

**Early v Hilton Hotels Corp.**

2008 NY Slip Op 33059(U)

November 12, 2008

Supreme Court, New York County

Docket Number: 113419/06

Judge: Milton A. Tingling

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. MILTON A. TINGLING**  
**J.S.C.**

PART 44

Index Number : 113419/2006  
**EARLY, ELIZABETH**  
vs.  
**HILTON HOTELS**  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 4/2/08  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is decided in accordance with annexed decision.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**  
NOV 14 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 11/12/08

met  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 44

-----X  
ELIZABETH EARLY and EDWARD EARLY,  
Plaintiffs,

Index No. 113419/06

-against-

HILTON HOTELS CORPORATION, Individually  
and d/b/a WALDORF ASTORIA HOTEL and  
WALDORF ASTORIA HOTEL,  
Defendants.

**FILED**  
NOV 14 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
TINGLING, J.:

Defendants Hilton Hotels Corporation, individually, and d/b/a Waldorf Astoria Hotel and Waldorf Astoria Hotel (collectively, Waldorf Astoria), make this motion pursuant to CPLR 3212, for an order granting summary judgment in their favor dismissing the complaint, dated September 19, 2006 (Complaint), of plaintiffs Elizabeth Early and Edward Early, on the ground that no genuine triable issues of fact exist with respect to the injuries Elizabeth Early sustained when she tripped on a plastic strap while walking on a sidewalk adjacent to the Waldorf Astoria Hotel.

For the reasons stated herein, the Waldorf Astoria's motion is denied.

**BACKGROUND**

Plaintiff alleges that, on the afternoon of October 1, 2003, while walking on the public sidewalk on 50<sup>th</sup> Street between Park Avenue and Lexington Avenue, New York, New York, near the loading dock of the Waldorf Astoria Hotel, she tripped and fell on a plastic strap - the type used for tying items up - that was entangled around her ankle. Plaintiff sustained injuries, including a fracture of the right hip, requiring a total right hip replacement and extensive

physical therapy. A Guest Accident Report was generated by the Waldorf Astoria with respect to the incident.

The Complaint contains one cause of action, for negligence, on behalf of Elizabeth Early, and a second cause of action, for loss of consortium, on behalf of her husband, Edward Early. In the answer, dated October 31, 2006 (Answer), the Waldorf Astoria denies the general allegations of the Complaint, and asserts one affirmative defenses for comparative negligence and a second one, pursuant to CPLR 4545.

### DISCUSSION

The Waldorf Astoria contends that summary judgment dismissing the Complaint is warranted because it had neither constructive nor actual notice of a hazardous condition.

In support of the motion, the Waldorf Astoria relies primarily upon the deposition testimony of Junior Foote, who was employed as its "Store Room Clerk, Purchasing Coordinator" at the time of the accident. Foote testified that some vendors who make deliveries to the Waldorf Astoria use plastic strips or straps to hold their goods together. However, according to Foote, the straps are not removed from the goods on the loading dock, but are instead removed from the goods after they are transported to a store room. He further stated that he could not remember ever seeing any plastic yellow straps that looked like the one plaintiff tripped on, and also that he had never received any complaints from anyone about plastic straps being anywhere in the vicinity of the sidewalk or the loading dock of the Waldorf Astoria.

In her opposing affidavit, sworn to February 29, 2008, plaintiff states, in relevant part:

4. As I was walking on the sidewalk from Park Avenue to Lexington

Avenue on 50<sup>th</sup> Street, near the loading dock to the Waldorf Astoria Hotel, a plastic strap, approximately 24 inches in diameter, wrapped around my ankles and caused my body to be propelled to the ground, whereupon I landed on the sidewalk.

\* \* \*

6. Following my fall, I entered the hotel and located a security officer. I alerted the security officer to my fall and a report was created by that security officer. Afterwards, I went out to the loading dock with the security officer at which time that security officer found three additional plastic strips in the vicinity of my fall.

7. Approximately six months following my accident, I returned to 50<sup>th</sup> Street between Park Avenue and Lexington Avenue to the sidewalk located next to the loading dock for the Waldorf Astoria Hotel. At that time, I obtained two plastic straps, similar to the plastic strap that caused my accident on October 1, 2003. Those two straps I found approximately six months following my fall were marked for identification purposes at my deposition . . . .”

Plaintiff submits that the evidence shows that the hazardous condition that caused her fall was a plastic strap that was located on the public sidewalk next to the loading dock of the Waldorf Astoria, and that the Waldorf Astoria created this condition. She contends that her deposition testimony as well as her affidavit raise a triable issue with respect to whether the presence of plastic straps on the Waldorf Astoria’s loading dock area and abutting sidewalk was attributable to the Waldorf Astoria.

The Waldorf Astoria, in reply, submits that plaintiff’s attempt to create some connection between the presence of plastic straps affixed to goods at the loading dock and the presence of the plastic strap on the sidewalk that allegedly caused plaintiff to fall is speculative and based on insufficient evidence. Under these circumstances, the Waldorf Astoria submits that plaintiff has not raised a triable issue sufficient to defeat its entitlement to summary judgment.

As explained in Montalvo v Western Estates, Ltd., (240 AD2d 45, 47 [1<sup>st</sup> Dept

1998]):

Generally, the municipality has the responsibility for maintenance of sidewalks so that they may be safely traveled upon by those who use them. (City of Rochester v Campbell, 123 NY 405, 411 [1890]; see, D'Ambrosio v City of New York, 55 NY2d 454 [1982].) This principle flows from the fact that it is the municipality, not the abutting owner, that has control of the sidewalks. (Rooney v City of Long Beach, 42 AD2d 34, 37-38 [2d Dept 1973].) Thus, an owner or one in possession of property will not be liable to a pedestrian injured by a condition on a public sidewalk abutting the premises unless the owner or possessor created the dangerous condition (Davenport v Apostol, 26 AD2d 874 [3d Dept 1966], aff'd 22 NY2d 943 [1968]; see, Mandel v City of New York, 44 NY2d 1004 [1978]) or caused the condition to occur because of some special use (Rooney v City of Long Beach, supra, 42 AD2d, at 36; PJ 2:111) or a statute or ordinance placed the obligation to maintain the sidewalk upon the owner or possessor (Bloch v Potter, 204 AD2d 672 [2d Dept 1994]).

Thus, an abutting property owner will not be liable to a pedestrian who sustains an injury as a result of a dangerous condition on a public sidewalk unless the owner: (a) created the condition; (b) caused the condition to occur because of some special use; or (c) a statute or ordinance place the obligation to maintain the sidewalk upon the landowner and expressly made the landowner liable in tort for injuries (id.; see also Xerri v Cooper Union for Advancement of Science and Art, 255 AD2d 165 [1<sup>st</sup> Dept 1998]).

Although, in New York City the maintenance and repair of sidewalks is the responsibility of both New York City and the abutting owner, tort liability will not be imposed upon abutting owners based on their negligence, in the absence of specific statutory authority for such liability (Montalvo v Western Estates, Ltd., supra, 240 AD2d at 47 ).

Here, plaintiff does not claim that some statute or ordinance imposes tort liability upon the Waldorf Astoria. Nor does plaintiff advance any claim of "special use." Rather, the sole issue is whether there is evidence that the Waldorf Astoria "created" this hazardous

condition.

In Xerri, the plaintiff was allegedly injured when he allegedly slipped on dirty posters on a sidewalk abutting a building owned and maintained by Cooper Union. The posters had allegedly peeled in part from the wall of the building. The IAS Court denied summary judgment, holding that questions of fact existed as to whether Cooper Union had caused or created the condition complained of, and whether it had notice of the condition. The First Department reversed, finding that there was no evidence that “Cooper Union hung the posters or that it caused or created the defective condition that allegedly caused the accident, i.e., the presence of posters on the sidewalk, or that it used the sidewalk for a special purpose” (255 AD2d at 166). The First Department further ruled that, since the accident did not occur on Cooper Union’s property, but instead on the sidewalk abutting its property, the issue of “notice” was not a relevant consideration (*id.*). Thus, here as in Xerri, since the accident did not occur on Waldorf Astoria’s property, but on the public sidewalk abutting its property, the issue of the Waldorf Astoria’s constructive or actual notice of the condition is not relevant.

The court has located two cases involving trip and falls on sidewalks caused by plastic straps, to wit: Bowry v Uptown Gift Shop (292 AD2d 240 [1<sup>st</sup> Dept 2002]) and Stephens v J & J Hat Center, Inc. (248 AD2d 270 [1<sup>st</sup> Dept 1998]). In Stephens, judgment was granted in the property owner’s favor because the plaintiff came forward with no evidence to suggest that the condition was caused or created by the owner or that it arose out of the owner’s special use of the sidewalk. In Bowry, however, the First Department reached the opposite conclusion. It denied the property owner’s motion for summary judgment, stating that “[s]ummary judgment in defendant’s favor is precluded by an issue of fact as to whether the plastic strap on which

plaintiff allegedly slipped had been wrapped around one of the boxes that defendant used to display merchandise on the sidewalk.”

Here, as in Bowry, plaintiff has submitted sufficient evidence to suggest that the hazardous condition may have been created by the Waldorf Astoria. Specifically, the evidence presented, including plaintiff’s testimony and affidavit, the Guest Accident Report and the actual plastic straps found by plaintiff at the same location of her accident approximately six months thereafter, raise issues as to whether the plastic straps on the sidewalk came from the Waldorf Astoria’s loading dock, where deliveries are made to the Waldorf Astoria on a daily basis, with many of those materials wrapped in plastic straps. As such, genuine issues of fact exist as to whether the Waldorf Astoria created the condition in question precluding summary judgment in the Waldorf Astoria’s favor.

#### CONCLUSION

It is ORDERED that the motion by defendants Hilton Hotels Corporation, individually, and d/b/a Waldorf Astoria Hotel and Waldorf Astoria Hotel for summary judgment is denied.

Dated: November 12, 2008

ENTER:

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J.S.C.

**FILED**  
NOV 14 2008  
COUNTY CLERK'S OFFICE  
NEW YORK