Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 22 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

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FILOMENA PALANDRA,

Plaintiff(s),

-against-

THE CITY OF GLEN COVE,

Defendant(s).

---x

Index No. 11823/2006

Motion Submitted: 7/25/08
Motion Sequence: 002

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....X

Defendant City of Glen Cove ("the City") moves this Court for an order, pursuant to CPLR § 3212, dismissing the complaint. Plaintiff opposes the requested relief.

Plaintiff commenced this action for injuries she allegedly sustained when she tripped and fell at the third floor south wing of a parking garage owned by the City. The incident allegedly occurred on March 20, 2006 at approximately 1:30 p.m. The garage is located next to One School Street, Glen Cove, N.Y. Filomena Palandra was 82 years old on the date of the incident. The Court notes that Maria Palandra had been appointed guardian ad litem of Filomena Palandra for the purposes of being the plaintiff in this proceeding (see Exhibit 6 annexed to plaintiff's affirmation in opposition).

Filomena Palandra was going for a doctor's appointment accompanied by her daughter Maria Palandra when they parked in the subject garage. There was no sign warning against walking on the island and doing so was the logical, straightest way to go to the doctor's office. According to Maria Palandra's deposition, Filomena Palandra fell before she was able to get a foot up on the divider, in a depression gap between the curb of the island and the pavement of the parking lot.

Maria Palandra stated the area between the pavement of the parking lot and the curb of the island had an indentation space or gap and that this is where her mother Filomena Palandra caught her left foot. Photos of the island are set forth at Exhibit 5 annexed to plaintiff's affirmation in opposition.

Filomena Palandra testified at a 50-h hearing that her left foot went inside a deep hole. She described the area as "not dark, but it was getting there." She further testified that she did not see the hole/depression she stepped in.

City contends the "hole" or "depression' near the island in the parking garage was a drainage trough designed to allow rain water, etc., to drain out of the floors or levels of the parking garage. According to the affidavit of Kevin Monahan, Labor Foreman and Heavy Construction Coordinator for the Director of Public Works for the City, the depth of the trough is 2 ½ inches.

Landowners have a duty to maintain their property in a reasonably safe condition whether the property is open to the public or not; the use to which one's property is put and the frequency of that use by others, weigh heavily in determining the likelihood of injury, the seriousness of the injury, and the burden of avoiding the risk (***Peralta v. Henriquez***, 100 N.Y.2d 139, 790 N.E.2d 1170, 760 N.Y.S.2d 741 (2003); ***Tagle v. Jakob***, 97 N.Y.2d 165, 763 N.E.2d 107, 737 N.Y.S.2d 331 [2001]). A landowner owes a duty to a person coming upon the land to keep it in a reasonably safe condition (***Gustin v. Association of Camps Farthest Out, Inc.***, 267 A.D.2d 1001, 700 N.Y.S.2d 327 [4th Dept., 1999]). A reasonably safe condition takes in all circumstances including the purpose of the person's presence on the property and the likelihood of injury (***Macey v. Truman***, 70 N.Y.2d 918, 519 N.E.2d 304, 524 N.Y.S.2d 393 [1987]). For a landowner to be liable in tort for an injury resulting from an allegedly defective condition upon his property, the existence of a defective condition must be established (***Sadowsky v. 2175 Wantagh Ave. Corp.***, 281 A.D.2d 407, 721 N.Y.S.2d 665 [2001]).

To establish a *prima facie* case of negligence, a plaintiff must demonstrate that the defendant created the condition, which caused the incident or that the defendant had actual or constructive notice of the condition (see ***Gloria v. MGM Emerald Enterprises, Inc.***, 298

A.D.2d 355, 751 N.Y.S.2d 213, [2d Dept., 2002]). It is not disputed that City owned, operated and approved the design of the parking garage in issue.

While a municipal ordinance requires prior written notice of any condition on a municipal road, sidewalk, parking lot, etc., in order for the municipality to be held liable for injuries caused by that condition, there is no need to plead or prove prior written notice where it is alleged that a municipality created the allegedly hazardous condition (see ***Coppiello v. Johnson***, 21 A.D.3d 921, 800 N.Y.S.2d 766 (2d Dept., 2005); ***Walker v. Inc. Village of Northport***, 304 A.D.2d 823, 757 N.Y.S.2d 801 [2d Dept., 2003]). There was no need for the plaintiff to comply with the City's prior written notice statute since the City designed and built the garage including the trough.

Plaintiff has offered the affidavit of her expert, Richard Berkenfeld, a professional engineer. Mr. Berkenfeld found within a reasonable degree of engineering certainty that the drainage trough/depression in front of the edge of the concrete island in the School Street Parking Garage in Glen Cove, N.Y. was a dangerous and hazardous condition. Mr. Berkenfeld found the island extended out over the depression to create a concrete lip over the depression/trough, which Mr. Berkenfeld found to constitute a trap-like condition for pedestrians. Mr. Berkenfeld noted there was no use of visual clues (accent lighting, contrast painting, etc.) to set off the depression/trough.

This Court finds that Mr. Berkenfeld has raised issues of fact as to whether the depression/trough created "optical confusion" (see ***Chafoulias v. 245 E. 55th Street Tenants Corp.***, 141 A.D.2d 207, 533 N.Y.S.2d 440 [1st Dept., 1988]).

There is no "bright line" test for determining whether a condition on a premises is open and obvious in analyzing whether an alleged tortfeasor is liable for an allegedly dangerous condition; the test is whether any observer reasonably using his or her sense would see the condition; the test for determining whether a condition on a premises is open and obvious incorporates a reasonableness standard is fact-specific and usually presents a question for resolution by the trier of the fact (***Centeno v. Regine's Originals, Inc***., 5 A.D.3d 210, 773 N.Y.S.2d 62 [1st Dept., 2004]). Here, the photographs (see Exhibit A after Monahan's affidavit annexed to City's motion) do not clearly show the trough/depression. This alone would raise an issue if the depression/trough was a trap or snare (see ***Morris v. Greenburgh Cent. School Dist. No. 7*** , 5 A.D.3d 567, 774 N.Y.S.2d 74, 186 [2d Dept., 2004]).

Filomena Palandra testified that the area where she fell ". . . could have been like leaves on the ground. You could see how much debris was there". Thus, Mrs. Palandra indicated the drainage trough was covered by leaves and debris. Her testimony implied the trough/depression was not clearly visible.

As a general rule, whether a dangerous condition exists on the real property so as to create liability depends on the particular facts and circumstances of each case and presents a question of fact for the jury (***Corrado v. City of New York***, 6 A.D.3d 380, 773 N.Y.S.2d 894 [2d Dept., 2004]). There is no minimal dimension test or *per se* rule that a defect must be of a certain minimum height or depth in order to be actionable; whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (***Trincere v. County of Suffolk***, 232 A.D.2d 400, 648 N.Y.S.2d 126 [2d Dept., 1996]).

The facts presented herein were insufficient to demonstrate, as a matter of law, that the alleged defective condition which caused the plaintiff to fall was too trivial to be actionable (***Smith v. A.B.K. Apartments, Inc.***, 284 A.D.2d 323, 725 N.Y.S.2d 672 [2d Dept., 2001]). Also, a condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff's attention is otherwise distracted or diverted (***Mauriello v. Port Authority of New York and New Jersey***, 8 A.D.3d 200, 779 N.Y.S.2d 199 [1st Dept., 2004]).

The fact that the condition that brought about plaintiff's fall might be of an open and obvious nature does not bar a finding of liability against the property owner but it does go to the issue of comparative negligence (***Cupo v. Karfunkel***, 1 A.D.3d 48, 767 N.Y.S.2d 40 [2d Dept., 2003]). The fact that the plaintiff may have been comparatively negligent does not negate the liability of the landlord who has a duty to keep the premises safe (***Powers v. St. Bernadette's Roman Catholic Church***, 309 A.D.2d 1219, 765 N.Y.S.2d 102 [4th Dept., 2003]). The doctrine of the assumption of risk does not exculpate a landowner from liability of ordinary negligence in maintaining a premises (***Sykes v. County of Erie***, 94 N.Y.2d 912, 728 N.E.2d 973, 707 N.Y.S.2d 374 [2000]).

The credibility of witnesses, the reconciliation of conflicting statements, a determination of which should be accepted and which should be rejected, the truthfulness and accuracy of testimony, whether contradictory or not, are issues for the trier of fact (***Lelekakis v. Kamamis***, 41 A.D.3d 662, 839 N.Y.S.2d 773 [2d Dept., 2007]). Moreover, whether an alleged sidewalk defect in a municipal sidewalk, roadway, parking garage, etc. is sufficiently hazardous to impose liability is usually a question for a jury to resolve as it involves a case by case basis (***Trincere v. County of Suffolk, supra***) since there is no minimal dimension test (***Wiese v. Town of Lancaster***, 31 A.D.3d 1153, 817 N.Y.S.2d 828 [4th Dept., 2006]).

Here, the City failed to sustain its initial burden of establishing that it is entitled to summary judgment based on the doctrine of qualified immunity because the City submitted no evidence that its decision to put in drainage troughs at the base of the islands in the parking lot was the product of a deliberate decision making process of the type afforded

immunity from judicial interference (see ***Boyd v. Trent***, 262 A.D.2d 260, 690 N.Y.S.2d 732 (2d Dept., 1999); see also ***Friedman v. State***, 67 N.Y.2d 271, 493 N.E.2d 893, 502 N.Y.S.2d 669 [1986]).

While plaintiff's ultimate burden at trial is to prove that the defendant's conduct was the proximate cause of her injury (see ***Barker v. Parnossa***, 39 N.Y.2d 926, 352 N.E.2d 880, 386 N.Y.S.2d 576 [1976]), here the plaintiff is required, in opposing the City's summary judgment motion, to raise issues of fact that the City created the alleged dangerous condition (under the assumption City owned, controlled, possessed, etc., the parking garage in question). The plaintiff has met her burden.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of material fact, and the moving party is, therefore, entitled to judgment as a matter of law (***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (***Miller v. Journal-News***, 211 A.D.2d 626, 620 N.Y.S.2d 500 [2d Dept., 1995]). Thus, the burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (***Ayotte v. Gervasio***, 81 N.Y.2d 1062, 619 N.E.2d 400, 601 N.Y.S.2d 463 [1993]). The City has failed to meet its burden. The motion is denied.

The foregoing constitutes the Order of this Court.

Dated: September 15, 2008
Mineola, N.Y.

Karen V. Murphy
J. S. C.

ENTERED
SEP 26 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE