

Serafin v Douglaston Plaza Shopping, LLC
2007 NY Slip Op 30557(U)
March 9, 2007
Supreme Court, Queens County
Docket Number: 0000713/2005
Judge: Orin R. Kitzes
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Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES
Justice

PART 17

-----X
MARTINA SERAFIN,
Plaintiff,

Index No.: 713/05
Motion Date: 3/7/07
Motion Cal. No.: 55

-against-

DOUGLSTON PLAZA SHOPPING, LLC AND
ACADIA REALTY TRUST,
Defendants.

-----X
The following papers numbered 1 to 9 read on this motion by defendants for an order pursuant to CPLR § 3212 for summary judgment in the defendants favor and dismissing the complaint.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply Affirmation.....	8-9

Upon the foregoing papers it is ordered that the motion for summary judgment is granted, for the following reasons:

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side’s papers do not suggest any issue exists. Moreover, on this motion, the court’s duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See, Barr v. County of Albany*, 50 NY2d 247 (1980); *Miceli v. Purex*, 84 AD2d 562 (2d Dept. 1981); *Bronson v. March*, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in *Daliendo v. Johnson*, 147 AD2d 312,317 (2d Dept. 1989), “Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied.”

The action herein stems from plaintiff’s tripping and falling on the speed bump located on the roadway in front of the Macy’s store in the Douglaston Shopping Plaza in Douglaston, N.Y.,

on April 30, 2004. Plaintiff alleges that defendants were negligent in creating or allowing this dangerous or defective condition to exist. She also claims that as a result of her fall, she suffered an injury and brought this action to recover damages.

Defendants have now moved for summary judgment on the grounds that plaintiff has failed to establish that the condition that allegedly caused plaintiff to trip and fall was not defective or dangerous in nature. Defendants have submitted plaintiff's deposition testimony which indicates she had been to this Macy's store and used the same entrance door on several occasions prior to the accident, and had also seen the subject speed bump before the accident. On the subject date, plaintiff parked and walked toward the store's door and walked over the speed bump, even though she could have easily walked around it. As her right foot went over the bump, her left foot got caught on a part of the bump and she fell. Plaintiff acknowledged seeing that it was a speed bump she was walking over at this time. Defendants have also submitted Thomas Donahue's deposition testimony (Regional Property Manager for Acadia Realty Trust) which indicates his company provided management services for Douglaston Plaza. He was responsible for the subject premises on April 30, 2004 and part of his duties was to inspect the premises for maintenance issues. He oversaw the installation of the speed bump and it was placed to slow traffic near the Macy's entrance. From its placement until the accident, Mr. Donahue had not received any complaints about the speed bump's placement or condition. Defendants also have submitted photographs of the speed bump over which plaintiff allegedly tripped.

Plaintiff opposes this motion and claims that the speed bump is an inherently dangerous obstruction and condition when placed in front of a store exit. They have submitted an affidavit of an expert, Stanley Fein, a professional engineer which indicates in his opinion, the placement of the bump in relation to the entrance and without warning signs is a clear departure from good and accepted safety practices. According to him, the bump itself interferes with the mechanics of walking.

The court is aware that the issue of whether a dangerous or defective condition exists depends on the peculiar facts and circumstances of each case, and is properly a question of fact for the jury. *See, Trincere v County of Suffolk*, 90 NY2d 976, 977 (1997.) However, summary judgment in favor of a defendant is appropriate where a plaintiff fails to submit any evidence that a particular condition is actually defective or dangerous. Przybyszewski v Wonder Works

Constr. Inc., 303 AD2d 482 (2d Dept 2003.) Additionally, by holding its property open to the public, defendants had "a general duty to maintain it in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries" However, "it is well settled that '[t]here is no duty on the part of a landowner to warn against a condition that can readily be observed by those employing the reasonable use of their senses' " Maravalli v. Home Depot U.S.A., Inc., 266 A.D.2d 437 (2d Dept 1999.) (Citations of cases quoted omitted)

Here, defendants have established their prima facie entitlement to judgment as a matter of law.

Plaintiff has failed to raise a triable issue of fact regarding the speed bump's placement. Initially, plaintiff cannot point to any admissible evidence that shows a defect existed. Her testimony does not mention the existence of a protrusion or any other defective condition that caused her to trip and fall. Her photographs are equally incapable of showing the existence of a defect. *Id.* Conroy v. Marmon Enters., 253 A.D.2d 839 (2d Dept 1998) Pilato v Diamond, 209 AD2d 393 (2d Dept 1994.)

Furthermore, since the speed bump was readily observed by the reasonable use of one's senses, the defendants had no duty to warn the plaintiff of the condition. *Id.* The speed bump in the roadway was seen by plaintiff prior to her fall and thus created no unreasonable risk of harm. Plessias v. John Vincent Scalia Home for Funerals, Inc., 271 A.D.2d 423(2d Dept 2000.) Plaintiff's engineer's affidavit fails to raise an issue of fact regarding the speed bump being an inherently dangerous condition since his report fails to specify any safety standard or practice which defendant violated. While his discussion of the speed bump in some manner hindering "the mechanics of the human walking condition" is creative, it does not suggest a dangerous condition existed. Mroz v Ela Corporation, 262 AD2d 465 (2d Dept. 1999.) Nor does his finding comport with plaintiff's testimony as to the cause of her accident- she does not say her walking style was in any way hindered. In sum, plaintiff offers nothing but unfounded speculation that the speed bump was inherently dangerous because it was placed in front of the store.

Accordingly, defendants' motion for summary judgment is granted and the complaint is dismissed.

Dated: March 9, 2007

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ORIN R. KITZES, J.S.C.