Turcios v Cairo
2020 NY Slip Op 35174(U)
December 16, 2020
Supreme Court, Nassau County
Docket Number: Index No. 609273/19
Judge: Denise L. Sher

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

RAQUEL TURCIOS,

Plaintiff,

- against -

ROBERT FRANK CAIRO, LISA F. CAIRO, TOWN OF HEMPSTEAD and COUNTY OF NASSAU,

Defendants.

TRIAL/IAS PART 33
NASSAU COUNTY

Index No.: 609273/19
Motion Seq. Nos.: 02, 03
Motion Dates: 09/10/2020
09/10/2020
XXX

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 02), Affirmation and Exhibits and Memorandum of Law	1
Affirmation in Opposition to Motion (Seq. No. 02) and Exhibits	2
Reply Affirmation to Motion (Seq. No. 02)	3
Notice of Cross-Motion (Seq. No. 03), Affirmation and Exhibits	4
Affirmation in Opposition to Cross-Motion (Seq. No. 03) and Exhibits	5
Reply Affirmation to Cross-Motion (Seq. No. 03)	6

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendants Robert Frank Cairo and Lisa F. Cairo (hereinafter collectively "defendants Cairo") move (Seq. No. 02), pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint as against them, and any and all cross-claims as against them. Plaintiff opposes the motion (Seq. No. 02).

Defendant Town of Hempstead ("TOH") cross-moves (Seq. No. 03), pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint as

against it, and any and all cross-claims as against it. Plaintiff opposes the cross-motion (Seq. No. 03).

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on February 11, 2019, at approximately 1:00 p.m., when she was caused to slip and fall due to a raised/uneven sidewalk abutting the property owned by defendants Cairo, located at 3026 Roxbury Road, at the corner of Campbell Avenue, Oceanside, County of Nassau, State of New York. *See* Defendants Cairo's Affirmation in Support of Motion (Seq. No. 02) Exhibit C. The action was commenced with the filing and service of a Summons and Verified Complaint on or about July 8, 2019. *See* Defendants Cairo's Affirmation in Support of Motion (Seq. No. 02) Exhibit B. Issue was joined by defendants Cairo on or about August 5, 2019. *See id.* Issue was joined by defendant TOH on or about August 1, 2019. *See id.*

In support of defendants Cairo's motion (Seq. No. 02), their counsel submits, in pertinent part, that, "[t]his lawsuit arises from a trip and fall accident that occurred on February 11, 2019 on the public sidewalk abutting the property owned by the Cairos, located at 3026 Roxbury Road (at the corner of Campbell Avenue), Oceanside, New York (hereinafter, the 'Premises') due to the alleged presence of a raised/uneven sidewalk. The plaintiff is a neighbor of the Cairos, living only a few houses down Roxbury Road.... Plaintiff's complaint asserts a number of causes of action sounding in negligence as against all of the defendants, and a cause of action as against the Cairos alleging their 'failing to follow Town and County guidelines', though (*sic*) does not specify any specific 'guidelines'.... Plaintiff asserts generally (in paragraph 7) the negligence of 'the defendants' in failing to properly construct, maintain and repair the sidewalk at issue, in creating the dangerous condition and in allowing it to remain for an inordinate period of time. Plaintiff further asserts that the defendants created the defective condition by 'failure to properly

remove tree located adjacent to sidewalk'. Plaintiff asserts actual and constructive notice, though provides no details regarding same. With regard to the allegation in the complaint regarding 'failing to follow Town and County guidelines', plaintiff provides no particulars and fails to even identify what 'guidelines' to which she is referring, instead (at paragraphs 12 and 13) asserting general violations by 'the defendants' 'as may be judicially noted by this Court'." *See* Defendants Cairo's Affirmation in Support of Motion (Seq. No. 02) Exhibits B and C.

In further support of defendants Cairo's motion (Seq. No. 02), they submit the Affidavits of defendant Robert Frank Cairo and Lisa F. Cairo. *See* Defendants Cairo's Affirmation in Support of Motion (Seq. No. 02) Exhibit D. Defendant Robert Frank Cairo asserts, in pertinent part, that, "I currently reside with my wife and our children at 3026 Roxbury Road, Oceanside, New York (hereinafter referred to as the 'Premises'). My wife and I were the owners of such Premises on the date of the plaintiff's accident herein, February 11, 2019, having purchased it in 2003. The Premises is, and has always been, a single-family residential dwelling.... My family are now and have always been the only occupants of the Premises. The Premises is now, and has always been since we have owned it, owner-occupied and used solely and exclusively for residential purposes. There have never been any businesses operated from the Premises. As we understand it, the plaintiff (who lives a few houses down Roxbury Road) claims she tripped and fell on a raised sidewalk flag on the public sidewalk abutting the Campbell Avenue side of the Premises (which is a corner property), approximately 37 feet from the corner of Campbell and Roxbury.... From the date we purchased and took possession of the Premises in 2003 through the date of plaintiff's accident on February 11, 2019, neither I nor my wife have made any repairs or performed any work to the public sidewalk at the accident location, or hired any contractor (or anyone) to make repairs or perform any work to such public sidewalk. The

condition of the public sidewalk at the accident location was, in February 2019, exactly the same as it was when we purchased the Premises in 2003, other than normal wear and tear caused by the weather, trees/tree roots and other forces of nature. In approximately April 2016, we hired a company to remove the tree that was located on the lawn at the side of the Premises. Such tree can be seen in the [Google Streetview and Microsoft/Bing OpenStreetMap] images discussed above … from prior to 2016, and is absent from the images after 2016. I would point out that the defect asserted by the plaintiff, the raised public sidewalk flag, can be seen in all of the images, as far back as those from 2007, and appears unchanged from before and after the tree was removed. The public sidewalk was not damaged or changed in any way by the removal of the tree in 2016. We do not have a driveway located at the accident location, the same was originally further down Campbell Avenue from the accident location (and never paved, so we did not use it as a driveway), but was moved years before the accident date to the front of the Premises on Roxbury Road. The lack of such driveway at the accident location can be seen in the images discussed above…. Neither I nor my wife make any 'special use' of such public sidewalk, as that term has been explained to me, in that we do not use such sidewalk in any manner which would be different than how it is used by the general public. Prior to the date of the plaintiff's accident, February 11, 2019, we never received any violation from the Town of Hempstead or any other government authority for any issue or condition related to the public sidewalk at the Premises. We never received any complaints concerning such public sidewalk or its condition prior to February 11, 2019. We have never been party to any other lawsuits relating to such public sidewalk or its condition. I understand that the plaintiff alleged that she tripped and fell on February 11, 2019 at approximately 1:00 p.m. on the public sidewalk abutting the side of the Premises. I was not aware of such accident until I received the summons and complaint in this

matter in July 2019. I did not witness the plaintiff's accident, and am not aware of any witness to it." *See id.*

Counsel for defendants Cairo additionally contends, in pertinent part, that, "[a]s this Court is well aware, the Court of Appeals and the Appellate Division Second Department have repeatedly held that liability of abutting landowners for alleged public sidewalk defects is governed by the Town or Village in which the property is located, and the ordinance or statute which obligates the owner to maintain the sidewalk must specifically provide that a breach of that duty will result in liability to third-parties. [citation omitted]. The Court of Appeals and the Appellate Division Second Department have consistently held that a landowner does not owe any duty with regard to the public sidewalk abutting his property solely by reason of his ownership in the abutting property. [citations omitted]. The reason for this, as the Court of Appeals has repeatedly held, is that the municipality is the owner of the public sidewalks and as such is generally liable for injuries to pedestrians caused by defective flags on the same. [citation omitted]. As a result of this, liability for injuries sustained due to a dangerous condition on a public sidewalk is placed on the municipality, not the abutting landowner. [citations omitted]. Since there is no general common law duty of a landowner regarding the abutting public sidewalk (which it is noted such landowner does not own), any such duty would need to come from the actions of the landowner or statute. 'Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner.' [citation omitted].... In this matter, the relevant Town of Hempstead Code, at Chapter 181, states that the abutting landowner shall be responsible to construct or repair a public sidewalk only after he is served with notice from the Town specifying the construction or repair work to be done. [citation

omitted]. Such Code, however, does not expressly impose tort liability on the abutting landowner and, therefore, the landowner cannot be held liable to an injured third-party for any alleged violation of the Code regarding repair or maintenance of the sidewalk.... Absent the existence of a statute or ordinance specifically imposing liability, a landowner will not be liable to a pedestrian injured by a defect in a public sidewalk abutting its premises. [citations omitted].... Here, plaintiff claims that she tripped and fell over an 'elevated' or uneven section of the public sidewalk abutting the side of the Cairos (*sic*) home located at 3026 Roxbury Road (corner of Campbell Avenue), Oceanside, New York, 37 feet west from the corner curbline.... The Cairos, however, have never performed, or retained anyone else to perform, any work to that public sidewalk.... Therefore, they could not have caused or created any defective condition thereat. Further, that portion of the sidewalk where the plaintiff fell was not adjacent to, or near, the Cairos (*sic*) driveway and the Cairos do not otherwise make any special use of that portion of the public sidewalk where plaintiff fell.... Moreover, to the extent that the claimed defect on the public sidewalk was the result of the tree that had been nearby, the Cairos would not be responsible for the same as a matter of law.... Here, the evidence shows that the public sidewalk at issue was not constructed in a special manner for the benefit of the Cairos, they were not making any special use of the same (such as for entering or exiting a driveway), and they did not repair or otherwise alter the public sidewalk at any time prior to the plaintiff's accident. The record is devoid of any evidence that the Cairos created the condition of which the plaintiff complains." *See* Defendants Cairo's Affirmation in Support of Motion (Seq. No. 02) Exhibits A-F.

In support of defendant TOH's cross-motion (Seq. No. 03), its counsel submits, in pertinent part, that, "[f]rom an examination of plaintiff's notice of claim, complaint and bill of

particulars, it seems that plaintiff, Raquel Turcios allegedly had an accident on February 11, 2019, when she tripped and fell on the sidewalk located west of the northwest corner of Campbell Road and Roxbury Road on the Campbell side of the property known as 3026 Roxbury Road in Oceanside, New York (hereinafter the 'subject accident location'). It is alleged that the sidewalk at the subject accident location was in a defective condition. The basis of liability against the Town of Hempstead rests on allegations in the notice of claim, complaint and bill of particulars that the Town negligently owned, operated, managed, maintained, repaired, inspected, constructed, controlled and caused and/or created the alleged sidewalk condition, all of which caused plaintiff's alleged injuries. It is submitted that such assertions are merely conclusory and unsupported by evidentiary facts sufficient to raise a triable issue or to warrant a denial of the within cross-motion. As such, this action as against the Town should be dismissed. [citations omitted]."

In support of its motion, defendant TOH submits the Affidavit of Laura Taranto ("Taranto"), a clerical employee of the Sidewalk Division of the Highway Department of the Town of Hempstead. *See* Defendant TOH's Affidavit in Support. Taranto states, in pertinent part, that, "[f]rom the facts contained in plaintiff's notice of claim, it is alleged the plaintiff, Raquel Turcios, had an accident when she tripped and fell on the sidewalk located west of the northwest corner of Campbell Road and Roxbury Road on the Campbell Road side of the property known as 3026 Roxbury Road in Oceanside, New York (hereinafter the 'specific (*sic*) accident location'). The accident is alleged to have occurred on February 11, 2019. A personal computerized search of the records of the Sidewalk Division of the Highway Department of the Town of Hempstead regarding repairs disclosed that the Town of Hempstead did not perform any affirmative acts to the sidewalk at the subject accident location and did not repair, construct,

inspect, replace or design the sidewalk at the subject accident location on or for five (5) years prior to February 11, 2019. Further, my personal search of the aforesaid indicates that the Town of Hempstead did not contract with any municipality, contractor or entity to repair or maintain, the sidewalk at the subject accident location on or for five (5) years prior to February 11, 2019. Additionally, I personally conducted a computerized search of the records of the Sidewalk Division of the Highway Department of the Town of Hempstead, including notices received by the Office of the Town Clerk of the Town of Hempstead with regard to any prior written complaints, oral complaints, telephonic complaints and notices of claim. Said research revealed no evidence of prior written notice, prior written complaints, prior oral complaints, prior telephonic complaints or prior notices of claim regarding any issues or conditions regarding the sidewalk at the subject accident location on or for five (5) years prior to February 11, 2019." *Id.*

Counsel for defendant TOH further argues that, "[p]ursuant to Chapter 6 of the Code of the Town of Hempstead, specifically Section 6-3, and §65-a, subd. 2 of the Town Law of the State of New York, receipt of prior written notice is a condition precedent to the maintenance of a civil action against the Town for injuries arising from a defective sidewalk. Plaintiff has failed to submit any proof indicating the existence of prior written notice of the alleged defect. Further, there is no evidence that the Town caused and/or created the sidewalk condition that allegedly caused plaintiff's injuries. Therefore, no action can be maintained against the Town. [citations omitted]"

Counsel for defendant TOH adds, in pertinent part, that, "in the case at bar, any claim by plaintiff that the defendant Town's motion should be denied pending further discovery as to the Town is totally without merit. The defendant Town has submitted proof in admissible form (see affidavit of Laura Taranto) which clearly establishes its entitlement to summary judgment."

In opposition to defendants Cairo's motion (Seq. No. 02) and defendant TOH's cross-motion (Seq. No.03), counsel for plaintiff argues, in pertinent part, that, "[d]efendants' Motions for Summary Judgment must be denied because Plaintiff (*sic*) failed to meet its (*sic*) initial burden by present (*sic*) evidence as to its last inspection of the location of the accident, liability exists under (*sic*) Town of Hempstead Code and questions of fact regarding the construction and landscaping work performed by Defendants at or near the location of the accident which can only be determined through further discovery, this making this motion premature.... The accident site was inspected by Robert T. Fuchs, P.E. of the firm of Paul J. Angelides, P.E., P.C. Mr. Fuchs was advised of the accident location by Ms. Turcios and he performed his inspection at that location.... Mr. Fuchs and the firm of Paul J. Angelides, P.E., P.C. concluded a. At the location where Ms. Turcios tripped, there was 'an abrupt 1 ¼ inch high difference in elevation that poses an inherent tripping hazard to pedestrians' and that 'such abrpt (*sic*) difference in elevation along the sidewalk was the proximate cause of Ms. Turcios' accident.' b. The raised and uneven condition existed for over 11 years and 'occurred because the sidewalk has been lifted due to pressure imposed by underlying and growing roots of a nearby tree that was located within the left side yard of 3026 Roxbury Road. c. 'The failure to maintain the sidewalk in a good, safe condition is an omission on behalf of the adjoining property owner at 3026 Roxbury Road that violates §§181-11 and 184-6(a) of the Code of the Town of Hempstead, along with §302.3 of the 2015 International Property Maintenance Code (IPMC). The accident was preventable had the hazardous condition of the sidewalk been corrected in a timely manner and not deferred for many years'." *See* Plaintiff's Affirmation in Opposition to Motion (Seq. No. 02) and Cross-Motion (Seq. No. 03) Exhibit D.

Counsel for plaintiff further asserts, in pertinent part, that, "[d]efendant (*sic*) Cairo's (*sic*) 'proof' upon its (*sic*) summary judgment in this case is that certain images show that the defect was 'exactly the same as it was when we purchased the Premises in 2003.' The Cairo Defendants each submitted Affidavits which are virtually identical. Defendants' Affidavits fail to offer any proof as to when they last inspected or viewed the subject accident site. Defendants do not say the first time they viewed the accident site so as to establish some foundation that the accident remained 'exactly the same.' It is unknown when or if the Defendants personally viewed this defective condition. Thus, neither of the defendant's (*sic*) witnesses can state one way or another what this area of the sidewalk looked like on the date of the accident, the day before the accident or five years before the accident other than what they claim to see through a photo. Thus, the defendants cannot negate the existence of constructive notice and the defendant (*sic*) has failed to meet its (*sic*) burden of proof. Likewise, Defendant Town of Hempstead failed to set forth evidence showing when it last inspected or reviewed the accident location or the Premises in general. Defendants failure to present such evidence is even more concerning because the Cairos acknowledge performing work at or near the accident site which consists of removal of a large tree. It can also be fairly concluded that the Cairos also put up a fence which would require a permit from the Town of Hempstead, or that one was put up between 2007 and 2014…. If a fence is put up in the Town of Hempstead, a permit is required. The Town also performs an inspection of the fence after it is put up to insure that it complies with Code. The Town fails to state even when that inspection took place. As such, the Defendants failure to present evidence showing when the Premises and the accident site was last inspected requires the denial of Defendants' Motion and Cross-Motion for Summary Judgment."

