SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
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MICHAEL A. KRONENBERG and SHARON KRONENBERG,

Plaintiffs,

DECISION AND ORDER (Motion #1)

-against-

Index No.: 033961/2016

COUNTY OF ROCKLAND and TOWN OF RAMAPO

Defendants.
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Sherri L. Eisenpress, A.J.S.C.

The following papers, numbered 1 to 6, were considered in connection with Defendant Town of Ramapo's Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, granting summary judgment in its favor and dismissing the action:

PAPERS	**NUMBERED**
NOTICE OF MOTION/AFFIDAVIT OF CHRISTIAN SAMPSON/AFFIDAVIT OF DENNIS LYNCH ESQ./EXHIBITS "A-D"	1-3
AFFIRMATION IN OPPOSITION/EXHIBITS "A-H"	4
AFFIDAVIT OF DENNIS LYNCH ESQ. IN REPLY/AFFIDAVIT OF THOMAS DEMONT/AFFIDAVIT OF DENNIS SMALL	5
SUR-REPLY LETTER FROM PLAINTIFF'S COUNSEL DATED 9/12/18	6

Upon the foregoing papers, the Court now rules as follows:

This action was commenced by Plaintiffs with the filing of the Summons and Complaint on September 21, 2016, alleging that Michael Kronenberg was caused to sustain serious personal injuries on September 13, 2015, at approximately 6:25 a.m., in a one-car accident that occurred on Carlton Road, approximately 100 feet of Whisper Lane, in the Town of Ramapo, Rockland County. Plaintiff alleges that Defendant Town of Ramapo ("Town")[1] failed to maintain the roadway in a safe condition in that there was no "curb" in the area where Plaintiff's vehicle left the roadway and that Defendant "created an oily condition on the

[1]The action was previously discontinued against Defendant County of Rockland.

roadway" when it failed to properly clean the oil from a prior accident two days earlier. Issue was joined as to the Town by service of a Verified Answer on October 20, 2016.

Plaintiff Michael Kronenberg testified at his General Municipal Law 50-H hearing that there were patches of oil on the roadway which his car came into contact with before it went out of control, skidded, crossed the road, hit an embankment and flipped over. Plaintiff's Wife testified that when she arrived at the accident scene, she observed oil marks on the roadway. Mr. Kronenberg further testified that he heard an unidentified police officer mention at the accident scene that an accident from a few days earlier resulted in an oil slick that was not cleaned up properly. The police officer who arrived at the scene had no independent recollection of the accident. He did not know why the police report indicates "Town Highway was dispatched to spread extra speedy dry."

Defendant moves for summary judgment on the ground that it had no prior written notice of any defective condition in the nature of a missing curb or oil condition on the roadway. Plaintiff opposes the summary judgment motion and argues that an exception to the prior written notice statute exists in that the Town "created the oily condition when they failed to properly clean the oil on the roadway from a prior accident two days earlier." Plaintiff offers no evidence that an accident actually occurred at that location prior to the accident, although presumably, such records would have been demanded during the course of discovery. Instead, they argue that Police Officer Small "intimated" as much when asking for "Extra Speedy Dry" in the police report. Based upon this "evidence", plaintiffs argue that a triable issue of fact exists as to whether Defendant created the condition. In reply, the Town argues that even accepting Plaintiffs' claims as true for purposes of the summary judgment motion, the failure to clean up an oil condition does not constitute an affirmative act of negligence as a matter of law.[2]

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[2]Defendant also submits the affidavits of PO David Small who avers that he had no knowledge of any notice to the Town concerning any oily substance on the road before the

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., *et al*., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003).

However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

It is well settled that a municipality which has enacted a prior written notice statute may not be subject to liability for personal injuries unless it either received actual written notice of the dangerous condition, its affirmative act of negligence proximately caused the accident, or where a special use confers a special benefit on the municipality. Estrada v. City of New York, 709 N.Y.S.2d 105, 106, 709 N.Y.S.2d 105 (2d Dept. 2000). Transitory slippery conditions, such as those presented by oil, sand and loose dirt are the types of

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accident and Thomas Demont, an employee of the Town of Ramapo Highway Department, who states that he responded to the scene after the accident to place some more Speedy Dry but found that no more was needed at that time. Plaintiffs object in a "sur-reply" letter that the Court should not consider these affidavits as they constitute new evidence in a Reply. However, the Court finds that it is unnecessary to even consider these affidavits in deciding the within summary judgment motion.

potentially dangerous conditions for which prior written notice must be given before liability will attach. Id.

"Where the allegations stem from physical conditions in streets or sidewalks, a municipality must only submit proof that it did not receive prior written notice pursuant to its statute, which shifts the burden to a plaintiff to establish the availability an exception." Lugo ex rel. Lugo v. County of Essex, 260 A.D.2d 711, 687 N.Y.S.2d 475, 477 (3d Dept. 1999). It is then incumbent upon the plaintiff, in opposing a motion for summary judgment, to establish an exception by producing evidenciary proof in admissible form. Palkovic v. Town of Brookhaven, 166 A.D.2d 566, 567, 560 N.Y.S.2d 850 (2d Dept. 1990).

Defendant has met its prima facie burden in that it did not receive prior written notice of a dangerous condition at the accident site. In opposition thereto, it appears that Plaintiffs have abandoned their claim that a dangerous road condition existed in the nature of a missing curb. However, they allege that an exception to the prior written notice requirement exists in that the Town affirmatively created a dangerous condition when it failed to clean up an oil spill from a prior accident. As an initial matter, the record is completely devoid of any admissible evidence that such an accident even took place in the days preceding the accident. However, even if there was sufficient evidence of same, as a matter of law, the failure to properly or timely clean up an oil condition on the roadway does not constitute affirmative negligence sufficient to invoke the exception to the prior written notice requirement.

The presence of oil on the roadway is analogous to the presence of snow or ice. The law is well-established that the failure to remove snow or ice from a public sidewalk or roadway, or to warn of a dangerous condition, are acts of omission, and not affirmative acts of negligence. Rodriguez v. County of Westchester, 138 A.D.3d 713, 29 N.Y.S.3d 418, 421 (2d Dept. 2016); Palkovic v. Town of Brookhaven, 166 A.D.2d 566, 567, 560 N.Y.S.2d 850 (2d Dept. 1990)(mere failure to remove ice and snow from public highway or sidewalk is insufficient to establish the type of affirmative negligence necessary to exempt personal injury case from

prior written notice requirements.); Camera v. Barrett, 144 A.D.2d 515, 534 N.Y.S.2d 395 (2d Dept. 1988). Likewise, the failure to expeditiously repair or remedy a condition of this nature is not affirmative behavior necessary to establish that the Town created the defective condition. See Silva v. City of New York, 17 A.D.3d 566, 793 N.Y.S.2d 478 (2d Dept. 2005).

Thus, assuming Plaintiffs submitted adequate proof of a prior oil spill which was not properly cleaned up or remedied by the Town, or which was not addressed in a timely manner (which they did not), such acts are considered passive and are insufficient to invoke the affirmative negligence exception to the prior written notice rule. As such, this action requires dismissal.

Accordingly, it is hereby

ORDERED the Notice of Motion filed by the Town of Ramapo for summary judgment and dismissal of the Complaint (Motion #1) is GRANTED and the Complaint is dismissed.

The foregoing constitutes the Decision and Order of this Court on Motion #1.

Dated: New City, New York
December 12, 2018

HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

TO:

All Parties via -NYSCEF-