Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Margaret Oraa,

Plaintiff,

-against-

The Town of Brookhaven,
The County of Suffolk
and Sun Enterprises, LLC

Defendants.

Index No.: 20346/2009

Attorneys [See Rider Annexed]

Motion Sequence No.: 002; MD
Motion Date: 7/21/11
Submitted: 11/10/11

Motion Sequence No.: 003; MG
Motion Date: 10/11/11
Submitted: 11/10/11

Motion Sequence No.: 004; MG
Motion Date: 10/27/11
Submitted: 11/10/11

Upon the following papers numbered 1 to 78 read upon these motions for summary judgment: Notice of Motion and supporting papers, 1 - 13; 40 - 48; 66 - 76; Answering Affidavits and supporting papers, 14 - 32; 49 - 63; Replying Affidavits and supporting papers, 33 - 34; 64 - 65; 77 - 78; Other, 35 - 39.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff when she tripped and fell in a hole in the seam of a concrete slab and the public sidewalk located on the northern side of Montauk Highway next to the Lighthouse Commons Shopping Mall in Shirley, New York. The plaintiff commenced this action against the County of Suffolk ("the County"), the Town of Brookhaven ("the Town") and Sun Enterprises, LLC ("Sun Enterprises").

In the complaint and the bill of particulars, the plaintiff alleges that the defendants were negligent in, *inter alia*, failing to properly maintain the subject premises and permitting the concrete slab to become and remain in a dangerous, unsafe and hazardous condition.

In their answers, the defendants each assert crossclaims against one another for contribution. In addition, Sun Enterprises asserts a cross claim against its co-defendants for common-law indemnification.

The defendants each now separately move for summary judgment.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (see, Rotuba Extruders, Inc. v. Ceppos, 46 NY2d 223 [1978]; Andre v. Pomeroy, 35 NY2d 361 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (see, Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see, Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (see, S.J. Capelin Assoc., Inc. v. Globe Mfg. Corp., 34 NY2d 338 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (see, Benincasa v. Garrubbo, 141 AD2d 636, 637 [2nd Dept., 1988]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (see, Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]).

Since a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the tortfeasor owed a duty of care to the injured party (see, Espinal v. Melville Snow Contrs., 98 NY2d 136 [2002]). "The law imposes a duty to maintain property free and clear of dangerous or defective conditions only upon those who own, occupy, or control property, or who put the property to a special use or derive a special benefit from it" (Segura v. City of New York, 70 AD3d 670, 670 [2nd Dept., 2010] [internal quotation marks omitted]).

Here, in response to Sun Enterprises' *prima facie* showing that it did not own, occupy, or have special use of the property where the accident occurred, the plaintiff established, through the submission of an affidavit from John Robinson, a licensed professional land surveyor, the existence of a triable issue of fact as to whether Sun Enterprises owned the property and, as a result, owed her a duty of care (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]). In his affidavit, Robinson states that after reviewing a copy of the deed, the photographs marked by the plaintiff at her deposition, and three sets of plans for the property, and after observing the accident site, it was his professional opinion that the area where the plaintiff fell straddled the property line between the land owned by Sun Enterprises and Montauk Highway. He noted that the concrete slab was part of a former driveway between the shopping center's parking lot and Montauk Highway. Accordingly, Sun Enterprises' motion for summary judgment is denied.

With respect to the Town's and the County's motions for summary judgment, Brookhaven Town Code §84-1 provides that the Town cannot be held liable as a matter of law for personal injuries sustained as a result of any defective, out of repair, unsafe, dangerous or

obstructed condition of any highway or street "unless, previous to the occurrence resulting in such damages or injuries, written notice of such defective, out-of-repair, unsafe, dangerous or obstructed condition, specifying the particular place and location was actually given to the Town Clerk . . . 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"; Suffolk County Charter §C8-2A provides that the County cannot be held liable as a matter of law for personal injuries sustained as a result of any defective, out of repair, unsafe, dangerous or obstructed condition of any highway, road, street, etc. "unless the County has received written notice within a reasonable time before said injury . . . was sustained." There are only two exceptions to the prior written notice requirement, to wit, "where the locality created the defect or hazard through an affirmative act of negligence . . . and where a special use confers a special benefit upon the locality" (Amabile v. City of Buffalo, 93 NY2d 471, 474 [1999] [internal citations and quotation marks omitted]).

The Town and the County established their *prima facie* entitlement to summary judgment as a matter of law through the submission of the affidavits of Suzanne Mauro, a principal clerk employed by the Town's highway department, Linda Sullivan, a clerk typist employed in the Town Clerk's office, Richard Bloch, an investigator employed by the Suffolk County Attorney's office, and Renee Ortiz, Chief Deputy Clerk of the Suffolk County Legislature, in which they stated that they conducted a search of the records and files maintained by their respective offices and found no records indicating that the Town or the County had received prior written notice of the alleged defective condition located in the seam of the concrete slab and sidewalk where the plaintiff's accident occurred (see, Politis v. Town of Islip, 82 AD3d 1191 [2nd Dept., 2011]; McCarthy v. City of White Plains, 54 AD3d 828 [2nd Dept., 2008]).

In opposition, the plaintiff failed to establish the existence of a triable issue of fact as to whether there was such prior written notice or as to whether one of the two exceptions to the prior written notice requirement applied (see, Amabile v. City of Buffalo, 93 NY2d 471 [1999]; Politis v. Town of Islip, 82 AD3d 1191 [2nd Dept., 2011]; McCarthy v. City of White Plains, 54 AD3d 828 [2nd Dept., 2008]). Accordingly, the Town's and the County's motions for summary judgment are granted. Since this finding defeats the crossclaims for common-law indemnification and contribution against the County, they are also dismissed (see, Stone v. Williams, 64 NY2d 639 [1984]).

Accordingly, it is

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

ORDERED that the motion by defendant Sun Enterprises, LLC for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and cross claims asserted against it is denied; and it is further

ORDERED that the motion by defendant The Town of Brookhaven for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint insofar as asserted against it is granted; and it is further

ORDERED that the motion by defendant The County of Suffolk for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and cross claims asserted against it is granted; and it is further

ORDERED that the claims as to which summary judgment was granted are hereby severed and that the remaining claims shall continue (see CPLR §3212 [e] [1]).

Dated: 2/6/2012

William B Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION

RIDER

Attorney for Plaintiff:

The Jacob D. Fuchsberg Law Firm, LLP
500 Fifth Avenue, 45th Floor
New York, New York 10110

Clerk of the Court

Attorney for Defendant The Town of Brookhaven:

Sunshine & Feinstein, LLP
666 Old Country Road, Suite 605
Garden City, New York 11530

Attorney for Defendant The County of Suffolk:

Christine Malafi, Esq.
Suffolk County Attorney
100 Veterans Memorial Highway, P.O. Box 6100
Hauppauge, New York 11788

Attorney for Defendant Sun Enterprises, LLC:

Andrea G. Sawyers
3 Huntington Quadrangle, Suite 102S
P.O. Box 9028
Melville, New York 11747