

**Hahn v Wilhelm**

2007 NY Slip Op 30815(U)

March 26, 2007

Supreme Court, Suffolk County

Docket Number: 0011818/2004

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**P R E S E N T :**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 5/18/06 (#003)  
7/28/06 (#004)  
ADJ. DATE 9/25/06  
Mot. Seq. # 003 - MD  
# 004 - MG; CASEDISP

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Upon the following papers numbered 1 to 61 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-18; 19-30; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 31-36; 37-53; Replying Affidavits and supporting papers 54-57; 58-61; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that for the purposes of this determination the motion by defendant Xavier's Restaurant Corporation d/b/a Cilantro's (#003) for summary judgment dismissing the complaint and the motion by defendant Kenneth Wilhelm (#004) for summary judgment dismissing the complaint are consolidated; and it is further

**ORDERED** that the motion by defendant Xavier's Restaurant Corporation d/b/a Cilantro's (#003) for summary judgment dismissing the complaint against it is denied; and it is further

**ORDERED** that the motion by defendant Kenneth Wilhelm (#004) for summary judgment dismissing the complaint and all cross claims against him is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Barbara Hahn, at approximately 8:30 p.m. on July 25, 2003, when she fell on the sidewalk immediately adjacent to a restaurant on 154 Montauk Highway, Blue Point, New York, leased by defendant Xavier's Restaurant Corporation d/b/a Cilantro's ("Xavier's Restaurant") and owned by defendant Kenneth Wilhelm, who is the owner of a strip mall where the restaurant is located. The gravamen of the complaint is that defendants were negligent in maintaining their property including the sidewalk.

Defendant Xavier's Restaurant now moves (#003) for summary judgment dismissing the complaint against it on the ground that it owes no duty of care with respect to any unsafe condition in that it neither controlled nor had a duty to maintain the subject sidewalk. In the alternative, Xavier's Restaurant seeks declaratory relief declaring that defendant Wilhelm is precluded from claiming indemnification and defense by Xavier's Restaurant. In support, Xavier's Restaurant submits, *inter alia*, the pleadings, a bill of particulars and the lease agreement between Xavier's Restaurant and defendant Wilhelm.

Under the lease agreement between Xavier's Restaurant and defendant Wilhelm, Xavier's Restaurant was obligated to "keep said sidewalks free of ice, snow, rubbish, and dirt." By the express terms of the lease, Xavier's Restaurant was also obligated to keep the leased premise including maintenance of exterior entrances "in good order, condition and repair \*\*\* except for structural portions of the premises which shall be maintained by Lessor." The lease stated that "Lessee shall have a nonexclusive right of use of all streets, driveways, and alleys adjoining said premises" and that "[t]he parking area, employee parking space, driveways, entrances and exits and all other common area and facilities provided by lessor for the general use, in common, of Lessees, their employees and customers, shall at all times be subject to the exclusive control and management of Lessor."

Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises and, without possession, or a right to maintain or control a common parking area, a tenant ordinarily owes no duty of care with respect to any unsafe condition existing there (*see, Gibbs v Port Auth. of New York*, 17 AD3d 252, 794 NYS2d 320 [2005]; *Kozak v Broadway Joe's*, 296 AD2d 683, 745 NYS2d 139 [2002]; *Masterson v Knox*, 233 AD2d 549, 649 NYS2d 108 [1996]). Liability may be found where there is some indication that the tenant created the dangerous condition, owned or retained any control over the subject area, or had the authority to correct the condition (*see, Kozak v Broadway Joe's, supra*). The determinative question is one of possession or control (*see, Smalls v New York Hous. Auth. Tenants Assn. of Woodside*, 276 AD2d 619, 715 NYS2d 322 [2000]; *Welwood v Association for Children with Down Syndrome*, 248 AD2d 707, 670 NYS2d 556 [1998]).

Here, defendant Xavier's Restaurant failed to meet its burden of showing that it did not have a duty to maintain the sidewalk area where the subject accident occurred. The adduced evidence indicated that Xavier's Restaurant was obligated to keep the subject sidewalk clean. There are several triable issues of fact as to whether the subject sidewalk area was clearly a common area under the lease agreement (*compare, Bridgham v Fairview Plaza*, 257 AD2d 914, 684 NYS2d 317 [1999]) and whether Xavier's Restaurant retained any control over the sidewalk area or had the authority to correct the allegedly dangerous condition (*see, Eilers v Horwitz Family Ltd. Partnership*, 2007 NY Slip Op 599, 2007 NY App Div Lexis 944 [2007]; *Frank v G & H Real Estate Holding Corp.*, 16 AD3d 619, 793 NYS2d 61 [2005]). Accordingly, the motion by defendant Xavier's Restaurant for summary judgment dismissing the complaint is denied. In addition, Xavier's Restaurant's another request for declaratory relief that it does not provide indemnification and defense to defendant Wilhelm is premature, and, thus, it is not entitled to the declaratory relief in light of the unresolved questions of negligence (*see, Singh v New York City Tr. Auth.*, 17 AD3d 262, 793 NYS2d 408 [2005]; *Lee v Chelsea Piers*, 11 AD3d 257, 782 NYS2d 712 [2004]).

Defendant Wilhelm moves (#004) for summary judgment dismissing the complaint and all cross claims against him on the grounds that the alleged dangerous condition was a trivial defect that is non

actionable as a matter of law and that he never received any prior notice that the alleged location where plaintiff had her accident was defective. In support, defendant Wilhelm submits, *inter alia*, the pleadings, a bill of particulars, the transcripts of the deposition testimony given by plaintiff and defendant Wilhelm, and the affidavit of his expert, Mr. Anthony Mellusi, accompanied by photos of the subject walkway.

At her examination before trial, plaintiff testified to the effect that, at approximately between 8:30 p.m. and 9:00 p.m. on the day of the subject accident, she arrived with her friend at the parking lot in front of Xavier's Restaurant where her daughter was working as a waitress. When plaintiff got out of the vehicle, she stepped up over the curb to walk into the restaurant. She testified that it was dry outside and that it was the first time that she had walked on the asphalt portion of sidewalk, although she had previously visited the restaurant once. When she was approximately one foot off the wooden deck abutting the entrance of the restaurant, her left foot got caught and she fell to the ground. She also testified that she did not remember whether there was any artificial lighting illuminating the area where she had the accident; that, prior to the accident, she had not "made any complaints to anyone regarding the lighting conditions at [Xavier's Restaurant]"; that, prior to the accident, she did not know "anyone making any complaints about the lighting at [Xavier's Restaurant]"; and that, prior to the accident, she did not know "anyone else having made complaints about the condition of the asphalt walkway leading to the wooden deck at [Xavier's Restaurant]."

At his deposition, defendant Wilhelm testified to the effect that he is the owner of the strip shopping center where Xavier's Restaurant is located; that he does not have "any management company that manages the center"; that he inspects the property almost every week; and, when he visited the property, he had not noticed the disrepair of the sidewalk. He also testified that he is responsible to maintain the parking lot and "the tenants take care of the sidewalk" and that there has been no complaint about the asphalt of the sidewalks, although there were some complaints about the parking lot made by Xavier's Restaurant.

In his affidavit, defendant Wilhelm's expert, Mr. Mellusi, indicates that he took photographs and measurements at the site of the accident on April 6, 2006, particularly observing the asphalt walkway that leads to a wood plank walkway directly adjacent to the restaurant. His affidavit indicates that the depth of the deepest depression in the surface of the asphalt walkway is less than one half inch and that there are no abrupt variations in height. Mr. Mellusi concluded that the construction, design and maintenance of the asphalt walkway where the plaintiff's accident occurred is within the standards set forth in the state building code and that the accident is not the result of a defect in the subject walkway.

While, in general, the finding of the existence of a dangerous or defective condition depends on the peculiar facts and circumstances of each case and is ordinarily a question of fact for a jury to determine, not every determination poses a jury question (*Hymanson v A.L.L. Assoc.*, 300 AD2d 358, 751 NYS2d 756 [2002]; *see also, Trincere v County of Suffolk*, 90 NY2d 976, 665 NYS2d 615 [1997]). A property owner may not be held liable in damages for trivial defects on a sidewalk, not constituting a trap or a nuisance, over which a pedestrian might merely stumble, stub a toe, or trip (*Hargrove v Baltic Estates*, 278 AD2d 278, 717 NYS2d 320 [2000]; *Marinaccio v LeChambord Rest.*, 246 AD2d 514, 667 NYS2d 395 [1998]). A court may find a defect trivial upon an examination of all the facts presented, including the width, depth, elevation, irregularity and appearance of the defect, along with the time, place and circumstance of the injury (*see, Trincere v County of Suffolk, supra; Mendez v De Milo*, 17 AD3d 328, 792 NYS2d 600 [2005]).

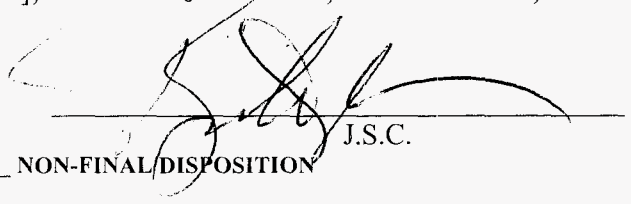
Here, scrutiny of the photographs and other evidence in the record supports the conclusion that, as a matter of law, the alleged defect, which did not have any of the characteristics of a trap or nuisance, was too trivial to be actionable (*Hymanson v A.L.L. Assoc.*, 300 AD2d 358, 751 NYS2d 756 [2002]). The sidewalk complained of was open and obvious, and as a matter of law, not inherently dangerous (*see, Webber v Miller*, 17 AD3d 352, 793 NYS2d 105 [2005]; *Velez v Institute of Design and Constr.*, 11 AD3d 453, 782 NYS2d 755 [2004]).

In opposition, plaintiff has failed to raise a triable issue of fact by showing that a defect, in fact, existed which would constitute a dangerous or defective condition or that the alleged defect had the characteristics of a trap or nuisance (*Arsenicos v Westland S. Shore Mall*, 294 AD2d 385, 742 NYS2d 329 [2002], *lv denied* 98 NY2d 612, 749 NYS2d 475; *see also, D'Arco v Pagano*, 21 AD3d 1050, 801 NYS2d 158 [2005]; *Mullaney v Koenig*, 21 AD3d 939, 801 NYS2d 343 [2005]; *Pirie v Kransinki*, 18 AD3d 848, 796 NYS2d 671 [2005]). Plaintiff contends that there existed a large crack or depression in the sidewalk on the day of the accident and the alleged dangerous condition which was not readily visible at 8:30 p.m. due to the alleged insufficient lighting constituted a trap or snare. Plaintiff further contends that "someone finally filled in the depression" and the entire walkway including the subject sidewalk was resurfaced. In support, plaintiff submits, *inter alia*, her own affidavit which indicates that she "noticed nothing cracked or uneven about the macadam [sidewalk], which is somewhat uniformly black or dark grey" since the lighting in the accident area was insufficient.

Here, in her bill of particulars, plaintiff alleges that the accident occurred on July 28, 2003, "at approximately 8:30 p.m." She also alleges that "the defective condition of the walkway and parking lot caused [her] to fall and be precipitated to the ground." Plaintiff further alleges that defendants "failed to adequately provide [any artificial lighting in the area in question]." This Court takes judicial notice that sunset on the date of the accident occurred at 8:15 p.m. (*see, People v Pisani*, 48 NY2d 725, 422 NYS2d 372 [1979]; *Brown v McCullough*, 240 AD 381, 270 NYS 37 [1934]). Plaintiff did not offer any evidence demonstrating that there existed the alleged defective condition in the subject sidewalk on the day of the accident and that the alleged condition was not readily visible at 8:30 p.m. At her deposition, plaintiff stated that she did not remember whether there was any artificial lighting illuminating the accident area, while, in her affidavit, she states that lighting was insufficient. These conflicting statements, by themselves, are insufficient to defeat defendant Wilhelm's properly supported motion for summary judgment (*Garcia v Jesuits of Fordham*, 6 AD3d 163, 774 NYS2d 503 [2004]). Moreover, even if this Court were to find that the lighting of the sidewalk was insufficient, she would fail to submit evidence sufficient to demonstrate that an alleged inadequate lighting condition was a proximate cause of the accident (*see, Leib v Silo Rest.*, 26 AD3d 359, 809 NYS2d 185 [2006]). Accordingly, defendant Wilhelm's motion for summary judgment in his favor is granted and the complaint against him is dismissed.

This Court has the authority to search the record and summary judgment may be granted to a non-movant who is entitled to such relief without the necessity of a cross motion (CPLR 3212[b]). Since plaintiff failed to demonstrate that a defect existed which would constitute a dangerous or defective condition, defendant Xavier's Restaurant is also entitled to judgment dismissing the complaint against it (*see, Jason v Danar*, 1 AD3d 398, 767 NYS2d 779 [2003]; *Hernandez v Linhart*, 290 AD2d 534, 736 NYS2d 695 [2002]).

Dated: MAR 26 2007

  
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J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION