SHORT FORM ORDER

INDEX No. 05-20877
CAL. No. 07-02062-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS WHELAN
Justice of the Supreme Court

MOTION DATE 1-8-08 (002 & 003)
3-5-08 (004)
ADJ. DATE 8-29-08
Mot Seq. No. 008 - MD
Mot. Seq. No. 009 - XMD
Mot. Seq. No. 010 - XMD

PAMELA J. DRURY,

Plaintiff,

- against -

KASLL MARKET, INC. d/b/a MONTAUK IGA, A. PHILIP DINKEL, ROBERT LACHMANN, DeLALIO ASPHALT, INC. p/k/a DeLALIO SFA: DeLALIO COAL & STONE CO., INC., PERRY W. DeLALIO, JR., individually, jointly and severally,

Defendants.

KASLL MARKET, INC. d/b/a/ MONTAUK IGA, A. PHILIP DINKEL and ROBERT LACHMANN,

Third-Party Plaintiffs,

- against -

TOWN OF EAST HAMPTON and PERRY W. DeLALIO, JR. d/b/a DeLALIO-SOUTH FORK and/or DeLALIO/SFA,

Third-Party Defendants.

Action No. 1
Index No. 05-20877

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Action No. 2
Index No. 26-0404

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Upon the following papers numbered 1 to 65 read on this motion and these cross motions for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 18; Notice of Cross-Motion and supporting papers 19 - 24; 50 - 54; Answering Affidavits and supporting papers 25 - 49; Replying Affidavits and supporting papers 55 - 57; 58 - 62; 63 - 65; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#002) by the defendants/third-party plaintiffs, Kasll Market, Inc. d/b/a Montauk IGA, A. Philip Dinkel and Robert Lachmann, for, among other things, an order granting them summary judgment dismissing all claims against them, is denied in its entirety; and it is

ORDERED that this cross motion (#003) by the third-party defendant, Town of East Hampton, for an order granting it summary judgment dismissing all claims against it, is denied; and it is further

ORDERED that this cross motion (#004) by the defendants, Delalio Coal & Stone Co., Inc. and Perry W. Delalio, Jr. and the third-party defendants, Perry W. Delalio, Jr. d/b/a Delalio-South Fork and/or Delalio/SFA, for an order granting them summary judgment dismissing all claims against them, is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff when she tripped and fell in the parking lot in front of the IGA Supermarket located at 654 Montauk Highway, Montauk, New York on June 19, 2004. The gravamen of the amended complaint is that the defendants Kasll Market, Inc. (hereinafter "Kasll") d/b/a Montauk IGA (hereinafter "Montauk IGA"), A. Philip Dinkel (hereinafter "Dinkel"), Robert Lachmann (hereinafter "Lachmann"), Delalio Asphalt, Inc. previously known as Delalio SFA, Delalio Coal & Stone Co., Inc. and Perry W. Delalio, Jr. (hereinafter "the Delalio defendants) negligently reconstructed the Montauk IGA handicapped parking lot and walkway where the plaintiff was injured.

The third-party complaint includes four causes of action by the defendants/third-party plaintiffs Kasll, Dinkel and Lachmann against the third-party defendants Town of East Hampton (hereinafter "Town"), Perry W. Delalio, Jr. d/b/a Delalio-South Fork and/or Delalio/SFA (hereinafter "Delalio"), which sound in common law indemnity, contractual indemnity and contribution. The gravamen of the third-party complaint is that the third-party defendant Town owned or was otherwise in control of the handicapped parking lot; that Delalio negligently performed work in the lot on May 14, 2002 pursuant to an agreement with the Town; that the Town had a non-delegable duty to maintain the lot or otherwise keep it in a safe condition; that the Town knew or should have known that Delalio was incapable of doing the work performed; that if the plaintiff sustained injuries, they were caused by the Town's affirmative act of negligence in failing to adequately supervise Delalio; that the Town negligently inspected or failed to inspect the work of Delalio; that the Town failed to ensure that the area was safe for its intended use before re-opening it to the public; and that the Town had actual, as well as, constructive notice of the defective work performed by Delalio.

The plaintiff claims in her bill of particulars, among other things, that (i) the defendants caused or permitted an unbeveled, elevated asphalt lip three-quarters of an inch in height located within the handicapped parking area in front of the subject Montauk IGA store; (ii) this defect presented a dangerous

tripping hazard; (iii) the restricted width of the entry areas between the two timber fence posts was of insufficient width and otherwise in violation Title III of the Americans With Disabilities Act ("ADA") Standards for Accessible Design and the applicable Code of Federal Regulations, U.S. Department of Justice (*see* 42 USC 12181 *et seq.* [1994]; 28 CFR Part 36 [1991]); and (iv) the narrow fence opening directed plaintiff's path to the defect. The plaintiff also claims that the defendants had actual, as well as, constructive notice of the defective condition. The Court notes that the plaintiff's bill of particulars submitted by the defendants predates the plaintiff's amended summons and amended verified complaint and the commencement of this action against the Delalio defendants.

According to the files maintained by the Office of the Suffolk County Clerk's Office, this action was discontinued with prejudice by all parties by stipulation dated August 10, 2007 as against the "defendant Delalio Asphalt Inc. previously known as Delalio SFA." A copy of the discontinuance, however, has not been furnished by counsel and the computerized records maintained by the Court do not reflect that the same has been filed with the Clerk of the Supreme Court (*see* CPLR 3217[a] [b]; Uniform Rules for Trial Courts [22 NYCRR] § 202.28). The computerized records maintained by the Court also indicate that the plaintiff has not, to date, moved to amend the caption of this action to reflect the above-noted discontinuance.

The defendants/third-party plaintiffs Kasll, Dinkel and Lachmann now move for an order granting summary judgment dismissing all claims in this action as against them on the basis that they bear no liability for the accident, or, in the alternative, granting them conditional judgment on their cross claims against the co-defendants Delalio Coal & Stone Co., Inc. and Perry W. Delalio, Jr., and the third-party defendants Town and Delalio on the basis that these co-defendants/third party defendants are solely and wholly responsible for the accident. The Town cross moves for an order granting it summary judgment dismissing all third-party claims on the basis that it bears no liability for the accident. The Delalio defendants and the third-party defendants Delalio cross move for an order granting summary judgment dismissing all claims as against them on the basis that they bear no liability for the accident.

CPLR 3212(a) requires that a motion for summary judgment be made within 120 days after the filing of a note of issue, except with leave of court on good cause shown (*see* CPLR 3212[a]). The Delalio defendants/third-party defendants made their cross motion on February 27, 2008 as indicated in the affidavit of service of same, which is 49 days after January 9, 2008, the 120-day deadline following the filing of the note of issue, thereby rendering the cross motion untimely (*see* CPLR 3212[a]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]). Notably, the Delalio defendants did not seek leave to file a late motion for summary judgment in their notice of cross motion (*see e.g.* ***Welch v City of Glen Cove***, 273 AD2d 302, 708 NYS2d 475 [2d Dept 2000]). In addition, counsel for the Delalio defendants has provided no explanation or "good cause" for serving the cross motion 49 days late, and thus, the Court has no discretion to entertain it on the merits (*see* ***Brill v City of New York***, 2 NY3d 648, *supra*; ***Rivers v City of New York***, 37 AD3d 804, 830 NYS2d 767 [2d Dept 2007]).

Further, a delay of more than one month is not minimal (*compare* ***Miranda v Devlin***, 260 AD2d 451, 688 NYS2d 578 [2d Dept 1999][cross motion was made approximately five days after expiration of applicable 120-day period]). Moreover, assertions that no prejudice resulted from the delay since the action is not ready for trial and that the motion is meritorious are insufficient justifications to permit late filing (*see* ***Gaines v Shell-Mar Foods, Inc.***, 21 AD3d 986, 801 NYS2d 376 [2d Dept 2005]).

This cross motion, however, falls under the exception where a timely motion for summary judgment was made on nearly identical grounds and the issues are already properly before the Court (*see e.g.* ***Grande v Peteroy***, 39 AD3d 590, 833 NYS2d 615 [2d Dept 2007]; ***Bressingham v Jamaica Hosp. Med. Ctr.***, 17 AD3d 496, 793 NYS2d 176 [2d Dept 2005]). The Court, in the course of deciding the timely motion is, in any event, empowered to search the record and award summary judgment to a nonmoving party (*see* CPLR 3212[b]).

As to the cross motion by the Delalio defendants/third-party defendants and the motion by the defendants/third-party plaintiffs Kasll, Dinkel and Lachmann, to prove a prima facie case of negligence in a slip/trip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*see* ***Bradish v Tank Tech. Corp.***, 216 AD2d 505, 628 NYS2d 807 [2d Dept 1995]; ***Gaeta v City of New York***, 213 AD2d 509, 624 NYS2d 47 [2d Dept 1995]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Bykofsky v Waldbaum's Supermarkets, Inc.***, 210 AD2d 280, 619 NYS2d 760 [2d Dept 1994]). Liability can be predicated only on failure of the defendant to remedy the danger after actual or constructive notice of the condition (*see* ***Piacquadio v Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [2d Dept 1994]). A defendant with actual knowledge of an ongoing and recurring dangerous condition may be charged with constructive notice of each specific recurrence of the condition (*see* ***Osorio v Wendell Terrace Owners Corp.***, 276 AD2d 540, 714 NYS2d 116 [2d Dept 2000]; ***Weisenthal v Pickman***, 153 AD2d 849, 545 NYS2d 369 [2d Dept 1989]).

It is well settled that "[l]iability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property. The existence of one or more of these elements is sufficient to give rise to a duty to exercise reasonable care. Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property" (***Turrisi v Ponderosa, Inc.***, 179 AD2d 956, 957, 578 NYS2d 724 [3d Dept 1992]).

The special use exception applies in situations "where a landowner whose property abuts a public street or sidewalk derives a special benefit from that property unrelated to the public use, and therefore is required to maintain a portion of that property" (***Lauer v Great South Bay Seafood Co., Ltd.,*** 299 AD2d 325, 327, 750 NYS2d 305 [2d Dept 2002]). The special purpose exception is not satisfied by the mere fact

that a commercial establishment derives some benefit from an adjacent public parking area (*see* ***Oles v City of Albany***, 267 AD2d 571, 699 NYS2d 202 [3d Dept 1999]). Generally, special use cases "involve the installation of some object in the sidewalk or some variance in the construction thereof, such as a concrete step mounted upon the sidewalk immediately beneath the elevated doorway of a restaurant, the installation of terrazzo tile underneath a theater's marquee, the installation of rails in the sidewalk to facilitate the removal of refuse, the placement of a pipe for heating oil or the installation of a driveway cutout" (***Marguiles v Frank***, 228 AD2d 965-966, 644 NYS2d 596 [3d Dept 1996]).

The fact that the landowner did not himself create the "special use" is no defense so long as he knows about it, as the duty to maintain the area providing a special benefit runs with the ownership of the land that it benefits (*see* ***Torres v City of New York***, 32 AD3d 347, 348, 820 NYS2d 268 [1st Dept 2006]). The causal connection between the owner's special use of a portion of a public walkway and a defective condition that caused the injury is an issue for the trier of fact and precludes the granting of summary judgment (*see* ***Granville v New York***, 211 AD2d 195, 197, 627 NYS2d 4 [1st Dept 1995]).

The Delalio defendants/third-party defendants failed to establish their prima facie right to judgment as a matter of law that they neither created the alleged defects (*see* ***Walls v City of New York***, 48 AD3d 792, 853 NYS2d 122 [2d Dept 2008]; ***Troise v New Water St. Corp.***, 11 AD3d 529, 782 NYS2d 853 [2d Dept 2004]), nor had actual or constructive notice of the defects (*see* ***Padula v City of Long Beach***, 20 AD3d 555, 799 NYS2d 557 [2d Dept 2005]). Initially, in support of their motion, the Delalio defendants/third-party defendants have failed to supply a copy of any written documentation that would delineate their obligations with respect to the asphalt work performed such as, a purchase order, delivery receipt, invoice or contract (*see generally* ***Espinal v Melville Snow Contr., Inc.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Palka Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 611 NYS2d 817 [1994]).

Further, the fact that Delalio was instructed by the Town as to the amount of asphalt delivered and the location of same would not, by itself, negate a finding of negligence. In any event, the deposition testimonies given by David Brown (hereinafter "Brown") on behalf of the Town and by Perry Delalio, Jr. on behalf of the Delalio defendants raise triable issues of fact as to whether the asphalt lip existed prior to Delalio's asphalt work or whether it was created by Delalio (*cf.* ***Abreau v Getty Refining and Mktg. Co.***, 121 AD2d 419, 503 NYS2d 116 [2d Dept 1986]).

Also, the testimonies of Brown and Delalio raise issues of fact as to whether Delalio properly feathered the delivered asphalt near the location of the timber fence and whether it was even required to do so by the Town (*cf.* ***Bengis v Thalle Indus., Inc.***, 19 AD3d 523, 797 NYS2d 531 [2d Dept 2005]; ***Sipourene v County of Nassau***, 266 AD2d 450, 698 NYS2d 705 [2d Dept 1999]). Brown testified at his deposition that he was present during the 2002 re-paving of the handicapped lot at the Montauk IGA. He recalled that asphalt work was performed by Delalio in the vicinity of the timber fence, but did not recall whether it involved a new asphalt overlay, painting or striping. He admitted that he did not inspect the edges of the

newly laid asphalt to determine whether "feathering" was needed. Lastly, he did not know if there were blue paint marks in the lot when it was re-paved.

Delalio, sued herein as "Perry W. Delalio, Jr.," testified at his deposition that he is a principal of Delalio Coal & Stone Co., Inc. and that his company does business as Delalio South-Fork Asphalt. Delalio performed work in the front lot of the Montauk IGA on May 14, 2002 pursuant to a purchase order and a "requirement contract." The Town decided the quantity of the asphalt that was supplied as a "wearing course," as well as any tapering or feathering which was based upon "field conditions." Delalio's testimony was inconsistent, however, as to whether he was hired by the Town to do an "overlay," and he did not know whether Delalio installed asphalt over an existing layer. Furthermore, Delalio admitted that he was not present while work was performed and that he never personally inspected the site after completion. Accordingly, in light of the issues of fact presented by the testimonies of Brown and Delalio, that branch of the motion by the Delalio defendants/third-party defendants for summary judgment on the basis that they bear no liability for the accident, is denied.

The defendants/third-party plaintiffs Kasll, Dinkel and Lachmann also failed to make a prima facie showing that Dinkel and Lachmann are not liable for the alleged defect as they have not proffered any evidence that would show that Dinkel and Lachmann did not own, maintain, or make a special use of the parking lot or fence (*cf.* ***Minott v City of New York***, 230 AD2d 719, 645 NYS2d 879 [2d Dept 1996]). Further, the defendants/third-party plaintiffs Kasll, Dinkel and Lachmann failed to make a prima facie showing that Kasll did not own, maintain, create or derive a special benefit from the handicapped parking spaces or fence in front of the Montauk IGA (*see* ***McKenzie v Columbus Ctr., LLC***, 40 AD3d 312, 835 NYS2d 190 [1st Dept 2007]; ***Hunter v City of New York***, 23 AD3d 223, 806 NYS2d 4 [1st Dept 2005]; ***Curtis v City of New York***, 179 AD2d 432, 557 NYS2d 855 [1st Dept 1992]).

Instead, their submissions raise triable issues as to whether Kasll derived a special benefit from the fence as it was designed to prevent the loss of shopping carts from their premises, whether the timber fence prevented a more uniform application of asphalt feathering and whether the fence proximately caused or contributed to the plaintiff's harm by directing her toward the alleged defect (*see* ***McKenzie v Columbus Ctr., LLC***, 40 AD3d 312, *supra*). Two of Kasll's three principals, Robert Stark (hereinafter "Stark") and William Clark (hereinafter "Clark"), admitted during their depositions that Kasll owned the timber fence that runs north to south on the date of the accident. They also admitted that they subsequently replaced the timber fence after the accident with a metal barrier.

Stark estimated that the distance from the first, right-most handicapped space to the "exit" of his store is only about fifteen feet, and that the lot is used by patrons of the store. Stark further testified that the photographs submitted fairly and accurately depicted the front of his store, the timber fence and the handicapped parking spaces. The photographic evidence itself shows shopping carts lined up on the premises owned by Kasll and against the south side of the timber fence, a narrow opening leading to the

handicapped lot, and an elevated asphalt lip running within the handicapped spaces and parallel to the fence. Moreover, the photographic evidence clearly supported an inference that the condition, which is the subject of the complaint, was not suddenly created, thus raising a triable issue as to whether Kasll could have obtained timely knowledge of it by the exercise of ordinary care (*see* ***Jacobsen v Krumholz***, 41 AD3d 128, 836 NYS2d 603 [1st Dept 2007]). Accordingly, that branch of the motion by the defendants/third-party plaintiffs Kasll, Dinkel and Lachmann for summary judgment on the basis that they bear no liability for the accident, is denied.

The Court now turns to the issue of whether the defect is actionable as a matter of law. Generally, the issue of whether a dangerous or defective condition exists depends on the particular facts of each case and is properly a question of fact for the jury (*see* ***Trincere v County of Suffolk***, 90 NY2d 976, 665 NYS2d 615 [1997]; ***Ayala v Gutin***, 49 AD3d 677, 853 NYS2d 665 [2d Dept 2008]). A property owner, however, may not be held liable for trivial defects, not constituting a trap or a nuisance, over which a person might merely stumble, stub his or her toes, or trip (*see* ***Hargrove v Baltic Estates***, 278 AD2d 278, 717 NYS2d 320 [2d Dept 2000]; ***Neumann v Senior Citizens Ctr., Inc.***, 273 AD2d 452, 710 NYS2d 382 [2d Dept 2000]).

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 NY2d 976, *supra*). Similarly, whether a particular height difference between sidewalk slabs constitutes a dangerous or defective condition depends upon the peculiar facts and circumstances of each case (*see* ***McKenzie v Crossroads Arena, LLC.***, 291 AD2d 860, 738 NYS2d 779, *lv denied*, 98 NY2d 647, 745 NYS2d 504 [2002]). While a gradual, shallow depression is generally regarded as trivial, the presence of an edge which poses a tripping hazard, however, renders the defect nontrivial (*see* ***Argenio v Metropolitan Tr. Auth.***, 277 AD2d 165, 716 NYS2d 657 [1st Dept 2000]).

By their submissions, the defendants/third-party plaintiffs and the third-party defendants failed to make a prima facie showing that the elevated asphalt lip, timber fence and passageway leading to the subject parking lot are too trivial to be actionable (*see* ***Portanova v Kantlis***, 39 AD3d 731, 833 NYS2d 652 [2d Dept 2007]; ***Moons v Wade Lupe Constr. Co., Inc.***, 24 AD3d 1005, 805 NYS2d 204 [3d Dept 2005]; ***Frasano v Green-Wood Cemetary***, 21 AD3d 446, 799 NYS2d 827 [2d Dept 2005]; ***Wilson v Time Warner Cable, Inc.***, 6 AD3d 801, 774 NYS2d 584 [3d Dept 2004]). Rather, the plaintiff's testimony and the photographic evidence raise questions of fact as to whether the alleged defect was too trivial to be actionable and whether it constituted a trap, snare or nuisance (*see* ***Portanova v Kantlis***, 39 AD3d 731, *supra*).

The plaintiff, in her deposition, testified that the elevated asphalt lip was about 1 ½ to 2 inches in height and that the edge of the lip caught the heel of her right shoe as she was walking. This, in turn caused her to lose her balance and then fall face-forward into the timber fence railing. She also testified that there was only approximately 18 to 20 inches of space in front of the two handicapped spaces and the north-south

fence. Additionally, the photographs, which the plaintiff testified accurately depicted the subject defect, show that the asphalt lip spans approximately the width of the parking spaces, and that it had an abrupt edge which poses a tripping hazard (*see* ***Argenio v Metropolitan Tr. Auth.***, 277 AD2d 165, *supra*; ***Cela v Goodyear Tire & Rubber Co.***, 286 AD2d 640, 730 NYS2d 323 [1st Dept 2001]).

These factors, together with the surrounding circumstances, show that the elevated asphalt lip, even if was less than 2 inches, would not as a matter of law be trivial (*see* ***Jacobsen v Krumholz***, 41 AD3d 128, 836 NYS2d 603 [1st Dept 2007]; ***Tesak v Marine Midland Bank, N.A.***, 254 AD2d 717, 678 NYS2d 226 [4th Dept 1998]; *compare*, ***Allen v Carr***, 28 AD2d 155, 284 NYS2d 796 [4th Dept 1967]). As the movants failed to meet their initial burden in seeking summary judgment, their request for relief must be denied without consideration of the sufficiency of the plaintiff's opposing papers (*see* ***Edwards v Arlington Mall Assocs.***, 6 AD3d 1136, 775 NYS2d 673 [4th Dept 2004]).

Accordingly, the motion and the cross motions for summary judgment are denied in their entirety as indicated herein.

Dated: 10/8/08

THOMAS F. WHELAN, J.S.C.