5

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15

Present: HON. WILLIAM R. LaMARCA
Justice

ANTONIO PEREZ,

Plaintiff,

-against-

MATTHEW VENTURA, TINA VENTURA and PEMO REMODELING, INC.,

Defendants,

Motion Sequence #4
Submitted April 7, 2009

INDEX NO: 16162/05

The following papers were read on this motion:

Notice of Motion..1
Affirmation in Opposition..2

Requested Relief

Defendants, MATTHEW VENTURA and TINA VENTURA (hereinafter referred to as the "VENTURAS"), move for an order, pursuant to CPLR §3212, dismissing the complaint in this action and granting MATTHEW and TINA summary judgment. Plaintiff, ANTONIO PEREZ (hereinafter referred to as "PEREZ"), opposes the motion which is determined as follows:

Background

This is an action to recover damages for personal injuries sustained by plaintiff, PEREZ, when he tripped and fell on the concrete sidewalk in front of the home of the VENTURAS at 6 Aberdeen Avenue in New Hyde Park, Nassau County, New York. The accident occurred on October 21, 2004 at approximately 12:30 P.M. It is alleged that plaintiff tripped and fell on wet cement while his foot tangled in yellow caution tape, striking his face on the driveway which resulted in a fractured nose. Plaintiff alleges that his injuries were, *inter alia,* the result of the VENTURAS negligence in causing and permitting co-defendant, PEMO REMODELING, INC., (hereinafter referred to as "PEMO") to create a dangerous and defective condition on and around a sidewalk in front of the VENTURAS' home. A default judgment as to liability was granted against PEMO, by Short Form Order dated July 28, 2006, with damages to be apportioned at the time of trial. Plaintiff alleges the VENTURAS are vicariously liable for the acts of co-defendant, PEMO, an independent contractor.

At his deposition, PEREZ, testified that he was walking from his home at 141 Strattford Road, New Hyde Park and attempting to go to a barbershop located on New Hyde Park Road when he sustained his injuries. Plaintiff testified that he was aware of work being performed at the VENTURAS' home and had walked past the residence previously while going to the aforementioned barbershop as well as church. Plaintiff further testified that concrete work was being performed at the VENTURAS' home, some of which may have been performed on the sidewalk. Further, plaintiff testified that wet cement was on top of dry cement on the sidewalk in front of the residence and that there were four (4) metal rods with yellow caution tape attached which was lying on or around the sidewalk area. Plaintiff testified that he noticed the yellow caution tape, which was "loose", and the wet cement on the sidewalk, but stepped over the caution tape and on to the cement. Plaintiff testified that he "could walk on the grass too, but usually I don't step on nobody's grass."

Defendant, MATTHEW VENTURA, testified that he and his wife work during the daytime hours and were not home at the time of the occurrence and had no knowledge of any condition on the sidewalk area in front of their home. Defendant further testified that co-defendant PEMO did not notify him of the occurrence involving PEREZ and that he became aware of the incident only when he received a letter in the mail. MATTHEW VENTURA testified that he did not see, nor was he aware, of debris on the sidewalk, and no one, including neighbors, had complained or made him aware of any debris. MATTHEW VENTURA further testified it was PEMO'S contractual obligation to remove any such debris.

In support of the motion to dismiss, it is the VENTURAS position that they did not create the alleged condition, which caused plaintiff's injury. Counsel states that the VENTURAS, owed no duty to PEREZ, citing *Pulka v Edelman*, 40 NY2d 781, 358 NE2d 1019, 390 NYS2d 393 (C.A. 1976). In *Pulka*, a pedestrian was injured after being struck by a car exiting a parking garage. The Court of Appeals held that the parking garage was not liable for the drivers negligence and that not all relationships will give rise to a duty because "[t]he imposition of a duty upon one unable to control the tort-feasor would be unreasonably burdensome." (*Pulka v Edelman, supra*).

Counsel also argues that plaintiff was negligent in attempting to walk over the cement and caution tape because PEREZ was aware of the condition, citing *Weigand v United Traction Co.*, 221 NY 39, 116 NE 345 (C.A. 1917); *Bolta v Lohan*, 242 AD2d 356, 661 NYS2d 286 (2nd Dept. 1997). Counsel argues that the condition was open and obvious and therefore PEREZ was owed no duty by the VENTURAS, citing *Cortese v Paris Maintenance*, 255 AD2d 354, 679 NYS2d 675, *app. den.*, 93 NY2d 811, 695 NYS2d 540 (2nd Dept. 1999); *Naim v Schwartz Brother Memorial*

Chapels Inc., 232 AD2d 383, 648 NYS2d 136 (2nd Dept. 1996); *Pepic v Joco Realty, Ltd.*, 216 AD2d 95, 628 NYS2d 89 (1st Dept. 1995); *Pilato v Diamond*, 209 AD2d 393, 618 NYS2d 446 (2nd Dept. 1994); *Campanaro v Arizona Lipnob Estates*, 259 AD2d 581, 686 NYS2d 493 (2nd Dept. 1999); *Russini v Incorporated Village of Mineola*, 184 AD2d 561, 584 NYS2d 622 (2nd Dept. 1992); *Bleecher v Holiday Health & Fitness Ctr. of N.Y. Inc.,* 245 AD2d 687, 664 NYS2d 869 (3rd Dept. 1997).

Counsel also argues defendants are not liable for the acts or omissions of independent contractors because the VENTURAS exercised no authority or control over PEMO in the cement work and in its placement of the yellow caution tape, citing *Zedda v Albert*, 223 AD2d 497, 650 NYS2d 301 (2nd Dept. 1996); *Seaman v A. B. Chance Co.*, 197 AD2d 612, 602 NYS2d 693 [2nd Dept. 1993], *app. dismissed*, 83 NY2d 846, 612 NYS2d 110, 634 NE2d 606 [C.A. 1994]); *McDonald v Shell Oil Co.*, 20 NY2d 160, 281 NYS2d 1002 (1967). Counsel contends that the VENUTRAS were not the proximate cause of the occurrence citing *Yacobellis v National Amusements, Inc.*, 289 AD2d 485, 735 NYS2d 172 (2nd Dept. 2001). Counsel urges that the defendants were not negligent and, even if they were, that their negligence was not the proximate cause of the accident. Defendants request that summary judgment dismissing the case be granted as to the VENTURAS.

In opposition to the motion, counsel for plaintiff states that the facts and testimony adduced at the depositions herein establish that the VENTURAS are vicariously liable for the acts of the independent contractor PEMO. Counsel for plaintiff points to the testimony of defendant, MATTHEW VENTURA, who acknowledged that he and his wife hired PEMO to perform as an independent contractor at their home. Counsel argues that defendants cannot argue that they are not responsible for the condition of the sidewalk because the duty to maintain the area was non-delegable. Plaintiff relies on *Tytell v Battery Beer Distributing, Inc.*, 202 AD2d 226, 608 NYS2d 225 (1st Dept. 1994), a case involving a scaffold over a sidewalk which collapsed resulting in falling debris injuring the plaintiff, inapposite herein. Counsel for plaintiff urges that the existence of material facts preclude the granting of summary judgment.

The Law

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (*see, Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]. Indeed, "[e]ven the color of a triable issue, forecloses the remedy" *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2nd Dept. 1993]). Moreover "[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate" (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]; *see also S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party's pleadings must be accepted as true (*see Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (See, *Mosheyev v Pilevsky, supra*).

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 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 [C.A.1993]; *Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 [C.A. 1985]; *Drago v King*, 283 AD2d 603, 725 NYS2d 859 [2nd Dept. 2001]). If the initial burden is met, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR§ 3212, subd [b]; *see also GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 498 NYS2d 786, 489 NE2d 755 [C.A. 1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [C.A. 1980]). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. (*Mgrditchian v Donato*, 141 AD2d 513, 529 NYS2d 134 [2nd Dept. 1988]).

"The general rule is that a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractors negligent acts." (*Zedda v Albert*, *supra; see Kleeman v Rheingold*, 81 NY2d 270, 614 NE2d 712, [C.A. 1993]). The basis of this general premise is that "one who employs an independent contractor has no right to control the manner in which the work is to be done and, thus, the risk of loss is more sensibly placed on the contractor," (*Kleeman v Rheingold*, *supra)*, but there are exceptions to the general rule. (*Sandra M. v St. Luke's Roosevelt Hosp. Center*, 33 AD3d 875, 823 NYS2d 463 [2nd Dept. 2006]; *see, Feliberty v Damon*, 72 NY2d 112, 527 NE2d 261 [C.A. 1988]). However, vicarious liability will attach "only when the injuries were sustained as the result of an actual dangerous condition at the work site, rather than as the result of the manner in which the work was performed, and then only if the

[* 7]

owner exercised supervision and control over the work performed at the site or had actual or constructive notice of the unsafe condition causing the accident." (*Kaczmarek v Bethlehem Steel Corp.* 884 F. Supp. 768 [WDNY 1995] *citing Seaman v A. B. Chance Co., supra*). The First Department has held that whether a condition on a sidewalk is inherently dangerous is a question of fact, *Tytell v Battery Beer Distributing, Inc., supra*, however, when there is "no notice to or knowledge by the defendant...of a nuisance or dangerous condition on the sidewalk" cases such as *Wright v Tudor City 12th Unit*, 276 NY 303, 12 NE2d 307 (C.A. 1938) (cited by plaintiff), will not be applicable. (*Levy v Socony-Vacuum Oil Co.*, 260 AD 1044, 24 NYS2d 641 [2nd Dept. 1940]).

To prove a *prima facie* case of negligence in a slip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or had actual or constructive notice of said condition. (*Picerno v New York City Transit Authority,* 4 AD3d 349, 771 NYS2d 549 [2nd Dept. 2004]; *Papazian v New York City Transit Authority*, 293 AD2d 658, 740 NYS2d 450 [2nd Dept.2002]). A finding that defendant created the dangerous condition requires some affirmative act on the part of defendant. (*Cf., Fink v Board of Educ. of City of New York*, 117 AD2d 704, 498 NYS2d 440 [2nd Dept. 1986], *app. den.*, 68 NY2d 607 [C.A. 1986] and *Cook v Rezende*, 32 NY2d 596, 347 NYS2d 57, 300 NE2d 428 [C.A. 1973]). When a condition is "both open and obvious *and, as a matter of law, was not inherently dangerous*" summary judgment is an appropriate remedy. (*Cupo v Karfunkel*, 1 AD3d 48, 767 NYS2d 50 [2nd Dept. 2003]; *see, Gibbons v Lido, Point Lookout Fire Dist.*, 293 AD2d 646, 740 NYS2d 440 [2nd Dept. 2002].

[* 8]

Discussion

After a careful reading of the submissions herein, the Court finds that, contrary to PEREZ' contentions, the alleged defective condition was too open and obvious to place a duty upon defendants, the VENTURAS, who had no actual or constructive notice of PEMO's acts or omissions and no supervision and control of the work site. In this instance, plaintiff has offered no proof that a hazardous condition existed or that defendants created a hazardous condition, concealed a defect, or had actual or constructive notice that one existed prior to the incident and therefore vicariously liability will not attach to the employer of an independent contractor (*see Zedda v Albert*, *supra*). The testimony of PEREZ, which indicates that he had observed the wet cement and yellow caution tape prior to the accident, demonstrates that the condition was readily observable.

It is the judgment of the Court that defendants, the VENTURAS, cannot be held vicariously liable for the acts of the independent contractor, PEMO. The record establishes that the alleged condition, the presence of wet cement on top of dry cement demarcated by yellow caution tape, which allegedly caused the injured plaintiff to fall, was not an inherently dangerous condition (*Cf., Cupo v Karfunkel*, 1 AD3d 48, 767 NYS2d 40 [2nd Dept. 2003]; *Pedersen v Kar, Ltd.*, 283 AD2d 625, 724 NYS2d 776 [2nd Dept. 2001] [plaintiff not looking when she fell]; *Canetti v AMCI, Ltd.*, 281 AD2d 381, 721 NYS2d 398 [2nd Dept. 2001]), and was readily observable by the reasonable use of plaintiff's senses. Therefore, the VENTURAS had no duty to warn of the condition and there is no basis to conclude that defendants breached a duty to maintain their premises in a reasonably safe condition. (*Plis v North Bay Cadillac*, 5 AD3d 578, 773 NYS2d 451 [2nd Dept. 2004]). Where, as here, the condition complained of by plaintiff is both open and obvious and not inherently dangerous, the Court is not precluded from granting summary judgment to defendant. (*Green v Grenadier Realty Corp.*, 23 AD3d 346, 804 NYS2d 97 [2nd Dept. 2005]). In opposition to defendants' motions, plaintiff has failed to submit evidence sufficient to raise a triable issue of fact. (*Winegrad v New York Univ. Med. Ctr.*, *supra*]; *Green v Grenadier Realty Corp*, *supra*).

Conclusion

Based upon the foregoing, it is hereby

ORDERED, that the VENTURAS' motion for an order dismissing the complaint as against them and directing summary judgment is granted; and it is further

ORDERED, given that the action has been dismissed against the VENTURAS, the action is severed and continued against defendant, PEMO, and the issue of damages is specifically referred to the Calendar Control Part (CCP) for Inquest and Assessment of Damages against the defendant, PEMO, and shall appear on the calendar of CCP on September 2, 2009 at 9:30 A.M. subject to the approval of the Justice there presiding; and it is further

ORDERED, that plaintiff shall serve a Notice of Inquest, together with a copy of this order and the Note of Issue upon the defendant, PEMO, by certified mail, return receipt requested, at its last known address, and shall serve copies of same together with receipt of payment, upon the Calendar Clerk of this Court, no later than ten (10) days prior to the date of Inquest; and it is further

ORDERED, that the directive with respect to an Inquest is subject to the right of the Justice presiding in CCP to refer the matter to a Justice, Judicial Hearing Officer, or a Court Attorney/Referee as he or she deems appropriate; and it is further

ORDERED, that the failure to file a Note of Issue or appear as directed may be deemed an abandonment of the claims giving rise to the Inquest.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: June 22, 2009

WILLIAM R. LaMARCA, J.S.C.

TO: Fogarty, Felicione & Duffy, PC
Attorneys for Plaintiff
185 Willis Avenue, Suite 2
Mineola, NY 11501

Robert P. Tusa, Esq.
Attorney for Defendants
1225 Franklin Avenue, Suite 500
Garden City, NY 11530

ENTERED
JUN 25 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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