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SHORT FORM ORDER

INDEX No. 06-10235

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

P R E S E N T :

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 12-19-07 (001 & 002)
MOTION DATE 1-23-08 (003)
ADJ. DATE 2-20-08
Mot. Seq. # 001 - MG
Mot. Seq. # 002 - XMG
Mot. Seq. # 003 - XMG; CASEDISP

CAROL MAHONEY, Plaintiff, - against - TOWN OF ISLIP, ERHARD HARDEKOPF d/b/a E & D REALTY CO. and HARVEY ALLEN SALON, Defendants.	LITE & RUSSELL Attorneys for Plaintiff 212 Higbie Lane West Islip, New York 11795 CHESNEY & MURPHY, LLP Attorneys for Defendant Town of Islip 2305 Grand Avenue Baldwin, New York 11510 MORENUS, CONWAY, GOREN, et al. Attorneys for Defendant Erhard Hardekopf 59 South Service Road, Suite 350 Melville, New York 11747 BURNS, RUSSO, TAMIGI & REARDON, LLP Attorneys for Defendant Harvey Allen Salon 390 Old Country Road Garden City, New York 11530

Upon the following papers numbered 1 to 50 read on this motion and these cross motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers 14 - 18; 19 - 36 ; Answering Affidavits and supporting papers 37 - 42 ; Replying Affidavits and supporting papers 43 -50 ; Other copy of reply affirmation by defendant Harvey Allen Salon ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Harvey Allen Salon (#001) for summary judgment dismissing the complaint and all cross-claims against it is granted; and it is further

ORDERED that the cross motion by defendant Erhard Hardekopf d/b/a E & D Realty Co. (#002) for summary judgment dismissing the complaint and all cross-claims against him is granted; and it is further

ORDERED that the cross-motion by defendant Town of Islip (#003) for summary judgment dismissing the complaint and all cross-claims against it is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Carol Mahoney, on September 21, 2005 at approximately between 11:15 and 11:30 a.m. when she tripped and fell on a raised portion of the sidewalk adjacent to a beauty salon on 539 Main Street, Islip, New York, leased by defendant Harvey Allen Salon and owned by defendant Erhard Hardekopf d/b/a E & D Realty Co. The gravamen of the complaint is that defendants were negligent in maintaining the sidewalk.

Harvey Allen Salon now moves for summary judgment dismissing the complaint against it on the ground that it neither created the alleged defect nor owed a duty to maintain the subject sidewalk. Harvey Allen Salon also avers that the alleged dangerous condition was a trivial defect that is nonactionable as a matter of law and that it never received any prior notice that the sidewalk where plaintiff had her accident was defective. In support, Harvey Allen Salon submits, *inter alia*, the pleadings; a bill of particulars; the transcript of the testimony at the General Municipal Law § 50-h hearing given by plaintiff; and the transcripts of the deposition testimony given by defendant Erhard Hardekopf, Harvey Berk, a representative of Harvey Allen Salon, and Peter Kletchka, a representative of the Town.

Defendant Erhard Hardekopf cross-moves for summary judgment dismissing the complaint against him on the ground that he neither created the alleged defect nor owed a duty to maintain the subject sidewalk. He also claims that the alleged dangerous condition was a trivial defect. In support, Defendant Hardekopf submits the pleadings and an affidavit of one of his attorneys which attempts to adopt and incorporate the arguments and supporting documents submitted in the motion by Harvey Allen Salon.

At the General Municipal Law § 50-h hearing, plaintiff testified that she had been a customer at defendant Harvey Allen Salon for approximately 15 years. On the day of the accident, after she parked her vehicle at the parking lot behind the defendant hair salon, she walked to the salon on the sidewalk flags adjacent to the defendant hair salon on 539 Main Street which sidewalk she had used "numerous times" in the past. One side of the sidewalk has hedges, and the other has a curb into the parking lot. While she was walking, her right foot "made contact with the lifted portion of the sidewalk flag," causing her to trip and fall forward. At the time, she was wearing sneakers and was carrying her pocketbook on her shoulder.

At his examination before trial, defendant Erhard Hardekopf testified to the effect that he is the owner of the building leased to Harvey Allen Salon and has owned the building for approximately 21 years. The subject sidewalk is not on his property, although the sidewalk and the hedges were not actually depicted on the survey.[1] He does not maintain the sidewalk or the tree or hedges located adjacent to the subject sidewalk. Defendant Hardekopf testified that the Town had built the back parking lot 15 to 16 years ago.

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[1] The survey was marked as Plaintiff's Exhibit 4 for identification.

At his deposition, Harvey Berk testified to the effect that he has owned Harvey Allen Salon for approximately 30 years, and it has always been located in the same building on 539 Main Street. About 8 to 10 years ago, he put in the hedges and the tree behind the building. While he does not maintain the subject sidewalk, he maintains the hedges along the sidewalk. During the winter of 2006, the tree was seriously cracked and damaged by a storm, and he asked the town to remove the tree. Approximately eight or nine months thereafter, the Town cut the tree, leaving the stump and a portion of the trunk of the tree in the ground.

At his deposition, Peter Kletchka testified to the effect that he is Deputy Commissioner of the Department of Public Works of the Town. He searched the Town's records and found that the subject sidewalk is owned and maintained by the Town and that the Town had not received prior written notice of any defects or complaints concerning the sidewalk.

Generally, liability for injuries sustained as a result of dangerous and defective conditions on public sidewalks is placed on the municipality and not the abutting landowner (*see*, ***Hauser v Giunta***, 88 NY2d 449 [1996]; ***Bruno v City of New York***, 36 AD3d 640 [2007]). However, an abutting landowner or tenant will be liable to a pedestrian injured by a defect in a sidewalk where the landowner or the tenant negligently constructed or repaired the sidewalk, otherwise caused the defective condition, caused the defect to occur by some special use of the sidewalk, or breached a specific ordinance or statute which obligated the owner to maintain the sidewalk (*see*, ***Hauser v Giunta***, *supra*; ***Biondi v County of Nassau***, 2008 NY Slip Op 2092 [2008]; ***Cannizzaro v Simco Mgt. Co.***, 26 AD3d 401 [2006]).

Here, defendants Harvey Allen Salon and Erhard Hardekopf made a prima facie showing of their entitlement to judgment as a matter of law by submitting evidence that the aforementioned defendants did not maintain or perform any repairs to the subject sidewalk abutting their premises, did not create the alleged defective condition, and did not use the sidewalk for a special purpose (*see*, ***Bruno v City of New York***, *supra*).

In opposition, plaintiff contends that there is a question of fact as to whether the subject sidewalk is located on defendant Hardekopf's property on the ground that the sidewalk and the hedges were not actually depicted on the survey that Mr. Hardekopf produced at his deposition. Plaintiff alleges that Mr. Hardekopf failed to provide evidence demonstrating that the subject sidewalk was "located outside the boundary of Mr. Hardekopf's property." Plaintiff also alleges that defendant Hardekopf is responsible for the condition of the subject sidewalk pursuant to Islip Town Code § 47A-17.

Here, the adduced evidence indicates that the subject sidewalk is owned and maintained by the Town, and plaintiff failed to offer any evidence to the contrary. Moreover, while Islip Town Code § 47A-17 imposes on abutting landowners a duty to maintain the public sidewalk, it does not expressly impose tort liability upon the landowner for injuries caused by a violation of that duty (*see*, ***Lowenthal v Theodore H. Heidrich Realty Corp.***, *supra*; ***Leggio v County of Nassau***, 281 AD2d 518 [2001]; ***Block v Potter***, 204 AD2d 672 [1994]). Furthermore, plaintiff did not offer any evidence to the contrary to the testimony given by Mr. Hardekopf that he neither maintained the subject sidewalk nor made any repairs to it (*see*, ***Soto v City of New York***, *supra*). Thus, plaintiff failed to raise an issue of fact regarding

defendant Hardekopf's alleged negligence. Accordingly, defendant Erhard Hardekopf's cross-motion for summary judgment is granted.

In opposition, plaintiff contends that there is a question of fact as to whether defendant Harvey Allen Salon created the alleged defective condition of the subject sidewalk. Plaintiff alleges that the roots of the hedges planted by Harvey Allen Salon have "grown underneath and also contributed to uplifting this flag of concrete" that caused the plaintiff's accident. In support, plaintiff submits, *inter alia*, the affidavit of her expert, Mr. Brian Moraghan, accompanied by photos of the subject sidewalk.

In his affidavit, Mr. Moraghan indicates that he took photographs and measurements at the site of the accident on February 7, 2008, particularly observing the subject sidewalk adjacent to the premises on 539 N. Main Street. His affidavit indicates that the 4th flag section of the sidewalk appears to be uplifted approximately 1" and that a large tree which has been cut down exists on the east side of the hedges. Mr. Moraghan concluded that the roots associated with the tree have grown in an outward direction over the years, and extended under the sidewalk, which resulted in the uplifted condition of the sidewalk.

While, in general, the finding of the existence of a dangerous or defective condition depends on the peculiar facts and circumstances of each case and is ordinarily a question of fact for a jury to determine, not every determination poses a jury question (***Hymanson v A.L.L. Assoc.***, 300 AD2d 358 [2002]; *see also*, ***Trincere v County of Suffolk***, 90 NY2d 976 [1997]). A property owner may not be held liable in damages for trivial defects on a sidewalk, not constituting a trap or a nuisance, over which a pedestrian might merely stumble, stub a toe, or trip (***Hargrove v Baltic Estates***, 278 AD2d 278 [2000]; ***Marinaccio v LeChambord Rest.***, 246 AD2d 514 [1998]). A court may find a defect trivial upon an examination of all the facts presented, including the width, depth, elevation, irregularity and appearance of the defect, along with the time, place and circumstance of the injury (*see*, ***Trincere v County of Suffolk***, *supra*; ***Mendez v De Milo***, 17 AD3d 328 [2005]).

Here, a triable issue of fact might exist as to whether Harvey Allen Salon created the alleged defective condition of the subject sidewalk on the ground that Mr. Harvey Berk, the owner of Harvey Allen Salon, planted the hedges and the tree. Nevertheless, scrutiny of the photographs and other evidence in the record supports the conclusion that, as a matter of law, the alleged defect, which did not have any of the characteristics of a trap or nuisance, was too trivial to be actionable (*see*, ***Hymanson v A.L.L. Assoc.***, 300 AD2d 358 [2002]). The sidewalk complained of was open and obvious, and as a matter of law, not inherently dangerous (*see*, ***Webber v Miller***, 17 AD3d 352 [2005]; ***Velez v Institute of Design & Constr.***, 11 AD3d 453 [2004]). Plaintiff failed to raise a triable issue of fact by showing that a defect, in fact, existed which would constitute a dangerous or defective condition or that the alleged defect had the characteristics of a trap or nuisance (*see*, ***Arsenicos v Westland S. Shore Mall***, 294 AD2d 385 [2002], *lv denied* 98 NY2d 612 [2002]; *see also*, ***D'Arco v Pagano***, 21 AD3d 1050 [2005]; ***Mullaney v Koenig***, 21 AD3d 939 [2005]; ***Pirie v Kransinki***, 18 AD3d 848 [2005]). Thus, defendant Harvey Allen Salon's motion for summary judgment is granted.

Town of Islip now cross-moves for summary judgment on the ground that it never received prior written notice of the alleged defective condition as required by Town Law § 65-a. The Town also claims

that the alleged dangerous condition was a trivial defect. In support, the Town submits evidence similar to that submitted by Harvey Allen Salon in its instant motion for summary judgment.

Pursuant to Town Law § 65-a and Town of Islip Code § 47A-3, as a precondition to commencing a civil action against the Town to recover damages for personal injuries sustained as a result of a defect in Town property, the Town must be given prior written notice of the defect and must fail to repair it within a reasonable time thereafter (*see*, ***Nixdorf v East Islip School Dist.,*** 276 AD2d 759 [2000]). There are only two exceptions to the prior written notice rule, namely, where the locality created the defect or hazard through an affirmative act of negligence and where a special use confers a special benefit upon the locality (*see*, ***Amabile v City of Buffalo***, 93 NY2d 471 [1999]; ***Ganzenmuller v Incorporated Vill. of Port Jefferson***, 18 AD3d 703 [2005]).

Here, the Town has made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that it did not receive the requisite prior written notice of the alleged defective condition (*see*, ***Betzold v Town of Babylon***, 18 AD3d 787 [2005]; ***Khaghan v Rye Town Park Commn.***, 8 AD3d 447 [2004]). Thus, the burden shifts to plaintiff, and it is incumbent upon plaintiff to submit "competent evidence" so as to establish evidence that the town affirmatively caused or created the defect (*see*, ***Betzold v Town of Babylon***, *supra*; ***Hinkley v Village of Ballston Spa***, 306 AD2d 612 [2003]) or that the subject sidewalk confers a special benefit upon the Town (*see*, ***Ganzenmuller v Incorporated Vill. of Port Jefferson***, *supra*; ***Poirier v City of Schenectady***, 85 NY2d 310 [1995]).

In opposition, plaintiff contends that the Town created the condition by installing the subject sidewalk in a dangerously raised condition and failed to properly maintain the sidewalk. In support, plaintiff offered no evidence other than photos of the subject sidewalk and the affidavit of her expert, Mr. Brian Moraghan, not indicating that the subject sidewalk was installed in a "dangerously raised condition." Thus, plaintiff failed to raise a issue of fact as to whether the Town received prior written notice of the condition, or as to whether one of the two exceptions to the prior written notice rule applied (*see*, ***Gilmore v Village of Hempstead***, 47 AD3d 676 [2008]; ***Healy v Village of Patchogue***, 28 AD3d 519 [2006]). Thus, the Town's cross-motion for summary judgment is granted.

Accordingly, the motion by defendant Harvey Allen Salon (# 001), the cross-motion by defendant Erhard Hardekopf d/b/a E & D Realty Co. (# 002), and the cross-motion by defendant Town of Islip (# 003) are granted.

Dated: 4/15/08

JOSEPH C. PASTORESSA, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION