SUPERIOR COURT OF NEW JERSEY
CAPE MAY-LAW DIVISION

Toni Ramsden	:	
	:	**Civil Action**
Plaintiff	:	
v.	:	**DOCKET NO.: CPM L 105-16**
	:	
Lower Township et al.	:	**Order**
	:	
Defendant	:	

THIS MATTER having come before the Court on the motion of Defendant, for summary judgment; and the Court having heard argument and considered the papers submitted; and for good cause shown;

IT IS ON THIS 22nd day of August, 2017 ORDERED that:

1. The motion of Defendant, the Lower Township, for summary judgment pursuant to R. 4:46-2(c) is granted.
2. The Complaint is hereby dismissed against this Defendant with prejudice.
3. FURTHER ORDERED that a copy of this Order be served on all parties within five (5) days.

J. Christopher Gibson, J.S.C.

Memorandum of Decision is attached.

12,964

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY

TO: Birchmeier & Powell, LLC
Erin R. Thompson, Esquire
1891 State Highway 50
PO Box 582
Tuckahoe, NJ 08250

CASE: Toni Ramsden v. Lower Township et al.

DOCKET NO.: CPM-L-105-16

NATURE OF APPLICATION: DEFENDANT'S LOWER TOWNSHIP'S MOTION FOR SUMMARY JUDGMENT

MEMORANDUM OF DECISION ON MOTION

BACKGROUND AND NATURE OF MOTION

The Complaint in this matter was filed on March 11, 2016. The discovery end date is September 5, 2017. There were two previous extensions of discovery for a total of 449 days of discover in this matter. Arbitration is set for September 21, 2017, which was not previously adjourned. Defendant, Lower Township, 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).

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.

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 fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540.

Regarding liability for a public entity under the Tort Claims Act, N.J.S.A. § 59:1-1 et seq., a public entity may be liable for a dangerous condition on public property if the public entity had actual or constructive notice [as defined in § 59:4-3] of the dangerous condition and sufficient time prior to the injury to have taken measures to protect against the dangerous condition. N.J.S.A. § 59:4-2(b). See also Posey v. Bordentown Sewerage Auth., 171 N.J. 172, 188 (2002) (outlining the elements of a claim under § 59:4-2).

A dangerous condition is one that creates a substantial risk of injury when the property is used in a reasonably foreseeable manner. § 59:4-1(a). A

public entity will not be liable unless its action (or inaction) to take measures was palpably unreasonable. § 59:4-2. Palpably unreasonable conduct 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." Holloway v. State, 125 N.J. 386, 403-04 (1991) (internal quotes omitted). Given this high threshold, immunity for public entities under the Tort Claims Act is the rule, and liability under the Act is the exception. Fluehr v. City of Cape May, 159 N.J. 532, 539 (1999). See also N.J.S.A. § 59:2-1.

MOVANT'S POSITION

Defendant, Lower Township, requests that this Court enter an Order for summary judgment, dismissing all claims against it with prejudice pursuant to R. 4:46-2(c).

The underlying matter involves a trip and fall by Plaintiff, Toni Ramsden, in Lower Township, New Jersey on August 29, 2014. Plaintiff provided this account in response to Defendant's Form A Interrogatories:

> Plaintiff was walking near the exit to the beach when she tripped and fell on a large piece of concrete/cement buried in the sand. She was wearing sneakers. There was not adequate lighting on the beach. The coloration of the sand and the concrete made it very difficult to discern the concrete from the sand thus creating a tripping hazard and dangerous condition.

Exhibit A, paragraph 2, attached to Defendant's Brief. Photographs were taken of the subject area, which contain an annotated circling of the sand/concrete area. See Exhibit C attached to Defendant's Brief. The area

where Plaintiff tripped was owned in part by co-Defendant, Mary Pacher. See Exhibit G attached to Defendant's Brief (representing the August 6, 1975 Deed).

Plaintiff submitted a Tort Claims Notice on November 13, 2014. See Exhibit D attached to Defendant's Brief. In establishing her claim under the Tort Claims Act, Plaintiff submitted the following:

> The factors which make [the concrete area] a dangerous condition, include but are not limited to: (1) concrete was buried in the sand; (2) it was partially not visible and/or difficult to see; (3) it is easy to trip over; (4) it was in a walkway area; (5) there was inadequate lighting; and (6) there were no warnings.

