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SHORT FORM ORDER

INDEX No. 09-20339
CAL No. 12-01880OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 9-27-12 (#005)
MOTION DATE 12-14-12 (#006)
MOTION DATE 12-18-12 (#007)
ADJ. DATE 2-26-13
Mot. Seq. # 005 - MG
006 - MD
007 - MG

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RONALD DEVITA,

Plaintiff,

- against -

TOWN OF BROOKHAVEN, ROSEMAR CONTRACTING, INC., and INTERCOUNTY PAVING ASSOCIATES, LLC,

Defendants.

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Upon the following papers numbered 1 to 63 read on these motions to renew and reargue & for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (005)1 - 28, (006) 29-42; (007) 43-52; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 53-54-untabbed; 55-56; Replying Affidavits and supporting papers 57–58; 59-60; 61-62; Other 63 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (005) by the defendant, Rosemar Contracting, Inc., pursuant to CPLR 2221(e) for an order granting renewal of its prior motion (003), which was brought pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint and all cross claims asserted against it, and which was denied with leave to renew upon completion of discovery in the consolidated action by order dated June 29,

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2011 (Tanenbaum, J.), is granted as to renewal, and upon renewal, summary judgment dismissing the complaint and all cross claims asserted against Rosemar Contracting, Inc. is granted; and it is further

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

ORDERED that motion (007) by the defendant, Intercounty Paving Associates, LLC, pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint and all cross claims asserted against it is granted.

In this negligence action, the plaintiff, Ronald Devita, alleges that he sustained injury on October 26, 2008, on a broken section of the curb located in front of the premises at 25 Matsunaye Drive, in Medford, New York. The roadway at issue had been milled by defendant Intercounty Paving Associates, LLC in October 2007. Tacking was applied thereafter by the Town of Brookhaven. Asphalt was applied in June 2008 to the road surface by defendant Rosemar Contracting, Inc. It is alleged that the defective condition occurred after the road work was started in October 2007, and prior to its completion in June 2008. It is alleged that the defendants created the alleged defective condition, and that the Town of Brookhaven, who inspected the work being performed by co-defendants Intercounty and Rosemar, had actual and constructive notice of the condition and negligently failed to repair the condition, causing the plaintiff to sustain injury on the defective curb.

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 (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]; ***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 motion (005), defendant Rosemar Contracting, Inc. (Rosemar) seeks summary judgment dismissing the complaint and all cross claims asserted against it on the bases that its responsibility was to pave the road; the area was to be inspected by the Town of Brookhaven and not by Rosemar prior to Rosemar performing the paving; Rosemar's work was supervised by the Town of Brookhaven; even if the curb were damaged, such condition would not prohibit Rosemar from performing its duties; and Rosemar did not cause or create the alleged defect of the curb upon which the plaintiff fell. In support of this application, Rosemar has submitted, inter alia, an attorney's affirmation; copies of the orders dated July 21, 2011 and June 9, 2011 (Tanenbaum, J.); copy of the prior motion which it seeks to renew; copies of the summons and complaints, the answers served by defendants Town of Brookhaven and Rosemar, and plaintiff's bill of particulars; copy of a contract dated May 4, 2007; unsigned insurance requirements; unsigned but certified copy of the 50-h hearing transcript of

Ronald Devita dated April 13, 2009; copies of the unsigned but certified transcripts of the examinations before trial of Ronald Devita dated September 13, 2010 and April 4, 2012, Rosemar Contracting by Thomas Ducz dated September 13, 2010, Town of Brookhaven by Suzanne Mauro dated September 13, 2010, Town of Brookhaven by Michael Murphy dated June 19, 2012, and Intercounty Paving Associates by Joseph LaPlaca dated June 19, 2012; the signed and certified transcript of the examinations of Rosemar Contracting by John Klaus dated June 19, 2012, and non-party Jeanmarie J. Devita dated July 20, 2012; photographs; invoices; and a Town of Brookhaven purchase order. Although many of the deposition transcripts are not signed and are not accompanied with proof of service pursuant to CPLR 3116, in searching the record, this court has found signed transcripts which are considered, except as to non-party witness Jeanmarie J. Devita (*see* ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]), whose transcript is not in admissible form to be considered.

In motion (006), the Town of Brookhaven (Brookhaven) seeks summary judgment on the basis that it did not receive prior written notice of the alleged defect, and it did not cause or create the alleged defective condition which did not occur, and was not visible, until the plaintiff stepped on the curb. In support of this application, Brookhaven has submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, its answer and amended answer, the amended verified answers of Intercounty Paving Associates and Rosemar Contracting, and plaintiff's bill of particulars; the signed and certified copies of the plaintiff's 50-h hearing transcript dated April 13, 2009, his deposition transcript dated September 13, 2010 and April 4, 2010; the unsigned transcripts of the examinations before trial of the Town of Brookhaven by Suzanne Mauro dated September 13, 2010 and Michael Murphy dated June 19, 2012 which are considered as adopted as accurate by the moving defendant (*see* ***Ashif v Won Ok Lee,*** 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]; the unsigned but certified transcript of the examination before trial of non-party Jeanmarie Devita dated July 20, 2012; the unsigned but certified transcript of the examination before trial of InterCounty Paving by Joseph LaPlaca; and photographs.

In motion (007), Intercounty Paving Associates, LLC (Intercounty) seeks summary judgment dismissing the complaint on the bases that when it installed the milling work at the site of the incident, the Town was present and inspected the site and that there were no complaints about its work; that it owed no duty to the plaintiff as it was a third-party contractor; that it did not damage the curb which remained intact for one year following the milling work and, thus, it received no actual or constructive notice of the condition. Intercounty incorporates by reference its co-defendants motions for summary judgment, and submits, inter alia, an attorney's affirmation; plaintiff's bill of particulars; photographs; signed and certified transcript of the examination before trial of Ronald Devita dated April 4, 2012; the unsigned and uncertified transcript of non-party Jeanmarie Devita dated July 20, 2012; the unsigned transcript of Joseph LaPlaca on behalf of Intercounty with proof of mailing of the same and which is considered as adopted as accurate by the moving defendant; and the affidavit of Joseph LaPlaca.

Ronald Devita testified to the extent that he currently rents the house at 27 Matsunaye Drive, which is next door to, and just north of, 25 Matsunaye Drive, which is where he resided on October 26, 2008 when the accident occurred. 25 Matsunaye Drive was owned by Eugene Riggio, and he rented the premises from him. There was no written lease. He later testified that it was his wife's father's house. He and his wife were in the process of getting a divorce, but he went to that address on many occasions over the years since 1989 when they were married. Prior to the accident, he had been living there for about a year. The accident occurred on the

curbside in front of 25 Matsunaye between 3:00 a.m. or 4:00 a.m. It was dark outside, and there was a streetlight located about ten feet away. There were no lights on at his home, but some of the neighbors lights were illuminated. He described the lighting in the area as poor. There were no sidewalks, just a curb alongside the road. He parked his truck curbside in front of his house, exited his truck, made a left around behind the back of it, and had walked about four feet from the rear bumper of his truck when the accident occurred. Devita testified that he stepped on the curb with his left foot and the curb gave way or collapsed. He had not looked down when he walked around his truck until he reached the curb. Devita testified that the curb had been in place the entire year that he lived at that address. He never noticed any cracks in it or damage to it. He did not know how long the curb had been in place. There were leaves on the ground and on the curb, about six inches deep. There had been no raking of his property or the leaves since the year before. The day after the accident, he took pictures of the curb. He testified that he believed equipment damaged the curb when the surface of the street was being scratched prior to repaving or asphalting it in the summer of 2008. Devita testified that he did not witness any damage to the curb, and he did not witness the road work as he thought it was repaved one day while he was away. No curbing was replaced when the road work was done. Prior to the accident, he did not make any complaints to anyone about the curbing in front of 25 Matsunaye Drive, and knew of no one who did. However, he testified, his wife was at home when two men who had been working on the road approached and advised that the curb would be repaired.

Joseph LaPlaca averred that he has been employed by Intercounty Paving Associates as Milling Supervisor for fifteen years. He stated that Intercounty was hired by the Town of Brookhaven to perform milling work on Matsunaye Drive as part of a road resurfacing project which included the road in front of 25 Matsunaye Drive, pursuant to a purchase order from the Town to Brookhaven. He described milling as scarifying the road or taking asphalt off the road with a milling machine prior to the application of new asphalt. He described the machine as having a big drum filled with carbide teeth, and as the drum spins and the machine propels forward, it grounds the asphalt right up to the curb. Part of the milling machine, the steel side gate, would actually ride directly on top of the curb about three to six inches, exerting ever so slight pressure, very minimal. A sweeper and perhaps a jackhammer were also used. In October, 2007, his crew with Intercounty performed the milling work at that location, probably in less than one day. Thereafter, no further work was performed by Intercounty at that site. LaPlaca continued that he was present while Intercounty performed the milling work on Matsunaye Drive at the curb in front of the premises, and that Intercounty did not cause any damage to the curb in front of the premises, or he would have heard about it from the Town. While performing the milling work, the Town of Brookhaven inspector was present. Intercounty did not receive any complaints at any time concerning damage to the curb in front of 25 Matsunaye Drive, in Medford. LaPlaca testified that if there was no application of the asphalt to the milled surface thereafter, that erosion would gouge out more of the road and subbase, and the curb could become undermined.

Thomas Ducz testified to the extent that he has been an operations supervisor for Rosemar Construction since 1990. He described it as an asphalt paving company and stated that it was the same company as Rosemar Contracting, Inc. Pursuant to a purchase order issued from the Town of Brookhaven, Rosemar repaved Matsunaye Drive in 2008, and was paid on June 16, 2008. The inspector from the Town of Brookhaven inspected the site. Bob Klaus, the job super from Rosemar, would have been the person in contact with the inspector from the Town who inspected the job prior to payment being made to Rosemar. The curbing would not need to be in any specific condition for Rosemar to effectuate its paving. Broken curbing would not interfere with the paving. The Town inspector would be present at the site the morning they begin to pave. Rosemar does not inspect curbing or report broken curbing prior to paving as curbing is not its responsibility. A diesel-

powered paver lays the asphalt and a roller compacts it. The paver and roller may come into contact with the curb that abuts the roadway, but it would be highly unlikely that the machine would break the curbing. If there was broken curbing prior to performing the paving, it would be removed prior to paving. He stated that the Town inspector walks alongside the machine as the asphalt is being applied.

John Klaus testified to the extent that he has been the general superintendent overseeing the daily field operations for Rosemar's paving business for five years. He was aware that paving work was done by Rosemar for the Town of Brookhaven at Matsunaye Drive pursuant to a purchase order issued by Brookhaven Town. After the milling work was done, the Town of Brookhaven swept the roadway and had another subcontractor, Bimasco (Bituminous Road Runner), apply a tack coat over the milled area prior to Rosemar applying the asphalt. He did not know the interval, but stated the industry standard was about a week or two between milling and asphalting. As part of the milling work, typically the machines do not make contact with the curbing. He did not know if he was present for the paving in the area of 25 Matsunaye Drive. When shown a picture of the curbing, Klaus stated that he never saw a milling machine cause such damage. Notices were hand delivered by Rosemar to residents one or two days prior to the work being performed. He added that if a curb were broken prior to paving by Rosemar, they would be able to pave anyway.

Suzanne Mauro testified to the extent that she is a principle clerk employed by the Brookhaven Highway Department for seventeen years. She handles claim and litigation that come into the department via a notice of claim, and sends a memo to the engineering department with the location and asks whether the Town maintains, and has jurisdiction, over the area. She also sends a memo to the Town Clerk's Office asking them to check their prior notices of defect for the location indicated on the notice of claim. She sends a copy to the general foreman advising of the specific area indicated to see if there is a problem or if something has to be repaired. She did a computer check for three years prior to the date of loss on the instant action searching for notices of defect regarding the notice of claim. When she did her search on the computer regarding this incident, the search did not reflect any road defect or curb defect within the incident location. Mauro continued that in October 2007, Intercounty did milling on the subject road pursuant to an agreement with the Town of Brookhaven. She believed there was also an agreement between the Town and Rosemar for paving the road, which was to be done after the milling. She continued that Rosemar performed the paving in June 2008, under the supervision of Michael Murphy from the Town of Brookhaven who filled out an inspection report.

Michael Murphy testified to the extent that he is employed by the Town of Brookhaven Highway Department as deputy supervisor. From 2007 through 2008, he was the inspector for the Highway Department, overseeing the work being performed by contractors to assure the work conformed to specifications. He completed an inspection report for the paving work done in the area of 25 Matsunaye Drive, which he thought was in 2008. He stated that it would be unusual for the milling work to be done six to eight months before it was paved. Ideally, paving would be done in the warmer weather. After the milling work was completed, and prior to the paving, a tack coat was sprayed over the road surface by a truck. While he was at the site inspecting the work, he did not observe any conditions depicted in the photographs showing the condition of the curb, and he had no knowledge as to the cause of the damage to the curb. Had he observed damage to the curb, he would have reported it to Tom at the Highway Department and a crew would have been sent out to fix the curb. While inspecting the paving job, he did not see Rosemar damage any curbs. With the milling work, he felt any contact with the milling machine and the curb would be minimal, and the curb wouldn't be used as a gauge. He was not aware of any complaints concerning the curbing prior to and including October 26, 2008, and knew of no one claiming to have tripped or fallen on the curb at the location during that time period.

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 neither created the dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (***Lee v Port Chester Costo Wholesale***, 82 AD3d 842, 918 NYS2d 549 [2d Dept 2011]). Here, the adduced testimonies establish prima facie entitlement to summary judgment dismissing the complaint as to defendants Intercounty Paving Associates and Rosemar Contracting on the basis they did not cause or create the broken curb at 25 Matsunaye Drive, Medford. They were not owners of the land where the condition occurred, and performed milling and paving in the location pursuant to a contract with the Town of Brookhaven. There was no privity of contract between them and the plaintiff. They established that they did not cause damage to the curbing and did not observe any damage at the time. Repair of the curbing was the responsibility of the Town of Brookhaven, and they could mill and pave whether or not there was defective curbing. Counsel for plaintiff, in opposing this motion, has submitted multiple deposition transcripts as noted above, and specifically stated that "no one has yet identified as to who actually caused the damaged curb as when it was done no one was notified or when it was done it was not observed and not reported." It is determined that no evidentiary proof has been submitted by plaintiff demonstrating that either Intercounty Paving of Rosemar Contracting caused the condition of the broken curb upon which the plaintiff claims to have sustained injury. Thus, no factual issues have been raised by plaintiff to preclude summary judgment from being granted to Intercounty Paving and Rosemar Contracting.

Accordingly, motions (005) and (007) by defendants Intercounty Paving Associates, LLC and Rosemar Contracting, Inc. are granted and the complaint and all cross claims asserted against them are dismissed.

Town Law §65-a(2) provides in pertinent part that no civil action shall be maintained against a town for damages or injuries to person or property sustained by reason of any defective, dangerous, unsafe, out-of-repair or obstructed sidewalks, unless written notice thereof, specifying the particular place, was actually given to the Town Clerk or to the Commissioner of the Department of Public Works of the Town and there was a failure or neglect to cause such defective, dangerous, unsafe, out-of-repair or obstructed sidewalks to be remedied, ... or to make the place otherwise reasonably safe within a reasonable time after receipt of such notice. A defective curb requires written notice to a Town (*see* ***Berner v Town of Huntington***, 304 AD2d 513, 757 NYS2d 585 [2d Dept 2003]). There are only two exceptions to the statutory rule requiring prior written notice of a defective condition (***Tekiroglu et al ve Copiague Memorial Public Library and Town of Babylon***, 2008 NY Slip op 30527U; [Sup Ct, Suffolk County 2008]). If the municipality created the dangerous condition by an affirmative act or negligence, the prior notice provision does not apply (***Wald v County of Nassau et al,*** 2009 NY Slip Op 31874U [Sup Ct, Nassau County 2009], citing from ***Amabile v City of Buffalo***, 93 NY2d 471, 693 NYS2d 77 [1999]). The second exception to the prior written notice requirement is if a special use confers a special benefit upon the locality (***Amabile v City of Buffalo***, *supra*). Constructive notice of a defect does not satisfy the written notice requirement (***Amabile et al v City of Buffalo,*** *supra*). Recurrence of a condition does not abrogate the need for prior written notice (***Rosario v Laroma Construction Corp and Incorporated Village of Floral Park,*** 2009 Slip Op 30487U [Sup Ct, Nassau County 2009]).

Here, the Town of Brookhaven has demonstrated prima facie through the adduced testimonies that it did not receive the requisite prior written notice of the alleged defective condition of the curb. The burden, thus, shifted to the plaintiff to demonstrate that the Town did receive prior written notice or that there exists an

exception to the notice requirement. The plaintiff thereafter, did not demonstrate that indeed prior written notice of the defective condition was provided to the Town of Brookhaven, as required by Town Code of the Town of Brookhaven § 84.1 (A) and (B). Even if it is claimed that a Town employee had actual notice of the condition complained of, prior written notice is still required.

A prior written notice statute does not protect a municipality from liability if it can be proven that the locality created the defect or hazard through an affirmative act of negligence (***San Marco v Village/Town of Mount Kisco***, 16 NY3d 111, 919 NYS2d 459 [2010]). While liability may not attach if the plaintiff was injured on a sidewalk abutting the owner's property, it may attach if the accident resulted from a dangerous condition of the curb (***Vucetovic v Epsom Downs, Inc.***, 10 NY3d 517, 860 NYS2d 429 [2008]; *see also* ***Yousef v Lee***, 103 AD3d 542, 959 NYS2d 440 [1st Dept 2013]). However, it is determined in the instant action that there are factual issues concerning whether or not the Town of Brookhaven failed to properly inspect and maintain the alleged defective curbing, whether it had actual or constructive notice of the alleged defective condition of the curb, and whether it failed to remedy said condition after its occurrence. The plaintiff testified that two men who had been working on the road from the Town approached the house while his wife was home prior to the accident and advised that the curbing was to be fixed. There is also a factual issue concerning whether the Town had constructive notice of the condition complained of. To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time before the accident to permit the defendant or its employees to discover and remedy it (***Ferrigno v County of*** Suffolk, 60 AD3d 726, 875 NYS2d 202 [2d Dept 2009]; ***Stumacher v Waldbaum, Inc.***, 274 AD2d 572, 716 NYS2d 573 [2d Dept 2000]). There are factual issues concerning the length of time the condition existed prior to the accident. These factual issues relative to actual and construct notice by the Town of Brookhaven preclude summary judgment dismissing the complaint against the Town (*see* ***Hilliard v Town of Greenburgh***, 301 AD2d 572, 754 NYS2d 29 [2d Dept 2003]).

Accordingly, motion (006) by the Town of Brookhaven for summary judgment granting dismissal of the complaint is denied.

The foregoing constitutes the Order of this Court.

Dated: July 1, 2013
Riverhead, NY

HON. HECTOR D. LASALLE, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**