

<b>Jones v Ciminelli's Pizza &amp; Rest. Inc.</b>
2007 NY Slip Op 33975(U)
November 30, 2007
Supreme Court, Suffolk County
Docket Number: 0021157/2005
Judge: Robert W. Doyle
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SUPREME COURT - STATE OF NEW YORK  
POST-NOTE MOTION PART - SUFFOLK COUNTY

**PRESENT:**

Hon. ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 5-25-07 (001)  
5-17-07 (002)  
ADJ. DATE 8-17-07  
Mot. Seq. # 001 - MD  
002 - MG

-----X  
GLENDA JONES, :  
 :  
 :  
 Plaintiff, :  
 :  
 - against - :  
 :  
 CIMINELLI'S PIZZA & RESTAURANT INC., :  
 FRANK NIOLA and JOAN NIOLA, :  
 :  
 :  
 Defendants. :  
-----X

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Upon the following papers numbered 1 to 25 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; 13 - 19; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 20 - 22; Replying Affidavits and supporting papers 23; 24; Other 25; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion by defendants Frank Niola and Joan Niola for summary judgment (motion sequence #001) and the motion by defendant Ciminelli's Pizza & Restaurant Inc. for summary judgment (motion sequence #002) are hereby consolidated for the purposes of this determination; and it is further

**ORDERED** that the motion by defendants Frank Niola and Joan Niola for summary judgment is denied; and it is further

**ORDERED** that this motion by defendant Ciminelli's Pizza & Restaurant Inc. for summary judgment is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff when she tripped and fell on exposed rebar in the parking lot of a strip mall owned by defendants Frank Niola and Joan Niola (hereinafter "the Niolas") at approximately 11:45 a.m., on May 15, 2005. The plaintiff was attending a baby shower at defendant Ciminelli's Pizza and Restaurant (hereinafter "Ciminellis"), a tenant in the strip mall. The complaint alleges, *inter alia*, that the defendants were negligent in allowing the metal rebar to jut out from the ground.

The Niolas now move for summary judgment arguing that they cannot be held liable for the accident because the record is devoid of any evidence to show that they created the alleged defect on the premises or that they had actual or constructive notice of its existence. In support of their motion, Niolas submit: the pleadings; the note of issue and certificate of readiness; the deposition testimony of the plaintiff, her daughter, and her mother; the deposition testimony of defendant Frank Niola; and the deposition of Bill Ciminelli, the owner of Ciminellis.

At her deposition, the plaintiff testified in pertinent part that she drove her car to Ciminellis to attend her cousin's baby shower and her mother and her daughter were with her in the car. She stated that she parked her car in the second parking space from the driveway apron facing the street and that she backed into the space. She testified to the effect that all three got out of the car and walked to the rear of the car to remove the gifts from the trunk. The plaintiff further stated that she passed her mother and her daughter their packages, and then retrieved her package. She stated that she closed her car's trunk and began walking approximately one or two steps toward the right of the vehicle, when her foot got caught on rebar, and she tripped and fell. When asked after exiting her vehicle if she had any opportunity to observe the ground, the plaintiff answered, "I noticed the car stop was back a little distance from the car, but I didn't notice the rebar." She explained that the car stop was about two feet away from the car. The plaintiff was also shown photographs of the parking lot and after examining the photographs, she testified that they were taken a few days after her accident and that the photographs were a fair and accurate representation of the parking area as it existed on the day of her accident. Finally, when asked if she knew how long the rebar existed as it appears in the photographs, the plaintiff answered that she did not know how long the rebar was exposed, but that it looked rusty; and that she was not aware of anyone tripping in this area, or complaining about the condition prior to her accident.

Plaintiff's mother, Gloria Farrell, testified at her deposition that after her daughter had handed out the gifts, her daughter turned, started to walk, and then tripped. She testified that after her daughter's fall she saw that the cement car stop was not where it was supposed to be and that there were two rods sticking up from the surface of the lot.

Plaintiff's daughter, Natalie Jones, testified at her deposition that right after her mother's fall she saw the rebar and that it looked rusty. She stated that the cement car stop was approximately 11 inches from the rebar.

Frank Niola testified at his deposition that he and his wife have owned the strip mall and parking lot for sixteen years, and that Ciminellis has been a tenant since he purchased the premises. He testified that he would go to the premises every couple of weeks to check it, and that his son would check this location on a weekly basis. Mr. Niola testified that there were car stops in the parking lot when he purchased the premises, but that he had new ones put in 1995 or 1996 with cement and with an iron bar.

He stated that the car stops he put in 1995 or 1996 were the same that were there on the date of the plaintiff's accident. When shown pictures of the parking lot, and asked if he had ever seen the car stops in that condition, Mr. Niola answered, "Never. Not my place, no." Mr. Niola also testified to the effect that he has a maintenance man for the property he owns next door to the strip mall, who cuts and blows the grass, and who also does snow removal for the strip mall. Mr. Niola stated that he used a company named "DeRosa" to maintain the surface of the parking lot and that this company would come to the strip mall every two to three years. He further testified that none of the tenants had any responsibility regarding the car stops at the strip mall, and that only he, as landlord, had such responsibility. Lastly, Mr. Niola testified in pertinent part that: no one indicated to him that there was a defective condition prior to the date of the accident; he was not aware of anyone tripping on rebar prior to the date of the accident; and he was not aware of any complaints about the rebar prior to the date of the accident.

Bill Ciminelli testified at his deposition that he is the owner of Ciminellis, and that including Ciminellis, there are five stores in the strip mall. He also testified that the Niolas are the landlords, and that pursuant to the lease, the landlords would maintain the parking lot, including snow removal, painting of parking stalls, and exterior lights. Mr. Ciminelli stated that he never saw the car stops out of place and never saw the rebar until after the accident. He further testified that his employees would pick up papers in the vicinity of parking lot if they saw them. Mr. Ciminelli stated that no one complained to him about the car stops or the exposed rebar prior to the plaintiff's accident, and he was unaware of anyone tripping or falling on the rebar prior to the plaintiff's fall. Lastly, Mr. Ciminelli testified that the Niolas would check the parking lot, or sometimes their son would come on their behalf, but that if he saw something he would call.

The Niolas argue that based upon the evidence herein, no facts demonstrate that they either created the alleged defective condition in the parking lot or had actual or constructive notice of its existence. They contend that in the absence of such proof, they cannot be liable for the plaintiff's injuries merely because they owned the premises on which the accident occurred.

Ciminellis also moves for summary judgment dismissing the complaint and all cross claims against it. In support of its motion, Ciminellis submits, *inter alia*: the pleadings; the deposition testimony of the plaintiff and Bill Ciminelli; and a copy of Ciminellis' lease agreement with Frank Niola. It argues that it had no ownership or control of the property where the plaintiff fell; and therefore, had no power to correct the hazard presented by the metal rebar that was allegedly protruding from the parking lot surface. It also asserts that it did not create the hazardous condition in the parking lot where the plaintiff fell. It further claims that the Niolas were responsible for the maintenance and repair of the parking lot pursuant to a lease agreement. It points to paragraph 49 of the lease which states in pertinent part, "Parking area maintenance, lighting and repairs shall be done by the landlord" and to paragraph 56 of the lease which states in pertinent part, "Landlord's obligation for maintenance shall include... the parking lot and driveways." Ciminellis contends that since it did not own and was not responsible to maintain the parking lot, it owed no duty of care to the plaintiff.

The plaintiff opposes both the Niolas' and Ciminellis' motions arguing that the defendants created a dangerous condition in their parking lot by placing cement parking stops which were not properly secured to the surface with metal rebar. The plaintiff claims that the defendants failed to properly install the parking stops, allowing them to become dislodged. She argues that this resulted in

pieces of rebar sticking up from the surface of the parking lot causing a tripping hazard. The plaintiff submits four photographs which she alleges show that several of the car stops in the parking lot had been moved out of position from where they were supposed to be anchored, including the one where she fell. She maintains that this was not a transitory condition where the defendants would not have the opportunity to observe these conditions upon a proper inspection. She asserts that the defendants have not provided any evidence that general maintenance guidelines were followed or that the parking spots were properly maintained.

In further opposition, the plaintiff also submits the affidavit of Robert L. Schwartzberg, a licensed engineer, who has reviewed the bill of particulars, the deposition testimony of plaintiff and defendant Frank Niola, as well as the four photographs which were marked at the deposition. Mr. Schwartzberg alleges that the photographs display a minimum of three parking stops which had been moved from their assigned parking spaces. He points out that one of the photographs shows the metal rebar sticking up from the ground in two of these spaces, and that two of the concrete stops clearly have been moved a fair distance from where they were supposed to be. He also points out that the parking stops had two holes drilled in the bottom with no corresponding holes drilled in the top. Mr. Schwartzberg states that without corresponding holes in both the top and bottom, no locking device could be installed to hold the parking stops in place. He additionally alleges that there is no evidence that the parking stops were attached by means of cement or epoxy. Mr. Schwartzberg further points out that there is dried oil in the parking space where the plaintiff alleged she parked on the date of the accident. He alleges that dried oil indicates that these oil spots were in place for a long period of time and that the parking stop had not prevented vehicles from parking behind the metal rebar and dripping oil in this location. He states that the presence of the dried oil is a clear indication that the condition was long standing within this space and should have been discovered based on any reasonable inspection of the parking lot. Mr. Schwartzberg also points out that the photograph of the parking space at issue shows discolorations and markings in at least three different positions indicating that the parking stop was only attached on the left side. The different makings, he alleges, indicate that the parking stop was not attached to both pieces of rebar, and thereby remained in place long enough to create discolorations and markings in the ground below. Mr. Schwartzberg states that a properly mounted parking stop would not move upon contact with normal vehicular traffic. He alleges that in his professional opinion, the failure to properly install the parking stops was a direct cause in allowing the parking stops to move from their assigned position and created a dangerous condition. He contends that it is foreseeable, given the method of installation of these parking stops, that a tripping incident would take place and that rebar would be exposed.

In general, liability for a dangerous condition on property is predicated on ownership, occupancy, control or special use of the property (*Ellers v Horwitz Family Limited Partnership*, 36 AD3d 849, 831 NYS2d 417 [2007]). Where none is present, a party cannot be held liable for injuries caused to the plaintiff by a dangerous or defective condition on the property (*Dugue v 1818 Newkirk Management Corp.*, 301 AD2d 561, 756 NYS2d 51 [2003]). Here, Ciminellis has demonstrated that it had no exclusive right to the possession of the parking lot, which it used in common with the other tenants, and that it had no obligation or right to repair or maintain the parking lot (see, *Franks v G & H Real Estate Holding Corp.*, 16 AD3d 619, 793 NYS2d 61 [2005]; *Millman v Citibank, N.A.*, 216 AD2d 278, 627 NYS2d 451 [1995]). Further, the record demonstrates that Ciminellis did not control or make special use of the area of the parking lot where the plaintiff fell, and that Ciminellis did not create or

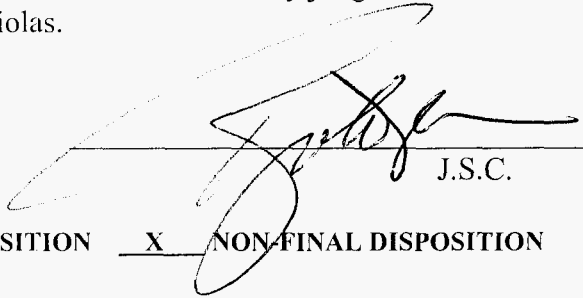
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contribute to the alleged dangerous condition (*see, Hindin v Maffei*, 251 AD2d 545, 674 NYS2d 731 [1998]). In opposition, the plaintiff has failed to submit evidence sufficient to raise a triable issue of fact. The occasional picking up of papers and the occasional phone call to the Niolas is not enough to establish that Ciminellis exercised control over the parking lot (*see, Figueroa v Tso*, 251 AD2d 959, 674 NYS2d 868 [1998]; *see also, Falu v 233 Associates, L.P.*, 258 AD2d 342, 685 NYS2d 230 [1999]). Accordingly, Ciminellis owed plaintiff no duty of care to maintain the parking lot, and it may not be held liable for permitting the existence of the alleged defective condition in the parking lot (*see, Rosato v Foodtown*, 208 AD2d 705, 617 NYS2d 531 [1994]). Thus, Ciminellis' motion for summary judgment dismissing the complaint and all cross claims against it is granted.

As to the Niolas, it is well settled that an owner of real property cannot be held liable for injuries caused by an allegedly defective condition unless the plaintiff establishes that such owner either created or had actual or constructive notice of the condition (*see, Winby v Kustas*, 7 AD3d 615, 775 NYS2d 906 [2004]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time before the accident to allow the owner an opportunity to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 501 NYS2d 646 [1986]). In this case, even assuming arguendo that the Niolas have made a prima facie showing of entitlement to summary judgment as a matter of law, the plaintiff has raised a triable issue of fact on the issue of constructive notice by submitting photographs and an expert affidavit, from which a jury could find that the rebar was exposed for a sufficient period of time for it to have been discovered and remedied (*Morgan v Chong Kwan Jun*, 30 AD3d 386, 817 NYS2d 325 [2006]). Furthermore, based upon the expert's affidavit, the plaintiff has raised a triable issue of fact as to whether the Niolas created the defective condition during the original installation of the car stops (*see, Bingell v County of Schuylar*, 260 AD2d 926, 688 NYS2d 839 [1999]). Since questions of fact have been raised which require a trial, the Niolas' motion for summary judgment must be denied.

Accordingly, Ciminellis' motion for summary judgment dismissing the complaint and the cross claims against it is granted, and the Niolas' motion for summary judgment is denied. The action is severed and shall continue against the Niolas.

Dated: 01/30/2007

  
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 J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION