Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Kindu Smith,

Plaintiff,

-against-

The Town of Brookhaven,
Rosemar Contracting, Inc. and Bimasco, Inc.,

Defendants.

Index No.: 00304/2009

Attorneys [See Rider Annexed]

Motion Sequence No.: 004; MD
Motion Date: 1/11/11
Submitted: 10/12/11

Motion Sequence No.: 005; MD
Motion Date: 2/18/11
Submitted: 10/12/11

Motion Sequence No.: 006; MD
Motion Date: 3/18/11
Submitted: 10/12/11

Upon the following papers numbered 1 to 68 read upon these motions and this cross motion for summary judgment: Notice of Motion and supporting papers, 1 - 15; 34 - 36; Notice of Cross Motion and supporting papers, 16 - 33; Answering Affidavits and supporting papers, 47 - 54; 55 - 58; Replying Affidavits and supporting papers, 59 - 60; 61 - 62; 63 - 64; 65 - 66; 67 - 68.

In this action, the plaintiff seeks to recover damages for personal injuries which he purportedly sustained on January 8, 2008 when he tripped over a ledge or lip that was present in the roadway of Eagle Avenue, approximately 47 feet south of Knickerbocker Avenue, in Medford, Town of Brookhaven, New York. In his complaint, the plaintiff alleges that he was caused to trip and fall when his foot came in contact with an uneven, unleveled and raised piece of asphalt which extended across the width of Eagle Avenue. It is undisputed that the Town of Brookhaven (hereinafter the Town) was coordinating road resurfacing and repaving in the area of the accident. In furtherance of this project, the Town contracted defendant Bimasco, Inc. (hereinafter Bimasco) to perform the mix-in-place, which is, in effect, a relaying of the roadway. The Town contracted with defendant Rosemar Contracting, Inc. (hereinafter Rosemar) to install the asphalt in the area. In his complaint

and bill of particulars the plaintiff alleges that the defendants are liable for his injuries as a result of their negligence. He alleges, among other things, that each of the defendants were negligent in creating a dangerous and hazardous condition in the roadway and in failing to warn pedestrians of such condition. The defendants each assert cross claims for, *inter alia*, contribution and indemnification against their co-defendants.

Defendant Rosemar now moves pursuant to CPLR §§3211 and 3212 for summary judgment dismissing the complaint and cross claims asserted against it. Rosemar contends that it is entitled to summary judgment on the grounds that (1) it does not owe a duty of care to the plaintiff, a non-contracting third-party, (2) it performed its work in accordance with the Town's specifications and the Town approved its work and (3) the plaintiff had prior notice of the open and obvious condition of the roadway. Defendant Bimasco cross-moves pursuant to CPLR §§3211 and 3212 for summary judgment dismissing the complaint and cross claims asserted against it. Bimasco contends that it is entitled to dismissal of the complaint and cross claims on the grounds that (1) it does not owe a duty of care to the plaintiff, a non-contracting third-party, where it did not create a dangerous condition or launch an instrument of harm, (2) it performed its work in accordance with the Town's specifications, the Town inspected its work and found it to be satisfactory and its conduct did not cause the accident and (3) the plaintiff had knowledge of the open and obvious condition of the roadway. Defendant Town of Brookhaven moves pursuant to CPLR §3212 for summary judgment dismissing the complaint and cross claims asserted against it. The Town contends that it is entitled to summary judgment on the grounds that (1) the condition of the street was open and obvious and not inherently dangerous, (2) the alleged defective condition of the roadway is too trivial to be actionable, as a matter of law, and (3) it did not have prior written notice of the alleged defective condition of the roadway.

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 demonstrate the absence of any material issues of fact (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v. City of New York, 49 NY2d 557 [1980]).

In support of the motion, Rosemar submits, *inter alia*, the plaintiff's deposition testimony, photographs depicting the location of the purported accident, the deposition testimony of Thomas Ducz on behalf of Rosemar, the deposition testimony of Michael Murphy on behalf of the Town, inspection reports prepared by Michael Murphy with respect to his inspection of the area on November 27, 2007 and May 30, 2008, and the contract between the Town and Rosemar for the subject road work.

In support of the cross motion, Bimasco submits, *inter alia*, the plaintiff's deposition testimony, photographs depicting the location of the purported accident, the deposition testimony of Thomas Ducz on behalf of Rosemar, the deposition testimony of Reed Hendricks on behalf of Bimasco, the deposition testimony of Michael Murphy on behalf of the Town, inspection reports prepared by Michael Murphy with respect to his inspection of the area on November 27, 2007 and May 30, 2008, and the contract between the Town and Bimasco for the subject road work.

In support of its motion the Town submits, *inter alia*, the pleadings, the notice of claim, the plaintiff's deposition testimony and the affidavits of Linda Sullivan and Suzanne Mauro.

As is relevant to this motion, the plaintiff testified that the accident occurred at approximately 10:00 a.m. on January 8, 2008 at which time he was walking back to his home from a local store. His home was around the corner from the store and he had walked the route on approximately twenty occasions in the six months prior to the accident. The accident occurred near the corner of Eagle Avenue and Knickerbocker Avenue, approximately ten steps from the corner and one block (or 10 houses) from his home. There were no sidewalks and he was walking on the street. Shortly prior to the accident, the plaintiff heard a car behind him and turned his head and looked over his shoulder for two seconds. After turning back and looking forward, he took two or three steps and his left foot came in contact with a lip that was present in the roadway causing him to somersault forward. The lip went all the way across the street from one side to the other. It appeared to him like someone had poured blacktop down on only one side of the roadway and that this portion of the roadway was about three or four inches higher than the portion of the roadway that did not yet have blacktop. He would have had to step up on the lip if the accident had not happened. The plaintiff testified that the photographs annexed, in particular photographs marked as exhibit C, D, E, F, and G, accurately depicted the lip in the roadway which caused his accident. The plaintiff testified that there were no barricades or cones in the area of the accident. The plaintiff admitted that he first noticed the lip a month prior to the accident and that he had walked in the area of the lip approximately twenty times without a problem. He also noticed the lip every time he drove over it because it felt like his vehicle was driving over half of a curb. The plaintiff admitted that he did not make any complaints about the lip and did not know anyone who did. The plaintiff testified that the entire road was once filled with potholes but it was all eventually paved. He presumed the Town had paved the roadway.

Thomas Ducz, operations supervisor of Rosemar, testified that Rosemar contracted with the Town of Brookhaven to perform work to the roadways in the vicinity of, and including, the roadway at issue in 2007 and 2008. According to Ducz, Rosemar was contracted to install base asphalt in the area and did, in fact, apply asphalt onto Eagle Avenue north and south of Knickerbocker location in the area of the plaintiff's purported accident. Prior to the time Rosemar applied the asphalt, Bimasco performed mix-in-place on the roadway. Ducz explained mix-in-place as a procedure during which a grinding machine grinds up the existing road, takes the existing asphalt, makes a subbase with it and regrades the road. According to Ducz, when the mix-in-place process is stopped at a certain portion of the street, it leaves an area where one street may be at a different level than the unfinished part of the street. This uneven portion of concrete or roadway will be leveled off when the binder is installed. Rosemar would come in and apply this asphalt binder after Bimasco's work was

complete. The binder would be feathered gradually, or ramped, to connect the uneven portions of concrete. It was Ducz's understanding that this was the process that occurred at Eagle Avenue. At some point when the binder on Eagle Avenue was placed, the two levels of roadway, the existing pavement and the mix-in-place, were feathered and sloped together gradually enough so that there was no difference in height. Ducz did not know when Rosemar applied the final coating of asphalt. He testified that the photographs of the plaintiff's purported accident site depicted the area in which they were performing their work. He could not tell from the photographs of the purported accident site whether the initial binder had been installed. Ducz testified that he did not have any contact with the Town but that someone from Rosemar did. According to Ducz, the Town would contact a representative of Rosemar directly when certain work needed to be performed. It was Ducz's understanding that there was an inspection by the Town of the subject area after the binder was laid including the feathering and that the work had passed inspection. He testified that the Town would have called Rosemar if there was a problem with the work. Ducz testified that he was not aware of any type of complaints that Rosemar received concerning the area where the binder met the existing portion of the intersection.

Michael Murphy testified that he is employed by the Town as a highway project inspector and that his duties include inspecting the blacktop that goes down on the roadways. According to Murphy, the Town was continuously paving the roadways dependent on the weather. Murphy knew which roadways were going to be paved and when they were going to be paved. Murphy recalled performing inspections of the roadway at issue in this case from November of 2007 through the first half of 2008. He prepared an inspection report following an inspection of the subject roadway on November 27, 2007. On such date, Rosemar had worked on putting binder down on the roadway. Binder is a type of asphalt which goes on top of mix-in-place. According to Murphy, the mix-in-place was performed on this road prior to November 27, 2007 by Bimasco. Normally there would be a height difference following the completion of mix-in-place between the portion of the road where the mix-in-place was performed and the existing road. Based on his experience when this type of work is being performed on a roadway, the work usually encompasses the intersection and encroaches onto the cross-streets. How far mix-in-place would be done into encroaching roads was sometimes determined by the Town and was sometimes left to the contractor. Murphy did not inspect the mix-in-place work, but did look at the work on November 27, 2007 in order to determine whether it was ready to be paved. According to the November 27, 2007 report, Bimasco was there that date touching up its work. Rosemar was instructed by Murphy to install the binder course and, when doing so, to ramp the asphalt so as to make a transition between the level of the existing roadway and the new roadway. The binder course is also lower than the existing roadway. According to Murphy, he told Rosemar to build the ramp because based on the time of year and the falling temperatures; he knew that they would be unable to install the top course which would level the roadway and complete the paving, at that time. Murphy testified that ramps were installed "for safety reasons" i.e., so snow plows would not hit the lip in the roadway. The main concern in determining the safety of a ramp is whether a lip exists in the roadway that a snow plow could hit. Theoretically, the ramp between the existing roadway and the binder course is only approximately one inch. Murphy testified that it was part of his duties to ensure that such a ramp was made and it was his understanding that Rosemar performed this task. It was also part of his job duties to inspect

the ramp and tell Rosemar about any problems. Upon viewing photographs of the location, Murphy testified that certain photographs appear to depict that the ramp did not meet the roadway flush in certain locations and the existence of lips in the roadway. Murphy testified that the ramps were in existence in the subject roadway from November 27, 2007 through May 30, 2008. On May 30, 2008, Rosemar returned and installed the top course of asphalt. Murphy prepared an inspection report on such date. The report indicates that asphalt was applied to 92 feet of Eagle Avenue, an area partially to the north and partially to the south of Knickerbocker Avenue. The height differential between the existing roadway and the reconstructed roadway was completely leveled off at this time.

Murphy testified that the construction coordinator for the Town directed him where to go and requested that he inspect certain work. Murphy testified that he communicated directly with Rosemar while on the job. In 2007 he spoke with Rosemar with respect to the specifications for the work being done and what the Town expected. In 2008 he spoke to Rosemar about installation of the top course. Murphy testified that no one that he recalled ever complained about the height differential in the roads. Murphy never discussed with Rosemar any complaints about injuries that had occurred as a result of the construction. Murphy testified that he did not communicate directly with Bimasco, that he did not inspect the mix-in-place work that Bimasco performed and that he did not know who the inspector was or if there was an inspector from the Town that performed such inspection.

Reed Hendricks, secretary and operations manager of Bimasco, a family owned business, testified that Bimasco contracted with the Town of Brookhaven to perform certain work in the vicinity of and including the area of plaintiff's accident. This work commenced in approximately September of 2007 and was completed in the end of October 2007. This work encroached on intersecting streets, including the location of the subject accident. It was Hendricks' usual practice to visit the job site but he admits that he does not recall visiting the subject job site. He testified that, generally, mix-in-place recycling occurs when a machine chews up the asphalt, grades it, injects it with oil and compacts it. According to Hendricks, after mix-in-place is performed, the roads are level, everything is flush and there is not an area where one street is higher than the other. In this regard, he concludes that everything was flush in the area of Knickerbocker and Eagle Avenue following Bimasco's work. Hendricks testified that at no point did he coordinate efforts with Rosemar.

In her affidavit, Linda Sullivan avers that she is employed by the Town as a clerk in the Town Clerk's office and personally conducted a search of the files maintained by the Town Clerk's office concerning all written notices of defect and notices of claim filed with or received by the Town Clerk for any alleged defective, out-of repair, unsafe, dangerous or obstructed condition upon Eagle Avenue at the location of the plaintiff's alleged accident. Sullivan asserts that no prior written notice of a defect was filed with, or received by, the Town Clerk within one year prior to the date of the incident. Likewise, no notices of claim were filed with, or received by, the Town Clerk concerning any accident occurring in the subject location, within one year prior to the date of the plaintiff's purported accident. In sum, Sullivan asserts that the Town of Brookhaven Town Clerk does not have any record of receiving any prior written notice of any alleged defective, out-of-repair,

unsafe, dangerous or obstructed condition upon Eagle Avenue at the location described by the plaintiff within a one year period prior to the date of the plaintiff's purported accident.

In her affidavit, Suzanne Mauro avers that she is employed by Town as a principal clerk in the Town of Brookhaven Highway Department headed by the Town's Superintendent of Highways. Mauro avers that she personally conducted a search of the files maintained by the Town's highway department concerning all written notices of defects and notices of claim filed, or received by, the Town Clerk for any alleged defective, out-of-repair, unsafe, dangerous or obstructed condition upon Eagle Avenue at the location of the plaintiff's accident. Mauro asserts that no prior written notice of a defect was filed with, or received by, the Town's Superintendent of Highways within one year prior to the date of the plaintiff's accident. She further asserts that no notice of claim was filed with the Town's Superintendent of Highways within a one year period prior to the date of the plaintiff's accident. In sum, Mauro asserts that the Town of Brookhaven's Superintendent of Highways does not have any record of receiving any prior written notice of any alleged defective, out-of-repair, unsafe, dangerous, or obstructed condition at the location described by the plaintiff within one year prior to the plaintiff's purported accident.

The evidence submitted by the defendants on their respective motions and cross motion was insufficient to demonstrate their entitlement to summary judgment dismissing the complaint and cross claims asserted against them. Rosemar, Bimasco and the Town failed to demonstrate, as a matter of law, either the absence of a defective condition in the roadway or that the defective condition complained of is too trivial to be actionable. Generally, the issue of whether a dangerous or defective condition exists depends on the particular facts and circumstances of each case, and is properly a question of fact for the jury (see, Kehoe v. City of New York, 88 AD3d 655 [2nd Dept., 2011]; Riser v. New York City Hous. Auth., 260 AD2d 564 [2nd Dept., 1999]). However, not every injury allegedly caused by a defect in a sidewalk must be submitted to the jury and a trivial defect, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes or trip on a raised projection, is not actionable (Kehoe v. City of New York, 88 AD3d 655 [2nd Dept., 2011]). In determining whether a defect is trivial as a matter of law, the court considers "the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" (Trincere v. County of Suffolk, 90 NY2d 976 [1997]; Kehoe v. City of New York, 88 AD3d 655 [2nd Dept., 2011]). The evidence submitted here fails to establish, as a matter of law, that the complained of defect possessed none of the characteristics of a trap or snare and was, thus, too trivial to be actionable (see, Figueroa v. City of New York, 89 AD3d 980 [2nd Dept., 2011]; Wilson v. Time Warner Cable, Inc., 6 AD3d 801 [3rd Dept., 2004]; Herrera v. City of New York, 262 AD2d 120 [1st Dept., 1999]). In this regard, the Court notes that (1) according to the plaintiff's testimony, the complained of defect was a three to four inch height differential running all the way across the roadway, (2) the testimony of the Ducz and Murphy corroborates the existence of a height differential in abutting portions of roadway and (3) scrutiny of the photographs identified by the plaintiff as accurately reflecting the condition of the roadway at the time of his fall depicts a visible elevation difference in the roadway (compare, Riser v. New York City Hous. Auth., 260 AD2d 564 [2nd Dept., 1999]).

Likewise, the evidence submitted also fails to establish, as a matter of law, that the defendants are entitled to summary judgment based on the plaintiff's prior notice of the lip in the roadway as well as the open and obvious condition of this alleged defect. It is now well settled that the open and obvious nature of a defect only raises a question as to the injured plaintiff's comparative negligence and does not, as a matter of law, negate liability on the part of those who created the defect and/or are responsible for the project (see, Figueroa v. City of New York, 89 AD3d 980 [2nd Dept., 2011]; Cucuzza v. City of New York, 2 AD3d 389 [2nd Dept., 2003]; Cupo v. Karfunkel, 1 AD3d 48 [2nd Dept., 2003]; see also, Mei Xiao Guo v. Quong Big Realty Corp., 81 AD3d 610 [2nd Dept., 2011]; Wilson v. Time Warner Cable, Inc., 6 AD3d 801 [3rd Dept., 2004]).

In addition, the evidence submitted fails to establish, as a matter of law, that Rosemar and Bimasco had no duty of care to the plaintiff, a non-contracting third-party. Although a contractual obligation standing alone does not generally give rise to tort liability in favor of a third party, contractors may still be liable if, in failing to exercise reasonable care in the performance of their duties, they "launche[d] a force or instrument of harm" (Espinal v. Melville Snow Contrs., 98 NY2d 136, 140 [2002]; Dunleavy v. Tuttle, 83 AD3d 995 [2nd Dept., 2011]) or otherwise made the construction area less safe than before the construction project began (see, Timmins v. Tishman Constr. Corp., 9 AD3d 62, 67 [1st Dept., 2004], lv. dismissed 4 NY3d 739 [2004], rearg denied 4 NY3d 795 [2005]; see also Golisano v. Keeler Constr. Co., 74 AD3d 1915 [4th Dept., 2010]). Here, it is undisputed that both of these entities performed work on the roadway in the area of the plaintiff's accident. The evidence submitted raises a triable issue of fact as to whether in the performance of their work Rosemar and/or Bimasco created or exacerbated a dangerous condition in the roadway which caused the plaintiff's accident (see Schosek v. Amherst Paving, Inc., 11 NY3d 882 [2008]; Dunleavy v. Tuttle, 83 AD3d 995 [2d Dept., 2011]; Golisano v. Keeler Constr. Co., 74 AD3d 1915 [4th Dept., 2010]).

Lastly, the evidence submitted fails to establish, as a matter of law, that the Town is entitled to summary judgment because it did not receive prior written notice of the alleged defective condition of the roadway. Where a municipality has enacted a prior written notice statute, it may not be subjected to liability for injuries arising from a defective roadway condition unless it has received prior written notice of the dangerous condition or an exception to the prior written notice requirement applies (see Pennamen v. Town of Babylon, 86 AD3d 599 [2nd Dept., 2011]; Danis v. Incorporated Vil. of Atl. Beach, 74 AD3d 1273 [2nd Dept., 2010]). The Court of Appeals has recognized only two exceptions to the statutory prior written notice requirement, namely, where the municipality created the defect or hazard through an affirmative act of negligence or where a special use confers a benefit upon the locality (see Amabile v. City of Buffalo, 93 NY2d 471 [1999]; Pennamen v. Town of Babylon, *supra*). Here, the Town established through the affidavits of Sullivan and Mauro that it had not received prior written notice of the complained of defect. However, the evidence submitted on the motion also raised a triable issue of fact as to whether the Town created the dangerous condition through an affirmative act of negligence (see Gelfand v. Adjo Contr. Corp., 82 AD3d 932 [2nd Dept., 2011]; Pennamen v. Town of Babylon, *supra*; Danis v. Incorporated Vil. of Atl. Beach, 74 AD3d 1273 [2nd Dept., 2010]). In this regard, the Court notes that if Rosemar or Bimasco created the allegedly dangerous condition, then the Town would have

affirmatively participated in creating the risk based on its control over these contractors (see Smith v. City of Syracuse, 298 AD2d 842 [4th Dept., 2002]; cf. Clark v. City of New York, 43 AD3d 419 [2nd Dept., 2007]).

Inasmuch as the evidence submitted by the defendants was insufficient to establish a *prima facie* entitlement to summary judgment dismissing the complaint, it is unnecessary to consider whether the plaintiff's opposition papers were sufficient to raise a triable issue of fact.

Accordingly, it is

ORDERED that these motions and cross motion are consolidated for the purposes of determination; and it is further

ORDERED that the motion (004) by defendant Rosemar Contracting, Inc., which is for an order pursuant to CPLR §3211 and CPLR §3212 granting summary judgment dismissing the complaint and cross claims asserted against it, is denied; and it is further,

ORDERED that the cross motion (005) by defendant Bimasco, Inc., which is for an order pursuant to CPLR §3211 and CPLR §3212 granting summary judgment dismissing the complaint and cross claims asserted against it, is denied; and it is further,

ORDERED that the motion (006) by defendant Town of Brookhaven, which is for an order pursuant to CPLR §3212 granting summary judgment dismissing the complaint and cross claims asserted against it, is denied.

Dated: 1/18/2011

William B. Rebolini

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

_____ FINAL DISPOSITION __x__ NON-FINAL DISPOSITION

RIDER

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