SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 4

_____X

MARIE MULLAN,

Plaintiff,

-against-

Index No.: 604656/19
Motion Sequence…01, 02
Motion Date...11/06/20
XXX

HAUPPAUGE ROUTE 111 ASSOCIATES, LLC,
3951 MERRICK ROAD ASSOCIATES, LLC,
THE PHOENIX ORGANIZATION INC. and THE
TOWN OF HEMPSTEAD,

Defendants.

_____X

Papers Submitted:
Notice of Motion (Seq. 01).....x
Notice of Motion (Seq. 02).....x
Affirmation in Opposition.....x
Affirmation in Opposition.....x
Reply Affirmation.....x
Reply Affirmation.....x

Upon the foregoing papers, the motion (Seq. 01) by the Defendants, HAUPPAUGE ROUTE 111 ASSOCIATES, LLC, 3951 MERRICK ROAD ASSOCIATES, LLC, THE PHOENIX ORGANIZATION INC. (hereinafter collectively referred to as "HAUPPAUGE"), seeking an Order, pursuant to CPLR § 3212, granting them summary judgment dismissing the Plaintiff's Complaint and all cross-claims asserted against them; and the motion (Seq. 02) by the Defendant, THE TOWN OF

HEMPSTEAD (the "TOWN"), seeking an Order, pursuant to CPLR § 3212 granting it summary judgment dismissing the Plaintiffs' Complaint and all cross-claims asserted against it, are decided as hereinafter provided.

This is an action to recover damages for personal injuries allegedly sustained by the Plaintiff, on November 20, 2018 at approximately 7:00 p.m., when she tripped and fell on a curb/sidewalk adjacent to the Seaford Movie Theater located in the rear of 3951 Merrick Road, Seaford, New York.

The Plaintiff alleges that the Defendants were negligent in, *inter alia*, allowing and permitting a defective condition to remain and exist at the curb/sidewalk where the Plaintiff was injured; and in failing to provide proper lighting conditions in and around the premises, failing to install light poles in and around the area and thereby causing dangerous circumstances to exist; and perpetuating the dangerous conditions that existed for a significant period of time that in the exercise of reasonable care defendants knew or should have known of their existence and corrected them (*See* Plaintiff's Bill of Particulars, annexed to HAUPPAUGE's Motion as Exhibit "D").

The Defendant, 3951 MERRICK ROAD ASSOCIATES, LLC, is the owner of the property located at 3951 Merrick Road, Seaford, New York; the Defendant, THE PHOENIX ORGANIZATION, INC., manages the property; and the Defendant, HAUPPAUGE ROUTE 111 ASSOCIATES, LLC did not own or manage the subject property. The HAUPPAUGE property consists of a 28,000 square-foot building which holds six tenants. HAUPPAUGE has a written lease with each of its tenants.

It is undisputed that the adjacent parking lot and subject curb/sidewalk are owned, maintained and controlled by the TOWN.

Sheila Dauscher testified at a deposition on behalf of the TOWN. She is employed by the TOWN as a Clerk 4 in its Highway Department. In pertinent part, Ms. Dauscher testified that the TOWN was responsible for maintaining the curb adjacent to the sidewalk at 3951 Merrick Road; that the TOWN maintains the light poles in the parking lot adjacent to said property; and that the TOWN was responsible for the subject curb in the area where the Plaintiff claims her accident occurred (*See* Dauscher Deposition Transcript at pp. 15, 19, 21-24, annexed to HAUPPAUGE's Motion as Exhibit "I").

An affidavit is also proffered by a TOWN Civil Engineer II, Department of Engineering, James Plonsky, wherein he attests that in his capacity as a Civil Engineer, he is familiar with the parking fields owned by the TOWN; that he is aware the Plaintiff is claiming to have tripped over the sidewalk and/or curb located in the rear of 3951 Merrick Road, adjacent to the TOWN's parking lot "S-2", which is approximately 20 feet east of the entrance to the Seaford Cinemas; and that he states with a reasonable degree of engineering certainty that the TOWN owned the property at this location which extends approximately 8 feet south from the face of the subject curb located thereat (*See* Plonsky Affidavit, annexed to HAUPPAUGE's Motion as Exhibit "J").

The basis of liability against the TOWN as alleged in the Plaintiff's notice of claim, complaint and bill of particulars, is that the TOWN negligently owned, operated

managed, maintained, serviced, inspected, designed, controlled, repaired, made special use of and caused and/or created the alleged defective curb/sidewalk condition; and that the TOWN failed to properly illuminate and failed to install light poles at the subject accident location, all of which resulted in the Plaintiff's injuries. In support of its motion (seq. 02), the TOWN asserts that pursuant to Chapter 6 of the TOWN Code, specifically Sections 6-1 and 6-3, and 65-a, subdivision 1 and 2 of the TOWN Law, receipt of prior written notice is a condition precedent to the maintenance of a the within action against it for injuries arising from a defective curb/sidewalk. The TOWN submits the affidavit of Sheila Dauscher, Records Access Officer of the Highway Department, wherein she states that a search of the TOWN's records revealed there were no prior notices or complaints pertaining to any issues or conditions regarding the subject curb/sidewalk for a period of five (5) years prior to November 20, 2018. Dauscher's affidavit also confirms that the TOWN did not perform any affirmative acts to the curb/sidewalk at that location for a period of five (5) years prior to the date of the accident; nor did the TOWN contract with any municipality, contractor or entity for the repair or maintenance of said location for a period of five (5) years prior thereto.

The TOWN further submits that, while prior written notice law does not apply to the claim that the TOWN negligently failed to illuminate the subject accident location, under a theory of common law negligence, a municipality is under no duty to install or maintain overhead street lighting. Rather, a municipality's duty to maintain existing streetlights is limited to those situations in which it is necessary to avoid

dangerous and potentially hazardous conditions where there is a defect or some unusual condition rendering the street unsafe to the travelling public, citing *Thompson v City of New York*, 78 NY2d 682 [1991] and *Mastro v. Maiorino*, 174 AD2d 654 [2d Dept. 1991].

Moreover, the TOWN submits that even assuming it had a duty to illuminate the subject accident location, in order to prevail, a plaintiff must also prove that the TOWN had prior actual or constructive notice of the alleged overhead street lighting defect (*Silvestri v. Village of Bronxville*, 965 106 AD3d 901 [2d Dept. 2013]). In this regard, the TOWN proffers the affidavit of Michael Nolan, Supervisor of the Street Lighting Division of the Traffic Control and Street Lighting Division of the Department of General Services, wherein the TOWN confirms that it had no written, oral or telephonic complaints or notices of any overhead street lighting conditions and had no reported outages pertaining to the overhead street lights in the subject parking lot at or near the rear of 3951 Merrick Road on or for two years prior to November 20, 2018. Mr. Nolan also reiterates the TOWN's ownership and control of the overhead streetlights in the subject parking lot and the Plaintiff's accident location.

In support of HAUPPAUGE's motion (seq. 01), it is argued that summary judgment is warranted in its favor as it is undisputed that HAUPPAUGE does not own the curb and/or sidewalk where the Plaintiff fell. Further, HAUPPAUGE cites to Section 181-1 of the TOWN Code which imposes a duty upon abutting property owners to maintain and repair the sidewalks in front of their premises; however, "it does not expressly impose tort liability on the owner for injuries caused by a violation of that

duty" (*Lahens v. Town of Hempstead*, 132 AD3d 954 [2d Dept. 2015]).

The Plaintiff has filed opposition to both motions. Preliminarily, the Court notes that the Plaintiff only submitted a single, unsubstantiated paragraph opposition as to the TOWN's motion, stating in the most conclusory fashion, that the TOWN has failed to establish its prima facie entitlement to summary judgment; failed to establish that it lacked prior written notice; and that triable issues exist of prior written notice warranting denial of its motion.

As to HAUPPAUGE, however, the entirety of Plaintiff's opposition centers upon the claim that Defendant HAUPPAUGE has failed to address the negligence claim of inadequate lighting as set forth in the Plaintiff's pleadings and substantiated at Plaintiff's deposition; and that HAUPPAUGE's motion must be denied on the grounds that HAUPPAUGE, as owner and manager, has a duty to illuminate the premises imposed by law, and the testimony that the location of the accident was "dark" and "dim" was sufficient to make out a prima facie case of negligence against HAUPPAUGE. The Plaintiff also relies upon deposition testimony by HAUPPAUGE's witness which purports to reflect that it was the landlord's responsibility to "maintain exterior lighting at the premises." Counsel for Plaintiff further cites to the testimony by HAUPPAUGE's witness in support of the claim that Defendant acknowledged there were two LED lights on the north side of the building where the plaintiff was injured.

In reply, counsel for HAUPPAUGE disputes the interpretation of Plaintiff's deposition testimony. Further, in relevant part, HAUPPAUGE submits a letter by the

TOWN that was exchanged during discovery wherein the TOWN advised that it upgraded the streetlights in the vicinity of Plaintiff's fall to LED lights during the two year period prior to November 20, 2018 (*See* HAUPPAUGE's Reply at Exhibit "C").

Legal Analysis:

A Court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to summary judgment as a matter of law (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter, its task is to determine whether or not there exists a genuine issue for trial (*Miller v. Journal-News*, 211 A.D.2d 626 [2d Dept. 1995]).

The moving party's burden seeking summary judgment is to demonstrate their prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of a material issue of fact (*Ayotte v. Gervasio*, 81 N.Y.2d 1062 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra*; *Miceli v. Purex*, 84 A.D.2d 562 [2d Dept. 1981]). A defendant who moves for summary judgment in a trip-and-fall case has the initial burden of making a prima facie case that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*See Sloane v. Costco Wholesale Corp.*, 49 A.D.3d 522 [2d Dept. 2008]).

" 'To meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell' " (*Oliveri v. Vassar Brothers Hospital*, 95 A.D.3d [2d Dept. 2012], quoting *Birnbaum v. New York Racing Assn., Inc.*, 57 A.D.3d 598 [2d Dept. 2008]).

"The elements of a cause of action alleging negligence are the existence of a duty of care owed by the defendant to the plaintiff, a breach of that duty, and a showing that the breach proximately caused the injury" (*Mitchell v. Icolari*, 108 A.D.3d 600 [2d Dept. 2013]; *See Turcotte v. Fell*, 68 N.Y.2d 432, 437 [1986]). Further, "liability for a dangerous condition or property is generally predicated upon ownership, occupancy, control or special use of the property" (*Mitchell v. Icolari, supra*).

Here, with respect to the TOWN's motion for summary judgment, the Court finds that the TOWN established its prima facie entitlement to judgment as a matter of law, and in opposition, the Plaintiff failed to raise an issue of fact. Accordingly, the TOWN's motion is granted in its entirety.

The Defendant, HAUPPAUGE, also met its initial prima facie burden entitling it to summary judgment by proffering evidence that it did not own or control the subject curb/sidewalk where the Plaintiff fell, and further, that there is no statute that imposes liability upon abutting landowners for failing to comply. With respect to the issue of inadequate lighting, the Court also finds that it was sufficient for HAUPPAUGE to submit an affidavit by a representative of the TOWN demonstrating that the TOWN

owned the overhead streetlights in and around the area where the Plaintiff fell.

In opposition, the Plaintiff failed to raise an issue of fact. The Court is unpersuaded by Plaintiff's counsel's reliance upon the deposition testimony of HAUPPAUGE's witness which purports to demonstrate that "it was the landlord's responsibility to maintain exterior lighting at the premises". (*See* Affirmation in Opposition at ¶¶ 16-17). The precise question and answer on this issue provides:

> Q: If the exterior lighting needed to be changed ***on the building façade itself***, who would be responsible for that?
>
> A: Landlord.

(*See* Deposition Transcript at p. 22, HAUPPAUGE's Exhibit "H" [emphasis supplied]). Based on the photographs proffered, there were undoubtedly overhead streetlights also in the area of the Plaintiff's fall. Moreover, the Plaintiff's deposition testimony does not support the claim that the lighting on the building façade itself was insufficient. Rather, when asked whether there were any sources of artificial illumination, streetlights or anything else at the accident location, the Plaintiff testified "there were lights on the building" (*See* Plaintiff's Deposition at p. 29). When asked whether the lights on the building where she hit her head illuminated the area where she tripped, Plaintiff initially responded, "it felt very dark to me." After several pages of colloquy between counsel, the Plaintiff ultimately testified that the area was illuminated (*Id.* at p. 33). Further, the photographs marked at the Plaintiff's deposition which identifies the precise location of the fall also depicts an overhead streetlight in that

vicinity.

The Plaintiff also testified that when she first exited her vehicle, the lighting conditions in that area were sufficient for her to see the surface of the parking lot (*Id.* at pp. 17-18). When she walked approximately 30 feet to the place where the accident occurred, when asked whether the lighting conditions "remained sufficient" for her to see the surface of the ground she was walking on, the Plaintiff testified that she "wasn't looking at the ground" (*Id.* at p. 18). When asked whether the lighting conditions changed from any point in time from when she first got out of her vehicle to the point where the accident happened (did it get lighter, darker, or stay the same), the Plaintiff testified "I can't recall" (*Id.*) The Plaintiff later testifies that it was not sufficient, but yet that she was again not looking at the ground. Upon being further pressed regarding whether the light was sufficient for her to see the ground at the accident location, the Plaintiff testified that there "was a car coming to the right, from the right", the headlights of which distracted her (*Id.* at p. 19). Finally, the Plaintiff also ultimately testified that she was able to see the subject curb from a distance of approximately three feet (*Id.* at pp. 21-23).

Based on the foregoing testimony, together with the entirety of the evidence submitted, the Court does not find that the Plaintiff proffered sufficient evidence in opposition so as to warrant denial of HAUPPAUGE's motion. Moreover, contrary to the Plaintiff's arguments, the cases relied upon in opposition largely involve inadequate lighting of interior staircases or premises that were unequivocally owned by the

defendants therein. The undisputed evidence here, however, establishes that the subject curb/sidewalk area, including the overhead streetlights in that vicinity, were owned, maintained and controlled by the TOWN.

Accordingly, it is hereby

ORDERED, that the Defendants' respective motions (Seq. 01 and 02) are **GRANTED**, and the Complaint is hereby **DISMISSED**.

This decision constitutes the order of the Court.

DATED: Mineola, New York
March 26, 2021

/S/
Hon. Randy Sue Marber, J.S.C.
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ENTERED
Mar 30 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE