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Plaintiff(s), SUSAN ELM vs. Defendant(s), LAURA ANN NARDI, INDIVIDUALLY AND AS EXECUTRIX FOR THE ESTATE OF GEORGE LIEB; CITY OF CAPE MAY	SUPERIOR COURT OF NEW JERSEY CAPE MAY COUNTY DOCKET NO. CPM-L-165-17 CIVIL ACTION ORDER

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

IT IS on this 29th day of March 2018, **ORDERED** that defendant City of Cape May'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 days.

J. Christopher Gibson, J.S.C.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY

CASE: **Susan Elm v. Laura Ann Nardi, Individually and as Executrix for the Estate of George Lieb; City of Cape May**

DOCKET NO.: **CPM-L-165-17**

NATURE OF APPLICATION: **DEFENDANT, THE CITY OF CAPE MAY'S MOTION FOR SUMMARY JUDGMENT**

MEMORANDUM OF DECISION ON MOTION

BACKGROUND AND NATURE OF MOTION

The Complaint in this matter was filed on April 13, 2017. Discovery will end on May 6, 2018. There are three hundred sixty (360) days of discovery. There has been one (1) extension of discovery. Neither trial nor arbitration is scheduled.

Defendant, the City of Cape May, now moves for summary judgment.

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), which governs 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); see also Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (requiring opposition to a motion for summary judgment to have "competent evidential material beyond mere speculation and fanciful arguments").

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. 4:46-2(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.

See also Brill, 142 N.J. at 529 (holding that the burden shifts to the non-movant to "come forward with evidence that creates a genuine issue as to any material fact challenged" after the movant has provided sufficient evidence for summary judgment). 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.

A motion for summary judgment is inappropriate prior to the completion of discovery. See Lederman v. Prudential Life Ins., 358 N.J. Super. 324, 337 (App. Div.), certif. denied, 188 N.J. 353 (2006); Wellington v.

Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div.), certif. denied, 177 N.J. 493 (2003); Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977) ("Ordinarily summary judgment dismissing the complaint should not be granted until the plaintiff has had a reasonable opportunity for discovery."). Also, summary judgment is inappropriate when "critical facts are peculiarly within the defendants' knowledge." Valentzas v. Colgate-Palmolive Co., 74 N.J. 189, 193 (1988), citing Martin v. Educ. Testing Serv., Inc., 179 N.J. Super. 317, 326 (Ch. Div. 1981). However, summary judgment may still be granted if, as a matter of law, further discovery will not rescue and maintain the action. The Appellate Division in Auster, 153 N.J. Super. at 56, supra, held:

> Plaintiff has an obligation to demonstrate to some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action. Here, there was no attempt by plaintiffs to avail themselves of the opportunity to engage in discovery until after the Complaint was in jeopardy of being dismissed and they have failed and continue to fail to demonstrate how further discovery might rescue it.

See also Tisby v. Camden County Corr. Facility, 448 N.J. Super. 241, 247 (App. Div. 2017) (requiring the party objecting to a motion for summary judgment as premature only if the party can "demonstrate with some particularity [that] the likelihood of further discovery will supply the missing elements of the cause of action").

However, the non-moving party must show that the nature of the discovery and its materiality are issues at hand. See Mohamed v. Iglesia Evangelica Oasis De Salvacion, 424 N.J. Super. 489, 498 (App. Div. 2012). It

is well-settled that bare conclusions in a Complaint without factual support will not defeat a motion for summary judgment. Miller v. Bank of Am. Home Loan, 439 N.J. Super. 540, 551 (App. Div. 2015), certif. denied, 221 N.J. 567 (2015); see also Triffin v. Am. Int'l Group, Inc., 372 N.J. Super. 517, 523-24 (App. Div. 2004) (holding that a party opposing summary judgment must do more than simply show that there is some "metaphysical doubt" as to the material facts).

Similarly, self-serving assertions, unsupported by documentary proof, are "insufficient to create a genuine issue of material fact." Globe Motor Co. v. Igdalev, 436 N.J. Super. 594, 603 (App. Div. 2014); Heyert v. Taddese, 431 N.J. Super. 388, 414 (App. Div. 2013); Martin v. Rutgers Cas. Ins. Co., 346 N.J. Super. 320, 323 (App. Div. 2002); Blair v. Scott Specialty Gases, 283 F.3d 595, 607 (3d Cir. 2002). Furthermore, a party may not "create" an issue of fact for trial by creating illusory or fanciful arguments or sham facts and then rely on such facts or arguments. See Shelcusky v. Garjulio, 172 N.J. 185, 201 (2002) ("Sham facts should not subject a defendant to the burden of a trial.").

MOVANT'S POSITION

Defendant, the City of Cape May ("Cape May"), respectfully requests that the Court enter summary judgment in its favor.

Cape May submits that this matter arises out of a trip and fall that occurred on May 7, 2015, at or near 1006 Washington Street, Cape May, New Jersey. Plaintiff, Susan Elm, was walking her dog on a sidewalk adjacent to a property owned by Defendant, Laura Ann Nardi ("Nardi"), individually and

as Executrix for the Estate George Lieb, when she tripped and fell. See Exhibit A, Complaint. Cape May notes that Plaintiff alleges that the sidewalk of Nardi's premises was cracked and not level, which caused Plaintiff's fall. See Exhibit B, Form A Interrogatory #2. Cape May asserts that it has no personal knowledge of Plaintiff's fall. See Exhibit C, Cape May's response to Form C Interrogatory #2.

Cape May maintains that pursuant to a local ordinance, individual property owners have an obligation to maintain, inspect, control, and repair their sidewalks of any defects. Cape May asserts that it did not become aware of Plaintiff's fall until it received a copy of the Tort Claims Notice on June 4, 2015. See Exhibit D, Cape May's response to Form C(2) Interrogatories #1-3. Cape May asserts that according to the City of Cape May Code, § 440-17, "responsibility of property owner,": "In any public street, avenue, alley and lane in the City, curbs and sidewalks shall be set or reset, laid, relaid, altered, repaired and maintained at the expense of the abutting property owner, except as hereinafter set forth." See Exhibit G, City of Cape May Code, § 440-17. Cape May adds that Nardi asserts that while she did not witness the alleged incident, the sidewalk is owned by Cape May, as it is public sidewalk. See Exhibit H, Nardi's Response to Form C(2) Interrogatory I.

Plaintiff's deposition was taken on December 13, 2017, wherein Plaintiff testified that on the date in question she was a visitor of Cape May, she was walking her dog between 9:30 and 10:00 p.m., while it was dark. See

Exhibit I, p. 35. Plaintiff tripped and fell in front of 1006 Washington Street, due to a crack in the sidewalk; after which she noticed her face was bleeding. Id. at pp. 40, 42, 46. Plaintiff was seen at Cape Regional Medical Center on May 11, 2015, and was informed that her nose was broken. Id. at pp. 50-51. Plaintiff then returned home and saw her family physician, who referred her to Dr. Maurice Singer. Id. p. 76. Plaintiff did not receive any treatment for her face, and her nose healed. Ibid. Plaintiff received electrical stimulation, manipulation, and massage for approximately nine (9) months, and her treatment stopped in March 2016. Id. p. 80. Plaintiff reported that she suffers from nosebleeds approximately once per month, and has a stuffy nose. Id. pp. 83-84. Plaintiff testified that she has treated with her family physician for her sinus issues, and he has not related her sinus problems to her fall in May 2015. Id. pp. 84-85. Plaintiff also testified that she gets neck pain when she drives long distances or bends over doing housework, and usually takes Aleve when she experiences neck pain. Id. p. 85. Plaintiff attributes her neck pain to her fall in May 2015. Id. pp. 87-88.

Cape May notes that Dr. Singer prepared a report on June 8, 2015 regarding his care of Plaintiff. Plaintiff was first seen on May 21, 2015. She complained of pain in her cervical spine and right shoulder. She attended three physical therapy sessions and was referred to a chiropractor. She then attended three chiropractic manipulations. Plaintiff was last seen by Dr. Singer on June 8, 2015, and was to follow up on an as-needed basis. Dr. Singer's x-rays of Plaintiff's thoracic and cervical spine revealed degenerative

changes, and Dr. Singer diagnosed Plaintiff with a concussion, cervical thoracic, and lumbar sprain and strain. See Exhibit K, Dr. Singer's June 8, 2015 report. On December 14, 2015, Plaintiff underwent a cervical MRI, which revealed disc protrusions at C3-4, C4-5, C5-6, and C6-7. Plaintiff last saw Dr. Haas on March 18, 2016, and then was discharged from Dr. Haas' care. See Exhibit L, Dr. Haas' March 18, 2016 Report.

Cape May first argues that it did not create a dangerous condition, and therefore it is entitled to immunity under the Tort Claims Act. Cape May argues that in order for a municipality to be liable for injuries, the condition of the property must post a substantial risk of injury. Wilson v. Jacobs, 334 N.J. Super. 640, 648 (2000). Generally, N.J.S.A. § 59:4-2 provides the conditions under which a public entity may be liable for a dangerous condition on its property: "[a] public entity is liable for injuries caused by a condition of *its* property if the plaintiff established that the property was in a dangerous condition at the time of the injury..." (emphasis in brief). Cape May asserts that the meaning behind this section is that a public entity may be held liable only for a dangerous condition of *its* property, not for a dangerous condition on the property of others. Cape May adds that the provisions of N.J.S.A. § 59:4-1(c) provide that a "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."

In Polzo v. County of Essex, the Supreme Court of New Jersey noted that N.J.S.A. § 54:9-2,

> ...recognizes the difficulties inherent in a public entity's responsibility for maintaining its vast amounts of public property. Thus it is specifically provided that when a public entity exercises or fails to exercise its discretion in determining what action should or should not be taken to protect against the dangerous condition that judgment should only be reversed where it is clear to the court that it was palpably unreasonable. (citation omitted). That decision was based on the thesis that a public entity's discretionary decisions to act or not to act in the face of competing demands should generally be free from the second guessing of a coordinate branch of Government.

Polzo v. Cty. of Essex, 209 N.J. 51, 76 (2012) (citing Harry A. Margolis and Robert Novack, *Claims against Public Entities*, 1972 Attorney General's Task Force on Sovereign Immunity comment on N.J.S.A. § 59:4-2 (Gann 2011). Cape May argues that in this matter, there is no question that Plaintiff fell in front of Co-Defendant Nardi's property, located at 1006 Washington Street. Cape May asserts that pursuant to City of Cape May Code § 440-17, Nardi has the responsibility of maintaining the sidewalk adjacent to that property. As such, Cape May argues that it is evident that it did not control or maintain the sidewalk adjacent to Nardi's property, and is entitled to summary judgment as a matter of law.

Second, Cape May argues that even if a dangerous condition existed, it had no actual notice of same. Cape May submits that as a general rule, Title 59 requires a plaintiff to show that the public entity had actual or constructive notice of an alleged dangerous condition. Cape May asserts that, as made clear in its Statement of Facts, it did not have any prior notice of any

dangerous condition. Furthermore, the control, maintenance, and repair of the sidewalk was mandated to Nardi as the owner of the adjacent property pursuant to City of Cape May Code § 440-17. Cape May asserts that in order to establish that a public entity had actual notice of a dangerous condition, the public entity must have "had actual knowledge of the existence of the condition and knew or should have known of its dangerous character." N.J.S.A. § 59:4-3(a). The history of similar incidents or complaints may serve to establish actual notice of a dangerous condition. Carroll v. N.J. Transit, 366 N.J. Super. 380, 389 (2004).

In this matter, Cape May argues that it did not control or maintain the sidewalk in question; rather, Co-Defendant Nardi was responsible for controlling and maintaining the sidewalk. Cape May adds that our courts have repeatedly held that in those instances where a public entity is no the owner of the property in question, a higher standard of actual notice is required and constructive notice will not suffice. See Debonis v. Orange Quarry Co., 233 N.J. Super. 156 (App. Div. 1989). Cape May argues that since Plaintiff cannot establish that Cape May had actual notice of any complaints, accidents, etc. concerning the sidewalk in question, Cape May is entitled to summary judgment as a matter of law.

Cape May argues third that any action or inaction on its part concerning the alleged dangerous condition was not palpably unreasonable. Cape May argues that a public entity is not liable for an injury caused by its failure to make an inspection, or by reason of making an inadequate or

negligent inspection of any property. N.J.S.A. § 59:2-6. "Palpably unreasonable" conduct implies behavior that is patently unacceptable under any circumstances, and must be so obvious that no prudent person would approve of the public entity's course of action or inaction. Holloway v. State, 125 N.J. 386, 403-04. Cape May asserts that the Tort Claims Act does not permit liability to be imposed on a public entity for negligent execution of its duties in the absence of tangible facts demonstrating the requisite actual or constructive awareness of the danger on the part of the entity. Cadmus v. Long Branch Bd. of Ed., 155 N.J. Super. 42, 47 (1997); see Gaskill v. Active Env'l Technologies, 360 N.J. Super. 42, 47 (1997); Carroll v. N.J. Transit, 366 N.J. Super. 380 (App. Div. 2004). "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..." N.J.S.A. § 59:2-6. Cape May submits that this immunity is essential in light of the potential and existing inspection activities engaged in by public entities for the general public's benefit. Further, these activities are to be encouraged, rather than discouraged, by the imposition of civil tort liability. Kenney v. Scientific, Inc., 204 N.J. Super. 228, 237 (Law Div. 1985).

Cape May argues that even if a dangerous condition existed, Cape May's alleged inaction was not palpably unreasonable. Cape May asserts that it had not notice of any alleged dangerous condition of the sidewalk, and is not liable for failure to make an inspection or for negligent inspections of any

property. Accordingly Cape May asserts that in light of the above facts, Cape May's acts or omissions cannot be considered palpably unreasonable.

Fourth, Cape May argues that as Plaintiff has not met the permanency requirements for maintaining a cause of action compensable under Title 59, Cape May is entitled to summary judgment. Cape May asserts that the Tort Claims Act, N.J.S.A. §§ 59:1-1, et seq., modified the doctrine of sovereign immunity and created limited situations in which a party may assert tort claims against a public entity. Feinberg v. State DEP, 137 N.J. 126 (1994). Cape May notes that the purpose of the Act was to re-establish the general rule of immunity of public entities from liability for injuries to others. Brooks v. Odum, 150 N.J. 395, 403 (1997).

In order to recover damages for pain and suffering against a public entity under the Act, a plaintiff must first meet the threshold of N.J.S.A. § 59:9-2(d), which provides:

> No damages shall be awarded against the public entity or public employee for pain and suffering resulting from any injury, provided however, that this limitation on recovery of damages for pain and suffering should not apply in cases of permanent loss of a bodily function, permanent disfigurement, or dismemberment..."

N.J.S.A. § 59:9-2(d). Cape May adds that a plaintiff must suffer a permanent injury or disfigurement in order to recover against a public entity. Peterson v. Edison Twp. Bd. of Ed., 137 N.J. Super. 566 (App. Div. 1975). Failure to meet this threshold bars recovery for pain and suffering, which includes damages allegedly sustained as a result of anguish, fear, anger, apprehension and

humiliation. Ayers v. Jackson Twp., 106 N.J. 557 (1987). For an injury to be considered permanent within the meaning of the Act, it must constitute an objective impairment. Thorpe v. Cohen, 258 N.J. Super. 523 (App. Div. 1992). Without an objective abnormality, there is no claim. Ibid.

Cape May argues that in Brooks v. Odum, supra, our Supreme Court concluded that in order to satisfy the requirements of N.J.S.A. § 59:9-2(d), a plaintiff must sustain a permanent loss of bodily function that is substantial. To recover for pain and suffering under the Act, the plaintiff must prove by objective medical evidence that the injury is permanent. Id. at 402-03. Furthermore, temporary injuries are not recoverable. Id. at 403. Subjective feelings of discomfort are not recoverable under the Act. Ibid. (citing Ayers v. Jackson Twp., supra). In order to cross the pain and suffering threshold under the Act, a plaintiff must satisfy a two pronged test: (1) they must show an objective, permanent injury; and (2) a permanent loss of bodily function that is substantial. Gilhooey v. County of Union, 164 N.J. 533, 541 (2000). There are a number of injuries that meet both prongs of this test if supported by medical proof: Injuries causing blindness, debilitating tremors, paralysis, and loss of taste and smell. Cape May asserts that by their very nature, these injuries are objectively permanent and implicate a substantial loss of bodily function.

Cape May adds that not every objective permanent injury resulting in a substantial loss of bodily function is recoverable, such as a completely healed fracture without any objective evidence of a permanent substantial

impairment. Cape May argues that subjective complaints of pain, coupled with a fully healed fracture, do not amount to a permanent impairment. Cape May notes that our Supreme Court held in Ponte v. Overeem, that a plaintiff who suffered an injury to his knee as the result of being rear-ended by a State transit bus, held that the injury was not a permanent and substantial loss of a bodily function as necessary under the Tort Claims Act. Id., 171 N.J. 46, 47 (2002). The Court held that the evidence did not show a limitation on range of motion, impairment of gait or restriction on ability to ambulate. Additionally, there was no such showing of permanent instability of the knee, and the plaintiff was not restricted in performing activities such as work duties or household chores. Id. at 54.

Additionally, the Appellate Division held that while a cheerleader who was injured while performing a stunt when she fell and suffered a compression fracture at T7 vertebra had suffered a permanent injury, the plaintiff had not met the pain and suffering threshold for the Tort Claims Act. Newsham v. Cumberland Regional High School, 351 N.J. Super. 186 (App. Div. 2002). The Appellate Division noted that while the plaintiff experienced some pain and discomfort, her limitations were minor, and she had not suffered a permanent loss of a bodily function that was substantial. Id. at 6. In Knowles v. Mantua Twp. Soccer Ass'n, our Supreme Court listed four precedents in classifying injuries under the Act. Id. 176 N.J. 324 (2000).

First, injuries causing blindness, debilitating tremors, paralysis and loss of taste and smell satisfy this threshold because they are objectively

permanent and implicate a substantial loss of bodily function. Id. at 332. Second, injuries that permanently render a bodily organ or limb substantially useless, but for the ability of modern medicine to supply replacement parts to mimic the natural function meet the threshold. Ibid. Third, there must be a physical manifestation of a claim that the injury is permanent and substantial. Ibid. Finally, neither the absence of pain nor a plaintiff's ability to resume some of his normal activities is dispositive of whether he is entitled to pain and suffering damages under the Act. Ibid.

Cape May argues Plaintiff cannot meet either prong of the Brooks test, because she has not suffered an objective permanent injury. Cape May notes that Plaintiff was initially seen at the emergency room where she was treated and released. Plaintiff then followed up with Dr. Singer and Dr. Haas, where she was diagnosed with sprain and strain injuries; Plaintiff never received a permanency diagnosis. Cape May argues that as reflected in Plaintiff's deposition, she has returned to all of her normal activities. See Exhibit I. Cape May asserts that Plaintiff has not suffered a permanent objective injury or disfigurement as defined by the Tort Claims Act. Furthermore, no matter how painful and debilitating, temporary injuries are not recoverable under the Act, and subjective feelings of discomfort are not recoverable under the Act.

Cape May argues that assuming *arguendo* that Plaintiff meets the first prong of the Brooks test, and establishes an objective permanent injury, Plaintiff did not suffer a permanent loss of bodily function that is substantial.

See Knowles, supra, at 332. Cape May argues that Plaintiff testified at her deposition that none of her bodily organs or limbs have been rendered substantially useless, and as such Plaintiff does not meet the requirements for maintaining a cause of action compensable under the Tort Claims Act.

Lastly, Cape May argues that summary judgment must be awarded to the moving party when there is no genuine issue of material fact, and where the moving party is entitled to judgment or order as a matter of law. R. 4:46-2. Cape May adds that once a prima facie right to summary judgment is established by the moving party, then the opposing party has the burden of demonstrating that there is competent evidential material showing that a genuine issue of material fact exists.

OPPOSITION

Plaintiff, Susan Elm, argues first that Cape May is unable to avail itself of immunity offered by the Tort Claims Act. Plaintiff submits that 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: (1) 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 (2) a public entity had actual or constructive notice of the dangerous condition with a sufficient time prior to the injury to have taken measures to protect against the dangerous

condition. Stempkowski v. Borough of Manasquan, 208 N.J. Super. 328 (1986).

Plaintiff argues that in this matter, it is undisputed that a dangerous condition existed in the form of a broken and otherwise defective sidewalk abutting 1006 Washington Street, and that this dangerous condition caused Plaintiff's injuries. Plaintiff asserts that this sidewalk is clearly a public sidewalk, and although Cape May has delegated the financial responsibility of maintenance to abutting homeowners, the sidewalk itself remains public property. Moreover, Plaintiff argues that a municipality cannot avail itself to immunity under the Tort Claims Act when it itself creates the dangerous condition.

Plaintiff asserts that her expert, Mark Werther's investigation into the sidewalk has raised numerous issues of material fact as to what parties or individuals have undertaken the installation, maintenance, and repair of the sidewalk in question. See Exhibit B, Expert Report. Plaintiff asserts that Mr. Werther points to the presence of both apparent ADA required modifications as well as caste iron utility service access caps. Plaintiff argues that Mr. Werther's report states that these alterations may have been implemented as part of a public installation and therefore suggests work undertaken by the municipality. Ibid.

Plaintiff also argues that Cape May can be shown to have requisite levels of constructive notice due to the presence of public workers such as street department workers, police and firemen. See Exhibit C, Deposition of

Joseph Picard, Cape May Designee, p. 13. Plaintiff asserts that as the sidewalk is a public walkway, Cape May cannot be required to have actual written notice of any such condition. Plaintiff submits that in Mr. Werther's report, the prolonged condition of the sidewalk "indicates a lack of concern for public safety and violation of life and safety standards." See Exhibit B. Further, the issue of whether the activity or inactivity of a municipality concerning a dangerous condition is found to be palpably unreasonable is traditionally a decision reserved for the fact finder at the expense of summary judgment. Vincitore v. N.J. Sports & Exposition Auth., 169 N.J. 119, 125 (2001) (quoting N.J.S.A. § 59:4-2). Finally, Plaintiff argues that her injuries satisfy the permanency requirements necessary to bring forth a claim against Cape May, as she still experiences neck pain, continuing sinus discomfort, and recurring nosebleeds.

Second, Plaintiff argues that summary judgment in this matter is premature as discovery has not been completed. Plaintiff asserts that a trial court should not grant summary judgment when the matter is not ripe for such consideration, such as when discovery has not yet been completed. Salomon v. Eli Lilly & Co., 98 N.J. 58 (1984). The court should afford "every litigant who has a bona fide cause of action or defense the opportunity for full exposure of his case." Oslacky v. Borough of River Edge, 319 N.J. Super. 79, 87 (App. Div. 1999) (quoting Velantzas v. Colgate-Palmolive Co. Inc., 109 N.J. 189, 193 (1988)). Plaintiff argues that the discovery period in this matter has been extended by consent until May 6, 2018. Thus, awarding summary

judgment to Cape May would be improper, and would rob Plaintiff of her ability to fully investigate and set forth factual averments necessary for her claims. Plaintiff submits that her expert specifically stated that requests for records of installation and permits from the Department of Streets is outstanding. See Exhibit B. Plaintiff asserts that this discovery is necessary for her expert to identify the full extent of the work history of the sidewalk in question, and to complete his report.

DISCUSSION

R. 4:46-2(c), which governs 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); see also Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (requiring opposition to a motion for summary judgment to have "competent evidential material beyond mere speculation and fanciful arguments").

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. 4:46-2(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.

See also Brill, 142 N.J. at 529 (holding that the burden shifts to the non-movant to "come forward with evidence that creates a genuine issue as to any material fact challenged" after the movant has provided sufficient evidence for summary judgment). 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.

A motion for summary judgment is inappropriate prior to the completion of discovery. See Lederman v. Prudential Life Ins., 358 N.J. Super. 324, 337 (App. Div.), certif. denied, 188 N.J. 353 (2006); Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div.), certif. denied, 177 N.J. 493 (2003); Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977) ("Ordinarily summary judgment dismissing the complaint should not be granted until the plaintiff has had a reasonable opportunity for discovery."). Also, summary judgment is inappropriate when "critical facts are peculiarly within the defendants' knowledge." Valentzas v. Colgate-Palmolive Co., 74 N.J. 189, 193 (1988), citing Martin v. Educ. Testing Serv., Inc., 179 N.J. Super. 317, 326 (Ch. Div. 1981). However, summary judgment may still be granted if, as a matter of law, further discovery will not rescue and maintain the action. The Appellate Division in Auster, 153 N.J. Super. at 56, supra, held:

> Plaintiff has an obligation to demonstrate to some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action. Here, there was no

> attempt by plaintiffs to avail themselves of the opportunity to engage in discovery until after the Complaint was in jeopardy of being dismissed and they have failed and continue to fail to demonstrate how further discovery might rescue it.

See also Tisby v. Camden County Corr. Facility, 448 N.J. Super. 241, 247 (App. Div. 2017) (requiring the party objecting to a motion for summary judgment as premature only if the party can "demonstrate with some particularity [that] the likelihood of further discovery will supply the missing elements of the cause of action").

However, the non-moving party must show that the nature of the discovery and its materiality are issues at hand. See Mohamed v. Iglesia Evangelica Oasis De Salvacion, 424 N.J. Super. 489, 498 (App. Div. 2012). It is well-settled that bare conclusions in a Complaint without factual support will not defeat a motion for summary judgment. Miller v. Bank of Am. Home Loan, 439 N.J. Super. 540, 551 (App. Div. 2015), certif. denied, 221 N.J. 567 (2015); see also Triffin v. Am. Int'l Group, Inc., 372 N.J. Super. 517, 523-24 (App. Div. 2004) (holding that a party opposing summary judgment must do more than simply show that there is some "metaphysical doubt" as to the material facts).

Similarly, self-serving assertions, unsupported by documentary proof, are "insufficient to create a genuine issue of material fact." Globe Motor Co. v. Igdalev, 436 N.J. Super. 594, 603 (App. Div. 2014); Heyert v. Taddese, 431 N.J. Super. 388, 414 (App. Div. 2013); Martin v. Rutgers Cas. Ins. Co., 346 N.J. Super. 320, 323 (App. Div. 2002); Blair v. Scott Specialty Gases, 283 F.3d

595, 607 (3d Cir. 2002). Furthermore, a party may not "create" an issue of fact for trial by creating illusory or fanciful arguments or sham facts and then rely on such facts or arguments. See Shelcusky v. Garjulio, 172 N.J. 185, 201 (2002) ("Sham facts should not subject a defendant to the burden of a trial.").

The Tort Claims Act ("TCA") was passed in response to the Supreme Court of New Jersey's abrogation of the common-law doctrine of sovereign immunity. Polzo v. Cty. of Essex, 209 N.J. 51, 65 (2012); see Willis v. Dept't of Conservation & Econ. Dev., 55 N.J. 534, 540-41 (1970). The Legislature recognized that "the area within which government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done." Ibid.; N.J.S.A. § 59:1-2. Accordingly, the Legislature confined the scope of a public entity's liability for negligence to the prescriptions in the TCA. Ibid. A public entity is only liable for an injury arising "out of an act or omission of the public entity or a public employee or any other person" as pursuant to the TCA. N.J.S.A. § 59:2-1(a). In other words, a public entity is "immune from tort liability unless there is a specific statutory provision" that makes it answerable for a negligent act or omission. Ibid.; Kahrar v. Borough of Wallington, 171 N.J. 3, 10 (2002) (citing Collins v. Union Cnty. Jail, 150 N.J. 407, 413 (1997)).

Pursuant to the Tort Claims Act, N.J.S.A. § 54:4-1 provides that "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." N.J.S.A. § 59:4-1(c). N.J.S.A. § 59:4-2, addresses a dangerous condition of public property, and provides:

> 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.

N.J.S.A. § 59:4-2; Polzo, 209 N.J. at 67. The Court explained that a public entity is on actual notice when it "should have known of [the defect's] dangerous character." Ibid. And when a dangerous condition is "obvious" and has existed "for such a period of time" that the public entity should have discovered it through the exercise of reasonable care, the public entity is on constructive notice. Id. at 67-68; N.J.S.A. § 59:4-3(b). Whether a public entity is on actual or constructive notice of a dangerous condition is measured by the standards set forth in N.J.S.A. § 59:4-3(b) and (c), not whether a "routine inspection program" would have discovered the condition. Id. at 68.

In order for a plaintiff to recover under the TCA, the plaintiff must prove that:

> (1) a dangerous condition existed on the entity's property at the time of the injury, (2) the dangerous condition proximately caused the injury, (3) the dangerous condition created a foreseeable risk of the kind of injury incurred, (4) the public entity had actual or constructive notice of the dangerous condition which caused plaintiff's injury in sufficient time prior to the injury to correct it, and (5) the action or inaction of the public entity with respect to its effort to protect against the condition was palpably unreasonable. Thompson v. Newark Housing Authority, 108 N.J. 525, 530 (1987).

De Bonis v. Orange Quarry Co., 233 N.J. Super. 156, 166 (App. Div. 1989). "'Dangerous condition' means a condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used." Ibid.; N.J.S.A. § 59:4-1(a).

Furthermore, N.J.S.A. § 59:2-6 "immunizes a public entity for the failure to inspect or the negligent inspection of private property. It is only with respect to public property that the Tort Claims Act evinces any legislative intention that there be imposition of liability for omissions in inspection (or for negligent inspection)—and then only upon a showing of palpable unreasonableness in the governmental unit's decision 'to act or not to act in the face of competing demands.'" Cadmus v. Long Branch Bd. of Educ., 155 N.J. Super. 42, 48 (Super. Ct. 1977) (citing Comment to N.J.S.A. §

59:4-2). Moreover, Cape May City Code § 440-17, Responsibility of property owner, provides that:

> A. In any public street, avenue, alley and lane in the City, curbs and sidewalks shall be set or reset, laid, relaid, altered, repaired and maintained *at the expense of the abutting property owner*, except as hereinafter set forth.

Cape May City Code, § 440-17 (emphasis added).

Plaintiff's claim against Cape May fails for a multitude of reasons. First, Plaintiff cannot prove that Cape May, a public entity, controlled the sidewalk in front of Co-Defendant Nardi's property, located at 1006 Washington Street, as provided by Section 59:4-1(c). Pursuant to the Cape May City Code, § 440-17, all public sidewalks in Cape May shall be repaired and maintained at the expense of the abutting property owner. Thus, it appears that while the sidewalk where Plaintiff sustained her injuries may be a public sidewalk, pursuant to Cape May's city ordinances, Co-Defendant Nardi actually controlled the sidewalk, and was responsible for maintaining it.

Furthermore, assuming *arguendo* that Cape May controlled the subject sidewalk for the purposes of this suit, Plaintiff failed to establish that Cape May was on constructive notice of the defect in the sidewalk due to the "presence of public workers such as street department workers, police, and firemen." Co-Defendant Nardi's property is in a residential neighborhood, and, thus, it is unlikely that police, firemen, or street workers were in the vicinity. Plaintiff also failed to allege in her opposition that these public

workers noticed that the sidewalk presented a dangerous condition such that they "should have known" of its dangerous character, or that it was "obvious" and had existed "for such a period of time" that the Cape May should have discovered it through the exercise of reasonable care. See N.J.S.A. §§ 59:4-3(a) and (b).

Plaintiff's injuries also occurred at night, at approximately 9:30 to 10:00 p.m., and Plaintiff testified that it was dark outside. See Exhibit I, 37:2-8. Moreover, Plaintiff admitted that she was visiting Cape May, and thus was most likely unfamiliar with the area. Id. 35:6-12. Additionally, Plaintiff admitted that she was not carrying a flashlight, nor were there any streetlights to illuminate the pavement. Id. 43:20-23; 43:24-45:6. Plaintiff also cannot prove that Cape May's action or inaction with respect to the sidewalk were "palpably unreasonable." See N.J.S.A. § 59:2-6. "Palpably unreasonable" conduct implies behavior that is patently unacceptable under any circumstances and must be so obvious that no prudent person would approve of the entity's course of action or inaction. See Holloway v. State, 125 N.J. 386, 403-04. Here, Cape May's inaction regarding the defects in the sidewalk abutting 1006 Washington Street was not so patently unacceptable or so obvious that no prudent person would approve of the inaction. Therefore, Plaintiff cannot establish that Cape May controlled a dangerous condition, that Cape May had constructive or actual notice of same, or that Cape May's inaction was "palpably unreasonable."

Even if Plaintiff could establish a claim under the TCA, Plaintiff does not meet the permanency requirements under N.J.S.A. § 59:9-2(d). That section provides that

> No damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury; provided, however, that this limitation on the recovery of damages for pain and suffering *shall not apply in cases of permanent loss of a bodily function*, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of $3,600.00.

N.J.S.A. § 59:9-2(d) (emphasis added). A plaintiff must prove (1) an objective permanent injury, and (2) a permanent loss of a bodily function that is substantial. Gilhooley v. Cty. of Union, 164 N.J. 533, 541 (2000). A plaintiff must prove by objective medical evidence that an injury is permanent to recover for pain and suffering under the TCA. "Temporary injuries, no matter how painful and debilitating, are not recoverable. Further, a plaintiff may not recover under the Tort Claims Act for mere 'subjective feelings of discomfort.'" Brooks v. Odom, 150 N.J. 395, 402-03 (1997); Ayers v. Township of Jackson, 106 N.J. 557, 571 (1987). "To be considered permanent within the meaning of the [TCA], an injury must constitute an 'objective' impairment, such as a fracture." Id. at 403.

Additionally, for an injury to be considered "permanent" within the meaning of the N.J.S.A. § 59:9-2(d), such injury must constitute an "*objective* impairment such as a fracture." Thorpe v. Cohen, 258 N.J. Super. 523, 527 (App. Div. 1992) (citing LaBarrie v. Housing Auth. of Jersey City, 143 N.J.

Super. 61, 64 (Law Div.1976)). Our Supreme Court identified a number of injuries that, if supported by medical proof, obviously meet both prongs of the standard: "injuries causing blindness, disabling tremors, paralysis and loss of taste and smell." Gilhooley, 164 N.J. at 541 (citing Brooks at 403). "Indeed such injuries, by their very nature, are objectively permanent and implicate the substantial loss of a bodily function (e.g., sight, smell, taste, and muscle control). Ibid.; see also, Hammer v. Township of Livingston, 318 N.J. Super. 298, 305 (App. Div. 1999) (finding that subjective complaints of pain coupled with fully healed fracture did not amount to permanent impairment).

Plaintiff's only injury from her fall was a broken nose, for which she did not receive a diagnosis until days after her fall, on May 11, 2015. She was seen by emergency room technicians where she received a CT scan and x-rays, which revealed no injuries. She followed up with two specialists, who diagnosed her were sprain and strain injuries. Plaintiff further testified at her deposition that she has returned to all of her normal activities. Furthermore, her injuries have healed, and thus cannot be permanent. Assuming, *arguendo*, that Plaintiff's injuries were permanent, Plaintiff has failed to establish that her injuries resulted in a substantial loss of bodily function. Although Plaintiff testified that she has nosebleeds and neck aches, these injuries do not result in a function," based on objective medical evidence established that she has an injury "causing lingeri lessened ability to perform certain tasks because of th

not suffice because she cannot recover for mere 'subjective feelings of discomfort.'" Knowles v. Mantua Twp. Soccer Ass'n, 176 N.J. 324, 332 (2003) (citing Gilhooley, supra, at 541).

Plaintiff is unable to establish a claim under the TCA, as she cannot establish that Cape May controlled the dangerous condition, that Cape May had actual or constructive notice of the dangerous condition, or that Cape May's action or inaction with respect to the dangerous condition was "palpably unreasonable." Furthermore, Plaintiff cannot establish an objective permanent injury, or a permanent loss of bodily function that is substantial under Brooks. As such, viewing the facts in the light most favorable to Plaintiff, Cape May has established that there is no genuine issue of material fact such that judgment should be awarded as a matter of law.

Moreover, even though discovery has not ended in this matter, summary judgment may still be granted if, as a matter of law, further discovery will not rescue and maintain the action. The Appellate Division in Auster, 153 N.J. Super. at 56, supra, held:

> Plaintiff has an obligation to demonstrate to some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action. Here, there was no attempt by plaintiffs to avail themselves of the opportunity to engage in discovery until after the Complaint was in jeopardy of being dismissed and they have failed and continue to fail to demonstrate how further discovery might rescue it.

See also Tisby v. Camden County Corr. Facility, 448 N.J. Super. 241, 247 (App. Div. 2017) (requiring the party objecting to a motion for summary judgment as premature only if the party can "demonstrate with some

particularity [that] the likelihood of further discovery will supply the missing elements of the cause of action"). While Plaintiff argues that there is still outstanding discovery, specifically requests for records of installation and permits from the Department of Streets, this discovery would not rescue Plaintiff's claim, as she is unable to establish damages under the Brooks test, and therefore would not be able to establish a prima facie case. See Plaintiff's Exhibit B.

Therefore, there is no genuine issue of material fact, and judgment in Cape May's favor is awarded as a matter of law.

CONCLUSION

The motion is opposed.

Defendant, the City of Cape May's Motion for Summary Judgment is granted.

Judgment is hereby awarded in favor of Defendant, the City of Cape May; Plaintiff's claims against it are hereby dismissed with prejudice.

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

March 29, 2018

J. Christopher Gibson, J.S.C.