SHORT FORM ORDER

INDEX No. 04-4420
CAL. No. 06-01690-OT

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 12-8-06
ADJ. DATE 2-23-07
Mot. Seq. # 003 - MG; CASEDISP

SUZANN H. APPLEGATE, Plaintiff, - against - LONG ISLAND POWER AUTHORITY and KEYSPAN CORPORATION, Defendants.	STOCK & CARR Attorneys for Plaintiff 88 Second Street Mineola, New York 11501 GEORGE D. ARGIRIOU, ESQ. Attorney for Defendants 175 East Old Country Road Hicksville, New York 11801

Upon the following papers numbered 1 to 21 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 12 - 19 ; Replying Affidavits and supporting papers 20 - 21 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Long Island Power Authority and Keyspan Corporation for summary judgment dismissing the complaint against them, is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, when on March 13, 2003, she tripped and fell over a utility cover on defendants' property located at 1650 Wheeler Road, in Central Islip, New York. The complaint alleges that the utility cover was concealed and unsecured.

Defendants Long Island Power Authority and Keyspan Corporation now move for summary judgment to dismiss the complaint on the grounds that they did not create or have any notice of the alleged dangerous condition. In support thereof they submit, *inter alia*, portions of plaintiff's deposition testimony wherein she testified to the effect that at the time of the accident she was employed by the New York State Department of Transportation as a maintenance worker and was walking in a grassy area picking up trash along Wheeler Road. She alleged that her work crew was assigned to the route along Wheeler Road and that such crew would go up and down Wheeler Road several times throughout the course of a day picking up trash. She also testified that: she had been working for the maintenance department for approximately eight months; it was her daily routine to walk in this area; she cleaned this area five days a week; she had been in this area the day before the accident; she had seen the utility cover prior to the date of the accident; and she had cleaned debris from that cover prior to the day of the

accident. The plaintiff further testified that prior to the accident she never observed any condition that she considered dangerous, and she did recall complaining to anyone about the condition of the utility cover, nor did she recall any of her co-workers making complaints. The plaintiff also claimed at her deposition that she fell because the utility cover collapsed.

The defendants additionally submit portions of the deposition testimony of Richard Zavada, defendants' senior supervisor for facilities management, who is responsible for maintaining the yards and buildings. Mr. Zavada testified that underneath the utility cover was an incoming water feed for the property, and that water was supplied by the Suffolk County Water District. He further testified to the effect that defendants hired an outside landscaper to cut the grass and a cleaning contractor to pick up debris around the buildings and perimeter of the property. Mr. Zavada stated that after finding out about the plaintiff's accident in October of 2003, he went out and inspected the utility cover, but did not find anything wrong with it.

In addition, the defendants submit the affidavit of Mr. Zavada who states that he performed a search of defendants' records for a two year period from March 13, 2001 until March 13, 2003. He alleges that the search was for work requests and repair records regarding any repairs that were made to the water cover and pit, as well as any complaints that were made pertaining to the water cover during that two year period of time. Mr. Zavada states that his search revealed that there were no repairs made to the water cover and that there were no records of any complaints regarding the water cover.

In further support of their motion, the defendants submit portions of the deposition testimony of Frank Graham who was superintendent at the defendants' facility in 2003, and his duties included maintaining the property. He testified to the effect that he would inspect the property on a daily basis and would look for items that needed maintenance. He stated his inspections occurred when he was walking from his car to the shop and that he "pretty much drove around the yard everyday." He also stated that if an employee saw that there was problem with the utility cover, they would fill out a work request and would make the repair.

The defendants also submit portions of the deposition testimony of Ryan Koenig, a highway maintenance worker who was assigned to the same work crew as the plaintiff. He testified to the effect that he worked everyday picking up papers on Wheeler Road, and that within a month prior to the plaintiff's accident he walked in the vicinity of the accident on approximately ten days. Mr. Koenig stated that he observed the utility cover on prior occasions when he was picking up papers, and that within a week before the plaintiff's accident he never observed anything he considered to be dangerous. He further stated that: he never observed any gaps between the cover and the frame; he never observed any holes or openings; he never complained, nor did he know of anyone else who complained about the condition of the cover; the grass in that area was routinely maintained short; and at no time prior to the date of the accident did he have difficulty observing the utility cover because the height of the grass.

Finally, the defendants submit portions of the deposition testimony of Alvaro Durant, another highway maintenance worker who was working on the day of the plaintiff's accident. Mr. Durant testified that he never observed the utility cover's frame being out of position at any time prior to the accident, that he never complained to anyone about the condition of the frame, and that he was unaware of any complaints about the frame.

The defendants allege that based upon the above-mentioned deposition testimony, they are entitled to summary judgment dismissing the plaintiff's complaint. They argue that such testimony establishes that they did not create or have any notice of the alleged dangerous condition. They assert that they maintained the premises in a reasonably safe condition and that there were no complaints made regarding the condition of the utility cover. The defendants additionally claim that the record is completely devoid of any evidence that demonstrates how long the alleged condition existed. Based upon the foregoing, allege the defendants, there are no material issues of fact warranting a trial in this matter.

The plaintiff opposes the defendants' motion. First, she argues that the evidence establishes that the utility cover was owned and maintained by the defendants. In support of such argument, the plaintiff provides a prior reply affirmation of the defendants' attorney, John F. Hastings, dated June 1, 2006, wherein Mr. Hastings states that the defendants, "unequivocally admit... that the subject facility is part of the property owned and operated by the defendants." In further support, the plaintiff provides portions of Mr. Graham's deposition testimony wherein Mr. Graham testified to the effect that his staff would handle any sort of maintenance issue that would come up with respect to the area between the fence and the sidewalk.

The plaintiff next argues that the mere happening of the accident, that is, the sudden collapse of the utility cover, is evidence enough of the existence of a dangerous condition. The plaintiff submits her affidavit in opposition wherein she states that at the time of her accident, the metal plate was extremely rusted and loose. She also states that she had been working in the area for approximately eight months prior to the accident and she had observed the metal plate to be rusted for that entire period of time. The plaintiff submits photographs of the utility cover and states that these photographs are a fair and accurate depiction of what the metal plate looked like at the time of her accident. The plaintiff also supplies the court with the deposition testimony of Mr. Zavada, and points to the portion of his testimony wherein he describes the plate as being rusty in color. In addition, the plaintiff submits the affidavit of Mr. Clark, and points to that portion of the affidavit wherein Mr. Clark describes the plate as "rust/brown" in color and wherein he explains that after the plaintiff's fall, he stepped on the plate, and it swung down, with his leg going into the hole up to his knee. The plaintiff asserts that based upon such evidence, the existence of a dangerous condition has been established.

The plaintiff further contends that the defendants had a duty to make reasonable efforts to inspect the property so as to determine the presence of dangerous conditions and that this duty is not satisfied by a careless inspection which fails to bring to light an existing defect. The plaintiff argues that the defendants' employees looking at the metal plate while driving or walking around the property was patently inadequate and no inspection at all. The plaintiff maintains that the issue of whether a truly reasonable and adequate inspection would have discovered the dangerous condition of the metal plate, constitutes a question of fact that requires a denial of the defendants' motion.

The plaintiff additionally argues that the special use doctrine is applicable in this case. She alleges, not only is liability predicated upon ownership, but also on the concession that this metal plate, vault and water main were utilized for the defendants' exclusive use and benefit. The plaintiff contends that the owner of property who benefits by the use of an appurtenance for a special purpose, must inspect it and maintain it in a reasonably safe condition. Even more importantly, alleges the plaintiff, the doctrine of special use eliminates the requirement that the defendants have actual or constructive notice of a defect

in the special use. She claims that the application of the special use doctrine herein raises questions of fact that require a denial of this summary judgment motion.

Lastly, the plaintiff argues that the doctrine of res ipsa loquitor applies to this case and that it is clear that her injury is of a type that would not occur in the absence of negligence. She alleges that viewing the evidence in a light that is most favorable to her, it is more probable that the negligence of the defendants, their failure to adequately inspect and repair the cover, caused this accident.

It is well settled that in order for a plaintiff in a trip and fall case to establish a prima facie case of negligence, the plaintiff is required to prove that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of such condition (*see*, ***Golding v Powell & Dempsey, Inc.***, 247 AD2d 510, 669 NYS2d 323 [1998]; ***Kraemer v K-Mart Corporation***, 226 AD2d 590, 641 NYS2d 130 [1996]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (***Gordon v American Museum of Natural History***, 67 NY2d 836, 837; 501 NYS2d 646, 647[1986]). "Moreover, constructive notice will not be imputed where a defect is latent and would not be discoverable upon reasonable inspection" (***Curiale v Sharrotts Woods, Inc.***, 9 AD3d 473, 475; 781 NYS2d 47, 49 [2004]).

Here, the defendants, by the submission of the depositions of the plaintiff, Mr. Zavada, Mr. Graham, Mr. Koenig, and Mr. Durant, as well as the affidavit of Mr. Zavada, have made a prima facie showing of entitlement to judgment as a matter of law by establishing that they did not create or have actual or constructive notice of a hazardous condition. There is no evidence that any complaints were made concerning the utility cover or that the defendants, or their employees, were aware or should have been aware of the utility cover's condition (*see*, ***Gam v Pomona Professional Condominium***, 291 AD2d 372, 737 NYS2d 113 [2002]). There is also no evidence that the utility cover was in a hazardous condition for a sufficient length of time to be discovered and remedied (*see*, ***Bernard v Waldbaum, Inc.***, 232 AD2d 596, 648 NYS2d 700 [1996]). In addition, Mr. Graham's testimony established that he conducted a reasonable inspection of the utility cover, by either walking or driving by it on a daily basis (*see*, ***Waller v Site Safety LLC***, 28 AD3d 236, 813 NYS2d 379 [2006]). The defendants have, therefore, met their prima facie burden.

In opposition, the plaintiff has failed to establish the existence of a triable issue of fact. Neither the affidavit of the plaintiff nor the affidavit of Mr. Clark demonstrate that the defect was visible and apparent. Initially, the court notes that the statements contained in the plaintiff's affidavit concerning the utility cover being extremely rusted and that she observed the rust for eight months prior to the accident, are inconsistent with her prior deposition testimony and are belated claims designed to avoid the consequences of dismissal by raising a feigned factual issue (***McGuire v Quinnonez***, 280 AD2d 587, 720 NYS2d 812 [2001]; ***Martin v W.B. Restaurant, Inc.***, 269 AD2d 431, 703 NYS2d 212 [2000]; ***Fontana v Fortunoff***, 246 AD2d 626, 668 NYS2d 394 [1998], *lv denied* 92 NY2d 804). Furthermore, while the utility cover may be rusty-brown in color, there is no evidence, expert or otherwise, that rust caused a defect in the integrity of the underlying structure of the utility cover prior to the plaintiff's accident (*see*, ***Morrow v Ashley***, 3 AD3d 619, 770 NYS2d 760 [2004]). With regard to issue of inspection, "In general, the duty which the common law imposes on the owner or possessor of property includes the duty to make reasonable efforts to inspect the property so as to determine the presence of dangerous conditions"

(***Zuckerman v State of New York***, 209 AD2d 510, 512; 618 NYS2d 917, 918 [1994]). The plaintiff has failed to establish that the defendants' inspection procedures which included driving and walking around the property looking for defects, were unreasonable or departed from the standard of reasonable care (*see*, ***Fowle v State of New York***, 187 AD2d 698, 590 NYS2d 280 [1992]). Moreover, the deposition testimony of Mr. Clark, plaintiff's supervisor, establishes that when he inspected the utility cover immediately after the plaintiff's accident it "looked like nothing was wrong with it," and it was not until he stepped down on the cover that "the thing swung open." Constructive notice will not be imputed against a defendant where the defect is latent (*see*, ***Lee v Bethel First Pentecostal Church of America, Inc.***, 304 AD2d 798, 762 NYS2d 80 [2003]).

As to the issue of special use, the court notes that special use cases generally involve the installation of an object in a public street or sidewalk for the benefit of a private owner (***Minott v City of New York***, 230 AD2d 719, 645 NYS2d 879 [1996]). Thus, "[t]he special use exception is reserved for situations where a landowner whose property abuts a public street or sidewalk derives a special benefit from that property unrelated to the public use" (***Loiaconi v Village of Tarrytown***, 36 AD3d 864, 865; 829 NYS2d 191, 192 [2007], *quoting* ***Poirier City of Schenectady***, 85 NY2d 310, 315). In the case at hand, the plaintiff's attorney, in his affirmation in opposition and by the submission of the Hastings affirmation, acknowledges that the utility cover was not on a public street or sidewalk. Since the utility cover was on the defendants' private property, the special use doctrine is inapplicable, and the plaintiff's claim that actual or constructive notice is not required herein, is without merit.

Finally, contrary to the plaintiff's claim, the doctrine of res ipsa loquitur is not applicable to this action. To invoke such doctrine, a plaintiff must show the following elements: "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff" (***Scott v First Stop, Inc.***, 3 AD3d 528, 529; 770 NYS2d 733, 734 [2004]; *quoting* ***Corcoran v Banner Super Mkt.***, 19 NY2d 425, 430). In the case at hand, the utility cover is located in a grassy, unfenced area adjacent to Wheeler Road. In addition to Suffolk County Water Authority having access to the water main which was located beneath the utility cover, this utility cover was in an area continuously open to the public. As such, the plaintiff has failed to demonstrate that the defendants had control of sufficient exclusivity to fairly rule out the chance that the defective utility cover was caused by some agency other than defendants' negligence (*see*, ***Dulgov v City of New York***, 33 AD3d 584, 822 NYS2d 298 [2006]; ***Scott v First Stop, Inc.***, *supra*).

Accordingly, since the defendants have met their initial burden and the plaintiff has failed to come forward with evidentiary proof sufficient to raise a triable issue of fact, the defendants' motion for summary judgment dismissing the complaint is granted.

Dated: MAY 14 2007

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION