

<b>Fontana v East Shore Inn, Inc.</b>
2007 NY Slip Op 32039(U)
July 10, 2007
Supreme Court, Richmond County
Docket Number: 0013497/2002
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND DCM PART 3**

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**Calendar No.: 184 - 002  
Index No.: 13497/02**

**MARY FONTANA and ANTHONY FONTANA**  
*Plaintiff*  
*against*

**DECISION  
HON. JOSEPH J. MALTESE**

**EAST SHORE INN, INC.,**

*Defendant(s)*

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The following papers numbered 1 to 3 used on this motion on this 24<sup>th</sup> day of April, 2007.

Notice of Motion of Defendant (Affirmation In Support)	<u>1</u>
Affirmation In Opposition	<u>2</u>
Reply Affirmation	<u>3</u>

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Plaintiffs commenced this action to recover damages for injuries sustained by MARY FONTANA when she tripped and fell off of a platform onto the adjacent sidewalk in front of defendant’s EAST SHORE INN restaurant. According to plaintiffs, the height differential between the platform and the sidewalk created a dangerous condition, and that defendant created this condition when it constructed the platform during renovations performed prior to the date of plaintiff’s accident.

As a result of said accident, plaintiff alleges to have sustained, *inter alia*, injuries to her legs and back and that she was incapacitated from her usual activities for approximately two months and continues to suffer from pain and is significantly limited in performing her usual activities as a result of such injuries. Plaintiff further alleges that she may require surgical intervention in the future. The claims of plaintiff ANTHONY FONTANA are purely derivative in nature.

In moving for summary judgment, plaintiffs contend that they are entitled to judgment in their favor as the proof establishes (1) the existence of a significant height differential from the platform to the adjacent sidewalk which caused plaintiff to trip and fall; (2) it is undisputed that defendant created this condition when it constructed the platform during renovations performed at the subject premises prior to the time the alleged incident occurred; and (3) according to plaintiffs' expert architect, the location of the platform, which exists beyond the building line, requires a permit from the New York City Buildings Department in order to construct and/or install the platform, and furthermore, requires adherence to certain Department of Transportation guidelines restricting the change in the level of the platform from the sidewalk. According to this expert, a search conducted revealed that defendant not only failed to obtain the necessary permit, but failed to adhere to certain guidelines which require, *inter alia*, that any such change in level from the sidewalk to the platform, must be marked or delineated in order to alert pedestrians of such a condition, which defendant did not do. According to plaintiffs, this proof establishes defendant's negligence by creating the platform, and that such negligence was a substantial factor in causing plaintiff's accident.

In opposition, defendant contends that summary judgment should be denied in view of the existence of triable issues of fact regarding the alleged dangerous condition of the sidewalk. Defendant submits its own architect's affidavit that indicates that the platform itself was clearly delineated from the adjacent sidewalk since it was constructed with two different colored pavers with a textured surface, and therefore, no railing or guardrail would be required. Defendant further contends that even if a permit was obtained from the buildings department, the platform, as constructed, would be within department guidelines. Defendant also contends that triable issues of fact exist regarding plaintiff's contributory negligence, which must be decided by a jury.

It is well settled that a motion for summary judgment must be denied if there are facts sufficient to require a trial of any issue of fact (*see* CPLR 3212[b]). The granting of summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of triable issues of fact. Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion (*see* Marine Midland Bank, N.A. v. Dino, 168 AD2d 610). Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable (*see* American Home Assurance Co. v. Amerford Int'l. Corp., 200 AD2d 472).

Here, it is the opinion of this Court that while plaintiffs have initially met their burden of establishing their entitlement to judgment, defendant, nevertheless, has submitted sufficient proof to raise triable issues of fact requiring the denial of summary judgment in plaintiffs' favor. In

particular, the parties have each submitted expert affidavits by architects which contradict each other's findings as to whether (1) a dangerous condition existed; (2) whether the raised platform was in violation of any building guidelines; and (3) whether any such violations was the proximate cause of plaintiff's injuries.

Accordingly, it is hereby:

ORDERED that the motion of plaintiffs MARY FONTANA and ANTHONY FONTANA for summary judgment is denied.

All parties shall appear in DCM Part 3 for a status conference on **August 14, 2007** at 9:30 a.m.

E N T E R,

Dated: July 10, 2007

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Joseph J. Maltese  
Justice of the Supreme Court