SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index No.: 101355/2007
Motion No.: 001 & 002

DIANA FROHLICH *and*
LEWIS FROHLICH

Plaintiffs

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

ROUSE SI SHOPPING CENTER, LLC,
GENERAL GROWTH PROPERTIES, INC., *and*
D'AGOSTINO, IZZO, QUIRK ARCHITECTS,
INC., *a/k/a* D' AIQ ARCHITECTS *a/k/a* D'AIQ, INC.,

Defendants

The following items were considered in the review of this motion for summary judgment

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Notice of Cross - Motion and Affidavits Annexed	2
Answering Affidavits	3
Replying Affidavits	4, 5
Exhibits	Attached to Papers

Defendants D'Agostino, Izzo, Quirk Architects (DAIQ) move pursuant to *CPLR* § 3212(I) and 214-d to dismiss the plaintiffs' complaint. Co-defendants Rouse Staten Island Shopping Center LLC ("Rouse") and General Growth Properties, Inc. ("GGP") cross-move for summary judgment pursuant to *CPLR* § 3212 to also dismiss plaintiffs' complaints and all cross-claims.

Facts

This action arises out of a trip and fall accident. The plaintiff, Diana Frohlich, fell over a planter located at the J.C. Penney wing of Staten Island Mall on January 8, 2005. The co-defendant, Rouse SI Shopping Center, LLC, is the owner of the Staten Island Mall. The plaintiffs claim that a dangerous condition existed as the planter was improperly installed, maintained, and placed. In particular, they accuse the defendants of failing to use different color schemes to differentiate between the planter and floor tiles.

Defendant DAIQ was the architectural firm contracted on August 15, 1991 by co-defendant GGP to design and construct the J.C. Penney wing addition to the Staten Island Mall. After construction of the subject wing, the City of New York issued a Certificate of Occupancy on October 4, 1994.

In her examination before trial, the plaintiff declared the following:

> Q: Just before your foot made contact. If you can imagine yourself in your memory walking towards that area where the fall took place, in that few seconds of time, three, four, five seconds of time, did you look towards the planter?
> A: I looked when I was walking, I knew I was walking parallel to the planter.[1]
>
> Q. I take it in your 30-plus years of going to the mall you had been to the Penney's area before, correct?
> A. Yes...
> Q. Can you say for certain you've been in this general area around this planter before?
> A. Yes.[2]
>
> Q. What was the lighting like in the time just before you had your slip and fall?
> A. I don't know.
> Q. Do you recall the lighting to be dim or bright or acceptable? How would you describe it?
> A. I didn't recall anything about it, so I guess it must have been normal.[3]

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[1] Testimony of Diana Frohlich, November 13, 2007, 40.

[2] *Id.* at 56.

[3] *Id.* at 121-22.

Procedural History

The plaintiff first filed a summons and complaint against the defendants on July 11, 2006. On December 7, 2006, the parties stipulated the discontinuance of the complaint against the DAIQ. A notice of claim was filed against DAIQ on November 28, 2006. Plaintiffs thereafter filed a new summons and complaint against DAIQ on March 19, 2007, under a new index number. Defendants Rouse and GGP answered the plaintiffs' amended summons and complaint on May 8, 2007.

Discussion

Ninety Day Notice on Suits Against Architects and Engineers

DAIQ argues that it is entitled to summary judgment because the plaintiff failed to provide a 90 day notice before beginning this action. The New York Civil Practice Law and Rules include special provisions for suits against architects, engineers, land surveyors, and landscape architects. *CPLR* § 3212(I) allows "summary judgment in certain cases involving licensed architects where a notice of claim must be served on the architect pursuant to the provisions of *CPLR* § 214(d)." CPLR § 214(d) requires that "[A]ny person asserting a claim for personal injury...against a licensed architect...shall give written notice of such claim to each such architect...at least ninety days before the commencement of any action..." While the plaintiffs failed to provide notice on the first action, it was discontinued. However, the plaintiffs served a notice of claim upon the architect 90 days before commencing the second action. Since the plaintiffs provided the required pre-complaint notice in this action they were entitled to proceed with this action.

Summary Judgment

Summary judgment is appropriate where there are no genuine issues of material fact to be resolved at trial. When appropriate, summary judgment has the additional benefit of expediting all civil cases by eliminating from the trial calendar claims that can be properly resolved as matter of law.[4] An unfounded reluctance to employ this remedy serves only to swell trial calendars and to deny other litigants the right to have their claims promptly adjudicated.[5]

A landowner has a duty to maintain his or her property in a reasonably safe condition.[6] In the realm of this duty, the landowner must also warn of a dangerous condition.[7] However, the landowner has no duty to warn or protect from an open and obvious condition that as a matter of law is not inherently dangerous.[8] A condition is open and obvious where

> ...a danger is readily apparent as a matter of common sense, 'there should be no liability for failing to warn someone of a risk or hazard which he [or she] appreciated to the same extent as a warning would have provided.' Put differently, when a warning would have added nothing to the user's appreciation of the danger, no duty to warn exists as no benefit would be gained by requiring a warning.[9]

Defendants argue that the existence of the planter, which allegedly caused plaintiff's fall, was open and obvious to the plaintiff. They maintain that the plaintiff had actual and

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[4] *Andre v. Pomeroy*, 35 NY2d 361 [1974].

[5] *Gibbons v. Hantman*, 58 AD2d 108,, *affd* 43 NY2d 941[1978].

[6] *Cupo v. Karfunkel*, 1 AD3d 48 [2d Dept 2003].

[7] *Id.*

[8] *Neiderbach v. 7-Eleven*, 56 AD3d 632 [2008].

[9] *Westbrook v. W.R. Activities-Cabrera Markets*, 5 AD3d 69 [1st Dept] *citing Liriano v. Hobart Corp.*, 92 NY2d 232, citing Prosser and Keeton, Torts § 96, at 686.

constructive knowledge of the place of the accident prior to its occurrence. In her Examination Before Trial, the plaintiff confirmed that she had seen the planter on previous occasions and she saw the planter right before she fell. It is undisputed that the planter was discernible and readily seen by the plaintiff.

Once the moving party has made a showing of sufficient evidence denying liability, the burden shifts to the party opposing summary judgment to put forth evidence in admissible form to establish a triable issue of fact.[10]

The plaintiff introduces the sworn affidavit of David A. Hunter, a professional architect who claims that the curb that surrounds the planter should have been higher or should have had a contrasting color. Plaintiff's expert also maintains that the planter's positioning violated the New York City Building Code because it was an exit that required a clearance of 36 inches, also violating the American with Disabilities Act (ADA). In addition, the plaintiff states that while she knew of the planter's existence, she was not aware that the planter's curb was protruding. She attributes the lack of color contrast between the curb of the planter and the surrounding area to her inability of seeing the planter curb before she tripped on it.

Plaintiffs' arguments fail to raise an issue of fact as to the defendants' liability. The construction of the J.C. Penney wing, including the location of the planter, was approved by the City of New of York through a Certificate of Occupancy. Hence, there cannot be a violation of the Building Code nor of the ADA. It is also inconsistent to say that one is aware of the planter, but not of the curb that surrounds it. It is common sense that the curb is attached to the planter. While not mandated, the plaintiff has failed to provide any evidence of any complaints or prior accidents involving the subject planter. Since the planter nor its location are inherently dangerous, the defendant had no duty to protect nor warn plaintiff of the planter's existence, which was open and obvious.

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[10] *Zuckerman v. City of New York*, 49 NY2d 557 [1980].

Accordingly, it is hereby:

ORDERED, that defendants' motion and cross-motion for summary judgment dismissing plaintiff's complaint is granted.

ENTER,

DATED: March 24, 2009

Joseph J. Maltese
Justice of the Supreme Court