Counsel for plaintiff contends, in pertinent part, that, "[t]he plaintiff's accident occurred as the result of a defective condition that existed on the defendants' premises. Furthermore, the defendant (*sic*) knew or should have known of the defect because it existed on the property for an extended period of time.... In this case, the area where plaintiff's accident occurred was clearly not maintained, kept in safe repair or free from obstructions due to the presence of the abrupt elevation in height of the sidewalk slab. The Defendants acknowledge that the condition existed for an extended period of time dating back many years. A simple inspection of the location would have revealed this dangerous condition to the Defendants, but the Defendants failed to present evidence as to when they last inspected that location. Since the defective condition existed for so many years, it is reasonable to conclude and precedent requires that the Defendants be deemed to have constructive notice of the defective location. Defendants argue that Plaintiff's action must be dismissed because the Town of Hempstead Code imposes an obligation upon the abutting property owner to maintain a sidewalk, it does not impose liability. However, Defendants Cairo fail to address violations under Chapter 184 of the Code of the Town of Hempstead. Chapter 184 of the Code of the Town of Hempstead concerns Tree Preservation.... Further, § 184-6 of the Code of the Town of Hempstead establishes the defendant (*sic*) Cairo's (*sic*) duty to maintain the curbside trees adjacent to the property and to repair any portion of the adjoining sidewalk that has been damaged by those sidewalk tree's roots.... Quite significantly, and unlike Chapter 181 of the Town Code concerning sidewalk maintenance, § 184-12 of the Town of Hempstead code (*sic*) concerns tree preservation and provides in pertinent part as follows: '**B.** ***In addition, this chapter may be enforced by civil action....***' As such, a violation of Chapter 184 of the Town Code allows for a civil action to be commenced and liability to attach for the violation of Chapter 184. At the very least there are

several questions of fact as to matters concerning the effects that the tree and tree removal on the Premises near the accident site had on the sidewalk slab and the sidewalk in general that would lead a reasonable person to believe caused, created, worsened or exacerbated the defective condition."

Counsel for plaintiff further argues, in pertinent part, that, "[i]t is also respectfully submitted that this Court should deny defendants' summary judgment motion (*sic*) as premature pursuant to CPLR 3212(f).... In this case, it is clear that further discovery ***will*** reveal material facts in the movant's exclusive knowledge. It is indisputable that records relating to the work done by the agents, servants, employees, contractors, subcontractors, and suppliers of the Cairo defendant (*sic*) prior to plaintiff's accident are crucial to the liability issues presented by this case. The Affidavits of the Cairos and the pictures revealed in the Cairo's (*sic*) Motion and the Report of Paul Angelides establish that not only did the Cairos remove a large tree adjacent to the accident site, but they also had a large fence installed adjacent to the accident site. Disclosure of the aforementioned project records and deposition of the Cairos and their contractor is necessary in this case in order to clarify whether or not the defect existed in its current condition or worsened upon the removal of the large tree and placement of the fence in the location abutting the sidewalk slab where the accident occurred."

In reply to plaintiff's opposition, counsel for defendants Cairo argues, in pertinent part, that, "[t]he Plaintiff's final 'evidence' in opposition is the June 24, 2019 report from Robert T. Fuchs. I presume that the plaintiff is proffering such as an 'expert report' of Mr. Fuchs, though the same fails to set forth the basis of Mr. Fuchs' purported expertise, other than providing a bunch of initials after his name. The report also fails to provide Mr. Fuchs' curriculum vitae, such that the undersigned has no idea of his training, expertise or any other factor that would

bear upon his purported expertise in whatever area plaintiff claims he is an expert. Based upon this, the report of Mr. Fuchs should be rejected as an 'expert report' and his purported opinions not considered on this motion.... Lastly, the 'expert report' is also not an affidavit, or otherwise sworn to under oath, and as such is not in admissible form, cannot be considered in opposition and is insufficient to raise any issue of fact. [citations omitted]. Based upon the foregoing case law, the report of Mr. Fuchs is not in admissible form to oppose this motion, and his opinions lack any basis to be considered 'expert' opinions as there is no evidence regarding his education, training or experience to determine if he is, in fact, an 'expert' in any field relevant to the claims asserted herein. This report should be wholly rejected by the Court as it is inadmissible in form and its contents are not competent evidence to raise any issue of fact. Should the Court consider the report of Mr. Fuchs in connection with this motion, it must be noted ... that Mr. Fuchs (*sic*) opinion is that the defect at issue was caused by the roots of a nearby tree, for which the Cairos would not be responsible as a matter of law. Moreover, Mr. Fuchs notes that the condition of the sidewalk at issue (caused by the tree roots) does not change following the removal of the nearby tree, providing photographs from before and after the removal that unequivocally prove this point." *See* Plaintiff's Affirmation in Opposition to Motion (Seq. No. 02) and Cross-Motion (Seq. No. 03) Exhibit D.

Counsel for defendants Cairo further asserts, in pertinent part, that, "counsel's argument that there is an issue of fact as to whether or not any contractors hired by the Cairos to perform such work (tree removal and fence installation) damaged the sidewalk is refuted by the admissible photographs submitted by the Cairos ... showing that the condition of the sidewalk before and after such work was performed was exactly the same. It is also contradictory of the observations made by Mr. Fuchs in the report submitted by the plaintiff, and which plaintiff

would have this Court rely. Moreover, this argument is also without legal basis since controlling case law holds that a property owner is not liable for a dangerous condition created by the negligence of an independent contractor in performing work upon the property. [citations omitted]." *See* Defendants Cairo's Affirmation in Support of Motion (Seq. No. 02) Exhibit F; Plaintiff's Affirmation in Opposition to Motion (Seq. No. 02) and Cross-Motion (Seq. No. 03) Exhibit D.

Counsel for defendants Cairo also argues, in pertinent part, that, "[p]laintiff (*sic*) counsel asserts that the Cairos' motion cannot be granted as they failed to address Chapter 184 of the Code of the Town of Hempstead, which involves Tree Preservation. Counsel states that such statute is different from Chapter 181 (concerning sidewalk maintenance) as it contains a provision that it may be enforced by civil action. Counsel however misrepresents such provision, which states that the chapter may be enforced by civil action, including an injunction, and that the Town may direct the replacement of any trees improperly removed or destroyed. The additional code cited by the plaintiff does not meet the requirement of 'specifically state that a breach of that duty will result in the landowner's liability to those who are injured'."

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of

law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra.* When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp., supra.* Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Issue finding, rather than issue determination, is the key to summary judgment. *See In re Cuttitto Family Trust*, 10 A.D.3d 656, 781 N.Y.S.2d 696 (2d Dept. 2004); *Greco v. Posillico*, 290 A.D.2d 532, 736 N.Y.S.2d 418 (2d Dept. 2002); *Gniewek v. Consolidated Edison Co.*, 271 A.D.2d 643, 707 N.Y.S.2d 871 (2d Dept. 2000); *Judice v. DeAngelo*, 272 A.D.2d 583, 709 N.Y.S.2d 427 (2d Dept. 2000). The court should refrain from making credibility determinations (*see S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 357 N.Y.S.2d 478 (1974); *Surdo v.*

Albany Collision Supply, Inc., 8 A.D.3d 655, 779 N.Y.S.2d 544 (2d Dept. 2004); *Greco v. Posillico, supra*; *Petri v. Half Off Cards, Inc.*, 284 A.D.2d 444, 727 N.Y.S.2d 455 (2d Dept. 2001)), and the papers should be scrutinized carefully in the light most favorable to the party opposing the motion. *See Glover v. City of New York*, 298 A.D.2d 428, 748 N.Y.S.2d 393 (2d Dept. 2002); *Perez v. Exel Logistics, Inc.*, 278 A.D.2d 213, 717 N.Y.S.2d 278 (2d Dept. 2000).

Summary judgment is a drastic remedy which should not be granted when there is any doubt about the existence of a triable issue of fact. *See Sillman v. Twentieth Century-Fox Film Corp., supra*. It is nevertheless an appropriate tool to weed out meritless claims. *See Lewis v. Desmond*, 187 A.D.2d 797, 589 N.Y.S.2d 678 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N.A.*, 82 A.D.2d 168, 442 N.Y.S.2d 610 (3d Dept. 1981).

With respect to defendants Cairo's motion (Seq. No. 02), generally, liability for injuries sustained as a result of dangerous and defective conditions on public sidewalks is placed on the municipality, and not the abutting landowner. *See Hauser v. Giunta*, 88 N.Y.2d 449, 646 N.Y.S.2d 490 (1996). Liability to abutting landowners for injuries sustained as a result of negligent maintenance of or existence of dangerous and defective conditions of public sidewalks will generally be imposed where the sidewalk was constructed in a special manner for benefit of the abutting landowner, the abutting owner affirmatively caused the defect, the abutting landowner negligently constructed or repaired the sidewalk or a local ordinance or statute specifically charges the abutting landowner with a duty to maintain and repair sidewalks and imposes liability for injuries resulting from a breach of that duty. *See id.*; *Lahens v. Town of Hempstead*, 132 A.D.3d 954, 18 N.Y.S.3d 187 (2d Dept. 2015).

The Court finds that, based upon the evidence before it, defendants Cairo neither caused, nor contributed to, any alleged defect in the subject sidewalk. Additionally, there is no provision

whereby liability shifts from the municipality to the abutting landowner for injuries to third parties on public sidewalks. *See Lagawo v. Myers*, 146 A.D.3d 1056, 52 N.Y.S.3d 487 (2d Dept. 2017). Furthermore, there is no evidence of special use by defendants Cairo.

Additionally, the Court finds that plaintiff's purported expert report is not sworn to, nor affirmed, and, therefore, does not constitute competent evidence. Unsworn reports that do not indicate that a person has the education and experience to qualify as an expert are insufficient to raise a triable issue of fact and defeat a motion for summary judgment. *See New York Cent. Mutual Fire Ins. Co. v. Turnerson's Elec., Inc.*, 280 A.D.2d 652, 721 N.Y.S.2d 92 (2d Dept. 2001). *See also 1212 Ocean Ave. Housing Development Corp. v. Brunatti*, 50 A.D.3d 1110, 857 N.Y.S.2d 649 (2d Dept. 2008) (holding that unsworn reports from two engineers submitted in support of application were not in admissible form); *Ellis v. Willoughby Walk Corp. Apartments*, 27 A.D.3d 615, 811 N.Y.S.2d 775 (2d Dept. 2006) (holding that the unsworn engineer's report was not in admissible form for summary judgment); *Mecabe by Mecabe v. Shmulevich*, 209 A.D.2d 593, 619 N.Y.S.2d 108 (2d Dept. 1994) (holding that plaintiffs failed to meet their burden as the report prepared by their expert was not in admissible form).

Moreover, the motion (Seq. No. 02) for summary judgment was not premature, since plaintiff failed to offer an evidentiary basis to suggest that the discovery may lead to relevant evidence. Plaintiff's "hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery was an insufficient basis for denying the motion." *Conte v. Frelen Assoc., LLC*, 51 A.D.3d 620, 858 N.Y.S.2d 258 (2d Dept. 2008). *See also Lopez v. WS Distrib., Inc.*, 34 A.D.3d 759, 825 N.Y.S.2d 516 (2d Dept. 2006).

Consequently, based upon the above, defendants Cairo's motion (Seq. No. 02), pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint as against them, and any and all cross-claims as against them, is hereby **GRANTED**.

With respect to defendant TOH's cross-motion (Seq. No. 03), in derogation of the common law, a municipality may avoid liability for injuries sustained as a result of defects or hazardous conditions on its public property by means of prior written notification laws. *See Amabile v. City of Buffalo*, 93 N.Y.2d 471, 693 N.Y.S.2d 77 (1999). An exception to the prior written notice laws exists where the municipality creates the defective condition through an affirmative act of negligence. *See id.* Actual or constructive notice of a condition are insufficient to satisfy the requirement of prior written notice under the Town Code. *See id.*; *Magee v. Town of Brookhaven*, 95 A.D.3d 1179, 945 N.Y.S.2d 177 (2d Dept. 2012).

"Where, as here, a municipality has enacted a prior written notice statute, it may not be subject to liability for personal injuries caused by a defective street or sidewalk condition unless it has received prior written notice of the defect or an exception to the notice requirement applies. *See Despositio v. City of New York*, 55 A.D.3d 659, 866 N.Y.S.2d 248 (2d Dept. 2008); *Sollowen v. Town of Brookhaven*, 43 A.D.3d 816, 841 N.Y.S.2d 351 (2d Dept. 2007); *Katsoudas v. City of New York*, 29 A.D.3d 740, 815 N.Y.S.2d 243 (2d Dept. 2006); *Borgorova v. Incorporated Village of Atlantic Beach*, 51 A.D.3d 840, 858 N.Y.S.2d 359 (2d Dept. 2007). *See also Poirier v. City of Schenectady*, 85 N.Y.2d 310, 624 N.Y.S.2d 555 (1995).

There are two recognized exceptions to this rule, "namely, where the locality created the defect or hazard through an affirmative act of negligence [and] where a 'special use' confers a special benefit upon the locality." *See Amabile v. City of Buffalo*, *supra*. *See also Lopez v. G & J*

Randolph Inc., 20 A.D.3d 511, 799 N.Y.S.2d 254 (2d Dept. 2005); *Filaski-Fitzgerald v. Town of Huntington*, 18 A.D.3d 603, 795 N.Y.S.2d 614 (2d Dept. 2005).

The Court holds that Section 6-3 of the Code of the Town of Hempstead and Section 65-a (2) of the New York Town Law apply to the instant action. Therefore, since said statutes apply in the instant matter, no civil action based on the alleged defective condition of the subject sidewalk may be maintained against defendant TOH unless said defendant had written notice of the subject condition prior to the accrual of the claim.

Through the Affidavit of Laura Taranto, defendant TOH has demonstrated that no such written notice was received in this matter pertaining to the subject area of the alleged defect that caused plaintiff's injuries. Based upon the evidence and legal arguments presented by defendant TOH, the Court finds that defendant TOH has established a *prima facie* showing that it had no prior written notice of the condition alleged to have caused plaintiff's fall. *See Gianna v. Town of Islip*, 230 A.D.2d 824, 646 N.Y.S.2d 707 (2d Dept. 1996); *Goldberg v. Town of Hempstead*, 156 A.D.2d 639, 549 N.Y.S.2d 138 (2d Dept. 1989).

Once defendant TOH satisfied its burden, plaintiff was required to come forward with admissible evidence to raise an issue of fact as to whether written notice was given or whether said defendant "created the defect or hazard through an affirmative act of negligence [and] where a 'special use' confers a special benefit upon the locality." *See Amabile v. City of Buffalo*, *supra*.

The Court finds that, in her opposition, plaintiff has failed to raise an issue of fact as to whether defendant TOH created the defect or hazard through an affirmative act of negligence [and] where a "special use" confers a special benefit upon said locality.

Once again, the cross-motion (Seq. No. 03) for summary judgment was not premature, since plaintiff failed to offer an evidentiary basis to suggest that the discovery may lead to relevant evidence. *See Conte v. Frelen Assoc., LLC, supra*; *Lopez v. WS Distrib., Inc.*, *supra*.6).

Accordingly, defendant TOH's cross-motion (Seq. No. 03), pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint as against it, and any and all cross-claims as against it, is hereby **GRANTED**.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
December 16, 2020

ENTERED

Dec 18 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE