SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 2
NASSAU COUNTY

KEVIN KEATING,

Plaintiff(s),

ORIGINAL RETURN DATE: 10/03/11
SUBMISSION DATE: 11/07/11

-against-

TOWN OF OYSTER BAY and ANCHORAGE, INC.,

INDEX No.: 1897/10

Defendant(s).

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Motion by defendant Town of Oyster Bay ("the Town") pursuant to CPLR 3025, granting the Town leave to amend its amended answer to assert twelfth and thirteenth affirmative defenses of failure to comply with prior written notice laws and, upon amendment, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims is granted.

Motion by defendant Anchorage, Inc. ("Anchorage"), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims against it is denied.

In this action plaintiff seeks damages for injuries he sustained at approximately 6:00 PM on January 30, 2009, when he slipped and fell on "black ice" in the parking lot adjacent to the building at 21 West Main Street, Oyster Bay, New York. Defendant Anchorage owns the building and defendant Town owns the parking lot. It had snowed two days earlier, and the temperature at the time was below freezing.

Plaintiff testified that he exited his workplace in the building and could not directly reach the parking lot where his car was parked because a wall or mound of ice was piled on the utility strip between the sidewalk and the curb for the entire length of the parking lot. For this reason, plaintiff made a right turn to walk on the sidewalk and cross over the wall or mound of ice at its lowest point, namely where the ice was approximately 8 inches high and 1½ feet wide. He lifted one leg over the ice and placed his foot on the concrete pavement of the parking lot which looked clear. As he was bringing his other leg over the mound, the foot on the ground slipped out from under him, and both legs went up in the air. When he had arrived in the morning he "went straight across the parking lot and up the steps, which did have a mound of solid snow as well" (Keating transcript, p. 72).

The president of Anchorage, Ms. Oelsner, testified that it was the job of an employee, Mr. Lightborne, to remove snow and ice at the premises, and, in particular, to clear a path from the parking lot to the sidewalk in two areas, namely, the entryways for the two tenants in the building, one of whom was plaintiff's employer (Oelsner transcript, pp. 37-38). No testimony was submitted from Mr. Lightborne, and, according to Ms. Oelsner, he no longer works at the premises.

One of the Town's witnesses, Mr. Wilcox, testified that the Town employees plowed "curb to curb," and he understood that this meant a build up of snow or ice against the curb line (Wilcox transcript, p. 75). The Town's records show that the subject parking lot was plowed twice in the morning two days prior to plaintiff's fall and that "spot sanding" took place early in the morning of January 29, 2009.

Summary judgment is the procedural equivalent of a trial (*S.J.Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]). The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist (*Matter of Suffolk County Dept. of Social Services on behalf of Michael V. v James M.*, 83 NY2d 178, 182 [1994]). The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 82 [2003]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Once a *prima facie* case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The evidence must be viewed in the light most favorable to the non-moving party (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931 [2007]; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004])

Anchorage seeks summary judgment dismissing the complaint and all cross-claims on the grounds that it owed no duty to plaintiff, as it did not own, occupy or make any special use of the parking lot in which plaintiff fell. The Town seeks summary judgment on the grounds that it had no prior written notice of the black ice condition on which plaintiff fell and no duty to provide a path to the parking lot.

The decision to grant or deny leave to amend is committed to the court's discretion, and mere lateness is not a barrier [*Edenwald Contracting Co., Inc. v City of New York*, 60 NY2d 957, 959 [1983]). Leave to amend pleadings pursuant to CPLR 3025(b) should be freely granted in the absence of prejudice or surprise to the opponent, unless the proposed amendment is palpably insufficient or devoid of merit on its face (*Truebright Co., Ltd v Lester*, 84 AD3d 1065 [2d Dept 2011]; *Maya's Black Creek LLC v Angelo Balbo Realty Corp.*, 82 AD3d 1175 [2d Dept 2011]; *Palau v Larson*, 81 AD3d 799 [2d Dept 2011]; *Turturro v City of New York*, 77 AD3d 732 [2d Dept 2010]).

