SHORT FORM ORDER INDEX NO. 26560/2005

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:
HON. JOSEPH FARNETI
Acting Justice Supreme Court

CHRISTINA BOUZIOTIS,

Plaintiff,

-against-

THE SOURCE MALL and WESTWOOD, LLC.,

Defendants.

ORIG. RETURN DATE: SEPTEMBER 14, 2007
FINAL SUBMISSION DATE: NOVEMBER 1, 2007
MTN. SEQ. #: 001
MOTION: MD

PLAINTIFF'S ATTORNEYS:
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Upon the following papers numbered 1 to 6 read on this motion FOR SUMMARY JUDGMENT.
Notice of Motion and supporting papers 1-3; Memorandum of Law 4; Answering Affidavits and supporting papers 5; Replying Affidavits and supporting papers 6; it is,

ORDERED that this motion by defendant, W&S ASSOCIATES, L.P. s/h/a THE SOURCE MALL ("defendant"), for an Order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's verified complaint in its entirety, is hereby **DENIED** for the reasons set forth hereinafter.

This is an action to recover for personal injuries allegedly sustained by plaintiff as a result of a fall in the parking lot of THE SOURCE MALL in Westbury, New York, on November 12, 2002. Defendant now moves for summary judgment alleging that plaintiff cannot identify what caused her to fall, and/or that the complained-of condition was both open and obvious, and not

inherently dangerous. In support thereof, defendant has submitted, among other things, affirmations of counsel and the deposition transcript of plaintiff. Defendant contends that according to plaintiff's own deposition testimony, plaintiff was unsure whether she "slipped" or "tripped," and was unable to identify what caused her to fall. As such, defendant argues that summary judgment must be granted as any finding with respect to proximate cause would only be predicated upon "rank speculation."

In opposition, plaintiff has submitted an affirmation of counsel in which counsel argues that defendant has mischaracterized plaintiff's deposition testimony. Plaintiff cites portions of the transcript wherein plaintiff testified that the accident occurred on an area of "mulch" located between two curbs in the parking lot, and that she fell as a result of "slipping" on wet debris such as "mulch" and/or "little wood chips." Accordingly, plaintiff urges a denial of the motion as, contrary to defendant's assertion, plaintiff was able to identify that her accident was caused by her slipping on wet debris consisting of the mulch and/or wood chips.

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212[b]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It has been held that "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue . . . or where the issue is even arguable" (*Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65 [1987] [citations omitted]; *see also Andre v Pomeroy*, 35 NY2d 361, *supra*; *Henderson v New York*, 178 AD2d 129 [1991]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]). It should be noted that Courts have repeatedly held that negligence claims should not be resolved at

the summary judgment stage (*see e.g. Kahane v Marriott Hotel Corp.*, 249 AD2d 164 [1998]; *Rivers v Atomic Exterminating Corp.*, 210 AD2d 134 [1994]; *Chahales v Garber*, 195 AD2d 585 [1993]; *In re World Trade Ctr. Bombing Litig.*, 3 Misc 3d 440 [Sup Ct, NY County 2004]).

In the instant application, the Court finds that defendant has failed to submit evidence in admissible form to establish entitlement to judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Dempster v Overview Equities, Inc.*, 4 AD3d 495, *supra*). Defendant relies upon affirmations of counsel, and the unsigned, unsworn deposition transcript of plaintiff in support of the motion. Counsel's affirmations in support of the motion, made without personal knowledge of the facts, are without any evidentiary value and are insufficient to support a motion for summary judgment (*see S. J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *Moran v Man-Dell Food Stores, Inc.*, 293 AD2d 723 [2002]; *Hoffman v Eastern Long Island Transp. Enter.*, 266 AD2d 509 [1999]; *Cataldo v Waldbaum, Inc.*, 244 AD2d 446 [1997]). In addition, defendant failed to establish that the unsigned deposition transcript of plaintiff, which testimony allegedly serves as a basis for summary judgment, was forwarded to her for review and signature pursuant to CPLR 3116(a). Hence, the transcript is not admissible evidence, and cannot be used to support a summary judgment motion (*see* CPLR 3116[a]; *McDonald v Mauss*, 2007 NY Slip Op 2521 [2d Dept]; *Pina v. Flik Intl. Corp.*, 25 AD3d 772 [2006]; *Santos v Intown Assoc.*, 17 AD3d 564 [2005]; *Lalli v Abe*, 234 AD2d 346 [1996]; *Palumbo v Innovative Communications Concepts*, 175 Misc 2d 156 [Sup Ct, New York County 1997], *affd* 251 AD2d 246 [1998]). In any event, as discussed hereinabove, plaintiff testified during her deposition that she fell as a result of slipping on wet debris consisting of mulch and/or little wood chips.

Moreover, the Court finds that defendant failed to demonstrate, as a matter of law, that the condition was both open and obvious and not inherently dangerous (*see Sewitch v Lafrese*, 41 AD3d 695 [2007]; *Cappella v City of New York*, 6 AD3d 567 [2004]; *Grgich v City of New York*, 2 AD3d 680 [2003]; *Cupo v Karfunkel*, 1 AD3d 48 [2003]). In addition, issues of fact exist as to whether defendant fulfilled its obligation to maintain the area in a reasonably safe condition under the circumstances, and whether defendant had actual or constructive notice of the condition, as apparently the area was being utilized as a walkway by the customers of mall (*Maggiore v 269 N. Broadway Assocs.*, 6 AD3d 402 [2004]; *Cupo v Karfunkel*, 1 AD3d 48, *supra*; *Ligon v Spring Creek Assocs.*, L.P., 4 Misc 3d 134[A] [App Term 2004]). Even if it is determined that

the condition was open and obvious, this would not absolve defendant of liability, but instead would present an issue of fact as to plaintiff's comparative fault (*Ettari v 30 Rampasture Owners, Inc.*, 15 AD3d 611 [2005]; *Miehl v Blue Ridge Homeowners Ass'n*, 6 AD3d 676 [2004]; *Sportiello v City of New York*, 6 AD3d 421 [2004]).

Accordingly, for the foregoing reasons, this motion by defendant for summary judgment dismissing plaintiff's complaint in its entirety, is **DENIED**.

This constitutes the decision and Order of the Court.

Dated: January 16, 2008

HON. JOSEPH FARNETI
Acting Justice Supreme Court