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SHORT FORM ORDER

INDEX No. 08-11483
CAL. No. 11-02022OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 11-28-11 (#004)
MOTION DATE 1-9-12 (#005)
MOTION DATE 12-14-11 (#006)
MOTION DATE 2-10-12 (#007)
MOTION DATE 2-29-12 (#008)
ADJ. DATE 5-2-12
Mot. Seq. # 004 - MD # 005 - MG
006 - XMD # 007 - MG
008 - MG; CASEDISP

JACQUELINE RAPPEL,
Plaintiff,

-against-

WINCOMA HOMEOWNERS ASSOCIATION, ROGER AMBROSIO, INC. AND A&J ANTORINO COMPANY, INC.,
Defendants.

KENNETH J. READY & ASSOCIATES
Attorney for Plaintiff
1565 Franklin Avenue
Mineola, New York 11501

MALAPERO & PRISCO, LLP
Attorney for Wincoma Association
295 Madison Avenue, 4th Floor
New York, New York 10017

WINCOMA ASSOCIATION INC.,
Third-Party Plaintiff,

-against-

ROBERT AMBROSIO INC. AND A&J ANTORINO COMPANY, INC.,
Third-Party Defendant.

CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER
Attorney for Roger Ambrosio, Inc.
333 Earle Ovington Boulevard, Suite 502
Uniondale, New York 11553-3625

MARTYN, TOHER & MARTYN
Attorney for A&J Antorino Company Inc.
330 Old Country Road, Suite 211
Mineola, New York 11042

WINCOMA ASSOCIATION, INC.,

Second Third-Party Plaintiff,

-against-

FRANK RAPPEL and SUSAN RAPPEL,

Second Third-Party Defendant.

Upon the following papers numbered 1 to 150 read on these motions and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-20; 21-40; 52-72; 73-100; Notice of Cross Motion and supporting papers 41-51; Answering Affidavits and supporting papers 102-108; 110-126; 127-127; 129-130; Replying Affidavits and supporting papers 131-136; 137-141; 142-144; 145-146; Other defendant/third-party defendant Roger Ambrosio Inc's memorandum of law - pg. 109; plaintiff's memorandum of law; plaintiff's supplemental affirmation in opposition to motion of Wincoma - 147-148; defendant/third-party plaintiff Wincoma Association, Inc. supplemental reply - 149-150; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#004) by defendant Wincoma Association, Inc., the motion (#005) by defendant A&J Antorino Company, Inc., the cross motion (#006) by defendant A&J Antorino Company, Inc., the motion (#007) by defendant Wincoma Association, Inc., and the motion (#008) by defendant Roger Ambrosio Inc. hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant Wincoma Association, Inc. and the motion by defendant A&J Antorino Company, Inc. seeking vacatur of the note of issue are denied, as academic; and it is

ORDERED that the motion by defendant A&J Antorino Company, Inc. seeking summary judgment dismissing the complaints and all cross claims against it is granted; and it is

ORDERED that the motion by defendant Wincoma Association, Inc. seeking summary judgment dismissing plaintiff's complaint and all cross claims against it is granted; and it is further

ORDERED that the motion by defendant Roger Ambrosio Inc. seeking summary judgment dismissing the complaints and all cross claims against it is granted.

Plaintiff Jacqueline Rappel commenced this action to recover damages for injuries she allegedly sustained as a result of a trip and fall that occurred at Wincoma Beach at its Bay Avenue terminus in the Town of Huntington on July 14, 2007. Defendant/third-party plaintiff Wincoma Association, Inc. (hereinafter referred to as "Wincoma") operates Wincoma Beach, a private beach located on Huntington Bay in the Village of Huntington. By her complaint, plaintiff alleges that her accident occurred immediately after she exited her vehicle and began running down the roadway towards a friend. She alleges that as she was running down the roadway leading to Wincoma Beach, she struck her right foot on a water-deterring berm on the roadway, causing her to fall and sustain severe personal injuries to her right shoulder. The water-deterring berm, which is made of asphalt and resembles a speed bump, is used to divert rainwater from the road to the shoulder. Defendant/third-party defendant A&J Antorino Company, Inc (hereinafter referred to as "Antorino") operates a sewer and drainage company and is a contractor with the Village of Huntington Bay. Defendant/third-party defendant Roger Ambrosio Inc. (hereinafter referred to as "Ambrosio") operates a paving and asphalt company and allegedly constructed the berm at the request of Wincoma. Plaintiff alleges defendants were negligent, among other things, in their construction of the berm.

Thereafter, Wincoma commenced a third-party action against Antorino and Ambrosio asserting claims for indemnification and contribution for any liability attributed to them in plaintiff's action, and for negligence in the construction of the sidewalk and appurtenances located in the roadway of Wincoma Beach. Subsequently, on August 6, 2009, plaintiff filed an amended complaint to include Antorino and Ambrosio as defendants in her original action.

Antorino now moves for summary judgment on the basis that it bears no liability for plaintiff's alleged injuries, because it has never performed any work in the location where the plaintiff's injury occurred. Antorino also contends that plaintiff is unable to establish a prima facie case of negligence, because she cannot establish that it owed either her or Wincoma a duty of care, since it does not have a relationship with Wincoma. Antorino, in support of the motion, submits copies of the pleadings, the parties's deposition transcripts, and photographs of the situs of the accident. Wincoma moves for summary judgment on the basis that plaintiff has failed to establish a prima facie case of negligence, because she cannot show that it created or had actual or constructive notice of the alleged defective condition on the roadway. Wincoma also contends that the alleged defective condition that caused the plaintiff's accident was open and obvious and, therefore, is not actionable as a matter of law. Wincoma further asserts that it is entitled to common law indemnification against Ambrosio, because it contracted with Ambrosio to construct the water-deterring berm that allegedly caused plaintiff's injuries, and it was under the exclusive control and supervision of Ambrosio. Ambrosio moves for summary judgment on the basis that plaintiff is unable to establish a negligence cause of action against it, because the water-deterring berm was open, obvious and readily observable by plaintiff and, therefore, it did not have a duty to warn plaintiff against such condition. Wincoma and Ambrosio, in support of the motions, rely upon the same evidence as submitted by Antorino on its motion for summary judgment.

Plaintiff opposes the motions on the ground that the water-deterring berm constituted a trap-like condition, because it is raised, only crosses a small portion of the roadway, and is constructed of asphalt similar in color to the surrounding area. Plaintiff also alleges that at the time of her accident the berm was camouflaged by dense foliage that cast a shadow over the change in elevation. Plaintiff, in opposition to the motion, submits her own affidavit, the affidavit of her expert, Joseph Cannizzo, and the affidavit of Gina Fortunato. Wincoma opposes the motion by Ambrosio on the ground that Ambrosio created the alleged defective condition, because it used "Rustoleum Marking" paint to mark the berm, which is not an appropriate coating for use on speed bumps. In addition, Wincoma alleges that it is entitled to common law indemnification from Ambrosio, because Ambrosio maintained exclusive control and supervision over the berm. Wincoma, in opposition to Ambrosio's motion, submits copies of the pleadings, photographs of the accident site, the deposition transcripts of plaintiff and Ambrosio, and the affidavit of its expert, Scott Silberman. Ambrosio opposes Wincoma's motion on the grounds that Wincoma, as the owner of the property, was under a duty to maintain its premises in a safe condition and to remedy the alleged defect. Ambrosio contends that Wincoma has failed to establish that it was not negligent in maintaining its premises or that Ambrosio was negligent in its construction of the water-deterring berm. Ambrosio further alleges that once the water deterring berm was constructed, it was in the exclusive control of Wincoma ,and that the painting of the berm did not render it more dangerous.

A court's task on a motion for summary judgment is issue finding rather than issue determination (*see* ***Sillman v Twentieth Century Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]), and it must view the evidence in the light most favorable to the party opposing the motion (*see* ***Boyce v Vazquez***, 249 AD2d 724, 671 NYS2d 815 [3d Dept 1998]). Therefore, in determining a motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]). In the first instance, the moving party bears the burden and must tender evidence sufficient to eliminate all material issues of fact (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once such showing has been made, the burden shifts to the nonmoving party to demonstrate the existence of material issues of fact

(*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). Mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]).

To establish a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and that the breach of that duty was a proximate cause of the plaintiff's injury (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Kievman v Philip***, 84 AD3d 1031, 924 NYS2d 112 [2d Dept 2011]; ***Demshick v Community Hous. Mgt. Corp.***, 34 AD3d 518, 824 NYS2d 166 [2d Dept 2006]). A landowner has a duty to maintain his or her property in a reasonably safe condition in view of the existing circumstances (*see* ***Tagle v Jacob***, 97 NY2d 165, 737 NYS2d 331 [2001]; ***Demshick v Community Hous. Mgt. Corp.***, *supra*). The nature and scope of that duty and the persons to whom it is owed require consideration of the likelihood of injury to another from a dangerous condition on the property, the seriousness of the potential injury, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property (***Galindo v Town of Clarkstown***, 2 NY3d 633, 636, 781 NYS2d 249 [2004], *quoting* ***Kush v City of Buffalo***, 59 NY2d 26, 29-30, 462 NYS2d 831 [1983]; *see* ***Peralta v Henriquez***, 100 NY2d 139, 144, 760 NYS2d 741 [2003]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]).

To impose liability upon a defendant in a trip and fall action, there must be evidence that the defendant either created the condition or had actual or constructive notice of it (*see* ***Hayden v Waldbaum, Inc.***, 63 AD3d 679, 880 NYS2d 351 [2d Dept 2009]; ***Denker v Century 21 Dept. Stores, LLC***, 55 AD3d 527, 866 NYS2d 681 [2d Dept 2008]). A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident so that it could have been discovered and remedied (*see* ***Gordon v American Museum of Natural History***, 67 NYS2d 836, 501 NYS2d 646 [1986]). However, a landowner does not have a duty to warn or protect against a condition that is open and obvious, and that is not inherently dangerous (*see* ***Atehortua v Lewin***, 90 AD3d 794, 935 NYS2d 102 [2d Dept 2011]; ***Losciuto v City Univ. of N.Y.***, 80 AD3d 576, 914 NYS2d 296 [2d Dept 2011]; ***Weiss v Half Hollow Hills Cent. School Dist.***, 70 AD3d 932, 893 NYS2d 877 [2d Dept 2010]; ***Bretts v Lincoln Plaza Assoc., Inc.***, 67 AD3d 943, 890 NYS2d 87 [2d Dept 2009]; ***Murray v Dockside 500 Mar., Inc.***, 32 AD3d 832, 821 NYS2d 608 [2d Dept 2006]). Further, while the issue of whether a condition is hidden or open and obvious generally is for the finder of fact to determine, a court may determine as a matter of law that a risk is open and obvious "where clear and undisputed evidence compels such a conclusion" (***Capasso v Village of Goshen***, 84 AD3d 998, 999, 922 NYS2d 567 [2d Dept 2011]).

Based upon the adduced evidence, Antorino established its prima facie entitlement to judgment as a matter of law that it is not liable for plaintiff's accident (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Dugue v 1818 Mgt. Corp.***, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]). "The law imposes a duty to maintain property free and clear of dangerous and 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, 892 NYS2d 870 [2d Dept 2010] *quoting* ***Guzov v Manor Lodge Holding Corp.***, 13 AD3d 482, 483, 787 NYS2d 84 [2d Dept]; *see* ***Nappi v Incorporated Vil. of Lynbrook***, 19 AD3d 565, 796 NYS2d 537 [2d Dept 2005] ***Aversano v City of New York***, 265 AD2d 437, 696 NYS2d 233 [2d Dept 1999]), and "where none of these factors are present, a party cannot be held liable for injuries caused by [an] allegedly defective condition" (***Grover v Mastic Beach Prop. Owners Assn.***, 57 AD3d 729,

730, 869 NYS2d 593 [2d Dept 2008]; *see* ***Sanchez v 1710 Broadway, Inc.***, 79 AD3d 845, 915 NYS2d 272 [2d Dept 2010]).

The record demonstrates that Antorino did not own, control, or make special use of the roadway where plaintiff tripped and fell, and, therefore, did not owe a duty to plaintiff to ensure that the roadway was maintained in a safe condition (*see* ***Cerrato v Rapistan Demag Corp.***, 84 AD3d 714, 921 NYS2d 648 [2d Dept 2011]; ***Segura v City of New York***, *supra*; ***Gauthier v Super Hair***, 306 AD2d 850, 762 NYS2d 736 [4th Dept 2003]; ***Aversano v City of New York***, *supra*). Moreover, Thomas Antorino, testifying on behalf of Antorino, explained that he is an officer of the company, that the company is in the sewer and drainage business, and that his company has a sewer and drainage contract with the Village of Huntington Bay. Mr. Antorino further testified that his company only has performed work on a sinkhole in the Village of Huntington Bay, which was approximately 2,000 feet from plaintiff's accident site, and that he has never performed any work on the roadway or water-deterring berm at issue. In addition, Neil Heimerich, testifying on behalf of Wincoma, stated that it has been approximately seven or eight years since Antorino performed drainage work for Wincoma, and that Antorino had not performed any work in the area where plaintiff's accident occurred.

Additionally, Wincoma and Ambrosio have demonstrated their prima facie entitlement to judgment as a matter of law by submitting evidence that they neither created nor had actual or constructive notice of the alleged defective condition that caused plaintiff's fall and subsequent injuries (*see* ***Cerniglia v Loza Rest. Corp.***, __ AD3d __ 951 NYS2d 57 [2d Dept 2012]; ***Knack v Red Lobster***, 98 AD3d 473, 949 NYS2d 205 [2d Dept 2012]; ***Comack v VBK Realty Assoc., Ltd.***, 48 AD3d 611, 852 NYS2d 370 [2d Dept 2008]), and that the water-deterring berm was not concealed, but was an open and obvious condition that was not inherently dangerous (*see* ***Turcotte v Fall***, 68 NY2d 432, 510 NYS2d 49 [1986]; ***Soussi v Gobin***, 87 AD3d 580, 928 NYS2d 80 [2d Dept 2011]; ***Capasso v Village of Goshen***, 84 AD3d 998, 922 NYS2d 567 [2d Dept 2011]; ***Russ v Fried***, 73 AD3d 1153, 901 NYS2d 703 [2d Dept 2010]). Plaintiff testified at an examination before trial that prior to her accident she was waiting in line in her vehicle to be granted access to the private Wincoma beach, where her children's party was being held. She testified that she was concerned about the long line of vehicles waiting at the access gate, and upon realizing that the access gate was not opening, she exited her vehicle to inquire about the situation, since her father-in-law was supposed to open the access gate for the party's guests. Plaintiff testified that upon exiting her vehicle and observing her friend, Gina Fortunato, waiting at the access gate, she began running towards her friend, but tripped and fell after taking four or five steps. She testified that she struck her right foot on the water-deterring berm and fell forward, injuring her right shoulder. She testified that although nothing blocked her view of the berm, she did not see it prior to her accident, and that she was looking straight ahead at her friend when her accident occurred. Plaintiff further testified that despite having written a letter to Wincoma after her accident regarding the berm, she never made any complaints prior to her accident, and that she was unaware of anyone else having made any complaints about the berm prior to her accident. In addition, Neil Heimerich and Peter Walter, president of Ambrosio, testifying on behalf of Ambrosio, stated that the berm, which begins in the middle of the roadway at issue, is approximately four inches high, ten feet in length, and sixteen to eighteen inches thick. Mr. Walter testified that the berm, which was installed by his company in 2006, is painted a fluorescent yellow to prevent vehicles from driving over it.

Thus, the parties's deposition testimony and the photographs of the situs of the accident, which were authenticated by plaintiff, Neil Heimerich and Peter Walter, are sufficient to prove that the water-deterring

berm was not inherently dangerous, and was readily observable by plaintiff (*see* ***Gallo v Hempstead Turnpike, LLC***, 97 AD3d 723, 948 NYS2d 660 [2d Dept 2012]; ***Pipitone v 7-Eleven, Inc.***, 67 AD3d 879, 889 NYS2d 234 [2d Dept 2009]; ***Giambruno v Wilbur F. Breslin Dev. Corp.***, 56 AD3d 520, 867 NYS2d 202 [2d Dept 2008]; ***Plessias v John Vincent Scalia Home for Funerals, Inc.***, 271 AD2d 423, 706 NYS2d 131 [2d Dept 2000]).

In opposition, plaintiff failed to raise a triable issue of fact (*see* ***Zuckerman v City of New York***, *supra*; ***Callen v Comsewogue School Dist.***, 95 AD3d 814, 942 NYS2d 818 [2d Dept 2012]; ***Badalbaeva v City of New York***, 55 AD3d 764, 866 NYS2d 322 [2d Dept 2008]; ***Espada v Mid-Island Babe Ruth League, Inc.***, 50 AD3d 843, 855 NYS2d 271 [2d Dept 2008]). The affidavit of plaintiff's expert, Joseph Cannizzo, is speculative and conclusory, since he, in reaching his conclusions, did not personally inspect the accident site nor did he observe the roadway to determine the material from which the berm was made, whether it was painted or its height differential. Instead, he relied on a review of photographs that were taken of the accident site. Further, Joseph Cannizzo's generalized conclusions are only supported by the notion that the berm's construction violated good and accepted engineering safety practices, and are not supported by any relevant industry standards or an alleged violation of any applicable statute or regulation (*see* ***Rivas-Chirino v Wildlife Conservation Socy.***, 64 AD3d 556, 883 NYS2d 552 [2d Dept 2009]; ***Cardia v Willchester Holdings, LLC***, 35 AD3d 336,825 NYS2d 269 [2d Dept 2006]; ***Pirie v Kransinki***, 18 AD3d 848, 796 NYS2d 671 [2d Dept 2005]; ***Rochford v City of Yonkers***, 12 AD3d 433, 786 NYS2d 535 [2d Dept 2004]). Moreover, the affidavit of Gina Fortunato does not support plaintiff's claim that the berm constituted a trap-like condition. In fact, Gina Fortunato states in her affidavit that as plaintiff proceeded towards her, she observed her trip and fall over a bump in the road, which she observed from her position by the access gate to the beach. Accordingly, the motions for summary judgment by Antorino, Wincoma and Ambrosio are granted.

Having granted the summary judgment motions by Antorino, Wincoma and Ambrosio dismissing plaintiff's complaint, the motion by Wincoma and the cross motion by Antorino for vacatur of the note of issue are denied, as academic.

Dated: 14 Nov. 2012

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION