STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

VITO FURCINITI AND CHARLESE FURCINITI,

Plaintiffs,

-against-

BOTTLING GROUP, LLC, THE PEPSI BOTTLING GROUP, INC. and PEPSICO, INC.,

Defendants.

DECISION and ORDER
INDEX NO. 3197-06
RJI NO. 01-07-088185

Supreme Court Albany County All Purpose Term, May 27, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Finkelstein & Partners, LLP
Marie Dusault, Esq.
Attorneys for Plaintiff
436 Robinson Avenue
Newburgh, New York 12550

Luboja & Thau, LLP
Michelle A. Nolan, Esq.
Attorneys for Defendant Bottling Group, LLC
10 East Fortieth Street
New York, New York 10016

TERESI, J.:

On December 1, 2003, Mr. Furciniti was injured when he tripped and fell over a low rise concrete wall and /or wooden pallets located along a walkway on property owned by Bottling Group, LLC d/b/a Pepsi Bottling Group (hereinafter "defendant"). Mr. Furciniti, and his wife derivatively, commenced this action against defendant seeking damages caused by his trip and fall. Discovery is now complete and Defendant brings the instant motion for summary judgment. For the reasons that follow, the court denies defendant's motion.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." Napierski v. Finn, 229 AD2d 869, 870 (3rd Dept., 1996). On a motion on for summary judgment, the movant must establish by admissible proof, the right to judgment as a mater of law. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986), Gilbert Frank Corp. v. Federal Insurance Co., 70 NY2d 966 (1988). A movant fails to meet their burden by "pointing to gaps in... proof", rather the movant's obligation on the motion is an affirmative one. Antonucci v. Emeco Industries, Inc., 223 A.D.2d 913, 914 (3d Dept.1996)

If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. Zuckerman v. City of New York, 49 NY2d 557 (1980). In opposing a motion for summary judgment, one must produce "evidentiary proof in admissible form. . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." Id. at 562. Moreover, all evidence must be viewed in the light most favorable to the opponent of the motion. Amidon v. Yankee Trails, Inc., 17 A.D.3d 835 (3d Dept. 2005); Crosland v. New York City Transit Auth., 68 NY2d 165 (1986).

In examining the liability of landowners the Court of Appeals restated the principal that "New York landowners owe people on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition... [and] it is for the court first to determine whether any duty exists, taking into consideration the reasonable expectations of the parties and society generally." Tagle v. Jakob, 97 N.Y.2d 165, 169 (2001). The Third Department, expanding on the rule set forth in Jakob, stated: "a landowner's duty to maintain its premises is separate and distinct from the duty to warn of latent, hazardous conditions". MacDonald v. City of Schenectady, 308 AD2d 125, 128 (3d Dept. 2003).

Here, defendant has set forth insufficient proof that they properly maintained their premises. Defendant's argument primarily relies on the notion that because the pallets and low rise wall were open and obvious, the defendant cannot be liable for the plaintiff's injury. However, as the Third Department pointed out "the open and obvious nature of an alleged dangerous condition does not, standing alone, necessarily obviate a landowner's duty to maintain his or her property in a reasonably safe manner." MacDonald v. City of Schenectady, 308 AD2d 125, 128 (3d Dept. 2003). Defendant's motion, by its terms, assumes as true plaintiff's allegation that he tripped over pallets and/or a low rise concrete wall. Such assumption necessarily assumes as true the details of Mr. Furciniti's allegations, which consist of the defendant's walkway being poorly lit, strewn with wooden pallets, pallet pieces and cartons, coupled with an unmarked low rise concrete wall. Assuming the above facts the defendant failed to make an affirmative showing that the premises was regularly maintained. The defendant's motion must be denied because "the obviousness of the allegedly dangerous condition did not negate the [defendant's] duty to maintain as a matter of law". MacDonald, 308 AD2d at 128, supra.

Relative to the defendant's affirmative proof on their maintenance of the area at issue, in their reply papers, they did submit the deposition transcript of James Kush, a former employee. Mr. Kush testified that on the day of Mr. Furciniti's fall he observed that the location of the incident was adequately lit and not strewn with pallets or debris. Such allegations, however, fail to conclusively prove that defendant properly maintained their premises, but rather at most raise an issue of fact when understood in conjunction with Mr. Furciniti's maintenance observations.

Accordingly, defendant's motion for summary judgment on this issue is denied.

Turning next to defendant's duty to warn, the Court of Appeals in Tagle v. Jakob, (97 N.Y.2d 165, 169 (2001)) stated: "while the issue of whether a hazard is latent or open and

obvious is generally fact-specific and thus usually a jury question... a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion... and may do so on the basis of clear and undisputed evidence." (internal quotations omitted). Here, the established facts are that a low rise concrete wall and/or wooden pallets caused plaintiff to trip and fall. It is also undisputed that the low rise wall and the pallets were readily observable and that the plaintiff was generally aware of them. Based upon such undisputed facts, this Court finds that the defendant met their initial burden on this portion of their summary judgment motion.

The Court also finds, however, that the plaintiff has raised issues of fact relative to defendant's duty to warn thus defeating defendant's summary judgment motion. The plaintiff alleged that the low rise concrete wall is the same color as the concrete floor with no safety coloring demarcations on it, that it was poorly lit and that pallets obstructed the clear passageway. Although generally when conditions are open and obvious there is no duty to warn. Here, because it was eminently foreseeable that pedestrians would be walking along this dimly lit pathway, where the low rise wall was obscured by wooden pallets and not demarcated by color from the rest of the floor, the defendant had a duty to warn of such hazardous condition.

Accordingly, for the reasons set forth above, defendant's motion for summary judgment is denied.

All papers, including this Decision and Order, are being returned to the attorney for the plaintiff. The signing of this Decision and Order shall not constitute entry or filing under CPLR

§ 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED.

Dated: July 9, 2008
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion for Summary Judgment, dated May 2, 2008, Affirmation in Support of Defendants' Motion for Summary Judgment of Michelle Nolan, dated May 2, 2008, with Exhibits "A" - "F", and accompanying Memorandum of Law of Michelle Nolan, dated May 2, 2008.
2. Affirmation in Opposition of Marie DuSault, dated May 12, 2008, with attached Exhibits0 "A" - "H" (inclusive of the affidavit of Vito Furciniti, dated May 9, 2008 and affidavit of Joseph McHugh, dated May 12, 2008, and accompanying Plaintiff's Memorandum of Law of Marie DuSault, dated May 12, 2008.
3. Reply Affirmation in Further Support of Defendants' Motion for Summary Judgment of Michelle Nolan, dated May 23, 2008, with Exhibits "A" - "C".