

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY**
Justice

IAS PART 16

THOMAS APICELLA,

Plaintiff,

- against -

INDEX NO. 10979/2004

MOTION
DATE March 25, 2008

COSTCO WHOLESALE CORP.,

Defendant,

MOTION
CAL. NO. 2, 3 & 4

MOT. SEQ.
NUMBERS

COSTCO WHOLESALE CORP.,

Third-Party Plaintiff,

- against -

INTERSTATE BRANDS CORPORATION and
KEMPER INSURANCE COMPANIES d/b/a
LUMBERMEN'S MUTUAL CASUALTY
INSURANCE COMPANY,

Third-Party Defendants.

The following papers numbered 1 to 24 read on this motion by the third-party defendant Kemper Insurance Companies d/b/a Lumberman's Mutual Casualty Insurance Company ("Kemper") for summary judgment "declaring that" it is not obligated to defend, indemnify or provide reimbursement for defense costs to the defendant/third-party plaintiff Costco Wholesale Corp. ("Costco"). Costco moves for summary judgment dismissing the plaintiff's complaint on the issue of liability. Costco also moves for summary judgment on its third-party complaint for relief declaring that Kemper is obligated to defend, indemnify or provide reimbursement for defense costs to Costco.

PAPERS
NUMBERED

Notice of Motion/Affid(s)-Exhibits-Memo of Law.....	1 - 5
Affid(s) in Opp.-Exhibits.....	6 - 7
Replying Affirmation-Exhibits.....	8 - 9
Notice of Motion/Affid(s)-Exhibits.....	10 - 13
Affid(s) in Opp.-Exhibits.....	14 - 15
Replying Affirmation.....	16
Notice of Motion/Affid(s)-Exhibits.....	17 - 20

Affid(s) in Opp.-Exhibits.....	21 - 22
Replying Affirmation-Exhibits.....	23 - 24

Upon the foregoing papers the motion and cross-motion are determined as follows:

In this action the plaintiff seeks to recover for injuries sustained when he tripped and fell on an allegedly defective condition in the parking lot of Costco's premises. At the time of the accident, the plaintiff was an employee of a vendor of Costco, Interstate Brands Corporation ("Interstate"), and was delivering bakery products to a Costco retail premises.

With respect to the motion on behalf by Costco for summary judgment dismissing the plaintiff's complaint on the issue of liability, while it is ultimately the plaintiff's burden at trial to establish a prima facie case of negligence against this defendant, on a motion for summary judgment it is incumbent upon the moving party to present evidence in admissible form showing their entitlement to judgment in its favor as a matter of law (See, e.g., Zuckerman v City of New York, 49 NY2d 557).

In this matter, therefore, Costco was required to affirmatively establish it neither created nor had actual or constructive notice of the alleged dangerous condition (Birthwright v Mid-City Sec., 268 AD2d 401; Dwoskin v Burger King Corp, 249 AD2d 358; Gordon v Waldbaum, Inc., 231 AD2d 673).

In the present case, Costco failed to meet its burden that it did not have actual or constructive notice, via an affidavit or deposition testimony of one of its employees (See, CPLR §3212[b]), of the condition that the plaintiff claims caused him to fall. Costco's arguments concerning the plaintiff's failure to establish notice on its part are unavailing as "a defendant moving for summary judgment does not carry its burden merely by citing gaps in the plaintiff's case" (Kucera v Waldbaums Supermarkets, 304 AD2d 531; See also, OLeary v Bravo Hylan, LLC, 8 AD3d 542; Nationwide Prop. Cas. v Nestor, 6 AD3d 409).

Costco's argument that the defect the plaintiff claims caused his accident is de minimus is unavailing. The question of "whether a dangerous or defective condition exists on the property of another so as to create liability 'depends on the peculiar facts and circumstances of each case' and is generally a question of fact for the jury'" (Trincere v County of Suffolk, 90 NY2d 976 citing, Guerrieri v Summa, 193 AD2d 647). "However, a property owner may not be held liable in damages for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip" (Hargrove v Baltic Estates, 278 AD2d 278). In determining whether an alleged defect is actionable, the court should examine a number of factors "including the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury [citation omitted]" (Trincere v County of Suffolk, supra).

Here, the plaintiff testified at his deposition that the defect in the asphalt in the parking lot was approximately four and one-half to five feet long, four or five inches wide and three inches deep. This is clearly not the type of trivial defect considered by the Court of Appeals in Trincere v County of Suffolk, 90 NY2d 976 and its progeny. Costco's reliance on photographs taken by the plaintiff and introduced at his deposition are of no help as the pictures do not depict any visual details concerning the dimensions of the alleged defect.

Since Costco has not established a prima facie case, it is not necessary to consider the sufficiency of the plaintiff's opposition papers (See, Alvarez v Prospect Hospital, 68 NY2d 320, 325).

Accordingly, after considering the evidence in a light most favorable to the plaintiff (Kelly v Media Services Corp, 304 AD2d 717; Krohn v Felix Industries, 302 AD2d 499), Costco's motion for summary judgment dismissing the plaintiff's summons and complaint is denied.

Costco also moves for summary judgment on its third-party causes of action for declaratory judgment. Costco asserts that it is an additional insured under a policy of insurance issued by Kemper to its insured Interstate and, as a result, Kemper is required to defend and indemnify Costco in this action.

Under a vendor agreement executed by Interstate and Costco, dated October 27, 2000, Interstate was required to, inter alia, obtain commercial general liability insurance covering Costco which included workers' compensation insurance. Annexed to the moving papers were declarations pages and a policy of insurance issued by Kemper to Interstate, as the named insured, covering the date when the accident occurred. It is apparent from a certificate of insurance annexed to Costco's papers and the fourth endorsement to the policy of insurance that Costco was an additional insured under the commercial general liability insurance policy issued by Kemper.

Under the fourteenth endorsement to the policy, Kemper's obligation to pay for losses covered under the policy "on behalf of the insured" is limited to those amounts that exceed a \$1,000,000.00 deductible. By the terms of this endorsement, the deductible amount includes "claim expenses" which are made up of, among other things, litigation expenses incurred by "the insured" in defending the action. In addition, this endorsement provides that Kemper has "the right, but not the duty or obligation to . . . defend or participate in the defense of any 'suit' against the insured".

Although Costco is correct that, as a general matter, the obligation of an insurer to provide a defense under a policy of litigation insurance is "exceedingly broad" (See, Continental Cas. Co. v Rapid-American Corp., 80 NY2d 640), that duty is limited to policies which, in fact, "represent[] that [the carrier] will provide the insured with a defense" (Seaboard Sur. Co. v Gillette Co., 64 NY2d 304, 310). Here, the policy, a commercial insurance policy issued to a sophisticated business entity, expressly provides that Kemper is not

obliged or duty-bound to provide a defense to "the insured" under the policy. Moreover, by the unambiguous terms of the fourteenth endorsement, Kemper is only required to indemnify "the insured" for those damages incurred that exceed \$1,000,000.00.

Costco's assertion that the application of this endorsement is limited to "the insured", to wit Interstate, and does not apply to it because it is an "additional insured" is without merit. It is plain from the certificate of insurance and the fourth endorsement that Costco is an "additional insured" under the terms of the policy. However, the "well-understood meaning" of the term "additional insured" is "an 'entity enjoying the same protection as the named insured'" (Pecker Iron Works of N.Y., Inc. v Traveler's Ins. Co., 99 NY2d 391, 393, citing Del Bello v General Acc. Ins. Co., 185 AD2d 691, 692, quoting Rubin, Dictionary of Insurance Terms 7 [Barron's 1987]). Under the incongruous logic advanced by Costco, it would be afforded greater protections under the policy than provided to the named insured, Interstate. Thus, Costco is subject to the same restrictions under the policy as Interstate.

Accordingly, Costco's motion for summary judgment on its claims for judgment on its third-party complaint for relief declaring that Kemper is obligated to defend, indemnify or provide reimbursement for defense costs is denied.

Notwithstanding this determination, Kemper's motion for summary judgment "declaring that" it is not obligated to defend, indemnify or provide reimbursement for defense costs to Costco is also denied. First, Kemper has not asserted a counter-claim for declaratory relief in its answer. Second, Kemper has failed to establish, as a matter of law, that Costco has not, and, more importantly, will not by the resolution of this case, incur damages and claim expenses in excess of the deductible under the policy.

Dated: May 2, 2008

Peter J. Kelly, J.S.C.