PREPARED BY THE COURT

NANETTE CALNAN AND JOHN CALNAN, Plaintiffs,	SUPERIOR COURT OF NEW JERSEY CIVIL DIVISION - LAW CAPE MAY COUNTY
v.	CPM-L-310-19
801 ASBURY ASSOCIATES LP, et al, Defendants.	Civil Action **ORDER**

THIS MATTER having come before the Court by way of Defendant City of Ocean City's Motion for Summary Judgment filed on January 8, 2021 and the court having heard oral argument by Zoom on Friday, February 5, 2021 at which time Paul Perpiglia, Esq. appeared for Plaintiff, Robert Ballou, Esq. appeared for 801 Asbury Associates, LP, Edward Romanik, Esq. appeared for the City of Ocean City and other Ocean City affiliated defendants, and Brielle Winkler, Esq. appeared for New Jersey American Water and American Water Works, and for reasons stated in the accompanying Memorandum of Decision entered this same date,

IT IS ON THIS 16th DAY OF FEBRUARY, 2021 ORDERED that:

1. The City of Ocean City's Motion for Summary Judgment is GRANTED; and
2. Defendant The City of Ocean City is dismissed with prejudice; and
3. This Order or Judgment shall be deemed automatically served upon all counsel of record and parties if served personally in court, and if not personally served in court shall be deemed automatically served upon all counsel of record simultaneously with

its online posting in eCourts; otherwise, all other parties shall be served by the party obtaining this Order or Judgment within seven (7) days after this Order or Judgment was signed. See Rule 1:5-1(a).

James H. Pickering Jr, J.S.C.

[X] Opposed
[ ] Unopposed

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

JAMES H. PICKERING, JR., J.S.C.

9 North Main Street
Cape May Court House, NJ 08210
609-402-0100 ext. 47730

MEMORANDUM OF DECISION PURSUANT TO RULE 1:6-2(f)

CASE:	**Calnan v. 801 Asbury Associates, et al.**
DOCKET #:	**CPM L-310-19**
RETURN DATE:	**February 16, 2021**
MOTION:	**Motion for Summary Judgment**
MOVANT:	**Defendant City of Ocean City**

PROCEDURAL STATUS

This matter is before the court on a Motion for Summary Judgment filed by Defendant City of Ocean City ("Ocean City"). The Motion was filed on January 8, 2021.

Plaintiff filed Opposition on January 25, 2021.

Ocean City filed a Reply on February 1, 2021.

Oral argument was held on Friday, February 5, 2021 at which time Paul Perpiglia, Esq. appeared for Plaintiff, Robert Ballou, Esq. appeared for 801 Asbury Associates, LP, Edward Romanik, Esq. appeared for a number of Ocean City Defendants, and Brielle Winkler, Esq. appeared for New Jersey American Water and American Water Works. Only Mr. Perpiglia and Mr. Romanik participated in argument.

FINDINGS OF FACT

On August 11, 2017, at 9:30 PM, Plaintiff was walking on 8th Street between Central Avenue and Asbury Ave in Ocean City, New Jersey when she tripped and fell on the sidewalk and was injured.

Plaintiff allegedly sustained injuries including but not limited to a fractured shoulder and rotator cuff tear which required surgery and the implantation of hardware

Plaintiff alleges she tripped over a raised portion of the sidewalk.

Ocean City does not own or possess the sidewalk. The sidewalk which Plaintiff alleges was raised is on a property owned by 801 Asbury Associates LP; the property is a commercial property, not a residential property.

Plaintiff produced an expert report from Scott Moore PE, CSP of Moore Engineering Services. He opines in his report that the unlevel walking surface resulted in a "hazardous condition" and that the sidewalk was "defective and unsafe". He produced photographic evidence that the unlevel sidewalk had existed since at least September 2013. His on-site inspection also showed the presence of a remnant of a prior failed attempt to repair the unlevel surface with mortar.

The alleged defect existed at least three years and 11 months before plaintiff tripped.

The Ocean City ordinances read us follow:

17--2.8 Repair and Replacement of Missing or Deteriorated Curb or Sidewalk

> The code official shall have the responsibility of inspecting curves and sidewalks in the city of Ocean City to determine if the condition of any portion of any curb or sidewalk, or the lack of any sidewalk or curb, presents a hazard or danger to the public safety, to those persons using the sidewalk or curb.

17--2.9 Notice to Owner to Construct or Repair

> If, upon adequate inspection, it is determined by the code official that a sidewalk or

curb or any portion thereof, is a hazard or danger to public safety, the code official shall cause a notice to be served upon the owner of the lot, in front of which said sidewalk or curb is located, which notice shall contain a description of the property affected, sufficiently definite in terms to identify the same, as well as a description of the required construction or repair and that unless that improvement shall be completed within 30 days after service thereof it is the intention of the City of Ocean City to make the same and cause it to be done

17--2.10 Construction or Repair

In the event the owner of any lot shall refuse to comply with the notice prescribed in section 17--2.9 above, the code official shall cause the sidewalk or curb to be constructed or repaired by the City of Ocean City or an independent contractor, chosen to perform such construction or repair. Any such construction, reconstruction, repair or alteration shall conform to the construction requirements of this section.

17--2.11 Assessment of Costs, Lien, Tax Sale

When any sidewalk work or curb work shall be constructed or repaired, a true and accurate account of the cost and expense incurred shall be kept and apportioned among the properties improved and proportioned to the frontage of their respective lands and a true statement of such costs, under oath or affirmation shall be forthwith filed by the code official in charge of such improvements with the city clerk and tax collector. Upon filing with the tax collector he shall record the same in the assessment book. Such assessment shall, from the date of confirmation become due and payable and shall remain a first lien upon the lot upon which they are filed until paid and shall bear interest at the rate of 8% per annum from the expiration of 30 days after the date of confirmation.

The ordinance also allows the City to incarcerate the owner of the property for violating the sidewalk ordinance for a period not to exceed 30 days; the property owner can also be fined up to $500.00 per violation.

SUMMARY JUDGMENT STANDARD

Summary Judgment must be granted "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." R. 4:46-2(c). A judge does not act as the fact-finder when deciding

a Motion for Summary Judgment. Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73 (1954).

Pursuant to Rule 4:46-2(c), the moving party must "show that there is no genuine issue as to any material fact challenged." In Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), the Court stated:

> a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential 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 nonmoving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill supra. 142 N.J. at 540, (alteration in original) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 214 (1986).

A genuine issue of material fact must be of a substantial, as opposed to being of an insubstantial nature. Brill, 142 N.J. at 529. "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." Id. (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. Id. (citations omitted).

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.'" Brill, 142 N.J. 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 factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540. Where the evidence presented "is so one-sided that one party must prevail as a matter of law," courts should not hesitate to grant Summary Judgment. Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016); Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill v. Guardian Life Ins. Co. 142 N.J. 520, 529 (1995)).

LEGAL ARGUMENTS AND ANALYSIS

GENERAL STATEMENT OF THE LAW

The Tort Claims Act generally prescribes when a public entity may be liable for a dangerous condition on public property:

> 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 [or her] employment created the dangerous condition; or
>
> b. a public entity had actual or constructive notice of the dangerous condition under [*N.J.S.A.*] 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.

N.J.S.A. 59:4-2. Thus, liability only attaches to the public entity if the plaintiff can show that the Premises is "public property". Public Property is defined in the Act as follows:

> Section 59:4-1 Definitions

. . .

> c. "Public property" means real or personal property owned or controlled by the public entity, but does not include easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity.

If Plaintiff can show that the subject property is Public Property, liability can only attach if Plaintiff can also show each of the following:

> 1. that the property was in a dangerous condition at the time of the injury;
> 2. that the injury was proximately caused by the dangerous condition;
> 3. that the dangerous condition created a reasonably foreseeable risk of the kind of injury that was incurred; and
> 4. that a public employee created the dangerous condition or that the public entity had notice in time to protect against the condition itself.

Kolitch v. Lindedahl, 100 N.J. 485, 492 (1985).

Additionally, "there can be no recovery unless the action or inaction on the part of the public entity in protecting against the condition was 'palpably unreasonable.'" Id. at 492-93.

Argument I: The City did not own, possess, maintain or control the sidewalk

Ocean City asserts that Summary Judgment should be granted because it did not own control or maintain the sidewalk; it is an undisputed fact that the land on which the sidewalk rests is owned by 801 Asbury Associates LP.

Plaintiff counters that the Act does not require that Ocean City own the property, but that it owned or controlled the property. Plaintiff asserts that Ocean City's ordinance gives it such broad powers over sidewalks that it had co-control of the sidewalk. Plaintiff cites Roman v. City of Plainfield, 388 N.J. Super. 527 (App. Div. 2006) to support its position that Ocean City had co-control of the sidewalk and that the issue is at least a question for the jury.

Public entity liability for sidewalks has a tortured legal history. It need not be repeated at length here. Applicable to this case, however, is Stewart v. 104 Wallace St., Inc., 87 N.J. 146

(1981), the seminal decision that placed responsibility to maintain sidewalks adjacent to a commercial property on the property owner. One case asserted that meant that a public entity could not be liable for a sidewalk adjacent to a commercial property. See Christmas v. City of Newark, 216 N.J. Super. 393, 401 (App. Div. 1987). In Levin v. Devoe, 221 N.J. Super. 61, 64 n.1, (App. Div. 1987), a different Appellate Panel noted "we disagree with the holding in Christmas v. City of Newark . . . that Stewart establishes an absolute municipal immunity for deteriorated sidewalks." In Roman, supra., the Appellate Division held the issue was put to rest by the Supreme Court in Norris v. Borough of Leonia, 160 N.J. 427 (1999), and held that there is not an absolute municipal immunity created in Stewart.

In this case, this court holds that Ocean City can potentially be liable for a dangerous condition of a sidewalk that is adjacent to a commercial property under certain circumstances.

The issue in this case is whether or not Ocean City controlled the sidewalk where Plaintiff tripped. The sidewalk is on land owned by 801 Asbury Associates, L.P., and not on land owned by Ocean City. The only way that Ocean City can be liable for injuries caused by the allegedly dangerous condition of the sidewalk is if Ocean City had control or co-control of the sidewalk.

In Posey v. Bordentown Sewerage Authority, 171 N.J. 172 (2002), a twelve-year-old boy was walking in the ankle-deep water of a creek near his home. The creek was owned by the Township of Bordentown. The boy, with others, ventured across the street to a pond that was located on private property. To do so, he had to walk through a culvert under the street that connected the creek to the pond. The culvert was owned by the County. When he exited the culvert and entered the pond the water level suddenly began to increase. The boy disappeared under the water, suffered brain damage, and later died.

The trial court had granted the public entity defendants summary judgment finding that they did not own or control the pond. The issue went to the Supreme Court. The Court determined that the public entity defendants, the local and county governments, could be liable because it was their conduct that caused the pond to become unnaturally and unexpectedly deep. The Township had installed storm-water drainage pipes and grates, and the County had installed the culvert, all of which together created an integrated system of storm-water management. This caused severe erosion around the pond and increased water velocity into the pond, and that created a dangerous situation in the pond. "By their actions, the public entities treated private property as if they owned it, making the private property, in effect, the public entities property. In doing so, the public entity defendants had exercised sufficient 'control' of the dangerous condition of the pond on private property within the meaning of N.J.S.A. 59:4-1(c) to have made the grant of summary judgment in favor of the defendants improper." Roman v. City of Plainfield, 388 N.J. Super. 527, 535 (App. Div. 2006), discussing Posey v. Bordentown Sewerage Authority, 171 N.J. 172 (2002).

In Roman v. City of Plainfield, 388 N.J. Super. 527 (App. Div. 2006), plaintiff was injured when she tripped over a raised sidewalk; the sidewalk had been raised by tree roots. The property owner had attempted to repair the sidewalk; to do so the property owner wanted to remove the sidewalk, cut the tree root, and replace the sidewalk so that it was not raised. The public entity would not allow the property owner to do that because it owned the tree. The tree was approximately 70 years old, and added to the beauty of the street. The Appellate Division held that: "the City because of its unyielding attitude concerning its tree, could be found to have dictated how and when the sidewalk could be repaired by its owner. In effect, the City usurped control of private property under the specific facts presented. It was this usurpation that was at

the heart of the Supreme Court's opinion in Posey." Id. at 538. The court pointed out that the public entity derived a benefit from its control over the private property; specifically, Plainfield preserved and maintained the beauty of the street in the historic section of town. There, the Appellate Division concluded "that plaintiff had presented sufficient evidence of control of the sidewalk within the meaning of N.J.S.A. 59:4-1(c) to have survived the City's motion for involuntary dismissal at the end of her case." Id.

In both of these cases, the public entity had taken direct action with regard to the private property. That direct action impacted the private property and was the basis for a finding of control of the property upon which the allegedly dangerous condition existed.

In contrast, in this case, there is not any evidence that Ocean City had ever taken any action with regard to the sidewalk where Plaintiff tripped. There is not any evidence for instance that Ocean City installed the sidewalk, maintained the sidewalk, or made the attempted repairs to the sidewalk. There is not any evidence that Ocean City instructed or mandated that the property owner make repairs to the sidewalk. Without that action or assertion of control over the sidewalk, this court finds that there is not sufficient evidence to find that Ocean City had control or co-control of the sidewalk. Because Ocean City did not have control or co-control of the sidewalk, the sidewalk is not public property as defined by the Tort Claims Act, and therefore Ocean City cannot be liable for injuries incurred by Plaintiff caused by this allegedly dangerous condition.

Plaintiff asserts that the Ocean City Ordinances create such control. Because Ocean City can assert control, however, does not mean that it has asserted or exercised control. In fact, it appears that Ocean City has chosen not to exercise control over this sidewalk. See Christmas v. Newark, 216 N.J. Super. 393, n.1 (App. Div. 1987) ("By [its] ordinance, Newark has the option

of repairing sidewalks but not a legal obligation to do so."). In the absence of competent evidence that Ocean City exercised direct control of the sidewalk, this court cannot find that Ocean City had control of the sidewalk.

Plaintiff's counsel acknowledged during oral argument the line of cases discussed above but urged the court to find that the existence of the ordinance alone is sufficient control. The problem with that argument is that the line of cases discussed above is not a line of cases, it is instead the line of cases. The court rejects the argument that the existence of the ordinance alone is sufficient to show control. To do so would eviscerate the Act because nearly every one of the over 500 public entities in this state has a sidewalk ordinance that is substantially similar to the Ocean City ordinance. If the court were to adopt Plaintiff's argument, it would essentially be ignoring the protections provided to public entities by the Act and make every public entity responsible for all sidewalks despite clear caselaw otherwise.

The court therefore grants Ocean City's Motion for Summary Judgment because it did not and does not own or control the sidewalk.

The court will address the remaining arguments made by Ocean City in its brief as if the court found that Ocean City did have control over the sidewalk.

Argument II: Ocean City did not have Notice of the Allegedly Dangerous Condition

Ocean City contends that it did not have actual notice or constructive notice of the allegedly dangerous condition. Plaintiff does not offer any evidence that Ocean City had actual notice, but instead contends Ocean City had constructive notice. A public entity can be found to have constructive notice of a dangerous condition if "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."

N.J.S.A. 59:4-3(b).

In its brief, Ocean City cites Polzo v. County of Essex, 196 N.J. 569, 581 (2008): "In the absence of actual notice, the public entity will be liable for a dangerous condition 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."

Plaintiff provided an expert report and photographic evidence that indicates the allegedly dangerous condition existed for at least three years. Plaintiff argues that whether Ocean City had constructive notice is an issue of fact for the jury, citing Milacci v. Mato Realty Co., Inc., 217 N.J. Super. 297 (App. Div. 1987), and Monaco v. Hartz Mountain Corp., 178 N.J. 401 (2004).

This court finds that whether or not Ocean City had constructive notice is an issue for the jury. There is substantial evidence that the allegedly dangerous condition existed for years. There was at least one attempt to repair the condition. This property is in the heart of the business district, with heavy foot traffic and motor vehicle traffic. It is just a block or two at the most from City Hall and other municipal offices. A reasonable jury could conclude that just in normal everyday travels a City Official should have noticed the allegedly dangerous condition of the sidewalk. A reasonable jury could conclude that Ocean City's Code Official should have a regular inspection schedule. A reasonable jury could conclude that Ocean City had constructive notice of the alleged dangerous condition.

The court denies Ocean City's Motion for Summary Judgment based on its assertion that it did not have actual or constructive notice.

Argument III: Ocean City's Actions or Inactions were not Palpably Unreasonable

Ocean City also asserts that Summary judgment should be granted because Plaintiff cannot show that "the action or inaction on the part of the public entity in protecting against the condition was 'palpably unreasonable.'" Kolitch, 100 N.J. at 492-93. First, it should be noted that "[a]lthough ordinarily the question of whether a public entity acted in a palpably unreasonable manner is a matter for the jury, in appropriate circumstances, the issue is ripe for a court to decide on summary judgment." Polzo, 209 N.J. at 75 n.12.

The "palpably unreasonable" standard is beyond ordinary negligence. "[T]he term implies behavior that is patently unacceptable under any given circumstance." Kolitch, 100 N.J. at 493. Indeed, "for a public entity to have acted or failed to act in a manner that is palpably unreasonable, 'it must be manifest and obvious that no prudent person would approve of its course of action or inaction.'" Ibid. (quoting Polyard v. Terry, 148 N.J. Super. 202, 216 (Law Div. 1977), rev'd on other grounds, 160 N.J. Super. 497 (App. Div. 1978), aff'd o.b. 79 N.J. 547 (1979)). We have stated that "[t]he test requires consideration of what the [public entity] did in the face of all of the attendant circumstances, including, of course, the extent of the known danger and what it considered to be the need for urgency." Schwartz v. Jordan, 337 N.J. Super. 550, 555 (App. Div. 2001).

In Polzo, the Court looked at a complaint in the death of a bicyclist who had fallen on "a circular depression" on the shoulder of a county road. 209 N.J. at 56-57. Noting that the county was responsible for maintaining an extensive network of roads, including the shoulder where the accident occurred, and that there were no prior complaints about injuries at the site, as well as the fact that the shoulder was generally intended to be used for vehicular travel, the Court concluded that the county's failure to locate and fix the depression could not be considered

"palpably unreasonable." Id. at 77-78. See also Garrison v. Twp. of Middletown, 154 N.J. 282, 311-12 (1998) (concluding that "[i]n view of the Township's responsibilities for maintaining significant areas of public property," its failure to find and repair a defect in a parking lot was not "palpably unreasonable"); Carroll v. N.J. Transit, 366 N.J. Super. 380, 387-89 (App. Div. 2004) (finding no "palpably unreasonable" conduct when plaintiff did not present proof of inspection standards and there was no history of similar complaints that would suggest a need for more frequent inspections of the area).

Plaintiff asserts that Ocean City does not have a regularly scheduled sidewalk inspection program. Ocean City has not provided any evidence that it has a regular sidewalk inspection program. If Ocean City were found to have approved its demanding ordinance, an ordinance that states explicitly that its code enforcement officer is to inspect sidewalks, that it can force adjacent property owners to make repairs, and if they do not that it can make the repairs and place a lien on the adjacent property, and even jail the property owner for non-compliance, but then never had any regular inspection or maintenance program of its sidewalks at all, a reasonable jury could find that Ocean City's inaction is palpably unreasonable. If safe sidewalks are important enough to approve such a demanding ordinance, then surely they are important enough to have a regular inspection program. If the only sidewalk inspection, maintenance and repair system that Ocean City has in place is to address sidewalks only after there is a complaint made via a phone call from a pedestrian or property owner, sometimes only after an accident occurs, a reasonable jury could find such a program in palpably unreasonable.

The court therefore denies Ocean City's Motion for Summary Judgment based on its assertion that its action or inaction was not palpably unreasonable.

Argument IV: Ocean City's Ordinance does not Create a Duty

Ocean City argues it is entitled to Summary Judgment because its ordinance does not create a tort duty. The court agrees. It addressed this issue above in the first argument. The court grants Summary Judgment.

Argument V: Ocean City cannot be Liable for not enforcing its Ordinance

Ocean City argues it is entitled to Summary Judgment because a public entity is not liable for any injury caused by the public entity because it failed to enforce any law. The Court agrees Ocean City cannot be liable for failing to require the adjacent property owner to repair the sidewalk. This is a different argument as to whether or not Ocean City's actions or inactions were palpably unreasonable as to its own obligations to inspect, repair and maintain. The court will therefore grant Ocean City's Motion for Summary Judgment because it cannot be liable for failing to enforce its local ordinance that requires adjacent landowners to maintain the sidewalk.

CONCLUSION

The Court grants Ocean City's Motion for Summary Judgment on the following grounds:

1. Ocean City did not own or control the sidewalk;
2. Ocean City's Sidewalk Ordinance did not create a duty that Ocean City violated; and
3. Ocean City cannot be liable for failure to enforce its sidewalk ordinance as to the property owner.

The Court denies Ocean City's Motion for Summary Judgment on the following grounds:

1. Ocean City did not have actual or constructive notice; and

2. Ocean City's actions or inactions were not palpably unreasonable.

The Court has entered an appropriate order.

James H. Pickering Jr, J.S.C.

Date: 2/16/2021