SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

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VINCENZO SARNELLI, JR.,

Plaintiff,

-against-

THE VILLAGE OF LAWRENCE and BILOTTA LANDSCAPING,

Defendants.

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TRIAL PART: 35

NASSAU COUNTY

INDEX NO: 002895/99

MOTION DATE: 4-05-00

MOTION SEQ. NO: 001

The following papers having been read on this motion:

Notice of Motion, dated 3-13-00 1
Affirmation in Opposition, dated 5-01-00 2
Reply Affirmation, dated 5-22-00..... 3

Motion by defendant Village of Lawrence for summary judgment on the issue of liability is denied.

This negligence action arises out of a trip and fall incident by plaintiff on May 14, 1998 in front of 56 Washington Avenue, Lawrence, in the County of Nassau, State of New York. The defendant Village of Lawrence moves for summary judgment on the grounds that it did not have prior written notice of the defective road conditions which allegedly caused the accident.

It is the rule that "summary judgment is a drastic remedy to be granted only when there is no clear triable issue of fact presented and even the color of a triable issue forecloses the remedy." *Matter of Benincasa v. Garrubbo*, 141 AD2d 636, 637 (2nd Dept. 1988). Furthermore, "In deciding a summary judgment motion, the evidence must be construed in

a light most favorable to the party opposing the motion." (Id.)

On a motion for summary judgment the Court must scrutinize the moving papers in a light most favorable to the party opposing the motion. *Goldstein v. County of Monroe*, 77 AD2d 232, (4th Dept. 1980). The Court focus on a motion for summary judgment is issue finding not issue determination. *Goldstein v. County of Monroe, supra.* On a motion for summary judgment the burden of proof rests with the movant to show entitlement to this drastic remedy, *Malary v. New York City Transit Authority,* 232 AD2d 380, (2nd Dept. 1996).

In the case at bar, this Court finds that the finding in *Ricciuti v. Village of Tuckahoe*, 202 AD2d 488 (2nd Dept. 1994), is controlling. As the Court in that case stated, "we note that 'the defendant Village has a non-delegable duty to maintain its highways, of which sidewalks are a part (see, *Williams v. State of New York*, 34AD2d 101, 104, 309 NYS2d 795; 64 NY Jur 2d, Highways, Streets, and Bridges, §§ 1, 6), in a reasonably safe condition (see, *Lopes v. Rostad*, 45 NY2d 617, 623, 412 NYS2d 127, 384 NE2d 673; *Blais v. St. Mary's of Assumption R.C. Church*, 89 AD2d 653, 453 NYS2d 117; see generally, 65 NY Jur 2d, Highways, Streets, and Bridges, § 411)' (*Combs v. Incorporated Vil. of Freeport*, 139 AD2d 688, 689, 527 NYS2d 443; see also, Kiernan v. Thompson, supra; *D'Ambrosio v. City of New York*, 55 NY2d 454, 450 NYS2d 149, 435 NE2d 366)".

In this matter the Village had gone to the bidding process and awarded a contract for the repair of the street in question. This situation is the same as the one in *Ricciuti v. Village of Tuckahoe*, *supra*, wherein that court stated, "The Village does not deny that it entered into a contract with Acocella for the repair of the area in question, but denies that it or its agents

created any defect. Accordingly, the Village moved for summary judgment on the ground that the plaintiffs failed to comply with the condition precedent of prior written notice, as required by both Village of Tuckahoe Law § 6-628 and CPLR 9804. It is well-settled that 'an exception to the prior written notice rule exists when the municipality has caused or created a defect or dangerous condition' (*Combs v. Incorporated Vil. of Freeport*, 139 AD2d 688, 689, 527 NYS2d 443; see, *Kiernan v. Thompson*, 73 NY2d 840, 537 NYS2d 122, 534 NE2d 39; *Montante v. City of Rochester*, 187 AD2d 924, 590 NYS2d 352). In the case at bar, based upon the conflicting testimony adduced at the examinations before trial, we find that there are triable issues of fact regarding the existence of the alleged defect and whether or not the Village was responsible for its creation (see, *Combs v. Incorporated Vil. of Freeport, supra,* at 689; *Schraub v. Town of Hempstead*, 167 AD2d 458, 561 NYS2d 922)."

Here too, as in *Ricciuti*, there are questions of fact dealing with *inter alia*, the creation and the nature of the condition, notice of the condition, warnings and protective devices.

Therefore, based on the above, the defendant Village of Lawrence's motion for summary judgment is denied and this Court is returned to the Trial Assignment Part.

The foregoing constitutes the Order and Decision of this Court.

ENTER

DATED: July 17, 2000

Daniel Palmieri

HON. DANIEL PALMIERI
Acting J.S.C.

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