

Pugliese v Bon Realty Corp.

2008 NY Slip Op 32286(U)

July 24, 2008

Supreme Court, Queens County

Docket Number: 0004953/2006

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

-----X

FRED PUGLIESE,

Plaintiff,

-against-

Index No:4953/06

Motion Date: 5/21/08

Motion Cal. No: 23 & 24

Motion Seq. No: 2 & 3

BON REALTY CORP., ECKERD CORPORATION
and ECKERD PHARMACY STORE, #5543,

Defendants.

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The following papers numbered 1 to 22 on this motion by defendants Eckerd Corporation and Eckerd Pharmacy Store, #5543 for an order, pursuant to CPLR § 3212, granting summary judgment in its favor [Motion No. 23]; and on this motion by defendant Bon Realty Corp., for an order, pursuant to CPLR § 3212 and CPLR § 3211: (a) dismissing plaintiff’s complaint and all cross claims on the grounds that defendant Bon Realty Corp. has never been the owner of the premises which were the site of plaintiff’s alleged trip and fall accident, and it has no maintenance or other duty with respect to that site; (2) or alternatively, granting summary judgment on the ground that plaintiff fell due to an “open and obvious” condition that is “not inherently dangerous,” and therefore is not actionable under New York law; or (3) granting it summary judgment since plaintiff, by his own admission, does not know the cause of his fall [Motion No. 24].

	PAPERS NUMBERED
Notices of Motion to Dismiss-Affidavits-Exhibits.....	1 - 8
Affirmations in Opposition-Exhibits.....	9 - 16
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Upon the foregoing papers, it is hereby ordered that the motions are resolved as follows:

This is a negligence action to recover money damages for personal injuries allegedly sustained by plaintiff Fred Pugliese (“plaintiff”), as a result of his trip and fall on April 23, 2005, over a parking divider in the parking lot adjacent to premises located at 160-10 Cross Bay Boulevard, Howard Beach, New York, that was occupied by an Eckerd’s drug store. Defendants Eckerd Corporation and Eckerd Pharmacy Store, #5543 (“Eckerd defendants”) move for summary judgment dismissing the complaint on the ground, inter alia, that the Eckerd defendants did not maintain ownership or control over the area where plaintiff allegedly tripped and fell and did not have notice of the alleged defective condition. Defendant Bon Realty (“Bon Realty”) moves for summary

judgment dismissing the complaint on the grounds that it has never been the owner of the premises which were the site of plaintiff's alleged trip and fall accident, it has no maintenance or other duty with respect to that site, the alleged defect was "open and obvious" and "not inherently dangerous," and therefore not actionable under New York law, and plaintiff failed to establish the cause of his fall.

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2d Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.)

"A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (citations omitted)." Sloane v. Costco Wholesale Corp., 49 A.D.3d 522 (2nd Dept. 2008); Frazier v. City of New York, 47 A.D.3d 757 (2nd Dept. 2008); Ulu v. ITT Sheraton Corp., 27 A.D.3d 554 (2nd Dept. 2006); White v. L & M Corporate, Inc., 24 A.D.3d 659 (2nd Dept. 2005); Beltran v. Metropolitan Life Ins. Co., 259 A.D.2d 456 (2nd Dept. 1999). "Where there is no indication in the record that the defendant created the alleged dangerous condition or had actual notice of it, the plaintiff must proceed on the theory of constructive notice." Rabadi v. Atlantic & Pacific Tea Co., Inc., 268 A.D.2d 418, 419 (2nd Dept. 2000); see, also, Ramos v. Castega-20 Vesey Street, LLC, 25 A.D.3d 773 (2nd Dept. 2006); Klor v. American Airlines, 305 A.D.2d 550 (2nd Dept. 2003); O'Callaghan v. Great Atlantic & Pacific Tea Co., 294 A.D.2d 416 (2nd Dept. 2002). "To constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time prior to the accident to permit the defendant's to discover and remedy it." Green v. City of New York, 34 A.D.3d 528, 529 (2nd Dept. 2006); see, Stone v. Long Island Jewish Medical Center, Inc., 302 A.D.2d 376 (2nd Dept. 2003); Blaszczyk v. Riccio, 266 A.D.2d 491 (2nd Dept. 1999); Russo v. Eveco Development Corp., 256 A.D.2d 566 (2nd Dept. 1998); Dima v. Breslin Realty, Inc., 240 A.D.2d 359 (2nd Dept. 1997); Kraemer v. K-Mart Corp., 226 A.D.2d 590 (2nd Dept. 1996).

The issue of whether a dangerous condition exists on the property of another which would create liability depends on the particular facts and circumstances of each case and is generally a question of fact for the jury. See Trincere v County of Suffolk, 90 N.Y.2d 876 (1997); Taussig v Luxury Cars of Smithtown, 31 A.D.3d 533 (2nd Dept. 2006). A property owner, however, may not be held liable for trivial defects, not constituting a trap or a nuisance over which a pedestrian might merely stumble stub his or her toes or trip. See, Ambrose v New York City Tr. Auth.,

33 A.D.3d 573 (2nd Dept. 2006); Taussig v Luxury Cars of Smithtown, 31 A.D.3d 533 (2nd Dept. 2006). “In determining whether a defect is trivial, the court must examine all of the facts presented, including the ‘width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury’ (Trincere v. County of Suffolk, 90 N.Y.2d 976, 978, 665 N.Y.S.2d 615, 688 N.E.2d 489; see Taussig v. Luxury Cars of Smithtown, Inc., 31 A.D.3d 533, 818 N.Y.S.2d 593).” Ayala v. Gutin, 49 A.D.3d 677 (2nd Dept. 2008); see, Outlaw v. Citibank, N.A., 35 A.D.3d 564 (2nd Dept. 2006); Velez v Inst. of Design & Constr., 11 A.D.3d 453 (2nd Dept. 2004). As a corollary to this principle, notwithstanding the duty to maintain its premises in a reasonably safe manner, a property owner “has no duty to protect or warn against an open and obvious condition, which, as a matter of law, is not inherently dangerous (citations omitted)” Gagliardi v. Walmart Stores, Inc., ___ A.D.3d___, ___ N.Y.S.2d___, 2008 WL 2522346 (2nd Dept. 2008); Rao-Boyle v. Alperstein, 44 A.D.3d 1022 (2nd Dept. 2007); Errett v Great Neck Park Dist., 40 A.D.3d 1029 (2nd Dept. 2007); Morgan v. TJX Companies, Inc., 38 A.D.3d 508 (2nd Dept. 2007); Sclafani v. Washington Mut., 36 A.D.3d 682 (2nd Dept. 2007). Ramsey v. Mt. Vernon Board. of Education, 32 A.D.3d 1007 (2nd Dept. 2006); Zimkind v Costco Wholesale Corp., 12 A.D.3d 593 (2nd Dept. 2004); Cupo v. Karfunkel, 1 A.D.3d 48 (2nd Dept. 2003).

It is undisputed that the Eckert defendants are the successor in interest to that of Genovese Drug Stores, Inc. (“Genovese”), which by lease dated April 24, 1992, and executed between Genovese and Bond Motors, Inc., contracted to rent “a certain store space,” that was to be a part of a to-be-erected shopping center on Cross Bay Boulevard, Howard Beach, New York. Pursuant to the Lease Agreement, the Landlord agreed that as a condition of delivery of possession, it would “create and construct on the Shopping Center Land, the following Shopping Center Improvements:

- a (iii) . . . (A) adequate sidewalks including a sidewalk abutting the front of the Demised Premises, and (B) a loading dock for Tenant’s exclusive use to be located in the area shown as ‘Loading Dock’ on Exhibit ‘A’, and (C) service drives as all shown on said Exhibit ‘A’ hereto, and (D) parking areas sufficient to accommodate a minimum of 137 standard sized American automobiles to be located and with angles, aisles, sizes of stalls, striping and marking as all shown on said Exhibit ‘A’ hereto and (E) entrances and exits from and to public streets or highways as shown on said Exhibit ‘A’ hereto...

The lease agreement further obligated the landlord to repair the “common areas,” providing in paragraph “19” that the “Common Facilities and/or Common Areas of the Shopping Center shall include, but not be limited to, any and all parking areas” [subdivision (a)], and further provided that the “Landlord shall, . . . keep and maintain the Common Areas in good condition and repair, including but not limited to, repairs, replacements, restriping, repaving. . .”

Here, plaintiff seeks to recover from all defendants based upon his alleged trip and fall while walking in the parking lot on a curb that was extended twelve feet into the parking lot, and “sticking out in the parking lot.” The Eckert defendants’ alleged liability is predicated upon the allegation that the parking lot was for patrons of the Eckert Pharmacy. The alleged liability of the Bon Realty is predicated upon its ownership of the property where the accident occurred. The summary judgment motion of each set of defendants will be addressed separately based upon the applicable principles set forth above.

The Eckert Defendants’ Motion for Summary Judgment

The Eckert defendants move for summary judgment dismissing the complaint on a variety of grounds. First, they allege that they did not maintain ownership or control over the area where plaintiff allegedly tripped and fell. Secondly, they allege that they did not take any action or fail to take any actions that were proximately related to plaintiff’s accident. Thirdly, they allege that they and did not have notice of the alleged defective condition, and fourth, they allege that the object plaintiff allegedly tripped on was “open and obvious.” In support of their motion, the Eckert defendants submit the deposition testimony of Diane Schreiber, the Assistant Property Manager for defendant Bon Realty, who testified that defendants Bon Realty and Eckerd took over the 1992 lease entered into between Bond Motors and Genovese, and that plaintiff’s fall occurred in the common area of the mall, which defendant Bon Realty had responsibility for maintaining. Also submitted was the deposition testimony of Chait Ram Singh, the Store Manager at the Eckert location where plaintiff tripped and fell, who testified that Eckert had no responsibility for maintaining the parking lot. They argue that as there is no evidence that the Eckert defendants had any ownership interest in or exercised any control over the parking lot, they are entitled to judgment in their favor dismissing the complaint insofar as asserted against them.

The initial question in a negligence action is whether the alleged tortfeasor owed a duty of care to the injured party [(see, Church ex rel. Smith v. Callanan Industries, Inc., 99 N.Y.2d 104 (2002); Espinal v. Melville Snow Contrs., Inc., 98 N.Y.2d 136 (2002) ; Eaves Brooks Costume Co., Inc. v. Y.B.H. Realty Corp., 76 N.Y.2d 220 (1990); Sheila C. v. Povich, 11 A.D.3d 120 (1st Dept. 2004)], and the existence and scope of that duty are legal questions for the courts to determine. See, 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 96 N.Y.2d 280 (2002); Solan v. Great Neck Union Free School Dist., 43 A.D.3d 1035 (2nd Dept. 2007); Daubert v. Flyte Time Regency Limousine, 1 A.D.3d 395 (2nd Dept. 2003). In premises liability cases, it is well recognized that to “establish a prima facie case of negligence, a plaintiff must establish the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and that such breach was a proximate cause of injury to the plaintiff (citations omitted).” “[L]iability for a dangerous condition on property is generally predicated upon ownership, occupancy, control or special use of the property (citations omitted).” “The existence of one or more of these elements is sufficient to give rise to a duty to exercise reasonable care (citations omitted).” Nappi v. Incorporated Village of Lynbrook, 19 A.D.3d 565 (2nd Dept. 2005); see, Comack v. VBK Realty Associates, Ltd., 48 A.D.3d 611 (2nd Dept. 2008); Vetrone v. Ha Di Corp., 22 A.D.3d 835 (2nd Dept. 2005); see, also, Casale v. Brookdale Medical Associates, 43 A.D.3d 418 (2nd Dept. 2007)[“[T]he imposition of liability for a dangerous

condition on property must be predicated upon occupancy, ownership, control, or special use of the premises”]. Here, the Eckert defendants have established their prima facie entitlement to summary judgment in their favor by establishing that they possessed neither ownership, control or management responsibility for the parking lot. See, e.g., Fung v. Japan Airlines Co., Ltd., 51 A.D.3d 861 (2nd Dept. 2008)[holding that management agent could be subject to liability for nonfeasance only if it was in complete and exclusive control of the management and operation of the parking lot].

