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Plaintiff(s), ELIZABETH GLANZMANN vs. Defendant(s), CITY OF WILDWOOD and STATE OF NEW JERSEY, DEPARTMENT OF TREASURY, BUREAU OF RISK MANAGEMENT and CAPE MAY COUNTY and CHRISTOPHER H. WOOD, CITY CLERK OF WILDWOOD	SUPERIOR COURT OF NEW JERSEY LAW DIVISION CAPE MAY COUNTY DOCKET NO. CPM-L-461-15 CIVIL ACTION ORDER

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

IT IS on this 17th day of January 2017, **ORDERED** that defendant City of Wildwood's Motion For Summary judgment is **GRANTED** dismissing any and all claims against it with prejudice.

IT IS FURTHER ORDERED that a copy of this Order be served upon all parties within seven 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NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS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

TO: **Erin R. Thompson, Esquire**
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Tuckahoe, NJ 08250

CASE: **Elizabeth Glanzmann v City of Wildwood et als**
DOCKET NO. **CPM L 461-15**

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

MEMORANDUM OF DECISION ON MOTION

BACKGROUND AND NATURE OF MOTION

The Complaint in this matter was filed on September 21, 2015. The discovery end date was October 27, 2016. There was one previous extension of discovery for a total of 360 days of discovery in this matter. Arbitration was scheduled for December 22, 2016. Defendant, City of Wildwood, moves for summary judgment, pursuant to R. 4:46-2.

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).

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).

MOVANT'S POSITION

Defendant, City of Wildwood, requests that this Court enter an Order for summary judgment dismissing all claims against them with prejudice.

The matter involves an alleged slip and fall on a beach walkway located in the City of Wildwood, New Jersey on July 7, 2014. Specifically, Plaintiff, Elizabeth Glanzmann, describes the beach walkway as a walkway four feet wide and configured in sections that were bolted together. See Exhibit B, 39:5-15, attached to Defendant's Brief (representing the deposition

testimony of Plaintiff). Plaintiff also testified that she noticed loose boards in the area where she slipped and fell. Exhibit B, 43:6-15. Plaintiff did not notice the loose boards prior to the accident. Exhibit B, 45:21-23.

Plaintiff and Plaintiff's daughter, Janine Nolan, testified that a "see-saw" effect occurred; when a group of persons was walking in the opposite direction, the weight of the group pushed one side of the plank down, causing the plank to be raised approximately one inch, allegedly causing the trip and fall. Exhibit B, 46:2-47-23; see also Exhibit C 14:14-15:9 attached to Defendant's Brief (representing the deposition testimony of Janine Nolan).

Defendant asserts that it had no personal knowledge of Plaintiff's fall. See Exhibit D, paragraph 2, attached to Defendant's Brief (representing Defendant's Responses to Form C Interrogatories). Furthermore, Robert Anderson, the Assistant Supervisor of Public Works for the City of Wildwood, testified that the beach walkways are installed seasonally and removed at the end of the summer season. See Exhibit H, 12:5-21 attached to Defendant's Brief. Maintenance crews also maintain and inspect the walkway throughout the season. See Exhibit H, 14:12-15:13.

Defendant argues that the area in which Plaintiff allegedly tripped does not constitute a dangerous condition. Defendant asserts that the beach walkways are installed seasonally and that the sections of boards are laid flat

on the sand. Defendant maintains that Plaintiff has failed to satisfy her burden of proving that the dangerous condition existed.

Second, Defendant notes that Plaintiff did not establish that Defendant was on notice of the defect in the beach walkway, as set forth in N.J.S.A. § 59:4-3. Against, Defendant notes that the environmental maintenance crew regularly inspects the beach walkways for defects and repairs defects that are found.

Third, Defendant asserts that Plaintiff failed to establish that the alleged dangerous condition was "palpably unreasonable." Given the asserted prompt replacement of sections of defective beach walkway by the environmental maintenance crew, Defendant argues that it had taken reasonable actions to identify and rectify defects; failing to identify this alleged dangerous condition was not palpably unreasonable.

OPPOSITION

Plaintiff maintains that the teetering section of the beach walkway constitutes a dangerous condition. Plaintiff refers to Charney v. City of Wildwood, stating, "The dangerous condition question is generally one of fact to be decided by a jury." 732 F. Supp. 2d 448, 454 (D.N.J. 2010), aff'd 435 F. App'x 72 (3d Cir. 2011). Similarly, Plaintiff compares the height difference in the beach walkway to the height difference in the bicycle lane pavement in Atalese v. Long Beach Twp., 365 N.J. Super. 1 (App. Div. 2003). There, the

Appellate Division reversed the entry of summary judgment based on the premise that the height difference could constitute a dangerous condition by the jury. Id. at 6.

Plaintiff argues that the height difference here amounts to a dangerous condition and notes that the plank in question was unsecured, teetering, and broken. See Plaintiff's Opposition Brief, p. 6. Plaintiff further notes that both Wildwood Police Officer Clarence Allen, III, the officer who assisted Plaintiff after she fell, and Robert Anderson, testify that condition at issue looked dangerous. See Exhibit C, 28:18-22; Exhibit E, 19:15-22, attached to Plaintiff's Opposition Brief (representing the deposition testimonies of Robert Anderson and Officer Clarence Allen, III, respectively). Given this testimony, Plaintiff submits that summary judgment should be denied.

Second, Plaintiff makes two arguments in support of the assertion that Defendant had notice of the allegedly dangerous condition. First, "Pursuant to N.J.S.A. § 59:4-2(a), Plaintiff is not required to prove Defendant had notice when the Defendant created the dangerous condition on its property, ..." Plaintiff's Opposition Brief, p. 9. Plaintiff argues that notice exists under subsection (a) because transported prisoners negligently installed these planks. See Exhibit C, 22:1-14.

In the alternative, Plaintiff argues that Defendant should have knowledge of the alleged defect of the pedestrian access point to the beach.

Specifically, Plaintiff contrasts the "at least a couple times a week" inspection rate of the beach walkways with the daily inspections for the boardwalk. See Exhibit C, 14:12-14; 15:6-13.

Third, Plaintiff maintains that there are enough facts in the record to establish the palpably unreasonable failure of Defendant in not securing the boards., especially when the facts are to be viewed in the light most favorable to Plaintiff.

DISCUSSION

This Court finds that Defendant, City of Wildwood, is entitled to summary judgment pursuant to R. 4:46-2.

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).

This Court finds the following undisputed facts: the matter involves an alleged slip and fall on a beach walkway located in the City of Wildwood, New Jersey on July 7, 2014. Specifically, Plaintiff, Elizabeth Glanzmann, describes the beach walkway as a walkway four feet wide and configured in sections that were bolted together. See Exhibit B, 39:5-15, attached to Defendant's Brief (representing the deposition testimony of Plaintiff). The beach walkway is comprised of wooden boards that are joined together in four-foot sections and are laid flat directly on the sand. See Exhibit H, 9:23-12:15 attached to Defendant's Brief (representing the deposition testimony of Robert Anderson, the Assistant Supervisor of Public Works for the City of Wildwood). Wildwood Police Officer Clarence Allen, III, the officer who assisted Plaintiff after she fell, stated that the purpose of the beach walkway is to walk on it if the sand is too hot and easier to traverse if a person is carrying something. See Exhibit E, 10:20-22 attached to Plaintiff's Opposition Brief.

Mr. Anderson testified that the beach walkways are installed seasonally and removed at the end of the summer season. See Exhibit H,

12:5-21 attached to Defendant's Brief. These beach walkways are installed by transported prisoners. See Exhibit H, 22:1-14. Also, the beach walkways are maintained and inspected by "environmental maintenance crews" throughout the season. See Exhibit H, 14:12-15:13. The inspections of the beach walkways are performed "at least a couple times a week" as opposed to the daily inspections of the boardwalk. See Exhibit H, 14:12-14; 15:6-13.

Plaintiff and Plaintiff's daughter, Janine Nolan, testified that a "see-saw" effect occurred; when a group of persons were walking in the opposite direction, the weight of the group pushed one side of the plank down, causing the plank to be raised approximately one inch, allegedly causing the trip and fall. Exhibit B, 46:2-47-23; see also Exhibit C 14:14-15:9 attached to Defendant's Brief (representing the deposition testimony of Janine Nolan).

For purposes of this motion, the Court finds that the fluctuating height of the unsecured wooden board in the walkway constitutes a dangerous condition, consistent with Atalese v. Long Beach Twp., 365 N.J. Super. 1, 6 (App. Div. 2003). However, this Court finds that Plainitiff has not presented any evidence that Defendant was on notice of the dangerous condition, or Defendant's failure to take action was not palpably unreasonable, as required by N.J.S.A. § 59:4-2. Accordingly, Defendant is entitled to summary judgment.

I. The Height Difference in the Boards of the Beach Walkway Constitutes a Dangerous Condition for Purposes of N.J.S.A. § 59:4-2.

When viewing the facts in the light most favorable to Plaintiff, the unsecured, teetering board in the beach walkway, which allegedly caused Plaintiff to trip and fall, constitutes a dangerous condition.

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 injury, ..." N.J.S.A. § 59:4-2. A dangerous condition is one 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." § 59:4-1(a). "The dangerous condition question is generally one of fact to be decided by a jury." Charney v. City of Wildwood, 732 F. Supp. 2d 448, 454 (D.N.J. 2010), aff'd 435 F. App'x 72 (3d Cir. 2011).

Plaintiff refers to Atalese v. Long Beach Twp., 365 N.J. Super. 1 (App. Div. 2003) in support of her Opposition.[1] In Atalese, the Appellate Division reversed the entry of summary judgment and remanded the matter after concluding that a reasonable factfinder could find that the three-quarter inch height difference in the concrete pedestrian and bicyclist roadway constituted a dangerous condition. Id. at 6.

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[1] Plaintiff also refers to several unpublished opinions throughout her brief; however, Plaintiff fails to attach copies of these opinions as required by R. 1:36-3. Therefore, consistent with the Rule, we do not consider them here.

When viewing the facts in the light most favorable to Plaintiff and given the general standard set forth in Charney, supra, and the precedent set forth in Atalese, this Court finds that height difference in the beach walkway constitutes a dangerous condition. Here, the wooden board in question was not fully secured and resulted in a "see-saw" effect; when a group of persons were walking in the opposite direction, the weight of the group pushed one side of the plank down, causing the plank to be raised approximately one inch, allegedly causing the trip and fall. Exhibit B, 46:2-47-23; see also Exhibit C 14:14-15:9 attached to Defendant's Brief. An unsecured board that "pops up" whenever weight is applied to the opposite side creates a substantial risk of injury even when pedestrians walk across the beach walkway with due care. Therefore, summary judgment as to this requirement of N.J.S.A. § 59:4-2 is denied.

II. Plaintiff has Failed to Establish that Defendant had Actual Notice of the Dangerous Condition Based on the Frequent Inspections of the Environmental Maintenance Crew, and Plaintiff has Failed to Establish Constructive Notice, as Required by N.J.S.A. § 59:4-3.

Even when viewing the facts in the light most favorable to Plaintiff, Plaintiff has failed to establish that Defendant was on notice of the dangerous condition.

Plaintiff can establish notice in three ways under the Tort Claims Act. First, Plaintiff can show that a "negligent or wrongful act or omission of an

employee of the public entity within the scope of employment created the dangerous condition[.]" N.J.S.A. § 59:4-2(a). Second, Plaintiff can show that Defendant had actual notice of the dangerous condition and "knew or should have known of its dangerous character." § 59:4-3(a). Third, Plaintiff can establish construction notice of the condition by showing that it "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." § 59:4-3(b).

Plaintiff has failed to establish notice in any of the three categories. First, Robert Anderson testified that the beach walkways were seasonally installed by transported prisoners. See Exhibit H, 22:1-14, attached to Defendant's Brief. While transported prisoners are not employees of the City of Wildwood, there is no evidence which supports this condition existed at the time of the installation. Therefore, notice under § 59:4-2(a) fails.

As to notice under § 59:4-2(b), Plaintiff argues that Defendant did not sufficiently inspect the beach walkways, especially in light of the fact that the boardwalk was inspected every day. Again, the beach walkways are maintained and inspected by "environmental maintenance crews" throughout the season. See Exhibit H, 14:12-15:13. The inspections of the beach walkways are performed "at least a couple times a week" as opposed to the daily inspections of the boardwalk. See Exhibit H, 14:12-14; 15:6-13. This

Court finds that an inspection of the beach walkways constitutes sufficient oversight that would preclude a finding of constructive notice. Plaintiff has failed to identify any legal authority that would force a municipality to inspect its walkways every single day. Therefore, summary judgment as to notice is granted.

III. Plaintiff has Failed to Show that Defendant's Failure to Protect Against the Dangerous Condition or Failure to Take Action was Palpably Unreasonable.

Plaintiff fails to show that Defendant's failure to identify and promptly correct the unsecured wooden board of the beach walkway was palpably unreasonable. Liability under the Tort Claims Act does not attach to the public entity unless the public entity's failure to take action to protect against the dangerous condition was palpably unreasonable. N.J.S.A. § 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). The question of palpable unreasonableness is generally one for the jury. Maslo v. City of Jersey City, 346 N.J. Super. 346, 350-51 (App. Div. 2002).

Despite the standard set forth in Maslo and even with the facts viewed in the light most favorable to Plaintiff, this Court does not

Defendant's failure to repair the dangerous condition in the beach walkway and warn pedestrians of the dangerous condition was palpably unreasonable. Again, Defendant inspects and maintains the beach walkways more than once per week. See Exhibit H, 14:12-14; 15:6-13, attached to Defendant's Brief. Plaintiff fails to explain why the City's inspection and its routine maintenance of beach walkways multiple times per week are so patently unacceptable that no prudent person would approve of Defendant's course of action.[2] The Court, even when viewed in the light most favorable to Plaintiff, the Court with the evidence before it determines that no reasonable factfinder could conclude that the City's conduct was palpably unreasonable. Accordingly, this Court finds that Defendant is entitled to summary judgment pursuant to R. 4:46-2(c) and N.J.S.A. § 59:4-2.

CONCLUSION

The motion is opposed.

The motion of Defendant, the City of Wildwood, for summary judgment pursuant to R. 4:46-2(c) is granted. All claims against this Defendant are dismissed with prejudice.

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[2] Plaintiff also references that Defendant knew of issues involving the beach walkways by "the walkway's splintered condition, previous complaints, and multiple suggestions from City Council to temporarily improve the safety of the incident walkway[.] Plaintiff's Opposition Brief, pp. 12-13. This allegation was never raised as an asserted material fact by either Plaintiff or Defendant as required by R. 4:46-2(a) and (b), and Plaintiff fails to substantiate this allegation with supporting documentation. As such, the Court will not consider these facts here as part of the instant motion.

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

January 17, 2017

J. Christopher Gibson, J.S.C.