| **Groeneveld v County of Suffolk** |
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| 2013 NY Slip Op 30994(U) |
| May 6, 2013 |
| Supreme Court, Suffolk County |
| Docket Number: 28849-2010 |
| Judge: John J.J. Jones Jr |
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SHORT FORM ORDER

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SUBMIT DATE: 3-13-2013
MTN. SEQ.#: 001

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

Present: **HON. JOHN J.J. JONES, JR.**
**Justice**

MOTION DATE: 1-8-2013
MOTION NO.: MG

---------------------------------------------------------X
HARRIET GROENEVELD,

Plaintiff,

-against-

COUNTY OF SUFFOLK, TOWN OF SMITHTOWN, MICHAEL A. GUARINO and YVETTE F. GUARINO,

Defendants.
---------------------------------------------------------X

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**By Christopher Pogan, Esq.**
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Attorneys for Defendant Town of Smithtown
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**Bello & Larkin**
**By John C. Meszaros, Esq.**
Attorneys for Defendant Guarino
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Hauppauge, NY 11788

Upon the following papers numbered 1 to 34 read on this application for an order granting summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1-13 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 14-31 ; Replying Affidavits and supporting papers 32-24 ; Other ____; it is

***ORDERED*** that the application by the defendants Michael A. Guarino and Yvette F. Guarino, [collectively "Guarino"], for summary judgment dismissing the plaintiff's complaint and all claims against them is granted.

On June 9, 2009, at approximately 5:00 PM on a clear sunny day the plaintiff, Harriet Groeneveld, ["the plaintiff"], was injured when she fell in the street in front of residential premises owned by Guarino located at 65 New Mill Road in the Town of Smithtown ["the Town"]. The plaintiff testified that she was taking a walk on her usual route when she suddenly fell injuring herself. According to the plaintiff, when the accident occurred she didn't know why she fell.

Several days later, at her daughter's urging, the plaintiff and her daughter returned to the scene of the accident apparently to determine what caused the plaintiff to fall. At the scene the plaintiff's daughter told the plaintiff, "Look, there's a dip here....[t]hat's what happened. " The dip was in the street approximately six inches from the curbline in front of Guarino's home. According to the plaintiff, the dip was fairly smooth. When the plaintiff fell, she didn't see her feet come in contact with the dip.

The plaintiff's daughter took several photographs of the site of the fall which the plaintiff authenticated at her deposition. In previous testimony at a municipal hearing conducted pursuant to General Municipal Law § 50-h, the plaintiff testified that her legs "didn't wiggle when she came in contact with the dip" to make her lose her balance. The bill of particulars confirms that the dangerous condition that caused the accident was "a dip in the roadway."

Robert F. Medwig, the Town's Highway General Supervisor ["Medwig"] testified that Guarino made a complaint to the Town on March 31, 2009 regarding a pothole or potholes in front of Guarino's residence. According to a work order generated by the Town, a Town work crew was commissioned to repair the pothole(s) which was completed the following day on April 1, 2009. According to Medwig, it's the Town's responsibility to maintain the roadway from "curb to curb."

Medwig was shown three photographs previously authenticated by the plaintiff at her examination before trial as the road in front of the Guarino premises. Medwig identified the darker areas of the roadway depicted in the photographs as road patches. Medwig explained the patching process to include the removal of all loose material, filling [the pothole], and squaring off and compacting the patch.

Guarino moved for summary judgment on the sole basis that it did not own the road where the plaintiff fell and had no duty to repair or maintain it. It is uncontradicted that the plaintiff's accident occurred on the asphalt roadway owned, controlled, managed and maintained by the Town. Guarino argued that there is no evidence that any action on Guarino's part created a hazardous condition in the street abutting their home.

Plaintiff opposed the motion arguing that Guarino did not establish their entitlement to judgment as a matter of law as is their burden on summary judgment (***Winegrad v. New York Univ. Medical Center,*** 64 N.Y.2d 851, 476 N.E.2d 642 (1985). She argued that Guarino did not establish that they did not make a special use of the area where the plaintiff's accident occurred and the immediate area around it. Plaintiff offered proof that some time between Guarino's purchase of the residence in late 2003 and the accident in 2009, Guarino replaced the Belgian block curbline that bordered the front of their property. Counsel's attorney's affirmation suggested that there was an issue of fact that the installation of the Belgian block curb constituted a special use of the Town's street. Counsel's affirmation urged that Guarino's special use in installing the Belgian block curb gave rise to a duty to maintain not just the special use, but the area immediately around it. This would include the "dip" six inches away from the curb that allegedly caused the plaintiff's fall. No

expert testimony was offered in this regard. The plaintiff also argued that an abutting owner may be liable for a defective condition which they create in the public roadway.

"[L]iability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property * * * Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property" (***Minott v. City of New York***, 230 A.D.2d 719, 645 N.Y.S.2d 879 [2d Dept.1996], *citing* ***Turrisi v. Ponderosa, Inc.***, 179 A.D.2d 956, 957, 578 N.Y.S.2d 724; ***Balsam v. Delma Eng'g Corp.***, 139 A.D.2d 292, 296–297, 532 N.Y.S.2d 105; *see* ***Hausser v. Giunta***, 217 A.D.2d 604, 629 N.Y.S.2d 462; ***Kobet v. Consolidated Edison Co. of N.Y.***, 176 A.D.2d 785, 575 N.Y.S.2d 114; ***Zucker v. 1255 Hewlett Plaza Realty Co.***, 172 A.D.2d 517, 568 N.Y.S.2d 335).

The Second Department explained the nature of a special use in ***Minott v. City of New York***, *supra*.

> "The principle of special use, a narrow exception to the general rule [of non-liability for those who do not own, manage or control property], imposes an obligation on the abutting landowner, where he puts part of a public way to a special use for his own benefit and the part used is subject to his control, to maintain the part so used in a reasonably safe condition to avoid injury to others" (***Balsam v. Delma Eng'g Corp.***, *supra*, at 298, 532 N.Y.S.2d 105; *see also,* ***Granville v. City of New York***, 211 A.D.2d 195, 197, 627 N.Y.S.2d 4; ***Curtis v. City of New York***, 179 A.D.2d 432, 577 N.Y.S.2d 855). Special use cases generally involve the installation of an object in the street or on the sidewalk, such as an oil cap or a runway, for the benefit of a private landowner (*see,* ***Balsam v. Delma Eng'g Corp***., *supra*, at 298, 532 N.Y.S.2d 105). 'The common thread in each of these cases was an installation "exclusively for the accommodation of the owner of the premises which he was 'bound to repair in consideration of private advantage'"' (***Balsam v. Delma Eng'g Corp***., *supra*, at 298, 532 N.Y.S.2d 105, *quoting* **Nickelsburg v. City of New York**, 263 App..Div. 625, 626, 34 N.Y.S.2d 1; *see,* ***Granville v. City of New York***, *supra*, at 197, 627 N.Y.S.2d 4). The special use is a use different from the normal intended use of the public way, and thus, "[t]he special use exception is reserved for situations where a landowner whose property abuts a public street or sidewalk derives a special benefit from that property unrelated to the public use" (***Poirier v. City of Schenectady***, 85 N.Y.2d 310, 315, 624 N.Y.S.2d 555, 648 N.E.2d 1318).

Here, Guarino was not making a "special use" of the roadway in front of their house merely because they replaced the Belgian blocks on their own property. The fact that there is evidence that upon Guarino's complaint the Town undertook to patch the road abutting Guarino's property is further evidence that the Town, not Guarino, owned, maintained, and controlled the road. Notably, the Town has not opposed Guarino's motion to dismiss all claims against them.

Further, there was no admissible evidence tending to show that the replacement of the old blocks with new blocks on Guarino's property in any way caused or created a "dip" in the roadway six inches away (*see* ***Crawford v. City of New York***, 98 A.D.3d 935, 950 N.Y.S.2d 743 [2d Dept. 2012]). The plaintiff's contention that Guarino may have caused the "dip" when he replaced the Belgian blocks was not supported by any admissible evidence and is based on mere speculation and conjecture (***Crawford***, *supra* at 937, *citing* ***Mayo v. Cedar Manor Mut. Hous. Corp***., 96 A.D.3d 913, 913, 946 N.Y.S.2d 486; ***Weinberg v. City of New York***, 96 A.D.3d 736, 736, 945 N.Y.S.2d 758; ***Fredette v. Town of Southampton***, 95 A.D.3d 939, 939, 943 N.Y.S.2d 760). Whether Guarino had a duty to obtain a permit from the Town to replace the blocks (something that the Town witness disputed) is a nonissue. The failure to obtain a permit does not create an issue of *material* fact that the replacement of the blocks caused the alleged defect.

Regarding the plaintiff's argument that Guarino did not establish entitlement to judgment as a matter of law because the transcripts annexed to the moving papers are not signed by the witnesses, under the circumstances here summary judgment is not precluded (*see generally* ***Martinez v. 123-16 Liberty Ave. Realty Corp.***, 47 A.D.3d 901, 850 N.Y.S.2d 201 [2d Dept. 2008]; ***Santos v. Intown Associates,*** 17 A.D.3d 564, 793 N.Y.S.2d 477 [2d Dept. 2005]).

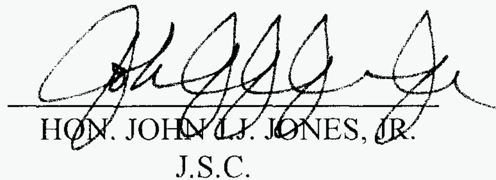
Although Guarino submitted an unsigned and uncertified copy of the plaintiff's 50-h testimony in support of the motion, at her examination before trial the plaintiff identified her signature on the transcript memorializing the testimony she gave at the municipal hearing and admitted that she reviewed and signed it (*Cf.* ***Mazzarelli v. 54 Plus Realty Corp.***, 54 A.D.3d 1008, 864 N.Y.S.2d 554 [2d Dept. 2008]). In opposing the motion, the plaintiff appended a fully executed transcript of the plaintiff's examination before trial testimony which, on the material facts, corresponded to her 50-h testimony. Thus, the plaintiff has not been prejudiced by Guarino's failure to annex an executed and certified copy of the plaintiff's 50-h testimony to the moving papers.

Contrary to the plaintiff's contentions, the unsigned but certified deposition of Guarino, which was submitted in support of the defendants' motion for summary judgment, was admissible under ***CPLR*** 3116(a), since the transcript was submitted by the party deponent themselves and, therefore, was adopted as accurate by the deponent (***Rodriguez v. Ryder Truck, Inc.***, 91 A.D.3d 935, 937 N.Y.S.2d 602 [2d Dept. 2012], *citing* ***Ashif v. Won Ok Lee***, 57 A.D.3d 700, 868 N.Y.S.2d 906). Further, the plaintiff has not disputed any of the testimony relied on by the movant or made any challenge to its accuracy. ***Rodriguez v. Ryder Truck, Inc.***, *supra* at 936.

Anecdotally, the plaintiff also relied on excerpts of both Guarino's and the Town's testimony in opposing the motion, notwithstanding that the defendants' transcripts annexed to the moving papers, although certified, were not signed. Finally, no one disputes that the Town owned and maintained the street where the accident occurred and the plaintiff has produced no admissible evidence creating an issue of fact that Guarino created a dangerous condition on the Town's road (*see* ***Walton v. City of New York***, --- N.Y.S.2d ----, 2013 WL 1319600 [2d Dept. 2013]).

Although the notice of motion only seeks a dismissal of the plaintiff's complaint, the "Wherefore" clause in the moving affirmation seeks a dismissal of all claims against Guarino as well as such other and further just relief as to the Court seems proper. Thus, summary judgment in favor of Guarino is granted and the plaintiff's complaint as well as the Town's cross claim against Guarino are dismissed. [1]

DATED: 6 May 2013



HON. JOHN J.J. JONES, JR.
J.S.C.

**CHECK ONE: [ ] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION**

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[1] The action against the County was discontinued with prejudice on or about September 12, 2012.

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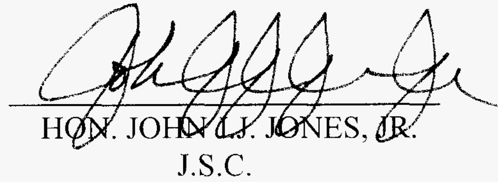

HON. JOHN J.J. JONES, JR.
J.S.C.

**CHECK ONE: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION**

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