO LIZZA AND SONS PAVING, INC. and TOWN OF HEMPSTEAD

Defendants.

X

Papers Submitted:
Notice of Motion x
Affirmation in Opposition.....x
Affirmation in Reply.....x

Upon the foregoing papers, the Defendants, THE COUNTY OF NASSAU ("County"), and CARLO LIZZA AND SONS PAVING, INC.'s ("Carlo Lizza & Sons") motion, seeking an order pursuant to CPLR § 3212, granting summary judgment in their favor and dismissing the complaint, is decided as hereinafter provided.

This action was commenced by the Plaintiff to recover for personal injuries allegedly sustained when he tripped and fell due to a defect in the road allegedly created by construction work performed by the Defendant, Carlo Lizza & Sons. Specifically, the Plaintiff alleges that on October 24, 2008, he was caused to trip and fall on an un-level joint

butt two to three inches in height spanning the entire width of the street. This action was commenced on November 23, 2009, by the filing of a Summons and Complaint. By service of a Verified Answer dated February 1, 2010, issue was joined on behalf of the Defendant, Carlo Lizza & Sons. By service of a Verified Answer dated December 28, 2009, issue was joined on behalf of the Defendant, County. By stipulation dated July 8, 2010, the caption was amended to include the TOWN OF HEMPSTEAD as a Defendant[1].

The Plaintiff testified at an Examination Before Trial on December 6, 2010, that on October 24, 2008, at approximately 6:30 a.m., at or near the southeast corner of the intersection of Nassau Boulevard and Warren Boulevard, he was a pedestrian crossing Warren Boulevard, proceeding north, with Nassau Boulevard parallel to his direction of travel and to his left. (*See* Examination Before Trial of DeMato, Pages 11 and 23-26, attached to the Defendants' Notice of Motion as Exhibit "K") According to the Plaintiff, he took about two steps into the intersection, onto Warren Boulevard, before the accident happened. (*Id.* at page 30) Before the accident occurred, the plaintiff was looking at the street and also looked down at the surface of Warren Boulevard. (*Id.*) As adduced from the Plaintiff's deposition, there were leaves covering the surface of Warren Boulevard along the curb until the place where the accident occurred. (*Id.* at pages 31 and 36) The Plaintiff testified that the accident occurred on the portion of the roadway where the paved surface ends and the milled surface begins, referred to as the "edge", which measured approximately

[1] An answer on behalf of the Defendant, Town of Hempstead, is not a part of the record before the Court.

two to three inches in height. When the Plaintiff stepped on the edge between the two surfaces, he twisted his left ankle and fell forward. (*Id.* at pages 32 and 37) He further testified that he did not see the edge at any time before the accident occurred. (*Id.* at page 33) The lighting condition at the time of the accident was dark which, the Plaintiff testified, contributed to his inability to see the defect. (*Id.* at page 12)

According to the Plaintiff, he first saw the edge after the accident occurred. The Plaintiff testified that he did not see any cones, barricades or engineers' tape in the vicinity of the accident. (*Id.* at page 35) The Plaintiff also testified that he later learned from the Nassau County Attorney that the Defendant, Carlo Lizza & Sons created the road condition. (*Id.* at page 35) The Plaintiff took four photographs of the area where the accident occurred on October 25, 2008, the day after the accident. The Plaintiff testified that the photographs are not a fair and accurate depiction of the condition of the road the day of the accident as the gravel and leaves had been removed. (*Id.* at page 99)

In their motion for summary judgment, counsel for the Defendants, County and Carlo Lizza & Sons, contends that Carlo Lizza & Sons complied with all contractual requirements, including those pertaining to signs and traffic controls. Counsel for the Defendants also avers that no prior accidents or complaint were reported to Carlo Lizza & Sons prior to the Plaintiff's accident. Further, it is argued that it was the responsibility of the Defendant, Town of Hempstead, to clean accumulations of leaves from its highways, including the area where the accident occurred. The Defendants, County and Carlo Lizza &

Sons, seek summary judgment in their favor on the basis that the butt joint in the road was or should have been readily apparent to the Plaintiff and that there is no evidence of there being a trap or a snare in the roadway.

In opposition, the Plaintiff's counsel asserts that the Defendant, Carlo Lizza & Sons failed to barricade and/or warn of the existence of a dangerous condition. The Plaintiff also asserts that the defective condition was concealed from his view due to poor lighting and the presence of refuse on the roadway. As such, the Plaintiff contends that the Defendants are not entitled to summary judgment as the defective condition was not open and obvious.

According to John Keeling, the project manager of Carlo Lizza & Sons, pursuant to a re-paving contract with the County, on October 12, 2008, Carlo Lizza & Sons was contracted to perform a "mill-and-pave job" on the surface of the roadway of Nassau Boulevard at its intersection with Warren Boulevard. The work to be performed included milling the road about one inch, raising the manholes and performing any base asphalt repair. (*See* Examination Before Trial of Keeling, dated December 9, 2010, page 29, attached to the Plaintiff's Opposition as Exhibit "A")[2] Mr. Keeling testified that, as directed by the County, anywhere from zero to two inches was going to be milled.

The Plaintiff claims that the poor lighting condition and the leaves and debris covering the roadway raises a question of fact as to whether the defective condition was open

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[2] The Court notes that the Plaintiff's page and line references to Mr. Keeling's deposition transcript contained in counsel's affirmation do not coincide with the transcript provided.

and obvious. The Plaintiff also claims that Carlo Lizza & Sons failure to erect signs and/or barricades to warn pedestrians of the defective condition precludes summary judgment.

In Reply, the Defendants refer to the Plaintiff's testimony that he was able to see where he was walking at the time of the accident. The Defendants also contends Mr. Keeling's deposition testimony establishes that the height of the butt joint or edge was one inch "more or less".

It is well settled that a motion for summary judgment is a drastic remedy that should not be granted where there is any doubt as the existence of a triable issue of fact. *Sillman v. Twentieth Century Fox*, 3 N.Y.2d (1957); *Bhatti v. Roche*, 140 A.D.2d 660 (2d Dept 1998). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof in admissible form sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor. *Friends of Animals v. Associated Fur Mfrs.*, 46 N.Y.2d 1065 (1979). Such evidence may include deposition transcripts as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines,* 64 N.Y.2d 1092 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). It is incumbent upon the non-moving party to lay bare all of the facts which bear on

the issues raised in the motion. *Mgrditchian v. Donato*, 141 A.D.2d 513 (2d Dept 1998).

In the matter sub judice, the Defendants have established their prima facie entitlement to summary judgment based upon the evidence presented that the two to three inch defective condition was or should have been open and obvious to the Plaintiff, barring liability. However, the Plaintiff, in opposition, presented facts which raise a question of fact to be determined by the trier of fact. In that regard, the Plaintiff testified at his deposition that leaves were covering the surface where the accident occurred. He further testified that the pictures, annexed to the Defendants' Notice of Motion as Exhibit "K", are not a fair and accurate depiction of the condition of the roadway on the date of the accident. Specifically, the Plaintiff asserts that the pictures do not show the leaves and debris that was covering the surface of the roadway on Nassau Boulevard where the accident occurred. Moreover, there is a factual dispute as to the height of the butt joint or edge.

While summary judgment has been found to be appropriate where the photographs reveal a readily apparent trivial depression and/or shallow in the pavement, *Cruz v. Deno's Wonder Wheel Park*, 297 A.D.2d 653 (2d Dept. 2002)), this Court cannot arrive at the same conclusion. "Whether a dangerous or defective condition exists on the property of another so as to create liability 'depends on the peculiar facts and circumstances of each case' and is generally a question of fact for the jury'" *Guerrieri v. Summa*, 193 A.D.2d 647 (2d Dept. 1993). Further, "[p]roof that a dangerous condition is open and obvious does not preclude a finding of liability against a landowner for the failure to maintain the property in

a safe condition but is relevant to the issue of the plaintiff's comparative negligence". *Cupo v. Karfunkel*, 1 A.D.3d 48, 52 (2d Dept. 2003). Accordingly, under the extant circumstances, summary judgment is inappropriate. *Zuckerman v City of New York*, 49 N.Y.2d 557 (1980), *supra*.

Accordingly, it is hereby

ORDERED, that the Defendants' motion, seeking an order pursuant to CPLR § 3212, granting summary judgment in their favor and dismissing the complaint, is **DENIED**.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
November 2, 2011

Hon. Randy Sue Marber, J.S.C.