Leave to amend the pleadings to identify a specific ordinance or code provision "may properly be granted, even after the note of issue has been filed," where the pleader makes a showing of merit and the amendment involves no new factual allegations, raises no new theories of liability and causes no prejudice to the opposing party (*Jara v New York Racing Assn., Inc*, 85 AD3d 1121, 1123 [2d Dept 2011], citing *D'Elia v. City of New York*, 81 A.D.3d 682, 684 [2d Dept 2011], quoting *Galarraga v. City of New York*, 54 A.D.3d 308, 310 [2d Dept 2008]),

In derogation of the common law, a municipality may avoid liability for injuries

sustained as a result of defects or hazardous conditions on its public property by means of prior written notification laws (*Amabile v City of Buffalo*, 93 NY2d 471 [1999]). The prior written notification laws at issue here are the Code of the Town of Oyster Bay §160-1(A) and Town Law §65-a(1). The Town seeks leave to amend its amended answer to add affirmative defenses based on this ordinance and statute. It admits that its citation in its amended answer of Town Law §65-a(2), which deals with defects in sidewalks, was inadvertent. It now seeks to cite the correct provision for defects in highways, a provision which has been construed to include parking lots (*Groninger v Village of Mamaroneck*, 17 NY3d 125 [2011]).

Plaintiff can claim no surprise as he expressly alleged compliance with prior written notification laws in his complaint (complaint, ¶. 32). The proposed amendments plainly have merit and do not allege any new theories or factual allegations. As to prejudice, plaintiff points only to the previously undisclosed Bibla Notice of Claim alleging a fall on snow and ice in the same Town parking lot in 2007(The Town's Ex. K). However this Notice of Claim describes the area of Ms. Bibla's fall as that part of the parking lot adjacent to the premises located at 138 South Road, not the location identified by plaintiff herein. On this record the Bibla Notice of Claim is not evidence of prior written notice to the Town of the condition which caused plaintiff's fall and, therefore, not a source of prejudice to the plaintiff. Consequently, the Town's request for leave to amend is hereby granted.

The Town has established that it received no prior written notification of the "black ice" condition in the subject parking lot prior to plaintiff's fall. Furthermore there is no allegation of prior written notice of any defective condition in the parking lot resulting from the Town's method of plowing the parking field from curb-to-curb. The Town has met its *prima facie* burden to establish no liability and the burden now shifts to plaintiff to raise an issue of fact supporting liability against the Town (*Shannon v Village of Rockville Centre*, 39 AD3d 528 [2^{d} Dept 2007]).

An exception to the prior written notice laws exists where the municipality creates

the defective condition through an affirmative act of negligence (*Amabile v City of Buffalo*). Here plaintiff strives to make a case that the Town's conduct in plowing curb-to-curb, and in failing to take any snow-clearing measures despite five hours of air temperatures above 32 degrees on the day before plaintiff's fall, raises a triable issue of fact as to the Town's creation of defective conditions which caused plaintiff's fall. Neither argument is successful.

Plaintiff relies upon *San Marco v Village/Town of Mount Kisco* (16 NY3d 111 [2010]), a black ice case, where the municipality had plowed the snow from a parking lot into a row of meters adjacent to the parking spaces. In *San Marco,* there was evidence that the air temperature had risen above freezing for approximately 19 hours after the plowing and then dropped and that the municipality did not employ a work crew on weekends although the parking lot was open seven days a week. The Court of Appeals found that plaintiff raised triable issues of fact as to whether the municipality exercised its duty of care by plowing snow high alongside active parking spaces and in failing to salt or sand on weekends an open parking lot.

San Marco is not applicable because plaintiff's Site Specific Weather Analysis Report (Pl's. Ex. 7) is unsworn and not made in the regular course of business and therefore inadmissible (*Frees v Frank & Walter Eberhart LP No. 1*, 71 AD3d 491 [1st Dept 2010]; *1212 Ocean Avenue Housing Development Corp. v Brunatti*, 50 AD3d 1110 [2d Dept 2010]; see *Bendik v Dybowski*, 227 AD2d 228 [1st Dept 1996]). While the climatological data submitted may be certified, it is data that requires expert testimony (*Viacom International Inc v Midtown Realty Co.*, 193 AD2d 45 [1st 1993]). No expert testimony has been submitted. On this record, there is no admissible evidence of temperatures for the period between the Town's plowing and the plaintiff's fall.

Moreover, even if the climatological data were admissible, this data does not appear to establish any kind of extended thaw in this case. A brief rise above freezing temperatures for a few hours on January 29, 2009, is not a condition which

would give a municipality notice that black ice may have formed in the parking lot. To hold otherwise would do exactly what *San Marco* rejects: it would effectively require municipalities to remove all snow off premises in order to avoid liability.

Plaintiff's further reliance upon *Smith v County of Orange* (51 AD3d 1006 [2d Dept 2008]) is unavailing because the facts underlying the decision in *Smith* are not presented in the decision therein.

Plaintiff's challenge to the Town's curb-to-curb snow removal practice fares no better. The plowing of snow against curbs in and of itself is not evidence of negligent snow removal (*Forman v City of White Plains*, 5 AD3d 434 [2d Dept 2004], nor is causing snow to be piled on the sidewalk near the curb (*Davis v City of New York*, 296 NY 869 [1947]; see also *Borkowski v City of New York*, 276 AD770 [2d Dept 1949], affd 301 NY 770 [1950]).

The only cases cited by plaintiff that support municipal liability are *Siddon v MH Fishman Co.*, (65 AD2d 832 [3d Dept 1978], app den 46 NY2d 714 [1979]) and *Brownell v City of New York* (277 AD2d 31 [1st Dept 2000], lv app den 96 NY2d 712 [2001]), In *Siddon*, the municipality was found to be liable for the creation of two-foot high snowbanks between the parking meters in a parking lot, because the snowbanks were on the municipal lot and there was no alternate means of ingress or egress from the lot. Furthermore, the prior practice of the Department of Public Works had been to remove the snowbanks. The facts of *Siddon*, taken together, distinguish it from the case at bar.

In *Brownell*, a jury verdict for plaintiff who fell on an icy sidewalk was supported by evidence that defendant's snow removal procedures caused snow to accumulate near curb cuts, and that defendant's salt-spreading caused snow to melt and refreeze at the curb cuts. Here again, curb cuts belong to the municipality and, of necessity, must be passable.

Based on the foregoing, plaintiff has failed to raise a triable issue of fact as to

whether the Town's snow removal efforts created a hazardous condition in the subject parking lot. Accordingly, the Town's motion for summary judgment dismissing the complaint and all cross-claims against it must be granted.

At the outset, the Court notes for the record that Anchorage cannot be held liable for the alleged black ice condition in the Town's parking lot. That conclusion, however, does not mandate summary judgment dismissing the complaint against Anchorage.

Absent a duty of care to the person injured, one cannot be held liable in negligence (*Palsgraf v Long Island R. R. Co.*, 248 NY 339, 342 [1928]). A landowner has a duty to maintain its property in a reasonably safe condition under all of the circumstances (*Basso v Miller*, 40 NY2d 233, 241 [1976]). Possession and control are key tests for premises liability, because the person in possession and control of the premises is the best able to identify and prevent harm to others (see generally *Butler ex rel Butler v Rafferty*, 100 NY2d 265, 270 [2003]). Possession, as well as control, are elements that give rise to the duty of reasonable care (*Quick v G.G.'s Pizza & Pasta, Inc.*, 53 AD3d 535 [2d Dept 2008]; *Franks v G&H Real Estate Holding Corp.*, 16 AD3d 619 [2d Dept 2005]; see *Nappi v Incorporated Village of Lynbrook*, 19 AD3d 565 [2d Dept 2005]; see also *Balsam v Delma Engineering Corp.*, 139 AD2d 292 [1st Dept], app dsmd in part and den in part, 73 NY2d 783 [1988]).

Anchorage plainly had possession and control of the sidewalks and walkways outside its building, and it recognized this duty as Mr. Lightborne was hired to clear these areas of snow and ice. However, because Anchorage could not establish whether Mr. Lightborne removed the ice and snow from the walkways of its property on January 30, 2009, or the two days prior (Oelsner transcript, pp. 58-60), it has failed to make out a *prima facie* case (*Carthans v Grenadier Realty Corp.*, 38 AD3d 489 [2d Dept 2007]).

Furthermore, while Anchorage had no duty to clear an unpaved area that was not

intended to be a walkway, triable issues of fact are presented as to whether the paved walkway between the sidewalk and the parking lot was suitable for pedestrian traffic at the time of plaintiff's fall and, if not, whether that was a substantial factor in causing plaintiff's fall (*Carthans v Grenadier Realty Corp.*; *Malley v Alice Hyde Hosp. Assn*, 297 AD2d 425 [3d Dept 2002]; see also *Marmol v North Isle Village, Inc.*, 48 ADd3d 760 [2d Dept 2008]).

Based on the foregoing, the motion by Anchorage for summary judgment dismissing the complaint and all cross-claims against it must be denied. The caption of the action is hereby amended to read as follows:

"KEVIN KEATING,

Plaintiff(s),

-against-

ANCHORAGE, INC.,

Defendant(s)."

This decision constitutes the order of the court.

Dated: January 10, 2012

HON THOMAS P. PHELAN

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