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SHORT FORM ORDER

INDEX No. 11-12389
CAL. No. 12-01940OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

***PRESENT*:**

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq.# 001 - MG; CASEDISP
002 - MG

BRENDA PERRONE and WILLIAM PERRONE, Plaintiffs, - against - SUFFOLK COUNTY WATER AUTHORITY and MYLES S. KASSMAN, Defendants.	TINARI, O'CONNELL, OSBORN & KAUFMAN, LLP Attorney for Plaintiffs 320 Carleton Avenue, Suite 6800 Central Islip, New York 11722 SOBEL LAW GROUP, L.L.C Attorney for Defendant Suffolk County Water 464 New York Avenue, Suite 100 Huntington, New York 11743 DEVITT SPELLMAN BARRETT, LLP Attorney for Defendant Kassman 50 Route 111, Suite 314 Smithtown, New York 11787

Upon the following papers numbered 1 to 38 read on these motions for summary judgment Notice of Motion/ Order to Show Cause and supporting papers 1-15, 16-27; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 28-34; Replying Affidavits and supporting papers 35-36, 37-38 Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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

ORDERED that the motion (#001) by defendant Myles S. Kassman ("Kassman"), pursuant to CPLR 3212, for summary judgment in his favor is granted; and it is further

ORDERED that the motion (#002) by defendant Suffolk County Water Authority ("SCWA"), pursuant to CPLR 3212, for summary judgment in its favor is granted.

This is an action to recover damages for personal injuries sustained by the plaintiff Brenda Perrone and for loss of services sustained by plaintiff William Perrone, allegedly due to the negligence of the defendants Kassman and the SCWA. It is alleged that on June 6, 2010, the plaintiff, Brenda Perrone, was walking on the front lawn of the premises at 11 Alder Drive, Mastic Beach, New York, when her right foot became caught in a below ground water meter enclosure, causing her to sustain personal injuries. Defendant Kassman now moves (Motion #001) for summary judgment dismissing the complaint. In support of the motion, he submits, *inter alia*, his attorney's affirmation and reply affirmation, his deposition, the pleadings, the verified bill of particulars, the depositions of the plaintiffs, and the deposition John Znaniecki, as a witness on behalf of the defendant SCWA. Defendant SCWA also moves (Motion #002) for summary judgment dismissing the complaint. In support of the motion, it submits, *inter alia*, its attorney's affirmation and reply affirmation, the pleadings, the verified bill of particulars, the depositions of the plaintiffs, the deposition of defendant Kassman and the deposition of John Znaniecki, as a witness on behalf of the defendant SCWA, as well as the affidavit of John Znaniecki, sworn to in December, 2012. In opposition thereto, the plaintiffs submit, *inter alia*, their attorney's affirmation, photographs and other discovery material.

Plaintiff Brenda Perrone testified that her accident occurred on June 6, 2012, on a neighboring property located at 11 Alder Drive, in Mastic Beach, New York. The accident occurred as said plaintiff was retrieving her dog, which had escaped from her house. After she had retrieved the dog, she began to walk across the front lawn back toward her house. There was nothing else in the front yard except grass, which was short. After taking approximately five to ten steps, she stepped into a "giant metal hole" that she subsequently realized was a water meter. Upon stepping onto the water meter cover, it had flipped, thereby causing her right leg to go into the hole. She did not see the water meter cover at any time before her accident. Prior to her accident she had never seen anyone open the water meter cover, she had never seen any tenants of 11 Alder Drive near the water meter nor did she observe any from the defendant SCWA reading the meter. She had no knowledge that the water meter was there prior to her accident. She did not know the defendant Kassman and had never seen him on the property. She was not aware of any complaints made to either of the defendants or to the tenants of 11 Alder Drive about the water meter prior to her accident, nor was she aware of any prior accidents involving the water meter.

Plaintiff William Perrone testified that he never observed the water meter or cover prior to his wife's accident. He never observed anyone touch, open or close the water meter or cover or perform any type of work in the area of the water meter prior to the accident. He did not know the defendant Kassman and had never seen him on the property. He was not aware of any complaints made to either of the defendants about the water meter or cover prior to her accident nor was he aware of any prior accidents involving the water meter.

John Znaniecki testified as a witness on behalf of defendant SCWA. He has been employed by the SCWA for approximately 22 years, and has been a water meter reader for about 15 years. He testified that the water meter involved in the accident was owned, installed and maintained by defendant SCWA. This particular type of water meter was located outside of the home and had to be physically read on the site by a meter reader. The meter could be read by use of a probe, without taking off the cover, but if the probe could not obtain a reading, the cover would have to be physically removed, and the reading taken directly from the meter in the vault. He had no specific recollection of working at this location prior to June 6, 2010, but SCWA records indicate that he was the last meter reader to go to the subject property prior to the date of the accident. He testified that the water meter cover contains a locking nut, but it could be removed by anyone by using a socket wrench. He had no knowledge of the water meeting cover at 11 Alder Drive being removed by anyone from the defendant SCWA prior to the date of the accident. He was not aware of anyone complaining about the water meter cover being loose prior to June 6, 2010. He testified that he had seen situations where he would find the water meter cover loose or entirely missing. He stated that it happened frequently, maybe once a week. He also testified he would find covers ajar, maybe once a week. If a cover was broken, he would either fix it or report it. He kept three or four covers in his truck. He further testified that he made approximately one thousand readings a week.

Records submitted from defendant SCWA indicate that the meter at 11 Alder Drive was last read, prior to the accident, on April 28, 2010. Based on the affidavit of John Znaniecki, submitted by defendant SCWA, the last reading date was May 3, 2010. His affidavit also indicates that it was the practice of all meter readers for defendant SCWA to check the covers of all water meters when they do a reading, and to check, secure, and tighten the lid cover, if necessary. If it cannot be secured, it is the practice to immediately report the problem to defendant SCWA.

Defendant Kassman testified that he was the owner of 11 Alder Drive, in Mastic Beach, New York at the time of the accident, having purchased it approximately ten years earlier. He purchased the property as a rental property and had never lived there. At the time of the accident, the house was occupied by a tenant named Geneva Cutler, pursuant to a Section 8 housing lease. The tenant was required to maintain the lawn area where the water meter was located. He testified that the water service was provided by the defendant SCWA. He had visited the property only one time prior to the date of the accident, approximately seven years earlier. At that time, he observed that there was a water meter located in the lawn area and that the cover was in place. He never removed the water meter cover and had no knowledge of anyone else having removed the cover. He never had the water shut off or turned on during this period, and never received any complaints from anyone about the water meter. He never requested that the defendant SCWA make any type of repair on the property.

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 (***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]).

The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Med. Ctr.***, 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. Med. Ctr.***, *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]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept], *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]). Proving that an accident occurred, or that the conditions existed for such an accident, is insufficient to establish negligence. "'Proof of negligence in the air, so to speak, will not do'" (***Martin v Herzog***, 228 NY 164, 170, 126 NE 814 [1920], quoting Pollock, Torts [10 th Ed.], p. 472). While proximate cause generally is a matter for the jury, a plaintiff who brings a negligence action must establish prima facie that the defendant's negligence was a substantial cause of the event which produced his or her injury (***Derdiarian v Felix Contr. Corp.***, 51 NY2d 308, 315, 434 NYS2d 166 [1980]; *see* ***Maheshwari v City of New York***, 2 NY3d 288, 778 NYS2d 442 [2004]; ***Forman v City of White Plains***, 5 AD3d 434, 773 NYS2d 102 [2d Dept 2004]). Further, while proximate cause may be inferred from the facts and circumstances surrounding the injury, there must be sufficient proof in the record to permit a finding of proximate cause based, not upon speculation, but upon the logical inferences to be drawn from the evidence (*see* ***Schneider v Kings Highway Hosp. Ctr.***, 67 NY2d 743, 500 NYS2d 95 [1986]; ***Hartman v Mountain Val. Brew Pub***, 301 AD2d 570, 754 NYS2d 31 [2d Dept 2003]; ***Babino v City of New York***, 234 AD2d 241, 650 NYS2d 778 [2d Dept 1996]).

Generally, an out-of-possession owner or lessor is not liable for injuries that occur on the premises unless the owner or lessor has retained control over the premises or is contractually obligated to repair unsafe conditions (***Lindquist v C & C Landscape Contrs.***, 38 AD3d 616, 831 NYS2d 523 [2d Dept 2007]; ***Gibson v Bally Total Fitness Corp.***, 1 AD3d 477, 767 NYS2d 135 [2d Dept 2003]. Control of the premises may be established by proof of a promise by the owner or lessor to keep the premises in repair or by a course of conduct demonstrating that the owner or lessor has assumed responsibility to maintain a particular portion of the premises (***Ever Win, Inc. v 1-10 Indus. Assoc., LLC***, 33 AD3d 845, 827 NYS2d 63 [2d Dept 2006]; ***Gelardo v ASTHMA Realty Corp.***, 137 AD2d 787, 525 NYS2d 334 [2d Dept 1988]). Owners may be held liable for injuries arising from a dangerous condition on their property if they created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it (*see* ***Halpern v Costco Warehouse/Costco Wholesale***, 95 AD3d 828, 943 NYS2d 567 [2d Dept 2012]; ***Sowa v SJNH Realty Corp.***, 21 AD3d 893, 800 NYS2d 749 [2nd Dept 2005]; ***Curiale v Sharrotts Woods, Inc.*** 9 AD3d 473, 781 NYS2d 47 [2d Dept 2004]; ***Patrick v Bally's Total Fitness***, 292 AD2d 433, 739 NYS2d 186 [2d Dept 2002]). In order to constitute "constructive notice" a defect "must be visible and apparent and it must exist for a sufficient length of time prior to the accident" to discover and remedy it (*see* ***Chianese v Meier***, 98 NY2d 270, 746 NYS2d 657 [2002], *citing* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Negri v Stop & Shop***, 65 NY2d 625, 491 NYS2d 151

[1985]).

Defendant Kassman has established entitlement to summary judgment as a matter of law by submitting evidence that he did not have actual or constructive notice of any dangerous condition on his property. Plaintiffs further attempt to impose liability on this defendant by alleging that he is in violation of the Housing Quality Standards set forth in 24 CFR §982.401. A landlord may be held liable for an injury caused by a defective or dangerous condition upon leased premises if the landlord is under a statutory or contractual duty to maintain the premises in repair and reserves the right to enter for inspection and repair, but the burden is on the plaintiff to prove not only that a dangerous condition existed on the premises, but also that the landlord had notice of the condition and a reasonable opportunity to repair it (***Juarez v Wavecrest Management Team LTD.***, 88 NY2d 628, 649 NYS2d 115 (1996). Plaintiff Brenda Perrone testified that upon stepping onto the water meter cover it had flipped, thereby causing her right leg to go into the hole. Thus, a visual inspection of the water meter cover would not have revealed that the cover was loose. In order to constitute "constructive notice" a defect "must be visible and apparent and it must exist for a sufficient length of time prior to the accident" to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, *supra*). In addition to this, the testimony of John Znaniecki established the water meter was installed and is maintained by the defendant SCWA. The records of the SCWA further establish the meter had been read byMr. Znaniecki just over a month prior to the accident and, therefore, the window for defendant Kassman to gain actual or constructive notice of the defective water meter cover was, at best, a little more than thirty days and there is no evidence in the record establishing when the cover actually became loose.

Nor does the record establish that the defendant Kassman was in violation of any statute or regulation. Paragraph "6" in Mr. Kassman's lease with his tenant at 11 Alder Drive, which is subject to the Federal regulations, states: "The landlord shall maintain the dwelling unit and all equipment provided for the use and benefit of the Tenant in compliance with the Housing Quality Standards in 24 CFR §982.401. The landlord shall respond in a reasonable time to calls by the Tenant for Services consistent with this obligation" The same paragraph makes the tenant responsible for mowing the lawn. Paragraph "B 2" of the lease states, in relevant part that the tenant "shall notify the Landlord as soon as he/she knows that repairs are needed to his/her dwelling unit or that there are unsafe conditions that could cause damage or injury." Thus, the lease places the responsibility on the tenant to inform the landlord as to any dangerous conditions on the property. Generally, an out-of-possession owner or lessor is not liable for injuries that occur on the premises unless the owner or lessor has retained control over the premises or is contractually obligated to repair unsafe conditions (*see* ***Lindquist v C & C Landscape Contrs.*** , *supra;* ***Santos v 786 Flatbush Food Corp.***, 89 AD3d 828, 932 NYS2d 525 [2d Dept 2011]) However, as has already been established, the responsibility for maintaining the water meter does not belong to the defendant Kassman, but resides with the defendant SCWA. Therefore, this defendant was not in violation of the federal regulations and was not obligated by the lease to repair this particular condition. As such, no liability attaches to the defendant Kassman and the plaintiffs have failed to raise any issue of fact to the contrary.

Defendant SCWA has also established entitlement to judgment as a matter of law by submitting

evidence that it did not have actual or constructive notice of any dangerous condition. Records submitted by defendant SCWA indicate that the meter at 11 Alder drive was last read, prior to the accident, on April 28, 2010. Based on the affidavit of John Znaniecki submitted by defendant SCWA the last reading date was May 3, 2010. His testimony and affidavit also establish that it was the practice of all meter readers for defendant SCWA to check the cover of all water meters when they do a reading to check and secure the cover and tighten the lid cover, if necessary. If the cover cannot be secured, it is the practice to immediately report the problem to defendant SCWA. Defendant SCWA has established that it had no actual or constructive notice of any problem with the water meter in question and thus has established its entitlement to summary judgment (*see* ***Starling v Suffolk County Water Authority***, 63 AD3d 822, 881 NYS2d 149 [2d Dept 2009]. Plaintiffs argue that the defendant SCWA had constructive notice because Mr. Znaniecki testified loose or missing water meter covers were frequent occurrences and happened once a week. However, Mr. Znaniecki also testified that he read two hundred meters a day and thus, approximately one out of every thousand covers was loose or missing. In light of this, plaintiffs' argument is unavailing. There is no proof defendant had actual or constructive as to the water meter cover in question (*see* ***Encompass Insurance Company v Suffolk County Water Authority***, 96 AD3d 713, 945 NYS2d 751 [2d Dept 2012] [the fact that the defendant was generally aware that improper backfilling caused other water mains to break was insufficient to constitute notice regarding this particular water main]; *see also* ***Piacquadio v Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [1994]). In response, the plaintiffs have failed to raise any issue of fact and any speculation or surmise on their part is insufficient to defeat a motion for summary judgment (*see* ***Jeansimon v Lumsden***, 92 AD3d 640, 937 NYS2d 869 [2d Dept 2012]).

In light of the foregoing, each of the motions for summary judgment dismissing the complaint are granted in all respects.

Dated: October 1, 2013

HON. JOSEPH C. PASTORESSA, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION