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Plaintiff(s), STEVEN ALESCI vs. Defendant(s), TOWNSHIP OF WILDWOOD, SOUTH JERSEY INDUSTRIES d/b/a SOUTH JERSEY GAS, WATERS & BUGBEE, INC., JOHN DOE I-X and/or ABC, INC., I-X, fictitious corporations, partnerships, individuals and/or entities, j/s/a	SUPERIOR COURT OF NEW JERSEY CAPE MAY COUNTY DOCKET NO. CPM-L-054-15 CIVIL ACTION ORDER

THIS MATTER having been brought before the Court by Birchmeier & Powell LLC attorneys for defendant, City of Wildwood ; **AND GOOD CAUSE** having been shown;

IT IS on this 20th day of July 2016, **ORDERED** that defendant City of Wildwood's Motion For Summary judgment is **GRANTED** dismissing any and all claims against it with prejudice.

IT IS FURTHER ORDERED that a copy of this Order be served upon all parties within seven (7) days of the receipt of this Order.

J. Christopher Gibson, J.S.C.

MEMORANDUM OF DECISION IS ATTACHED

7/29/16
Mailed to counsel

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY

TO: **Erin R. Thompson, Esquire**
BIRCHMEIER POWELL
1891 State Highway 50
P. O. Box 582
Tuckahoe, NJ 08250

CASE: **Steven Alesci v Township of Wildwood et als**
DOCKET NO. **CPM L 54-15**

NATURE OF APPLICATION: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO R. 4:46-2

MEMORANDUM OF DECISION ON MOTION

BACKGROUND AND NATURE OF MOTION

The complaint in this matter was filed on February 2, 2015. The discovery end date is August 2, 2016. There were three previous extensions of discovery in this matter for a total of 511 days of discovery. Currently neither arbitration nor trial is scheduled. Defendant, City of Wildwood, now moves for summary judgment pursuant to R. 4:46-2 in order to dismiss any and all claims against it with prejudice.

This Court has carefully and thoroughly reviewed the moving papers and attached exhibits submitted by the parties with this motion.

LEGAL ANALYSIS

R. 4:46-2(c), governing motions for summary judgment, provides, in pertinent part, that:

> the judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

A genuine issue of material fact must be of a substantial, as opposed to being of an insubstantial nature. Brill v. Guardian Life Ins. Co. 142 N.J. 520, 529 (1995). "Substantial" means "[h]aving substance; not imaginary, unreal, or apparent only; true, solid, real," or, "having real existence, not imaginary[;] firmly based, a substantial argument." Ibid., internal citations omitted. Disputed facts which are immaterial, fanciful, frivolous, gauzy, or merely suspicious are insubstantial, and hence do not raise a genuine issue of material fact. Ibid., internal citations omitted.

Additionally, R. 4:46-5 provides, in pertinent part, that

> when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleading, but must respond by affidavits

> meeting the requirements of R. 1:6-6 or as otherwise provided in this rule and by R. 4:42-2(b), setting forth specific fact showing there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered, unless it appears from the affidavits submitted, for reasons therein stated, that the party was unable to present by affidavit facts essential to justify opposition, in which case the court may deny the motion, may order a continuance to permit additional affidavits to be obtained, depositions to be taken or discovery to be had, or may make such order as may be appropriate.

In determining whether a genuine issue of material fact exists, the motion judge must "engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Id. at 533. This weighing process "requires the court to be guided by the same evidentiary standard of proof—by a preponderance of the evidence or clear and convincing evidence—that would apply at the trial on the merits when deciding whether there exists a 'genuine' issue of material fact." Id. at 533-34. In short, the motion judge must determine "whether the competent evidentiary materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540.

MOVANT'S POSITION

Defendant, City of Wildwood, requests this Court grant summary judgment in its favor pursuant to R. 4:46-2 in order to dismiss any and all claims against it with prejudice.

I. Statement of Material Facts

On September 5, 2013 Plaintiff was in Wildwood, New Jersey and accosting to Plaintiff's Answer to Form A Interrogatory #2,

> At approximately 4:00 p.m., plaintiff was operating his motorcycle traveling on Spicer Street in the City of Wildwood, New Jersey and as a direct and proximate result of a dangerous and hazardous condition in roadway, plaintiff lost control of his motorcycle and was thrown to the ground. The weather was clear and dry.

According to Plaintiff's deposition, he traveled down Spicer Avenue and he states, "[g]uys are turning into the driveway or a parking lot, rather, I followed behind and, all of a sudden, my front end just dropped, wheel turned, and threw me up in the air; dropped in a rut." As Plaintiff was in the process of making his turn into the driveway or parking lot, there was nothing in the road that gave him any concern. Plaintiff testified that motorcycle riders pay attention to the roadway in order to look for potholes, wet spots, ice. Where, Plaintiff testified that at the time he was making his turn, the roadway appeared to be clear as there was no debris and there were darker areas of asphalt that appeared to be patches. As Plaintiff was making

his turn, his front wheel went down and he did not notice any hole or depression.

At the time of the incident, Defendant, Waters & Bugee, Inc., entered into a contract with South Jersey Gas to install high pressure plastic gas pipes in Wildwood. On September 3, 2013, Waters & Bugee, Inc. performed work on Spicer Avenue and Joseph Mallory was the construction manager on site. Waters & Bugee, Inc. excavated an area of Spicer Avenue to install the plastic piping and backfill the area with hot asphalt. According to Mr. Mallory, on September 3, 2013, a perpendicular patch of asphalt to the curb was excavated at or near the area where Plaintiff presumably fell off of his motorcycle. Defendant, City of Wildwood, has no personal knowledge of Plaintiff's fall.

II. Defendant, City of Wildwood, contends that it is entitled to summary judgment as a matter of law as there has been no evidence that the area was a "dangerous condition" as defined by N.J.S.A. §59:4-2.

The Tort Claims Act codified as N.J.S.A. §59:1-1 sets forth that a public entity is immune from liability unless there is a specific provision in the Act that imposes liability. Defendant notes that N.J.S.A. §59:4-2 of the New Jersey Tort Claims Act states in pertinent part,

> A public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in

dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:

a. a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

b. a public entity had actual or constructive notice of the dangerous condition under section 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Nothing in this section shall be construed to impose liability upon a public entity for a dangerous condition of its public property if the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable.

Defendant further references the case of Sharra v. Atlantic City, 199 N.J. Super. 535, 540 (App. Div. 1985), wherein the Appellate Division held that N.J.S.A. §59:4-1 refers to the physical condition of the property itself and not to activities on the property. Thus, the appellate court found that there was no merit to the plaintiff's contention concerning liability for failure to supervise activities on the boardwalk even assuming it is a recreational facility. Id. at 540. Herein, Defendant asserts that Plaintiff was operating his motorcycle on September 5, 2013 at or near Spicer Avenue in Wildwood, New Jersey and he turned into a driveway or parking lot while looking straight ahead and the roadway appeared to be clear and free of debris. Plaintiff noticed some dark areas of asphalt in the roadway that he assumed was

recent patching and discovery revealed that co-defendant, Waters & Bugee, Inc., had been installing high pressure gas mains pursuant to a contract with South Jersey Gas.

The City of Wildwood contends that the area where Plaintiff fell did not amount to a dangerous condition within the meaning of the Tort Claims Act and therefore, Plaintiff cannot establish a dangerous condition as defined by N.J.S.A. §59:4-2.

III. Defendant, City of Wildwood, contends that there has been no compliance with the notice requirements of N.J.S.A. §59:4-3.

Defendant references N.J.S.A. §59:4-3, which defines actual and constructive notice as follows,

> a. A public entity shall be deemed to have actual notice of a dangerous condition within the meaning of subsection b. of section 59:4-2 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character.
>
> b. A public entity shall be deemed to have constructive notice of a dangerous condition within the meaning of subsection b. of section 59:4-2 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character.

As to actual notice, Defendant acknowledges that several months in 2013 South Jersey Gas installed high pressure gas pipes throughout the City of

Wildwood and work had been subcontracted to Waters & Bugbee, Inc., yet the City of Wildwood maintains that the area where Plaintiff allegedly fell off his motorcycle did not amount to a dangerous condition nor did the City of Wildwood have any actual and/or constructive notice of any dangerous condition.

IV. Defendant, City of Wildwood, contends that any actions or inactions on the part of the City of Wildwood concerning the alleged dangerous condition was not palpably unreasonable.

Pursuant to N.J.S.A. §59:2-6, "a public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property." Defendant notes that the New Jersey Supreme Court stated, "palpably unreasonable" implies "behavior that is patently unacceptable under any circumstance" and that "it must be manifest and obvious that no prudent person would approve of its course of action or inaction." See Holloway v. State, 125 N.J. 386, 404 (1991).

Thus, Defendant submits that the City of Wildwood's actions were not palpably unreasonable within the meaning of Title 59 and therefore, the City of Wildwood is entitled to summary judgment as a matter of law under N.J.S.A. §59:2-6.

DISCUSSION

This Court finds that Defendant, City of Wildwood, is entitled to summary judgment pursuant to R. 4:46-2 in order to dismiss any and all claims against it with prejudice.

R. 4:46-2(c), governing motions for summary judgment, provides, in pertinent part, that:

> the judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

A genuine issue of material fact must be of a substantial, as opposed to being of an insubstantial nature. Brill v. Guardian Life Ins. Co. 142 N.J. 520, 529 (1995). "Substantial" means "[h]aving substance; not imaginary, unreal, or apparent only; true, solid, real," or, "having real existence, not imaginary[;] firmly based, a substantial argument." Ibid., internal citations omitted. Disputed facts which are immaterial, fanciful, frivolous, gauzy, or merely suspicious are insubstantial, and hence do not raise a genuine issue of material fact. Ibid., internal citations omitted.

Additionally, R. 4:46-5 provides, in pertinent part, that

> when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleading, but must respond by affidavits meeting the requirements of R. 1:6-6 or as otherwise provided in this rule and by R. 4:42-2(b), setting forth specific fact showing there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered, unless it appears from the affidavits submitted, for reasons therein stated, that the party was unable to present by affidavit facts essential to justify opposition, in which case the court may deny the motion, may order a continuance to permit additional affidavits to be obtained, depositions to be taken or discovery to be had, or may make such order as may be appropriate.

In determining whether a genuine issue of material fact exists, the motion judge must "engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Id. at 533. This weighing process "requires the court to be guided by the same evidentiary standard of proof—by a preponderance of the evidence or clear and convincing evidence—that would apply at the trial on the merits when deciding whether there exists a 'genuine' issue of material fact." Id. at 533-34. In short, the motion judge must determine "whether the competent evidentiary materials presented, when viewed in the light most favorable to

the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540.

I. Statement of Material Facts

On September 5, 2013 Plaintiff was in Wildwood, New Jersey and accosting to Plaintiff's Answer to Form A Interrogatory #2,

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According to Plaintiff's deposition, he traveled down Spicer Avenue and he states, "[g]uys are turning into the driveway or a parking lot, rather, I followed behind and, all of a sudden, my front end just dropped, wheel turned, and threw me up in the air; dropped in a rut." As Plaintiff was in the process of making his turn into the driveway or parking lot, there was nothing in the road that gave him any concern. Plaintiff testified that motorcycle riders pay attention to the roadway in order to look for potholes, wet spots, ice. Where, Plaintiff testified that at the time he was making his turn, the roadway appeared to be clear as there was no debris and there were darker areas of asphalt that appeared to be patches. As Plaintiff was making his turn, his front wheel went down and he did not notice any hole or depression.

At the time of the incident, Defendant, Waters & Bugee, Inc., entered into a contract with South Jersey Gas to install high pressure plastic gas pipes in Wildwood. On September 3, 2013, Waters & Bugee, Inc. performed work on Spicer Avenue and Joseph Mallory was the construction manager on site. Waters & Bugee, Inc. excavated an area of Spicer Avenue to install the plastic piping and backfill the area with hot asphalt. According to Mr. Mallory, on September 3, 2013, a perpendicular patch of asphalt to the curb was excavated at or near the area where Plaintiff allegedly fell off of his motorcycle.

II. This Court finds that Defendant, City of Wildwood, is entitled to summary judgment as a matter of law as there has been no evidence that the area was a "dangerous condition" as defined by N.J.S.A. §59:4-2.

The Tort Claims Act codified as N.J.S.A. §59:1-1 sets forth that a public entity is immune from liability unless there is a specific provision in the Act that imposes liability. Defendant notes that N.J.S.A. §59:4-2 of the New Jersey Tort Claims Act states in pertinent part,

> A public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
>
> c. a negligent or wrongful act or omission of an employee of

the public entity within the scope of his employment created the dangerous condition; or

d. a public entity had actual or constructive notice of the dangerous condition under section 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Nothing in this section shall be construed to impose liability upon a public entity for a dangerous condition of its public property if the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable.

In the case of Sharra v. Atlantic City, 199 N.J. Super. 535, 540 (App. Div. 1985), the Appellate Division held that N.J.S.A. §59:4-1 refers to the physical condition of the property itself and not to activities on the property. Thus, the appellate court found that there was no merit to the plaintiff's contention concerning liability for failure to supervise activities on the boardwalk even assuming it is a recreational facility. Id. at 540.

Herein, Plaintiff was operating his motorcycle on September 5, 2013 at or near Spicer Avenue in Wildwood, New Jersey and he turned into a driveway or parking lot while looking straight ahead and the roadway appeared to be clear and free of debris. Plaintiff noticed some dark areas of asphalt in the roadway that he assumed was recent patching and discovery revealed that co-defendant, Waters & Bugee, Inc., had been installing high pressure gas mains pursuant to a contract with South Jersey Gas.

Accordingly, the area where Plaintiff fell did not amount to a dangerous condition within the meaning of the Tort Claims Act and therefore, Plaintiff cannot establish a dangerous condition as defined by N.J.S.A. §59:4-2.

III. This Court finds that there has been no compliance with the notice requirements of N.J.S.A. §59:4-3.

N.J.S.A. §59:4-3 provides definitions for both actual and constructive notice, which is as follows:

> a. A public entity shall be deemed to have actual notice of a dangerous condition within the meaning of subsection b. of section 59:4-2 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character.
>
> b. A public entity shall be deemed to have constructive notice of a dangerous condition within the meaning of subsection b. of section 59:4-2 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character.

Notice is required per N.J.S.A. §59:4-3 because failure to discover a dangerous defect is not equivalent to creating the defect. See Polozo v. Cnty of Essex, 209 N.J. 51, 67-68 (2012). A public entity may be liable for a dangerous condition if it had actual or constructive notice under the standards set forth in N.J.S.A. §59:4-3(a) and (b).

For instance, in Polozo v. Cnty of Essex, the New Jersey Supreme Court addressed the issue of whether the County had actual or constructive notice of a dangerous condition on the shoulder that caused the accident. 209 N.J. at 65-67. The Court found that per N.J.S.A. §59:4-3, the plaintiff could not show that the depression on the shoulder was of such an obvious nature that the public entity, in the exercise of due care, should have discovered and its dangerous character. Id. More so, even if the County had notice that the depression was a dangerous condition, a reasonable jury could not find that the failure to repair was palpable unreasonable. Id. at 66.

This Court notes that Defendant acknowledges that several months in 2013 South Jersey Gas installed high pressure gas pipes throughout the City of Wildwood and work had been subcontracted to Waters & Bugbee, Inc., yet the area where Plaintiff allegedly fell off his motorcycle did not amount to a dangerous condition nor did the City of Wildwood have any actual and/or constructive notice of any dangerous condition.

IV. This Court finds that any actions or inactions on the part of the City of Wildwood concerning the alleged dangerous condition were not palpably unreasonable.

Pursuant to N.J.S.A. §59:2-6, "a public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property." Defendant notes that the

New Jersey Supreme Court stated, "palpably unreasonable" implies "behavior that is patently unacceptable under any circumstance" and that "it must be manifest and obvious that no prudent person would approve of its course of action or inaction." See Holloway v. State, 125 N.J. 386, 404 (1991).

Thus, the City of Wildwood's actions were not palpably unreasonable within the meaning of Title 59 and therefore, the City of Wildwood is entitled to summary judgment as a matter of law under N.J.S.A. §59:2-6.

CONCLUSION

The motion is unopposed. Defendant, City of Wildwood's, motion for summary judgment pursuant to R. 4:46-2 dismissing any and all claims against it with prejudice is granted.

An appropriate form of order has been executed. Conformed copies of that order will accompany this memorandum of decision.

July 20, 2016

J. Christopher Gibson, J.S.C.