SHORT FORM ORDER

INDEX No. 603369/2018
CAL. No. 202000134OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 7/15/20
ADJ. DATE 9/2/20
Mot. Seq. # 001 MD
002 MD

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VINCENT MASSUCCI,

Plaintiff,

- against -

TOWN OF HUNTINGTON, DIX HILLS WATER DISTRICT, BERNARD CERRONE and BARBARA CERRONE,

Defendants.

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Upon the following papers read on these e-filed motions for summary judgment : Notice of Motions/Order to Show Cause and supporting papers by Cerrone defendants, dated May 19, 2020 and by Town defendants, dated May 21, 2020 ; Notice of Cross-Motion and supporting papers __; Answering Affidavits and supporting papers by plaintiff, dated August 17, 2020 and by plaintiff, dated August 17, 2020 ; Replying Affidavits and supporting papers by Town defendants, dated August 27, 2020 and by Cerrone defendants, dated September 1, 2020 ; Other __; it is

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

ORDERED that the motion by defendants Bernard Cerrone and Barbara Cerrone for summary judgment dismissing the complaint and cross claims against them is denied; and it is further

ORDERED that the motion by defendants Town of Huntington and Dix Hills Water District for summary judgment dismissing the complaint and cross claims against them is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, on November 25, 2016, at approximately 2:15 p.m., when he fell into an uncovered water meter hole, approximately 11.5 inches wide and 21 inches deep, on the property located on 5 Foxhurst Road, Huntington, New York, owned by defendants Bernard Cerrone and Barbara Cerrone. The water meter is owned and operated by defendants Town of Huntington and Dix Hills Water District (collectively "Town" defendants).

The Cerrone defendants move for summary judgment dismissing the complaint and cross claims against them on the grounds that the condition of the uncovered water meter hole was open and obvious and not inherently dangerous. The Cerrone defendants allege that they neither created the alleged hazardous condition, nor had actual or constructive notice of any such condition. In support, the Cerrone defendants submit, *inter alia*, the pleadings and the transcripts of the parties' deposition testimony.

At his deposition, plaintiff testified that after parking on the street, he walked up the driveway of the subject premises to look at a vehicle for sale. He testified that while walking along the side of the vehicle, his left foot stepped in a hole. The hole was located in the lawn and adjacent to the line of the Belgium blocks that outlined the pavement area of the driveway. He testified that prior to the accident, he did not see the hole, and when he stepped on it, there was no cover thereon.

At his deposition, defendant Bernard Cerrone testified that prior to the subject accident, he had never inspected the subject water meter, nor made any complaints to the Town regarding the meter or its lid. He testified that prior to the accident, he was not aware if the lid was on or off. He testified that he learned of the accident when plaintiff's wife called the day after the accident.

At her deposition, defendant Barbara Cerrone testified that no one was home at the time of the accident. She testified that prior to the accident, she had never inspected the subject water meter.

At her deposition, Emily Gleason testified that she is a meter reader for the Dix Hills Water District and that she travels and reads meters per household every three months. She testified that in October 2016, one month prior to plaintiff's incident, she and her partner went to the subject house to read the meter, but she had no recollection as to who read the particular meter at issue. She testified that although the protocol is that a meter reader would open and close the lid using the hand key, she did not know if the lid was locked when she left the house on this occasion.

A landowner has a duty to exercise reasonable care to maintain its premises in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk (*see* ***Basso v Miller***, 40 NY2d 233, 241, 386 NYS2d 564 [1976]; ***Hadidi v City of New York***, 181 AD3d 795, 118 NYS3d 440 [2d Dept 2020]; ***Salomon v Prainito***, 52 AD3d 803, 861 NYS2d 718 [2d Dept 2008]). In a premises liability case, a defendant property owner who moves for summary judgment has the initial burden of making a prima facie showing that he or she neither created the alleged defective condition nor had actual or constructive notice of its existence (*see* ***Kyte v Mid-Hudson Wendico***, 131 AD3d 452, 453, 15 NYS3d 147 [2d Dept 2015]; ***Pampalone v FBE Van Dam, LLC***, 123 AD3d 988, 1 NYS3d 155 [2d Dept 2014]). Moreover, whether a dangerous condition exists on real property so as to create liability on the part of the

landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*see* ***Clark v AMF Bowling Ctrs., Inc.***, 83 AD3d 761, 921 NYS2d 273 [2d Dept 2011]; ***Moons v Wade Lupe Constr. Co.***, 24 AD3d 1005, 805 NYS2d 204 [3d Dept 2005]; ***Fasano v Green-Wood Cemetery***, 21 AD3d 446, 799 NYS2d 827 [2d Dept 2005]). A landowner has no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous (*see* ***Shermazanova v AmeriHealth Med., P.C.***, 173 AD3d 796, 103 NYS3d 160 [2d Dept 2019]; ***Lazic v Trump Vil. Section 3, Inc.***, 134 AD3d 776, 776, 20 NYS3d 643 [2d Dept 2015]; ***Barone v Risi***, 128 AD3d 874, 9 NYS3d 620 [2d Dept 2015]). The issue of whether a dangerous condition is open and obvious is fact-specific, and usually a question of fact for a jury (*see* ***Gordon v Pitney Bowes Mgt. Servs., Inc.***, 94 AD3d 813, 942 NYS2d 155 [2d Dept 2012]; ***Cassone v State of New York***, 85 AD3d 837, 925 NYS2d 197 [2011]). "Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances" (***Katz v Westchester County Healthcare Corp.***, 82 AD3d 712, 713, 917 NYS2d 896 [2d Dept 2011]; *see* ***Shermazanova v AmeriHealth Med., P.C.***, *supra*; ***Barone v Risi***, *supra*; ***Baron v 305-323 E. Shore Rd. Corp.***, 121 AD3d 826, 994 NYS2d 651 [2d Dept 2014]).

The Cerrone defendants have failed to establish their prima facie entitlement to summary judgment as a matter of law by demonstrating that they neither created or had actual or constructive notice of the alleged dangerous condition (*see* ***Saporito-Elliott v United Skates of Am., Inc.***, 180 AD3d 830, 119 NYS3d 204 [2d Dept 2020]; ***Gurewitz v City of New York***, 175 AD3d 658, 664, 109 NYS3d 167 [2d Dept 2019]). The Cerrone defendants testified that prior to the subject accident, they did not inspect the subject water meter, and that they did not know whether the meter was covered with a lid at that time of the accident. Plaintiff testified that as he walked along the side of the vehicle for sale, he fell into a hole. Thus, there are questions of fact as to whether a dangerous condition existed on the premises so as to create liability on the part of the Cerrone defendants, and if so, whether they had actual or constructive notice of such condition (*see* ***Rhodes-Evans v 111 Chelsea LLC***, 44 AD3d 430, 843 NYS2d 237 [1st Dept 2007]). They have also failed to establish their prima facie entitlement to judgment as a matter of law, as they did not demonstrate that the condition of the uncovered water meter hole was open, obvious, and not inherently dangerous (*see* ***Shermazanova v AmeriHealth Med., P.C.***, *supra*; ***Barone v Risi***, *supra*; ***Russo v Incorporated Vil. of Atl. Beach***, 119 AD3d 764, 989 NYS2d 320 [2d Dept 2014]). Considering the surrounding circumstances, there is an issue of fact whether the hole was open and obvious and not inherently dangerous (*see* ***Russo v Home Goods, Inc.***, 119 AD3d 924, 990 NYS2d 95 [2d Dept 2014]). "A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" (***Katz v Westchester County Healthcare Corp.***, *supra*; *see* ***Shermazanova v AmeriHealth Med., P.C.***, *supra*; ***Lazic v Trump Vil. Section 3, Inc.***, *supra*).

The Town defendants move for summary judgment dismissing the complaint and cross claims against them on the grounds that they neither created the alleged hazardous condition nor had notice of it. They also allege that the condition of the uncovered water meter hole was open and obvious and not inherently dangerous. In support, they submit, *inter alia*, the pleadings, the transcripts of the parties' testimony, and the affidavits of John Hennessey and Max Hawxhurst.

In his affidavit, Hawxhurst states that he is employed by the Town of Huntington as an automotive equipment operation [sic] for the Dix Hills Water District. He states that although he and

Gleason visited the subject house to read the meter on October 13, 2016, he had no recollection as to who actually performed the reading.

A municipality that has enacted a prior written notice provision may not be subjected to liability for injuries caused by a defective or dangerous condition which comes within the ambit of the law unless it has received prior written notice of the alleged defect or dangerous condition, or an exception to the prior written notice requirement applies (*see* ***Amabile v City of Buffalo***, 93 NY2d 471, 474, 693 NYS2d 77 [1999]; ***Brower v County of Suffolk***, 185 AD3d 774, 127 NYS3d 145 [2d Dept 2020]). As relevant here, an exception to the prior written notice laws exists where the municipality creates the defective condition through an affirmative act of negligence (*see* ***Manzella v County of Suffolk***, 163 AD3d 796, 798, 82 NYS3d 49 [2d Dept 2018]; ***Lopez-Calderone v Lang-Viscogliosi***, 127 AD3d 1143, 1145, 7 NYS3d 506 [2d Dept 2015]).

Here, the Town defendants have failed to establish their prima facie entitlement to summary judgment as a matter of law demonstrating that they neither created or had actual or constructive notice of the alleged dangerous condition in the area. The Town's meter readers admitted that they had no recollection as to who actually read the meter on October 13, 2016, several weeks prior to the subject accident. Moreover, Gleason testified that she did not know if the lid of the meter was locked when she left the house. Under these circumstances, there are triable issues of fact as to whether the lid of the subject meter was properly secured when the meter readers left the house and whether plaintiff's accident was a natural and foreseeable consequence of the Town's alleged negligence (*see* ***Manzella v County of Suffolk***, *supra*). As discussed above, the Town defendants have also failed to establish their prima facie entitlement to judgment as a matter of law, as they did not demonstrate that the condition of the uncovered water meter hole was open, obvious, and not inherently dangerous (*see* ***Shermazanova v AmeriHealth Med., P.C.***, *supra*; ***Barone v Risi***, *supra*). The parties' remaining contentions have been considered and are without merit.

Dated: October 26, 2020
Riverhead, NY

J.S.C.
HON. DAVID T. REILLY

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION