

Short Form Order

**NEW YORK STATE SUPREME COURT - QUEENS COUNTY**

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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ORLOVA CHAZE,

Plaintiff,

-against-

ASSOCIATED FOOD STORES, INC.,

Defendant.

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Index No: 16869/07  
Motion Date: 4/22/09  
Motion Cal. No: 3  
Motion Seq. No: 3 & 4

The following papers numbered 1 to 23 read on this motion for an order, pursuant to CPLR §3212, granting summary judgment to defendant Associated Food Stores, Inc., dismissing the complaint of plaintiff Orlova Chaze [Motion Cal. No. 3]; and upon this motion by plaintiff for summary judgment on the issue of liability and setting this matter down for a trial at the earliest available date to determine damages [Motion Cal. No. 4].

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 5
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Upon the foregoing papers, it is hereby ordered that the motions are resolved as follows:

This is a personal injury action commenced by plaintiff Orlova Chaze (“plaintiff”) to recover damages for injuries allegedly sustained on May 4, 2007, as the result of a trip and fall on the sidewalk adjacent to the premises of defendant Associated Food Stores, Inc. (“defendant”), located at 663 East Park Avenue, Long Beach, New York. Defendant moves for an order granting it summary judgment dismissing the complaint, and plaintiff moves for summary judgment on the issue of liability.

Summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1<sup>st</sup> Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination.

See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2<sup>nd</sup> Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, *supra*.

“To demonstrate its entitlement to summary judgment in a trip-and-fall case, a defendant must establish, prima facie, that it did not create the condition that allegedly caused the fall and did not have actual or constructive notice of that condition for a sufficient length of time to remedy it.” Gregg v. Key Food Supermarket, 50 A.D.3d 1093 (2<sup>nd</sup> Dept. 2008); Sloane v. Costco Wholesale Corp., 49 A.D.3d 522 (2<sup>nd</sup> Dept. 2008); Frazier v. City of New York, 47 A.D.3d 757 (2<sup>nd</sup> Dept. 2008); Ulu v. ITT Sheraton Corp., 27 A.D.3d 554 (2<sup>nd</sup> Dept. 2006); White v. L & M Corporate, Inc., 24 A.D.3d 659 (2<sup>nd</sup> Dept.2005); Beltran v. Metropolitan Life Ins. Co., 259 A.D.2d 456 (2<sup>nd</sup> Dept.1999). “Where there is no indication in the record that the defendant created the alleged dangerous condition or had actual notice of it, the plaintiff must proceed on the theory of constructive notice.” Rabadi v. Atlantic & Pacific Tea Co., Inc., 268 A.D.2d 418, 419 (2<sup>nd</sup> Dept. 2000); see, also, Ramos v. Castega-20 Vesey Street, LLC, 25 A.D.3d 773 (2<sup>nd</sup> Dept. 2006); Klor v. American Airlines, 305 A.D.2d 550 (2<sup>nd</sup> Dept. 2003); O’Callaghan v. Great Atlantic & Pacific Tea Co., 294 A.D.2d 416 (2<sup>nd</sup> Dept. 2002). “To constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time prior to the accident to permit the defendant’s to discover and remedy it.” Green v. City of New York, 34 A.D.3d 528, 529 (2<sup>nd</sup> Dept. 2006); see, Stone v. Long Island Jewish Medical Center, Inc., 302 A.D.2d 376 (2<sup>nd</sup> Dept. 2003); Blaszczyk v. Riccio, 266 A.D.2d 491 (2<sup>nd</sup> Dept. 1999); Russo v. Evenco Development Corp., 256 A.D.2d 566 (2<sup>nd</sup> Dept. 1998); Dima v. Breslin Realty, Inc., 240 A.D.2d 359 (2<sup>nd</sup> Dept.1997); Kraemer v. K-Mart Corp., 226 A.D.2d 590 (2<sup>nd</sup> Dept.1996).

Here, although defendant has made a prima facie showing that it did not create the defective condition, defendant has failed to meet its burden of establishing that it “did not maintain control over the area.” Defendant proffers the deposition testimony of plaintiff who was asked, inter alia, “Did your foot go into the hole when you were stepping down into the roadway or did it occur before or something else?” In response to that question, plaintiff stated that the accident occurred “when I was stepping down from the curb, you know, there was a broken section from the curb, and that’s when my foot fell into the hole below the section with the curb.” Plaintiff was further asked if the engineer at the scene of the accident tell her anything with regard to the happening of the accident, and she stated that the engineer “...confirmed that it was a broken curb and a hole on the ground, and that’s what caused me to lose my balance.” Plaintiff also testified that the broken curb and the hole in the street immediately below the curb were both approximately one foot in length and a few inches wide.

Defendant also proffered the affidavit of Omar Rodriguez, the general manager of defendant, who stated that on the morning of February 27, 2007, following a snow storm, he heard one of the Long Beach sanitation vehicle plowing the streets. Upon hearing a loud noise, he exited the store

and saw that the plow had come into contact with the curb area and damaged the sidewalk. He further stated that the driver got out of the vehicle, apologized for the damage and indicated that there would be a repair crew sent to remedy the problem, which never occurred.

As such, defendant contends that based upon plaintiff's testimony, it is clear that "the curb itself did not cause plaintiff to fall, rather, plaintiff testified that she lost her balance when her foot entered an alleged defect in the actual roadway." Defendant further contends the following:

[Defendant] did not create the alleged defective condition where plaintiff fell. [Defendant] did not maintain control over the area damaged by the snow plow. The snow plow driver who caused the defect apologized and informed the manager of [defendant] that their agency would repair the damaged curb and roadway. Under these facts, no liability can be attributed to [defendant] and this complaint must be dismissed.

Notwithstanding defendant's contentions to the contrary, defendant failed to meet its burden. Indeed, defendant had actual notice of the defective condition through its manager, Mr. Rodriguez, who was aware of the defect at least two months prior to plaintiff's accident. Nevertheless, the issue of notice of the hazardous condition is secondary to defendant's duty to repair the subject sidewalk and curbstone. If there was no duty upon defendant to maintain the sidewalk, then notice of the actual hazardous condition would be of no import. Although defendant states that it "did not maintain control over the area damaged by the snow plow," it has failed to eliminate triable issues of fact with regard to this contention entitling it to summary judgment.

"An owner of land does not, solely by reason of being an abutting owner, owe a duty to keep the public sidewalk in a safe condition." Flores v. Baroudos, 27 A.D.3d 517 (2<sup>nd</sup> Dept. 2006); Tiralongo v. City of New York, 41 A.D.3d 700 (2<sup>nd</sup> Dept. 2007). As a general proposition, "liability may be imposed on the abutting landowner where the landowner either affirmatively created the dangerous condition, voluntarily but negligently made repairs to the sidewalk, created the dangerous condition through a special use of the sidewalk, or violated a statute or ordinance expressly imposing liability on the abutting landowner for a failure to maintain the sidewalk." James v. Blackmon, 58 A.D.3d 808 (2<sup>nd</sup> Dept. 2009); see, also, Sachs v. County of Nassau, 60 A.D.3d 1032 (2<sup>nd</sup> Dept. 2009); Klotz v. City of New York, 9 A.D.3d 392, 393-394 (2<sup>nd</sup> Dept. 2004); Negron v. G.R.A. Realty, Inc., 307 A.D.2d 282 (2<sup>nd</sup> Dept. 2003); Archer v. City of New York, 300 A.D.2d 518 (2<sup>nd</sup> Dept. 2002); Shivers v. Price Bottom Stores, Inc., 289 A.D.2d 389 (2<sup>nd</sup> Dept. 2001); Booth v. City of New York, 272 A.D.2d 357 (2<sup>nd</sup> Dept. 2000).

Here, there are triable issues of fact as to how the accident occurred, that is, whether plaintiff's accident was caused by the defective curb and/or street, and whether, based upon how the accident occurred, defendant violated the Long Beach ordinance expressly imposing liability on the abutting landowner for a failure to maintain the sidewalk and curbstone. See, Hausser v. Giunta, 88 N.Y.2d 449 (1996)[stating that "the City of Long Beach, in 1931, adopted section 256 of the City of Long Beach Charter, transferring liability from the municipality to abutting land owners and

clothing landowners with liability for injuries caused by defective sidewalks. It provides: ‘The owner or occupant of lands fronting or abutting on any street, highway, traveled road, public lane, alley or square, shall make, maintain and repair the sidewalk adjoining his lands and shall keep such sidewalk and the gutter free and clear of and from snow, ice and all other obstructions. Such owner or occupant and each of them, shall be liable for any injury or damage by reason of omission, failure or negligence to make, maintain or repair such sidewalk.’”].

Thus, under these circumstances, as defendant has failed to make a prima facie showing entitling it to summary judgment in the first instance, it is not necessary for this Court to consider the sufficiency of plaintiff’s opposition papers. See, Bruk v. Razag, Inc., 60 A.D.3d 715 (2<sup>nd</sup> Dept. 2009); Taylor v. Rochdale Village, Inc., 60 A.D.3d 930 (2<sup>nd</sup> Dept. 2009); Pearson v. Parkside Ltd. Liability Co., 27 A.D.3d 539, 540 (2<sup>nd</sup> Dept. 2006). Defendant’s burden cannot be satisfied merely by pointing to gaps in plaintiff’s case. See, Gregg v. Key Food Supermarket, supra; Stroppel v. Wal-Mart Stores, Inc., 53 A.D.3d 651 (2<sup>nd</sup> Dept. 2008); DeFalco v. BJ’s Wholesale Club, Inc., 38 A.D.3d 824, 825 (2<sup>nd</sup> Dept. 2007). “Only after the defendant has satisfied its threshold burden will the court examine the sufficiency of the plaintiff’s opposition (citations omitted).” Doherty v. Smithtown Cent. School Dist., 49 A.D.3d 801 (2<sup>nd</sup> Dept. 2008); see, also, Gregg v. Key Food Supermarket, supra; Seabury v. County of Dutchess, 38 A.D.3d 752 (2<sup>nd</sup> Dept. 2007); Yioves v. T.J. Maxx, Inc., 29 A.D.3d 572 (2<sup>nd</sup> Dept. 2006). Therefore, defendant’s motion for an order granting it summary judgment, pursuant to CPLR §3212, and dismissal of the complaint is denied.

Likewise denied, based upon the triable issues present in the record, is plaintiff’s motion for summary judgment on the issue of liability. Plaintiff, in support of the motion, proffers, inter alia, her deposition transcript in which she testified as follows:

Q. How did- The accident occurred when you were stepping down?

A. Well, I was stepping off the curb to get in the car. I stepped off with my left foot from the curb onto the road, and I was fine, and as I followed with my right foot, my right foot went over the broken section of the curb and went down into the hole. Then I lost my balance. Then, I twisted my right knee, and then I fell down onto my right knee.

...

A. What caused me to fall?

Q. Yes.

A. As I was stepping off the curb with my right foot, I found my right foot stepped onto a broken piece of curb, then it went down and hit a hole in the road.

Q. Right. But, I know that is how you fell. But, what caused you to fall, if anything caused you to fall?

A. I lost my balance.

Q. What caused you to lose your balance?

- A. A broken ground, which was below ground level.
- Q. Was your right foot going up or coming down or neither one or something else, when the accident occurred?
- A. I was stepping off the curb with my right foot when the accident occurred.
- Q. So, was your right foot going up in the air?
- A. It was going down. It was trying to reach the level curb- the level road.
- Q. Okay, when your right foot was going down, was it going into the roadway and then hit the curb or something else?
- A. It was stepping off the curb to land on the road. So it was going into the road.
- Q. Did you step into a hole?
- A. Yes I did.
- Q. What happened when you stepped into a hole?
- A. I lost my balance.

...

- Q. Do you know why you lost your balance?
- A. Because the hole was not at the level of the road, and it was not at the level of my left foot.

Here, notwithstanding plaintiff's contentions to the contrary, the aforementioned testimony does not eliminate the issues of fact in the instant matter. In light of the foregoing, this Court finds that plaintiff similarly is not entitled to summary judgment on the issue of liability as there still remains issues of fact, as previously stated, regarding how the accident occurred, and whether defendant violated the aforementioned ordinance by failing to make repairs to the sidewalk and curbstone.

Accordingly, the motion for an order, pursuant to CPLR §3212, granting summary judgment to defendant Associated Food Stores, Inc., dismissing the complaint of plaintiff Orlova Chaze, and the motion by plaintiff for summary judgment on the issue of liability, setting this matter down for a trial at the earliest available date to determine damages, hereby are denied

Dated: June 17, 2009

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J.S.C.