SHORT FORM ORDER

INDEX No. 06-12116
CAL. No. 07-01334-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 10-22-07
ADJ. DATE 12-28-07
Mot. Seq. # 002 - MG; CASEDISP

FRANCES P. McCARTHY, Plaintiff, - against - ANTHONY MAZZELLA, BAYPORT SELF SERVICE CAR WASH and E.A.M. ENTERPRISES INC., Defendants.	GRUENBERG & KELLY, PC Attorneys for Plaintiff 3275 Veterans Memorial Highway, Suite B-9 Ronkonkoma, New York 11779 LESTER SCHWAB KATZ & DWYER, LLP Attorneys for Defendants 120 Broadway New York, New York 10271-0071

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 - 10 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 11 - 19 ; Replying Affidavits and supporting papers 20 ; Other 21 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Anthony Mazzella, Bayport Self Service Car Wash, and E.A.M. Enterprises Inc. for summary judgment dismissing the plaintiff's complaint against them is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff when she tripped and fell at defendants' self-service car wash on March 30, 2006. The plaintiff was walking toward the back of the building to get tokens to operate the car wash when the fall occurred. The verified bill of particulars alleges that the plaintiff was caused to trip and fall due to a hazardous or dangerous concrete area adjacent to the coin machine.

The defendants now move for summary judgment alleging that the plaintiff cannot identify the cause of her accident and that they did not create any condition or have actual or constructive notice of any alleged condition. In support of their motion the defendants submit, *inter alia*: a copy of the pleadings, the deposition testimony of the plaintiff, and the deposition testimony of defendant Anthony Mazzella.

At her deposition, the plaintiff testified in pertinent part, that she had driven her car to the car wash after visiting a friend, and that earlier in the day, she had been to physical therapy for an injury she sustained to her left leg from a fall which had occurred on August 13, 2005. She explained that she had been going to physical therapy for approximately six months and that for about a two-month period after the August 2005 fall, she had used a cane for support. The plaintiff further testified that after arriving at the car wash she pulled into one of the bays, got out of her car taking her money and her keys, and started walking to get tokens. The plaintiff stated that she never made it to the token machine because she fell. When the plaintiff was asked what caused her to fall, she responded, "I wasn't sure." When the plaintiff was then asked if her feet were located on the asphalt of the parking lot or on the concrete sidewalk, the plaintiff, responded that she "guessed" a combination of both and that her left foot was on the concrete sidewalk. However, when further questioned about the location of her left foot at the time of her fall, the plaintiff indicated that she was guessing, and that she was not really sure.

The plaintiff, upon further questioning, was asked if she slipped or tripped. The plaintiff stated, "As far as I know, sir, I just fell and I'm not sure if I tripped or slipped. I am not sure. I can't say." The plaintiff was again asked where her feet were when she fell. The plaintiff answered, "It was so quick, you know, so – it's hard to say, you know. I had to fall here (indicating) and then over this (indicating) way. It's hard to say. I just – went down." In addition, the plaintiff was asked if she knew whether either of her feet became caught on anything, and she answered, "No, I don't. As far as I know, it didn't get caught on anything." Later, when the plaintiff was questioned as to whether it was her left foot or right foot that caused her to fall, she responded that she guessed it must have been her left foot, but then stated, "I'm not sure, sir. I am not sure." The plaintiff also testified that she never saw anyone else fall at the car wash, and that she never made any complaints about the area when she was previously at the car wash.

Lastly, the defendants point to the deposition testimony of defendant Anthony Mazzella, the owner of the car wash, wherein he testified to the effect that: he was responsible for maintaining the premises; he was at the car wash five or six days a week; he had no knowledge of an alleged crack in the sidewalk where the sidewalk meets the first bay; he first became aware of the plaintiff's accident when he was served with a summons; in the ten years of reviewing surveillance video, he never observed anyone falling on the sidewalk towards the back of the building; and prior to March 30, 2006, no one had informed him that they fell towards the area of the coin machines.

The defendants argue that plaintiff's own testimony establishes that she is unable to identify what caused her to fall, that she is unable to identify which one of her feet caused the fall, and that she has no knowledge as to whether she tripped or slipped. As a consequence, contend the defendants, the plaintiff's testimony as to how she fell would be complete conjecture. In addition, the defendants assert that the plaintiff has not identified any condition which caused the incident, and as such they cannot be cast in litigation under a negligence theory. The defendants claim that they are, therefore, entitled to summary judgment.

The plaintiff opposes the defendants' motion, and submits in opposition, *inter alia*: her affidavit, her attorney's affirmation, her deposition testimony, photographs of the car wash, and the deposition testimony of defendant Anthony Mazzella. In her affidavit, the plaintiff alleges that although at her

deposition she testified that she was not sure what caused her fall, she was "never questioned further as to when I wasn't sure or if I ever, following the accident, learned what caused me to fall." She alleges that at the time of her fall she was not sure of the cause, but that after her fall, she was able to see the cause when she rolled over and noticed a cracked and broken portion of the sidewalk where her right foot had been. She further points to a photograph upon which at her deposition she had marked with an "R" indicating where her right foot had been before the fall. The plaintiff additionally states that although at her deposition she testified that she did not know if her foot got caught on anything, she does know that her right foot came into contact with the defective area and that contact caused her to fall. Furthermore, alleges the plaintiff, her left foot was by the asphalt as it comes up and meets the sidewalk, and such area was mis-leveled and uneven. She contends that her left foot was on this mis-leveled area and then she stepped with her right foot into the cracked sidewalk area, and fell to the ground.

The plaintiff's attorney argues in his affirmation that the plaintiff cannot be blamed for defense counsel's questioning techniques and that the plaintiff's affidavit is necessary in this case to uncover facts that escaped her deposition testimony. The plaintiff's attorney maintains that simply because the plaintiff cannot differentiate between a slip and a trip does not absolve the defendants from liability, and that the legal distinction between a slip and trip is not easily understood by the general public. He also contends that the plaintiff has stated clearly in her affidavit that her right foot came into contact with the defect in the sidewalk causing her fall. He alleges that the fact that the plaintiff could not identify at her deposition the cause of her fall is irrelevant based upon the facts of this case.

The plaintiff also points to defendant Anthony Mazzella's deposition testimony wherein he testified to the effect that since he purchased the property in 1981 or 1982, neither he nor anyone else has done any concrete or asphalt work. The plaintiff further highlights Mr. Mazzella's deposition testimony wherein he stated that he was on site almost every day, and upon being shown photographs of the car wash, Mr. Mazzella stated that the photographs depicted how the area looked in March, 2006 and March, 2005. The plaintiff claims that, thus, the areas in the photographs have remained in the same condition for at least one full year prior to her fall. The plaintiff additionally contends that defendants were not only in the position to readily observe the hazardous conditions as they existed on the sidewalk concrete and asphalt, but defendants were also duty-bound to keep the area in a state of safe repair. The plaintiff also alleges that the defendants have failed to come forward with proof of when the premises were last inspected and that no evidence of a hazard existed. Therefore, argues the plaintiff, the defendants have failed to meet their burden that they lacked notice of the defect.

The defendants have established their entitlement to summary judgment dismissing the complaint against them by submitting the plaintiff's deposition testimony which demonstrated that she was unable to state the cause of her fall (***DeSantis v Lessing's Inc.***, 46 AD3d 743, ___ NYS2d ___ [2007];***Golba v City of New York,*** 27 AD3d 524, 813 NYS2d 125 [2006]). "Although the absence of direct evidence of causation would not necessarily compel a grant of summary judgment in favor of the defendant[s], as proximate cause may be inferred from the facts and circumstances underlying the injury, the evidence must be sufficient to permit a finding based on logical inferences from the record and not upon speculation alone" (***Hartman v Mountain Valley Brew Pub, Inc.***, 301 AD2d 570, 754 NYS2d 31, 32 [2003]). Mere speculation as to the cause of a fall, where there can be numerous causes, is fatal to a plaintiff's cause of action (***Garvin v Rosenberg,*** 204 AD2d 388, 614 NYS2d 190 [1994]). "Since it is

just as likely that the accident could have been caused by some other factor, such as a misstep or loss of balance, any determination by the trier of fact as to the cause of the accident would be based upon pure speculation (***Teplitskaya v 3096 Owners Corp.***, 289 AD2d 477, 478; 735 NYS2d 585, 586 [2001]).

In opposition, the plaintiff has failed to raise a triable issue of fact. Although the plaintiff points to the photograph on which she placed an "R" at her deposition to indicate where her right foot had been before her fall, her deposition testimony clearly indicates that she did not know exactly where she placed her feet prior to her fall. Moreover, even if there appears to be some chipped sidewalk near to where she placed her right foot, such evidence establishes nothing more than a *possibility* that her fall was caused by a defect in the sidewalk, and a trier of fact would be required to base a finding of proximate cause upon nothing more than speculation (***Curran v Esposito***, 308 AD2d 428, 764 NYS2d 209 [2003]; *see also*, ***Rodriguez v Cafaro***, 17 AD3d 658, 794 NYS2d 113 [2005]). Furthermore, the affidavit the plaintiff submitted in opposition is insufficient to defeat the defendants' motion for summary judgment because it merely raises a feigned factual issue designed to avoid the consequences of her earlier deposition testimony (***Tejada v Jonas***, 17 AD3d 448, 792 NYS2d 605 [2005]).

Accordingly, the defendants' motion for summary judgment dismissing the complaint against them is granted.

Dated: FEB 28 2008

J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**