Once the moving party makes a prima facie showing of entitlement to summary judgment in its favor, it is incumbent upon the opposing party to come forth with evidentiary proof in admissible form sufficient to demonstrate the existence of triable issues of fact. Chalasan v. State Bank of India, New York Branch, 283 A.D.2d 601 (2nd Dept. 2001); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); Pagan v. Advance Storage and Moving, 287 A.D.2d 605 (2nd Dept. 2001); Gardner v. New York City Transit Authority, 282 A.D.2d 430 (2nd Dept. 2001). Pursuant to CPLR 3212, summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (2nd Dept. 1993). In opposition, plaintiff submits the affirmation of his attorney, that makes the legal argument that defendants had a “special use of the premises,” and that the lease imposes the same responsibility for maintenance and upkeep of the parking lot upon the owner and the tenant, and references paragraph “19(g)” of the Lease agreement. That section, however, only imposes financial obligations upon the tenants, explicitly referencing the tenant only in the language “(subject to the contribution by Tenant set forth in Subdivision (I) hereof and to contributions by other tenants of the Shopping Center).” Moreover, as the Eckert defendants correctly point out, dispositive of this issue is the opinion of the Appellate Division, Second Department, in Millman v. Citibank, N.A., 216 A.D.2d 278 (2nd Dept. 1995), in which the Court stated, in a strikingly similar case [216 A.D.2d at 279]:

Here, however, Citibank's evidentiary submissions demonstrated that it had no exclusive right to possession of the parking lot, which it was merely permitted to use in common with its landlord and other tenants, and that it had no obligation or right to perform repairs to the parking lot. Moreover, the plaintiffs have not alleged that Citibank created the condition which caused the injured plaintiff's accident, or that Citibank made special use of the parking lot. Under these circumstances, Citibank owed the injured plaintiff no duty of care to maintain or repair the parking lot, and may not be held liable for permitting the existence of a dangerous condition (*see, Warren v. Wilmore, Inc.*, *supra*; *Abdul-Azim v. RDC Commercial Center*, 210 A.D.2d 191, 620 N.Y.S.2d 70; *Rosato v. Foodtown*, *supra*; *Turrisi v. Ponderosa, Inc.*, 179 A.D.2d 956, 578 N.Y.S.2d 724; *McGill v. Caldors, Inc.*, 135 A.D.2d 1041, 522 N.Y.S.2d 976). Accordingly, Citibank's motion for summary judgment is granted.

Similarly, in Marrone v. South Shore Properties, 29 A.D.3d 961 (2nd Dept. 2006), the Appellate Division, citing Millman v. Citibank, *supra*, held 29 A.D.3d at 961:

CVS established its entitlement to judgment as a matter of law by demonstrating that it did not own and had no exclusive right to possession of the sidewalks in the strip mall where the accident occurred, and that it had no obligation or right to perform repairs or clean the sidewalks. In opposition to that showing, the plaintiff failed to raise a triable issue of fact in this regard, and there is no allegation that CVS made special use of the sidewalks or created the condition that caused the accident. Hence, CVS owed the plaintiff no duty of care to maintain the sidewalks, and may not be held liable for permitting the continued existence of a dangerous condition.

Here, the customers of the Eckert defendants, like those of the Citibank and CVS defendants in the aforementioned cases, utilized the common areas used by customers of other businesses in the shopping area. Implicit in both Millman and Marrone is the rejection of plaintiff's argument that such a use constituted a "special use" that would subject a tenant to liability. Inasmuch as it "well settled that liability for injuries sustained by a shopping center patron due to defects in the surface of the shopping center's parking lot attaches to parties in possession or in control of the parking lot" [(Rosato v. Foodtown, 208 A.D.2d 705 (2nd Dept. 1994))], this Court need not address the alternative grounds for a grant of summary judgment. As plaintiff failed to provide evidentiary proof in admissible form sufficient to raise an issue of fact as to the Eckert defendants' ownership interest in or maintenance responsibilities for the parking lot, the Eckert defendants' motion for summary judgment in their favor is granted, and the complaint and all cross-claims hereby asserted must be dismissed insofar as asserted against them.

Defendant Bon Realty Corp.'s Motion for Summary Judgment

Defendant Bon Realty also moves for summary judgment dismissing plaintiff's complaint and all cross claims on several grounds, each of which will be addressed separately. First, defendant Bon Realty alleges that it has never been the owner of the premises which were the site of plaintiff's alleged trip and fall accident, and that it has no maintenance or other duty with respect to that site. As set forth above, "liability for a dangerous condition on property is generally predicated upon ownership, occupancy, control or special use of the property (citations omitted)." "The existence of one or more of these elements is sufficient to give rise to a duty to exercise reasonable care (citations omitted)." Nappi v. Incorporated Village of Lynbrook, 19 A.D.3d 565 (2nd Dept. 2005); Comack v. VBK Realty Associates, Ltd., 48 A.D.3d 611 (2nd Dept. 2008); Vetrone v. Ha Di Corp., 22 A.D.3d 835 (2nd Dept. 2005). Here, defendant Bon Realty points to the lease agreement that establishes that the lessor of the shopping center property was Bond Motor, Inc., as well as the deed pursuant to which the property identified as 160-10 Cross Bay Boulevard was conveyed to Bond Motor, Inc., by Thomas Abruzzi, who also executed the lease agreement in his capacity as President of Bond Motors, Inc. Also submitted, is the deposition testimony of Diane Schreiber, who testified that

although Bon Realty has an office at 160-10 Cross Bay Boulevard, it is not the owner of the property where Eckerd is located. While defendant Bon Realty concedes that Bond Motor conveyed 160-06 Cross Boulevard to it in 1998, it alleges that that conveyance did not include 160-10 Cross Bay Boulevard. Defendant Bon Realty's evidence was sufficient to establish its prima facie entitlement to summary judgment on the issue of ownership.

The burden then shifted to plaintiff to rebut the prima facie showing. In opposition, counsel for plaintiff refers to the documentary evidence submitted in the moving papers, and argues:

The moving defendant submits three deeds, from 1966, 1968 and 1994. . . The premises know as 160-10 Cross Bay Blvd., Queens, NY is known as Block 14030, Lot 0006, and the current deed for that block and lot is BOND MOTORS, INC. TO BON REALTY CORP. There is no deed for BOND REALTY CORP., as the owners of 160-10 Cross Bay Blvd., nor has a deed been submitted by the moving defendant for premises 160-10 Cross Bay Blvd. Also, attached hereto and made a part hereof as EXHIBIT D, is a copy of an Agreement dated November 2004, between Independence Community Realty Corp. and the defendant, BON REALTY CORP., for premises know as 160-00/160-16 Cross Bay Blvd., Howard Beach, New York. Page 9 of this agreement states the Block as 14030, lot 6. The moving defendant, also claims that the address is 160-06 Cross Bay Blvd., not 160-10 Cross Bay Blvd. . . Again, the moving defendant has not produced any valid documentation, nor a deed, nor an affidavit from the principals of the corporation, nor a valid lease agreement showing that BOND REALTY CORP., is the correct owner of the premises know as 160-10 Cross Bay Blvd., Howard Beach, New York nor for premises 160-06 Cross Bay Blvd., Howard Beach, New York.

Plaintiff also points to the deposition testimony of Ms. Schreiber, later corrected on the correction/errata sheet, that Bon Realty was the owner of the property; that Bon Realty maintained the property and that described the relationship of Rocco Abruzzi, her father, as a shareholder of Bon Realty. This evidence is sufficient to raise an issue of fact with respect to the ownership of the property leased to the Eckert defendants, which was not rebutted by defendant Bon Realty. That plaintiff commenced a second action against Bond Motors is not interpreted by this Court as a concession that plaintiff served the wrong corporate entity, particularly given the interrelatedness between Bon Realty and Bond Motor. Accordingly, defendant Bon Realty's motion for summary judgment on this ground must be denied.

Defendant Bon Realty also seeks dismissal on the alternative grounds that plaintiff fell due to an "open and obvious" condition that is "not inherently dangerous," and therefore not actionable under New York law. Plaintiff alleges that a concrete parking line divider caused him to trip and fall, and submits photographs in support of his position that this divider created a dangerous

condition. “A wheel stop or concrete parking lot divider which is clearly visible presents no unreasonable risk of harm”[(Cardia v. Willchester Holdings, LLC, 35 A.D.3d 336 (2nd Dept.2006); Plessias v. Scalia Home for Funerals, 271 A.D.2d 423 (2nd Dept. 2000)], particularly where, as here, the concrete divider was readily observable by the reasonable use of one’s senses, and it did not present an unreasonable risk of harm. Jang Hee Lee v Sung Whun Oh, 3 A.D.3d 473 (2nd Dept. 2004). The alleged defect at issue was at most “a trivial defect which was not actionable as a matter of law.” See, Trincere v. County of Suffolk, *supra*; Shohet v. Shaaya, 43 A.D.3d 816 (2nd Dept. 2007); Outlaw v. Citibank, 35 A.D.3d 564, 565, *supra*; Taussig v. Luxury Cars of Smithtown, Inc., 31 A.D.3d 533 (2nd Dept. 2006). Here, as in Sclafani v. Washington Mut., 36 A.D.3d 682, 683 (2nd Dept. 2007), “defendants each established their prima facie entitlement to summary judgment dismissing the complaint insofar as asserted against them by presenting evidence that the concrete parking barrier over which the plaintiff tripped and fell was open and obvious, as it was readily observable by those employing the reasonable use of their senses and, as a matter of law, was not inherently dangerous.” This conclusion is supported by the plethora of cases granting summary judgment in favor of the property owner in circumstances based upon virtually identical facts. See, Cardia v. Willchester Holdings, LLC, 35 A.D.3d 336 (2nd Dept. 2006)[concrete wheel stop in the parking lot]; Gaines v. Shell-Mar Foods, Inc., 21 A.D.3d 986 (2nd Dept. 2005)[concrete parking lot divider]; Zimkind v. Costco Wholesale Corp., 12 A.D.3d 593 (2nd Dept. 2004)[concrete wheel stop]; Dominitz v. Food Emporium, Inc., 271 A.D.2d 640 (2nd Dept. 2000)[concrete curb of an island in a parking lot]. Defendants’ papers, submitted in support of their motion, thus established their prima facie entitlement to summary judgment. Gaines v Shell-Mar Foods, 21 A.D.3d 986 (2nd Dept. 2005) In opposition, plaintiff failed to present sufficient evidence to raise a triable issue of fact. Accordingly, defendant Bon Realty’s motion for summary judgment on this ground is granted.

Conclusion

Based upon the foregoing, the Eckert defendants’ motion for summary judgment dismissing the complaint as to them is granted on the ground that they did not maintain ownership or control over the area where plaintiff allegedly tripped and fell, which renders academic their request for alternative relief. Defendant Bon Realty Corp.’s motion for summary judgment is denied as to the asserted ground that it has never been the owner of the premises which were the site of plaintiff’s alleged trip and fall accident, and Bon Realty has no maintenance or other duty with respect to that site. However, the motion is granted to the extent that the alleged defect was an “open and obvious” condition that was “not inherently dangerous,” and therefore not actionable under New York law. Likewise, summary judgment on this basis renders academic their request for alternative and additional relief for judgment. Accordingly, the motions for summary judgment by defendants Eckerd Corporation and Eckerd Pharmacy Store #5543 and Bon Realty Corp. are granted, and the complaint and all cross claims asserted against them are hereby dismissed.

Dated: July 24, 2008

J.S.C.