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Who SHORT FORM ORDER

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INDEX No. 08-45713
CAL No. 10-02004OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 2-17-11
ADJ. DATE 6-2-11
Mot. Seq. #001 - MD

CHARLES ROBERTS, IV, an infant under the age of 14 years by his parent and natural guardian, CHARLES ROBERTS, III, and CHARLES ROBERTS III, individually,

Plaintiffs,

- against -

EINSIDLER MANAGEMENT, INC.,

Defendant.

BUTTAFUOCO & ASSOCIATES, PLLC
Attorney for Plaintiffs
144 Woodbury Road
Woodbury, New York 11797

MARGARET G. KLEIN & ASSOC.
Attorney for Defendant
200 Madison Avenue
New York, New York 10016

Upon the following papers numbered 1 to 16 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-10 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 11-14 ; Replying Affidavits and supporting papers 15-16 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by the defendant, Einsidler Management Inc., pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint in the action is denied.

The plaintiffs seek damages personally and derivatively for injuries sustained by the infant plaintiff on August 8, 2008, when he was riding his bicycle on the premises, including the sidewalk area, at the defendants' property located at North Isle Village, Coram, New York. It is claimed that the defendant caused and permitted an allegedly dangerous and defective condition of the sidewalk to exist, in that the sidewalk was raised and uneven, causing the infant plaintiff to fall from his bicycle and sustain injury.

Einsidler Management Inc. (Einsidler) seeks summary judgment dismissing the complaint on the bases that the action cannot be maintained pursuant to General Obligations Law §9-103; the plaintiff assumed the risk; the condition of the sidewalk was open and obvious and was not inherently dangerous; and the defendant did not create the condition or have exclusive control over the operation of the premises, and therefore cannot be held liable for nonfeasance.

RST

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [1981]).

In support of this application, Einsidler has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answer, and the plaintiffs' verified bill of particulars and supplemental bill of particulars; unsigned copies of the transcripts of the examinations before trial of Charles Roberts, IV and Charles Roberts, III, each dated April 26, 2010; a signed copy of the transcript of the examination before trial of Richard Shyman on behalf of Einsidler Management, dated April 26, 2010. The unsigned copies of the deposition transcripts are not in admissible form as required by CPLR 3212 (see, ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2nd Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2nd Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2nd Dept 2006]), however, they are accompanied by proof of mailing to the plaintiffs pursuant to CPLR 3116, and the plaintiffs have not denied having received the transcripts nor do they assert that changes were made. Therefore, they are considered on this motion. In opposing this motion, the plaintiffs have submitted an attorney's affirmation; the affidavit of Charles Robert, IV; and photographs.

The adduced testimony of Charles Roberts, IV establishes that at the time of the accident, he lived at North Isle Village, Coram, New York, which he described as an apartment complex. He was riding his bicycle to visit four friends who also lived at the complex about two to three minutes from him. Upon meeting up with his friends, they hung outside for a little while. It had been drizzling, but stopped, and the ground was wet. He was still on his bicycle, when he decided to ride around the courtyard slowly and make a U-turn. He described the sidewalk area where he fell as having one "plate" or flag that was slanted upward. He had seen that raised area before. As he went to make the U-turn, he forgot the raised flag was there. His bike hit the raised flag and his rear tire slipped on the wet sidewalk. There was no dirt or loose stones on the sidewalk. The mother of two of the boys was outside with them when the accident occurred, but he did not think she saw the accident.

Charles Roberts III testified that he learned of his son's accident when his wife called him. He thereafter spoke to his son who told him that he was riding his bicycle, making a U-turn, not very fast, and rode onto an uneven part of the sidewalk. He described the sidewalk as having two flags there were angled up from each other, located next to the Boulder complex, which is where his son said he fell. He

further testified that the bicycle was purchased new for his son's prior birthday. The tires had good treads on them, the brakes were located on the handles, and the bike was in good working condition.

Richard Shyman testified to the effect that he is the property manager for Einsidler Management and previously managed residential properties which he owned. North Isle Village was an Einsidler property which he managed since June 1, 2008. He described North Isle Village as having been constructed approximately forty years ago, and consists of 769 co-op garden apartments on 70 acres. He oversees running of the complex, negotiating contracts, performing safety inspections, and holds weekly staff meetings to ascertain any situation that is not noticed during an inspection. He supervises maintenance which is performed by vendors brought to the complex to perform services, and stated that North Isles employs two full-time maintenance men whom he also supervises. Shyman stated that when he first started his job, he walked the sidewalks and grounds. He walks and drives around the property on a golf cart and maintains a log in which he makes entries concerning any findings upon inspection. He did not notice any raised sidewalk flags on the several driveways located by the Boulder building in the vicinity of the accident. If he had noticed a problem, he would have contacted the board of directors for the co-op. He was unaware of any complaints about any of the sidewalks by the driveways by the Boulder building. If there were complaints, they would be maintained on site at the management office. He reviewed the complaints and did not find any complaints about uneven sidewalk flags on either the second of third driveway located by the Boulder building. Shyman testified that sidewalks are the responsibility of the co-op. He did not know if the sidewalks were replaced after they were initially constructed. He stated that bicycle riding was permitted at North Isle Village by the residents, although other sporting activities are restricted pursuant to the applicable homeowner rules. He stated he did not know where the accident happened.

General Obligations Law GOL §9-103

The defendant management company asserts that this action is barred by GOL §9-103 and that it cannot be held liable for the alleged condition of the sidewalk.

GOL §9-103 provides that there is "[no] duty to keep premises safe for certain uses; responsibility for acts of such users." GOL §9-103 (1) (a) provides, "an owner, lessee or occupant of premises, whether or not posted as provided in section 11-2111 of the environmental conservation law, owes no duty to keep the premises safe for entry or use by others for hunting, fishing, organized gleaning as defined in section seventy-one-y of the agriculture and markets law, canoeing, boating, trapping, hiking, cross-county skiing, tobogganing, sledding, speleological activities, horseback riding, bicycle riding, hand gliding, motorized vehicle operation for recreational purposes, snowmobile operation,..., to give warning of any hazardous condition or use of or structure or activity on such premises to persons entering for such purposes.

GOL §9-103 (1) (b) provides that an owner, lessee, or occupant of the premises who gives permission to another to pursue any such activities upon such premises does not thereby (1) extend any assurance that the premises are safe for such purpose, or (2) constitute the person to whom permission is granted an invitee to whom of duty of care is owed, or (3) assume responsibility for or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted. GOL

§9-103 (2) does not limit the liability which would otherwise exist (a) for willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity; ... (c) for injury caused, by acts of persons to whom permission to purse any of the activities enumerated in this section was granted, to other persons to whom the person granting permission, or the owner, lessee or occupant of the premises, owed a duty to keep the premises safe or to warn of danger. Section 3 of GOL §9-103 further provides that "Nothing in this section creates a duty of care or ground of liability for injury to person or property."

GOL §9-103, also known as the "recreational use statute," provides landowners with immunity from liability for ordinary negligence, if a person is injured while engaged in the listed recreation activity on the landowner's property. The statute seems counter-intuitive, as it abrogates the traditional obligation of property owners to keep property reasonably safe for persons whose presence is foreseeable. The overall purpose of GOL §9-103 recognizes the value and importance to New Yorkers of pursing recreational activities, so that a statute immunizing landowners from liability arising from recreational activities will result in more properties being made available for such uses (***Morales v Coram Materials Corp.***, 51 AD3d 86, 853 NYS2d 611 [2d Dept 2008]). To meet its burden, a party asserting a defense under GOL §9-103 is required to establish the two expressed components of GOL §9-103, namely, its ownership of the property and the plaintiff's engagement in a specified recreational activity. A party seeking summary judgment must also establish in its moving papers the "suitability" of the property for recreational use, even though suitability is not specifically identified as an element in the language of the statute (activities will result in more properties being made available for such uses) (***Morales v Coram Materials Corp.***, supra).

In the instant action, it is determined that bicycling is a recreational activity enumerated in GOL §9-103. It is further determined that bicycling is permitted at North Isle Village in compliance with the rules of the co-op. Thus, the property is appropriate or suitable for the purpose of bicycling as a recreational use. However, it has not been determined that the infant plaintiff was a member of the public within the definition of the statute, thereby precluding the plaintiffs from maintaining an action against the management company. As set forth in ***Wittner v Mackall***, 2010 NY Slip Op 32303U [Sup. Ct. New York County 2010], the statute grants immunity for ordinary negligence to landowners who permit members of the public to come onto their property to engage in the enumerated recreational activities. In the instant action, it has been established that the infant plaintiff resided with his family in a co-op on the premises and thus was not a member of the public. Merely engaging in an enumerated activity is not, in and of itself, sufficient to invoke GOL §9-103 (***Ackermann v Town of Fishkill***, 201 AD2d 441, 607 NYS2d 384 [2d Dept 1994]).

The recreational use statute has been applied liberally to public and private land, to rural or urban property, whether developed or undeveloped (***Rivera v Glen Oaks Village Owners, Inc.***, 41 AD3d 817, 839 NYS2d 183 [2nd Dept 2007]). In ***Rivera v Glen Oaks Village Owners, Inc.***, the plaintiff and two friends went bicycling and turned off the road onto a dirt trail located in a two-acre wooded area, which was part of a large residential cooperative community. When the plaintiff came upon a hole in the ground, his bicycle tire went into the hole, causing him to be thrown over the bicycle's handlebars, causing him to sustain injury. He saw the hole "maybe a second" before he fell into the hole. The court

stated that, in return for opening up their lands for public use, property owners are provided immunity from liability. In the instant action, the defendant, through the testimony of Shyman, has not demonstrated that the infant plaintiff was a member of the public, but instead, that the infant resided on the premises, and that the co-op permitted residents to bicycle on the property. Thus, the defendant has not demonstrated that the action is barred by GOL 9-103.

To establish entitlement to summary judgment based upon GOL §9-103, a defendant must establish ownership of the property (***Finnocchiaro v Napolitano***, 52 AD3d 464, 859 NYS2d 477 [2d Dept 2008]). Generally, a question of fact is raised under the recreational use statute, GOL §9-103, if there is evidence that the defendant does not own, lease, or occupy the land where the accident occurred, or that the plaintiff was not engaged in a listed recreational activity, or that the property was not suitable for recreational use (***Morales v Coram Materials Corp.***, *supra*). No proof has been submitted to this court to demonstrate who the owner of the complex is, although Shyman testified that he was hired by the owner to manage the property. The owner of the premises has not been named in this action, and the liability asserted against the defendant is premised upon it being a management company. No copy of a contract or agreement has been submitted setting forth the duties and responsibilities of the defendant management company.

In ***Albright v Metz***, 217 AD2d 123, 635 NYS2d 331 [3d Dept 1995], *affd* 88 NY2d 656, 649 NYS2d 359 [1996]), the infant plaintiff sustained injury while riding his bicycle on the defendant's property, and the Court of Appeals determined that a contractor, a corporation wholly owned by the landowner's family, was an occupant of the land within the meaning of § 9-103. Thus, the defendant contractor was afforded the protection of GOL §9-103. The plaintiff had argued that to be an "occupant," the party had to "control access to the land or hold the right to exclude people from the property," and the contractor did not have such a right. While the Third Department expressly rejected the test urged by the plaintiff, it based its decision on a finding that the contractor was an alter ego of the owner and was specifically charged with the management of the property, and concluded that the contractor's authorized presence on the premises was sufficient. On appeal, the Court of Appeals did not address whether to adopt the test proffered by the plaintiff.

In the instant action, the defendant has not established that it is entitled to dismissal of the complaint as barred by GOL §9-103 on the basis that the management company is not the owner, lessee, or occupant of the land. No evidence has been presented to establish prima facie whether the management company had an ownership interest in the premises where the accident occurred. No family relationship, such as the relationship between the owner and the defendant/contractor/family, present in the ***Albright v Metz*** action, has been demonstrated to show that Einsidler Management is the alter ego of the owner of North Isle Village. While the Court of Appeals has not yet established a bright-line test, or set forth some type of "authorized presence" standard for the management company to claim the benefit of GOL §9-103, this court determines that the defendant herein has not demonstrated entitlement to the affirmative defense that the action is precluded by GOL §9-103. There are multiple factual issues raised in the moving papers which preclude summary judgment on this issue. The defendant has not submitted a copy of any agreement it had with the owner of the property concerning its duties or responsibilities. It is further noted that although Shyman testified that he maintains an office at North Isle Village, he stated that he was present at the site only about two days a week. There are factual issues concerning

whether this presence alone is sufficient to raise the management company's relationship with the owner to that of alter ego of the owner. Additionally, Shyman testified that the sidewalks are the responsibility of the owner, but then added that he supervises the two maintenance workers employed by the owner. The court has not been advised as to who is the owner of North Isles Village.

Accordingly, the defendant has failed to establish prima facie entitlement to dismissal of the complaint as barred by GOL §9-103.

OPEN AND OBVIOUS/INHERENTLY DANGEROUS

The defendant seeks dismissal of the complaint on the basis that the condition of the raised sidewalk was open and obvious and that it was not inherently dangerous. Although the question of whether a condition is hidden, or open and obvious is fact specific and generally for the finder of fact to determine, the court may determine that the risk is open and obvious as a matter of law where clear and undisputed evidence compels such a conclusion (***Capasso v Village of Goshen,***, 2011 NY Slip Op 4188, 2011 N.Y. App. Div. Lexis 4102 [2d Dept, May 17, 2011]; ***Shah v Mercy medical Center***, 71 AD3d 1120, 898 NYS2d 589 [2d Dept 2010]). A condition that is generally apparent "to a person making reasonable use of his senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" (***Clark v AMF Bowling Centers, Inc.***, 2011 NY Slip Op 3016, 2011 N.Y. App. Div. Lexis 2944 [2d Dept April 12, 2011]; ***Beck v Bethpage Union Free School District***, 2011 NY Slip Op 2339, 919 NYS2d 192 [2d Dept, March 22, 2011]). Additionally, whether the alleged defect in the sidewalk was open and obvious is significant only as to the injured infant's comparative fault and does not relieve the landowners of liability altogether so as to entitle them to summary judgment (***Cupo v Karfunkel***, 1 AD3d 48, 767 NYS2d 40 [2d Dept 2003]). In the instant action, the defendant merely asserts in a conclusory manner, unsupported by any evidentiary submissions, that the condition of the sidewalk was open and obvious and was not inherently dangerous. Shyman testified that he did not know where the accident occurred and had not noticed the raised sidewalk slab upon inspection. The defendant did not provide measurements concerning the height that the concrete sidewalk slab was elevated, thus raising a factual issue concerning the same.

The defendant also seeks dismissal of the complaint on the basis that the condition of the sidewalk was not inherently dangerous. Again, the defendant's argument is conclusory and unsupported by admissible evidence. The burden is on the defendant to demonstrate, as a matter of law, that the condition of the sidewalk was not inherently dangerous because the condition which caused the infant plaintiff to fall from his bike was readily observable by the infant employing the reasonable use of his senses (***Cooper v Costello, Inc.***, 2009 NY Slip op 32040U [Sup. Ct., New York County 2009]; *see,* ***Martinez v Kaufman-Kane Realty Co., Inc.***, 74 Misc2d 341, 343 NYS2d 383 [Sup. Ct., Bronx County 1973]). Here, the defendant has not demonstrated with evidentiary submissions that the condition was open and obvious to enable this court to determine that the sidewalk was not inherently dangerous as a matter of law. While this court finds that, ordinarily, a sidewalk is not dangerous in and of itself, there are factual issues concerning "whether the owner's neglect or failure to maintain the sidewalk rendered it unsafe, thus bringing injury to the child" (*see generally,* ***Menaker v Aramark American Food Services, Inc.***, 2008 NY Slip Op 31539U [Sup. Ct., Nassau County 2008]). "Whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts

and circumstances of each case and is generally a question of fact for the jury" (***Clark v AMF Bowling Centers, Inc.***, supra). Here, Shyman, from the defendant management company, testified that his company inspected and maintained the premises. However, Shyman did not testify concerning inspections of the sidewalk at issue, findings, if any, upon inspection, or the condition of the sidewalk where the incident occurred.

Accordingly, the defendant has not established prima facie entitlement to summary judgment on the issue of whether the condition of the sidewalk was open and obvious and whether it was inherently dangerous.

NEGLIGENCE

In New York, to establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. In order to establish the third element, proximate cause, plaintiff must show that defendant's negligence was a substantial factor in bringing about the injury. If, defendant's negligence were a substantial factor, it is considered to be a "proximate cause" even though other substantial factors may also have contributed to plaintiff's injury (***Spiegel v Fine Paint Co.*** 2006 NY Misc. LEXIS 2549, 236 NYLJ 51 [Sup. Ct. Nassau County 2006]). "To recover in a negligence action plaintiff must establish that defendants owed her a duty to use reasonable care, and that they breached that duty (***Atkins v Glens Falls City School District***, 53 NY2d 325, 441 NYS2d 644 [1981]). In the instant action, the defendant has failed to demonstrate prima facie that it used reasonable care in inspecting the sidewalk as the defendant has failed to demonstrate the condition of the sidewalk and what action was taken to inspect or remedy the condition. He did not remember seeing the raised sidewalk flag. Thus, there are factual issues concerning whether there was negligent inspection of the sidewalk by the management company. Also, Shyman testified that the co-op employed two maintenance workers whom he supervises. He further testified that the sidewalks are the responsibility of the co-op, however, no copy of any contract or agreement has been submitted by Shyman in support of the conclusory and somewhat contradictory statements that the condo is responsible for the co-op, and yet he inspects the premises and supervises those maintenance workers employed by the co-op.

"A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it. To meet its burden on the of lack of constructive notice, the defendant must offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall" (***Mei Ziao Guo v Quong Big Realty Corp.***, 81 AD3d 610, 916 NYS2d [2d Dept 2011]). "A property owner has a duty to maintain his or her property in a reasonably safe condition" (***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1978]). "However, a property owner has no duty to protect or warn against an open and obvious condition, which as a matter of law is not inherently dangerous" (***Katz v Westchester County Healthcare Corporation***, 2011 NY Slip Op 1620, 917 NYS2d 896 [2d Dept 2011]). Where an allegedly dangerous condition might have been open and obvious, it does not negate the defendant's duty to maintain the premises in a reasonably safe condition (***Bradley v DiPaterio Mangement Corp.***, 78 AD3d 1096, 913 NYS2d 244 [2d Dept 2010]).

Here, Shyman testified that he regularly inspected the area, but did not state when the last time the accident site was inspected and what his findings were. In fact, Shyman testified that he did not know where the accident occurred and has not previously noticed the raised sidewalk slab. Shyman failed to establish that the raised concrete sidewalk slab did not exist for a sufficient period of time for it to have been discovered and remedied by the defendant in the exercise of reasonable care (*see,* ***Bloomfield v Jericho Union Free School District***., 80 AD3d 637, 915 NYS2d 294 [2nd Dept 2011]). It has not been determined that the condition was open and obvious, whether it was inherently dangerous, and whether the sidewalk was maintained in a relatively safe condition. Therefore, there are factual issues concerning actual and constructive notice of the condition which preclude summary judgment on the issue of negligence.

Accordingly, the defendant has not demonstrated that the premises was maintained in a reasonably safe condition, that it had no duty to protect the plaintiff, or to warn about the condition of the sidewalk at the site of the accident.

ASSUMPTION OF RISK

It is well established that the application of the doctrine of assumption of risk "is justified when a consenting participant is aware of the risks, has an appreciation of the nature of the risks, and voluntarily assumes the risks" of a sporting activity (***Morgan v State of New York,*** 90 NY2d 471, 484, 662 NYS2d 421 [1997]). The doctrine of assumption of the risk will not serve as a bar to liability if the risk is unassumed, concealed, or unreasonably increased, nor does the doctrine of assumption of the risk exculpate a landowner from liability for ordinary negligence in maintaining an area such as a playing field (***Warren v Town of Hempstead***, 246 AD2d 536, 667 NYS2d 389 [2d Dept 1998]).

"By engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation, risks which various participants are legally deemed to have accepted personal responsibility for because they commonly inhere in the nature of those activities. Under this formulation, it follows that the duty of a landowner is to exercise care to make the conditions as safe as they appear to be. If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and the defendant has performed its duty. It is not necessary to the application of assumption of risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury. In assessing a defendant's duty under the doctrine of assumption, the standard is whether the alleged defect is unique and created a dangerous condition over and above the usual dangers that are inherent in the sport" (***Schiavone v Brinewoood Rod & Gun Club, Inc.***, 283 AD2d 234, 726 NYS2d 615 [1st Dept 2001]; *see also,* ***Cotty v Town of Southampton***, 64 AD3d 251, 880 NYS2d 656 [2d Dept 2009]).

In ***Calise v City of New York,*** 239 AD2d 378, 657 NYS2d 430 [2nd Dept 1997], the court found that the assumption of the risk doctrine was a complete bar to a mountain bike rider riding on an unpaved dirt and rock path in a park when he was thrown from his bike and sustained injury when his bicycle struck an exposed root. The court determined that the tree root did not constitute a concealed or

unreasonably increased risk, or that the city failed to make conditions at the park as safe as they appeared to be.

While recovery may still be had for damages resulting from exposure to "unreasonably increased risk" (***Morgan,*** *supra* at 485; ***Simoneau v State of New York,*** 248 AD2d 865, 866, 669 NYS2d 972 [1st Dept 1988]), the mere fact that a defendant could feasibly have provided safer conditions is not dispositive where the risk is open and obvious to the participant taking into consideration the individual's level of experience and expertise (***Morgan***, *supra*; ***Simoneau***, *supra*; ***Maddox v City of New York,*** 66 NY2d270, 278, 487 NE 553, 496 NYS2d 726 [1985]). Moreover, in assessing the application of the doctrine of assumption of risk, it is not necessary that the injured plaintiff may have foreseen the exact manner in which the injury occurred "so long as he or she is aware of the potential for injury of the mechanism from which the injury results"(***Maddox,*** *supra*). In ***Caraballo v City of Yonkers***, 54 AD3d 796, 865 NYS2d 229 [2d Dept 2008], a 12 year old was injured when the bicycle he was riding came into contact with a pothole abutting a manhole cover on a city street. The court stated that the infant, admittedly, was aware of the pothole, but failed to observe it on the date in question when he was traveling to a friend's house. Although the trial court dismissed the complaint on the city's motion for summary judgment, the Appellate Division held, as a matter of law, that the infant plaintiff did not assume the risk of being injured by a defective condition on a city street merely because he was using his bicycle as a means of transportation and participating in the activity of recreational bicycling. Such is the situation in the instant action where the infant plaintiff was using his bicycle as a means of transportation, participating in the recreational activity of bicycling, when his bicycle tire struck the raised cement sidewalk flag. The infant plaintiff was also aware of the raised sidewalk flag, but failed to observe it at the time of the accident.

Although assumption of the risk to be implied from participation in a sport with awareness of the risk is generally a question of fact for a jury, dismissal of a complaint as a matter of law is warranted when on the evidentiary materials before the court no fact issue remains for decision by the trier of fact (***Maddox v City of New York***, 66 NY2d 270, 496 NYS2d 726 [1985]). In the instant action, in moving for summary judgment, the defendant argues that the infant plaintiff, in riding his bicycle, assumed the risk of encountering all open and obvious conditions on the premises, and thus the defendant is not liable for the infant's injuries. Here, the defendant testified that bicycle riding was permitted on the premises of the apartment complex, although other various sporting activities were prohibited. The infant plaintiff testified that he had ridden his bicycle in the area previously, and had ridden on the date of the accident to visit his friends at the apartment complex where he lived. He stated that he did know that the sidewalk had an elevated flag, however, he was unaware of the same at the time his bicycle tire encountered the elevated flag. Here there are factual issues concerning whether the doctrine of primary assumption of the risk is applicable to riding a bicycle on a paved driveway with an adjacent sidewalk with a raised or elevated cement flag. This court has already determined that there are factual issues concerning whether the condition of the sidewalk was open and obvious and whether it was inherently dangerous (*see,* ***Moore v City of New York***, 29 AD3d 751, 816 NYS2d 131 [2d Dept 2006]). There are further factual issues concerning whether the condition of the sidewalk increased the chance of injury to a bicyclist and whether the defendant exercised reasonable care in maintaining the sidewalk (*see,* ***Vestal v County of Suffolk***, 7 AD3d 613, 776 NYS2d 491 [2d Dept 2004]). Here, it cannot be said as a matter of law that the infant plaintiff assumed the risk of being injured as a result of a defective condition on a

paved pathway merely because he participated in the activity of bicycling, or that his actions were so extraordinary and unforeseeable as to have been deemed a superseding cause of his injuries (***Vestal v County of Suffolk***, supra). There are also factual issues concerning whether the infant plaintiff assumed the risk of a defective, raised area (*see,* ***Berfas v Town of Oyster Bay***, 286 AD2d 466, 729 NYS2d 530 [2d Dept 2001]).

Accordingly, the defendant has failed to demonstrate as a matter of law that the doctrine of assumption risk serves as a bar to the plaintiffs' action.

Motion (001) by the defendant, Einsidler Management Inc., pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint in the action is denied.

Dated: 4/4/2012

Hon. Denise F. Molia
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION