

**Kanter v J.D. Posillico, Inc.**

2007 NY Slip Op 33681(U)

November 13, 2007

Supreme Court, Suffolk County

Docket Number: 0028697/2004

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 5-31-07  
ADJ. DATE 7-30-07  
Mot. Seq. # 002 - MD  
003 - XMD

-----X  
PAUL KANTER. :  
 :  
 Plaintiff, :  
 :  
 - against - :  
 :  
 J.D. POSILICO, INC., :  
 :  
 Defendant. :  
-----X

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Upon the following papers numbered 1 to 36 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers 13-33; Answering Affidavits and supporting papers   ; Replying Affidavits and supporting papers 34 - 36; Other Sur reply; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that defendant's motion for summary judgment dismissing plaintiff's complaint is denied; and it is

**ORDERED** that the cross motion by plaintiff for leave to serve an amended bill of particulars is denied without prejudice to renewal upon submission of a proposed amended bill of particulars as indicated herein within thirty (30) days of the entry date of this order.

Plaintiff Paul Kanter commenced this action to recover damages for injuries allegedly sustained as a result of a trip and fall accident that occurred on a sidewalk in front of premises known as 384 New York Avenue, Huntington, New York. The accident allegedly occurred at 10:00 p.m. on October 9, 2004, as plaintiff was walking along a sidewalk construction area that had been barricaded off with a temporary metal fence. The temporary fence had been erected by defendant J.D. Posilico, Inc., a contractor hired by the State to complete a construction project which involved excavating certain sidewalks within the Village of Huntington. Plaintiff alleges that as he was walking in front of a Radio

Shack store, which is operated at 384 New York Avenue, he tripped over one of the support legs for the fencing. Plaintiff's bill of particulars alleges, among other things, that defendant was negligent in creating an unreasonably dangerous condition at the accident site; in failing to place orange safety cones over all of the support legs; and in failing to provide adequate lighting.

Plaintiff, who lives at 400 New York Avenue, testified at an examination before trial that he walked past the subject construction area every day, 10 times a day, and had observed the support legs on the temporary fencing prior to his accident. He testified that some, but not all, of the support legs for the fencing were covered with orange cones, and that certain legs were not flush with the ground. He further testified that as the fencing was made from dull aluminum, it was difficult at night to see where the support legs were located. Plaintiff testified that on the night of the accident he had no difficulty seeing the orange cones that were present along the walkway. He testified that he did not see the leg that he tripped over prior to his fall, as it was not covered with an orange cone. In addition, plaintiff testified that while he did not recall the street lights in the area to be working at the time of the accident, the Radio Shack store did have some lights coming from its windows.

Defendant now moves for summary judgment dismissing plaintiff's complaint on the ground that it did not create the alleged dangerous condition, and that it had no notice of the alleged dangerous condition. Defendant further argues that the complaint should be dismissed, because its actions with respect to the temporary fencing complied with the requirements and recommendation of New York State inspectors, who allegedly were on the job site on a daily basis. In support of its motion, defendant submitted copies of the pleadings, transcripts of the parties' deposition testimony and an affidavit from a safety consultant, Howard Edelson. Mr. Edelson's affidavit states that the temporary fence used by defendant was approved by the State of New York and conformed with the Manual on Uniform Traffic Control Devices. Moreover, the affidavit states that defendant's use of the temporary fence and orange safety cones to "delineate a temporary traffic control zone pedestrian walkway" and to prevent pedestrians from entering the work zone area "did not depart from accepted construction safety practices."

Plaintiff opposes the motion for summary judgment, arguing that in cases where there is a continuous recurring dangerous condition, plaintiff does not have to prove that defendant had, or should have had, knowledge of the existence of the defect. Plaintiff also cross-moves for an order granting leave to amend the bill of particulars. The Court notes that the sur reply filed by plaintiff was not considered in this determination (*see*, CPLR 2214; *Flores v Stankiewicz*, 35 AD3d 804, 827 NYS2d 281 [2006]).

Gary Cerlini, who is employed by defendant as an office engineer, testified on behalf of defendant. Mr. Cerlini testified that while his primary function is billing, he also is responsible for inspecting the job site for safety. He testified that he would visit the job site at least two or three times a week, and that he did not have a written record of the days he actually visited the site. He testified that he does not have a record of the days that he visited the site. He also testified that the workers responsible for maintenance and protection of traffic, the project superintendent and the state inspectors also would inspect the job site for safety. Further, Mr. Cerlini testified that the temporary fence was bought from a company named National Construction Rentals. He testified that while National

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Constructor Rentals initially installed the fencing at the work site, J.D. Posillico employees would later move the fences to different areas of the street. He testified that the State recommended that orange safety cones be placed on the feet of the fence. He testified that when he saw a cone missing, he would place a cone back on top of the feet of the fence. He also testified that he never saw a missing cone in the area where plaintiff's alleged accident occurred. In addition, Mr. Cerlini testified that he did not know whether the street light was functioning at the time of the alleged incident. However, he did testify that the project involved moving lighting cables as well as telephone poles.

Jonathan Newman testified that he was an employee of Radio Shack at the time of the incident. Mr. Newman testified that he was not aware of any complaints of anyone tripping over the fence. He also testified that he "intermittently" observed safety cones to be missing from two or three of the fence legs in the general area in front of the Radio Shack store.

To prove a prima facie case of negligence in a trip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*see, Bradish v Tank Tech Corp.*, 216 AD2d 505, 628 NYS2d 807 [1995]; *Gaeta v City of New York*, 213 AD2d 509, 624 NYS2d 47 [1995]). 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 (*see, Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]; *Bykofsky v Waldbaum's Supermarkets, Inc.*, 210 AD2d 280, 619 NYS2d 760 [1994]). Liability can be predicated only on failure of the defendant to remedy the danger after actual or constructive notice of the condition (*see, Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]). Furthermore, a defendant with actual knowledge of an ongoing and recurring dangerous condition may be charged with constructive notice of each specific recurrence of the condition (*see, Brown v Linden Plaza Hous. Co., Inc.*, 36 AD3d 742, 829 NYS2d 571 [2007]; *Fundaro v City of New York*, 272 AD2d 516, 708 NYS2d 149 [2000]).

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see, Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]).

Defendant failed to establish its entitlement to judgment as a matter of law. Mr. Edelson's affidavit, which merely states that defendant's use of temporary fencing "did not depart from accepted construction safety practices," is insufficient to show prima facie that the fence at issue did not create a hazardous condition for pedestrians (*see, Reagan v Hartsdale Tenants Corp.*, 27 AD3d 716, 813 NYS2d 153 [2006]; *Manning v 6638 18<sup>th</sup> Ave. Realty Corp.*, 28 AD3d 434, 814 NYS2d 153 [2006]). In

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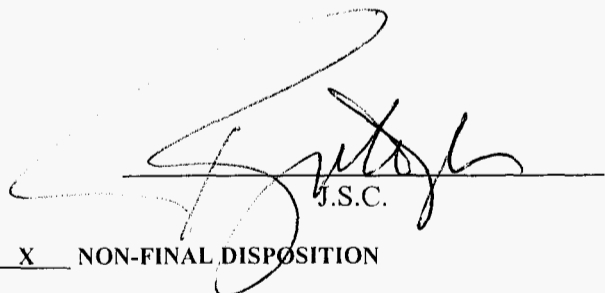
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addition, Mr. Edelson's affidavit lacks evidentiary value, as there is no indication that his conclusions were based on his inspection of the work site or the temporary fence at issue (*see, Sawyer v Dreis & Krump Mfg. Co.*, 67 NY2d 328, 502 NYS2d 696 [1986]; *Khan v Bangla Motor & Body Shop*, 27 AD3d 526, 813 NYS2d 123, lv dismissed 7 NY3d 864, 824 NYS2d 608 [2006]; *Banks v Freeport Union Free School Dist.*, 302 AD2d 341, 753 NYS2d 890 [2003]; *Davidson v Sachem Cent. School Dist.*, 300 AD2d 276, 751 NYS2d 300 [2002]). Opinion evidence must be based on facts in the record or personally known to the witness (*see, Cassano v Hagstrom*, 5 NY2d 643, 187 NYS2d 1 [1959]).

Moreover, defendant failed to present evidence as to the frequency and nature of its safety inspections at the construction site (*see, Feldmus v Ryan Food Corp.*, 29 AD3d 940, 818 NYS2d 98 [2006]; *Britto v Great Atl. & Pac. Tea Co.*, 21 AD3d 436, 799 NYS2d 828 [2005]). Although Mr. Cerlini testified that he was responsible for conducting work site safety inspections for defendant, he could not recall when he had been to the subject area prior to the alleged accident. Thus, Mr. Cerlini's testimony clearly is insufficient to show that defendant lacked notice of the alleged dangerous condition. Further, according to plaintiff's deposition testimony, safety cones repeatedly were missing from the support legs of the temporary fence in the area of the accident. Mr. Newman also testified to there being missing safety cones on the fence legs in the area of the accident. Based upon such testimony, an inference could be drawn that defendant had actual knowledge of a recurrent dangerous condition and therefore could be charged with constructive notice of the condition. (*see, Sweeney v D & J Vending*, 291 AD2d 443, 737 NYS2d 388 [2002]; *McLaughlan v Waldbaums, Inc.*, 237 AD2d 335, 654 NYS2d 406 [1997]; *Chin v Harp Mktg.*, 232 AD2d 601, 648 NYS2d 697 [1996]). Defendant's submissions, therefore are insufficient to demonstrate prima facie that the temporary fencing along New York Avenue did not create a dangerous condition or that it lacked notice of such condition (*see, Riley v ISS Intl. Serv. Sys.*, 5 AD3d 754, 774 NYS2d 182 [2004]).

Finally, plaintiff's cross motion for leave to serve an amended bill of particulars is denied without prejudice to renewal upon submission of a proposed amended complaint within (30) days of the entry date of this order. Motions to amend pursuant to CPLR 3025 will generally be granted as long as the opponent is not surprised or prejudiced, and the proposed amendment appears to be meritorious (*see, Oakwood Realty Corp. v HRH Constr. Corp.*, 19 AD3d 668, 798 NYS2d 89 [2005]; *Ruby Land Dev. v Toussie*, 4 AD3d 518, 771 NYS2d 701 [2004]). However, such motions will be denied where, as in this case, the plaintiff has failed to submit a copy of the proposed amendment with his moving papers (*see, Chang v First Am. Title Ins. Co. of N. Y.*, 20 AD3d 502, 799 NYS2d 121 [2005]; *Ferdinand v Crecca & Blair*, 5 AD3d 538, 774 NYS2d 714 [2004])

Dated: NOV 13 2007


J.S.C.

FINAL DISPOSITION  NON-FINAL DISPOSITION