Exhibit F, paragraph 7, attached to Defendant's Brief (representing responses to Supplemental Interrogatories. Plaintiff asserted that it is presumed that Defendant dumped the concrete, making them have actual knowledge, or at the very least, Defendant would have constructive knowledge because a "simple inspection" would have resulted in identifying the existence of the dangerous condition. Exhibit F, paragraph 8. Moreover, Plaintiff maintains that the dumping of concrete in this area is palpably unreasonable. Exhibit F, paragraph 9.

Defendant first argues that based on Plaintiff's account of the subject area, Plaintiff has not shown a dangerous condition as required by N.J.S.A. § 59:4-2(b).

Second, Defendant asserts that Plaintiff has not shown that Defendant knew of the alleged dangerous condition, pursuant to N.J.S.A. § 59:4-3. Defendant did not know of a defective condition on the beach ingress/egress.

Defendant further asserts that it does not know exactly where Plaintiff fell at all. Defendant argues that Plaintiff's position is speculative, as she assumes she tripped on concrete while also stating that she did not know if it was hard sand or concrete.

Third, Defendant asserts that Plaintiff has not shown that Lower Township's failure to fix the alleged defective condition was palpably unreasonable. Any allegation that Defendant should have performed an inspection of the premises would not result in liability pursuant to N.J.S.A. § 59:2-6.

Accordingly, Defendant submits that there is no genuine issue of material fact, and therefore summary judgment should be granted as a matter of law.

OPPOSITION

Plaintiff notes that her friend, Donna, went back to the beach area to investigate where Plaintiff fell. Donna informed her that the subject area "was really hard, like cement sand that was all colored – it was the color of the sand. It was rock hard." See Exhibit B, 53:1-11, attached to Defendant's Brief. As a result of the fall, Plaintiff has sustained damages and emotional hardship. See Exhibits E & F attached to Plaintiff's Brief.

While it is undisputed that the subject area is owned by co-Defendant Pacher, Defendant Township was doing work in that area at the direction of the Department of Environmental Protection. Defendant had been "illegally dumping concrete and construction debris on the beach unbeknownst to [co-

Defendant Pacher]. Defendant Township of Lower was cited by the NJDEP for such an activity ... ." Exhibit B, paragraph 5, attached to Plaintiff's Opposition Brief (representing co-Defendant Pacher's responses to Interrogatories); see also Exhibit C attached to Plaintiff's Opposition Brief (representing a November 21, 2008 letter by Defendant indicating that the NJDEP has deemed the beachfront in question has been cleaned); Exhibit D attached to Plaintiff's Opposition Brief (representing subpoenaed NJDEP documents regarding waste on the subject beach area).

Contrary to Defendant's assertions, Plaintiff is able to attribute the fall to the dangerous condition of the remaining concrete in the beach walkway area. Plaintiff indicated the exact area by circling the area in the photographs where she fell. See Exhibit A attached to Plaintiff's Opposition Brief. Plaintiff maintains that hard concrete buried in the sandy area would indeed result in substantial injury, and therefore the concrete constitutes a dangerous condition.

As to notice, Plaintiff asserts that NJDEP records clearly show that Defendant was aware of the buried concrete. Plaintiff submits that there is no genuine issue of material fact that at least some of the buried concrete was left on the beach by Lower Township.

As to palpable unreasonableness, Plaintiff notes that determining whether Defendant's conduct is palpably unreasonable is a question of fact for the jury. See Vincitore v. Sports & Expo Auth., 169 N.J. 119, 130 (2001). Plaintiff seeks to call all Township representative who had knowledge of the

NJDEP investigation. Plaintiff submits that the characterization of performing an inadequate clean-up of debris that Defendant spawned should at least be a question for the jury to decide.

Finally, Plaintiff asserts that the instant summary judgment motion should be denied because discovery has not yet been completed at the time of the filing of the instant application.

REPLY

Defendant rejects the allegation that it was illegally dumping concrete on the private beach owned by co-Defendant Mary Pacher. Other individuals were responsible for the dumping, and Defendant removed and cleaned up the berm on one portion of the road. On March 11, 2009, Michael Hansen of the NJDEP met with a Mr. Foley of Land Use Enforcement. They did not see any problems with the sand dune reconstruction and requested that vegetation be planted there. See Defendant's Reply, Exhibit C. Overall, Defendant submits that there is no actual evidence of illegal dumping.

SUR-REPLY

Since the time of the filing of the instant motion, more discovery had been conducted. Plaintiff supplies a supplemental brief encompassing this additional discovery.

First, there originally was an issue of who owned the subject area of the beach. According to Lower Township Public Works Superintendant Gary Douglass, the dunes/access way on the beach is owned by Lower Township. See Exhibit A, pp. 9-11, attached to Plaintiff's Sur-Reply (testifying that the

access way was a "paper street," separate and apart from the privately owned beachfronts). Plaintiff thus argues that Defendant was at least on constructive notice of the condition, satisfying N.J.S.A. § 59:4-2. According to Mr. Douglass, Defendant did not regularly inspect or maintain that area. Exhibit A, pp. 13-15.

DISCUSSION

Defendant is entitled to summary judgment as to all claims against it pursuant to R. 4:46-2(c).

The Court finds the following facts as undisputed: the underlying matter involves a trip and fall by Plaintiff in Lower Township, New Jersey on August 29, 2014. Plaintiff provided this account in response to Defendant's Form A Interrogatories:

> Plaintiff was walking near the exit to the beach when she tripped and fell on a large piece of concrete/cement buried in the sand. She was wearing sneakers. There was not adequate lighting on the beach. The coloration of the sand and the concrete made it very difficult to discern the concrete from the sand thus creating a tripping hazard and dangerous condition.

Exhibit A, paragraph 2, attached to Defendant's Brief.[1] Photographs were taken of the subject area, which contain an annotated circling of the sand/concrete area.[2] See Exhibit C attached to Defendant's Brief. The area where Plaintiff tripped was owned in part by co-Defendant, Mary Pacher. See

[1] There is an issue of fact as to who owns the subject area. While beachfronts in that area are privately owned, the public access ways to the beach are owned by Defendant. See Exhibit A, pp. 9-11, attached to Plaintiff's Sur-Reply (testifying that the access way was a "paper street," separate and apart from the privately owned beachfronts).

[2] There is a dispute as to whether the fall was due to sand or concrete. When viewing the record in the light most favorable to the non-moving party, the Court will proceed in its analysis presuming the fact that Plaintiff tripped on a portion of concrete.

Exhibit G attached to Defendant's Brief (representing the August 6, 1975 Deed).

Plaintiff submitted a Tort Claims Notice on November 13, 2014. See Exhibit D attached to Defendant's Brief. In establishing her claim under the Tort Claims Act, Plaintiff submitted the following:

> The factors which make [the concrete area] a dangerous condition, include but are not limited to: (1) concrete was buried in the sand; (2) it was partially not visible and/or difficult to see; (3) it is easy to trip over; (4) it was in a walkway area; (5) there was inadequate lighting; and (6) there were no warnings.

Exhibit F, paragraph 7, attached to Defendant's Brief (representing responses to Supplemental Interrogatories. Plaintiff asserted that it is presumed that Defendant dumped the concrete, making them have actual knowledge, or at the very least, Defendant would have constructive knowledge because a "simple inspection" would have resulted in identifying the existence of the dangerous condition. Exhibit F, paragraph 8. Moreover, Plaintiff maintains that the dumping of concrete in this area is palpably unreasonable. Exhibit F, paragraph 9.

Defendant Township was doing work in that area at the direction of the Department of Environmental Protection sometime in 2008. Defendant had been "illegally dumping concrete and construction debris on the beach unbeknownst to [co-Defendant Pacher]. Defendant Township of Lower was cited by the NJDEP for such an activity ... ." Exhibit B, paragraph 5, attached to Plaintiff's Opposition Brief (representing co-Defendant Pacher's responses to Interrogatories); see also Exhibit C attached to Plaintiff's

Opposition Brief (representing a November 21, 2008 letter by Defendant indicating that the NJDEP has deemed the beachfront in question has been cleaned); Exhibit D attached to Plaintiff's Opposition Brief (representing subpoenaed NJDEP documents regarding waste on the subject beach area).

Normally, a public entity may be liable for a dangerous condition on public property if the public entity had actual or constructive notice [as defined in § 59:4-3] of the dangerous condition and sufficient time prior to the injury to have taken measures to protect against the dangerous condition. N.J.S.A. § 59:4-2(b). See also Posey v. Bordentown Sewerage Auth., 171 N.J. 172, 188 (2002) (outlining the elements of a claim under § 59:4-2). A dangerous condition is one that creates a substantial risk of injury when the property is used in a reasonably foreseeable manner. § 59:4-1(a). A public entity will not be liable unless its action (or inaction) to take measures was palpably unreasonable. § 59:4-2. Palpably unreasonable conduct 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." Holloway v. State, 125 N.J. 386, 403-04 (1991) (internal quotes omitted). Determining palpable unreasonableness is a question of fact for the jury. See Vincitore v. Sports & Exposition Auth., 169 N.J. 119, 130 (2001).

As set forth more fully below, the November 21, 2008 letter demonstrates that Defendant would have no further reason to believe that a dangerous condition remained at the subject area. Therefore, Plaintiff cannot

establish notice necessary for a claim under the Tort Claims Act as a matter of law.

A. The Concrete on the Beach Walkway is a Dangerous Condition

The Court finds that the portion of the concrete upon which Plaintiff tripped and sustained injuries constitutes a dangerous condition pursuant to N.J.S.A. § 59:4-2. Pursuant to this statute:

> A public entity is liable for an 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 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 § 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

When viewing the record in the light most favorable to Plaintiff, a rational factfinder could determine that concrete buried in a beach walkway would create a reasonably foreseeable risk of personal injury by tripping. Therefore, summary judgment is denied as to this element of Plaintiff's claims.

B. Plaintiff has not Shown Actual or Constructive Notice that a Dangerous Condition Remained at the Beach Area after Clean-Up

Defendant had notice of the dumped concrete in the subject area due to being the entity that created the condition; however, Defendant was never

made aware that such condition persisted after the New Jersey Department of Environmental Protection's determination that the debris was cleaned up and the issue rectified. Plaintiff thus fails to establish that Defendant had actual or constructive knowledge of the dangerous condition at the time of Plaintiff tripping.

In Plaintiff's Sur-Reply, which was not previously permitted by this Court as required by R. 1:6-3(a), Plaintiff argues that "it is undisputed" that the area in question is owned by Defendant. If Defendant owned the area in question, Plaintiff submits that the Court need not engage in a notice analysis. Plaintiff provides no legal support for this proposition. Rather, notice for a public entity is statutorily defined. For liability due to a dangerous condition pursuant to N.J.S.A. § 59:4-2(b), actual or constructive notice must be established pursuant to § 59:4-3. The statute defines these terms as follows:

> a. A public entity shall be deemed to have actual notice of a dangerous condition within the meaning of [§ 59:4-2(b)] 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 [§ 59:4-2(b)] 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.

Addressing § 59:4-3(b) first, no rational factfinder would be able to find that the concrete buried in the sand would be a condition "of such an obvious

nature" that Defendant should have discovered. Indeed, Plaintiff states in her response to Defendants' Supplemental Interrogatory No. 7, in pertinent part:

> The coloration of the sand and the concrete made it difficult to discern the concrete from the sand thus creating a tripping hazard and dangerous condition. The factors which make this a dangerous condition, include but are not limited to: (1) concrete was buried in the sand; (2) it was partially not visible and/or difficult to see; (3) ... .

Exhibit F attached to Defendant's Brief.

Plaintiff argues, "[A] simple inspection of the beach would have resulted in the identification and existence of the dangerous condition." Exhibit F, No. 8. While it is true that N.J.S.A. § 59:2-6 does not protect a public entity from liability under § 59:4-2,[3] the Court finds that no rational factfinder could find that a "simple inspection" would have resulted in the discovery of the dangerous condition to satisfy notice under § 59:4-3(b). When giving Plaintiff all favorable inferences that the dangerous condition was "buried in the sand" and "was partially not visible and/or difficult to see," there can be no genuine issue of material fact that a "simple inspection" of the entire Lower Township portion of the Wildwood beach would result in the discovery of such a defect. Plaintiff has not established that Defendant

[3] N.J.S.A. § 59:2-6 provides:

> 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; provided, however, that nothing in this section shall exonerate a public entity from liability for negligence during the course of, but outside the scope of, any inspection conducted by it, nor shall this section exonerate a public entity from liability for failure to protect against a dangerous condition as provided in chapter 4.

should be endowed with the obligation to regularly inspect every foot of the beach that it owns for buried defects, or else avail itself to incur liability under the Tort Claims Act. Therefore, notice under § 59:4-3(b) fails.

For actual knowledge under § 59:4-3(a), Plaintiff argues that Defendant created the dangerous condition by intentionally dumping concrete in the area, resulting in NJDEP intervention in 2008. See Exhibit D attached to Plaintiff's Opposition Brief (representing a NJDEP incident report of "construction debris" in the subject area). Plaintiff also provides a November 21, 2008 letter by Defendant which also indicates their knowledge of the dumping of concrete. See Exhibit C attached to Plaintiff's Opposition Brief. While the letter indicates knowledge that a potentially dangerous condition existed prior to the cleaning up, it indicates that area was, in fact, cleaned up, stating specifically, in pertinent part:

> I am writing to inform you that the Township has **in fact cleaned up the beachfront on Wildwood Avenue** and the Bay that is owned by the Township. We have been in touch with New Jersey Department of Environmental Protection. **They have reviewed our work and notified us that the beach is clean.**

Id. (emphasis added).

Based on this letter, upon which Plaintiff directly relies, there is no indication that Defendant would have any actual knowledge of a dangerous condition existing after the cleanup. This is supported by the facts submitted in Defendant's Reply Brief, which shows that on March 11, 2009, NJDEP and land use representatives concluded that the subject area was cleaned up, and

the sand dune reconstruction was complete. See Defendant's Reply, Exhibit C. Defendant's lack of knowledge of a lingering dangerous condition is supported by NJDEP's review of the work and confirmed that the beach is clean. Therefore, no actual knowledge of the dangerous condition is established as to the subject lingering dangerous condition when there was no incident involving the concrete area for nearly six (6) years between the November 21, 2008 letter and the subject August 29, 2014 incident. Where no other indication that Defendant knew of the dangerous condition exists, there is no genuine issue of material fact that Defendant was aware of the dangerous condition. Therefore, summary judgment is granted due to Plaintiff's failure to establish notice pursuant to N.J.S.A. § 59:4-3.

C. Defendant's Conduct in Not Inspecting the Beach Area was not Palpably Unreasonable

Even when viewing the record in the light most favorable to Plaintiff, no rational factfinder would be able to determine that Defendant's failure to inspect the entirety of its beaches for buried tripping conditions was palpably unreasonable.

Palpably unreasonable conduct 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." Holloway v. State, 125 N.J. 386, 403-04 (1991) (internal quotes omitted). Courts have found a defendant's conduct to be palpably unreasonable "when faced with clearly irresponsible and inadequate

measures taken by municipalities confronting serious dangers on public property." Fine v. City of Margate, 48 F. Supp. 3d 772, 783 (D.N.J. 2014). Determining palpable unreasonableness is a question for the jury. See Vincitore v. Sports & Exposition Auth., 169 N.J. 119, 130 (2001).

As stated above, Plaintiff has not shown that it was palpably unreasonable for Defendant not to inspect buried conditions of its beaches. Such circumstances are contrasted with findings of palpably unreasonableness of Vincitore, 169 N.J. at 130 (for failing to place railroad crossing guards for traffic despite crossing train traffic) and Schwartz v. Jordan, 337 N.J. Super. 550, 563 (App. Div. 2001) (failing to adequately illuminate a designated cross-walk for pedestrians). Overall, the Court notes that immunity is the rule under the Tort Claims Act – liability is the exception. Fluehr v. City of Cape May, 159 N.J. 532, 539 (1999). See also N.J.S.A. § 59:2-1. Therefore, there is no genuine issue of material fact that Plaintiff has not established palpable unreasonableness.

CONCLUSION

The motion is opposed.

The motion of Defendant, the Lower Township, for summary judgment pursuant to R. 4:46-2(c) is granted. The Complaint is hereby dismissed against this Defendant with prejudice.

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

August 22, 2017

J. Christopher Gibson, J.S.C.