

**O'Brien v County of Nassau**

2009 NY Slip Op 32002(U)

August 17, 2009

Supreme Court, Nassau County

Docket Number: 9579/07

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 20 NASSAU COUNTY**

**PRESENT:**

**Honorable Karen V. Murphy  
Justice of the Supreme Court**

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**WINIFRED O'BRIEN,**

**Plaintiff(s),**

**-against-**

**THE COUNTY OF NASSAU AND PLAZA 400  
REALTY CO.,**

**Defendant(s).**

\_\_\_\_\_ X

Index No. 9579/07

Motion Submitted: 5/14/09

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.....

Defendant Plaza 400 Realty Co. ("Plaza") moves this Court for an order granting summary judgment in its favor dismissing the complaint. Plaintiff opposes the requested relief.

Plaintiff commenced this action for injuries allegedly sustained on a trip and fall at 400 South Oyster Bay Road, Hicksville, N.Y. on July 31, 2006 at approximately 8:45 a.m. Plaintiff contends that a raised slab or sidewalk flag caused her to trip and fall.

Plaza notes that the Plaintiff stated in her deposition that at the time of the incident she was walking when her foot hit something and she fell. Plaintiff had been going to the same dentist in the building where the incident occurred every six (6) months for fifteen (15) years.

On prior visits, Plaintiff never noticed a problem with the sidewalk. Plaintiff did not make a complaint to anyone in the building following the July 31, 2006 incident.

Plaza also points to the deposition of Maryann Ortega, the Plaza property manager. Ms. Ortega inspected the sidewalk in front of the building on a monthly basis and she never observed a defect that would require repair. Ms. Ortega's affidavit restates the fact she never received complaints about anyone tripping in front of 400 South Oyster Bay Road, she inspected the property and never observed any defect; was unaware of any problems with the subject sidewalk; and never requested, prior to July 31, 2006, the sidewalk be repaired.

In opposition, Plaintiff has offered the expert affidavit of Jacques P. Wolfner, a professional engineer. Wolfner stated he examined photographs supplied by Plaintiff's counsel that were taken on October 12, 2006, which showed the sidewalk slabs were raised up 1 1/8 inch with a tripping hazard being at 1/2". The raised slab existed for months or years prior to the date of the incident on July 31, 2006, and Plaza was aware or should have been aware of the raised sidewalk slab.

Plaintiff further points to the photos taken on October 12, 2006 and contends the pictures show a visible defect that probably existed for a long time. Plaintiff argues that a jury could infer constructive notice on Plaza based on the photo. Plaintiff also argues that the deposition of Paul Mullins, a floating superintendent of Plaza's managing agent, Skyline Management Corp. Mullins stated he and another employee, Charles Butt, would perform daily morning inspections of Plaza's property, therefore inferring knowledge and notice of the condition.

A negligent failure to discover a condition that should have been discovered can be no less of a breach of due care than a failure to respond to the actual notice of such a condition (*Blake v. City of Albany*, 48 N.Y.2d 875, 400 N.E.2d 300, 424 N.Y.S.2d 358 [1979]). One who undertakes to perform inspections becomes subject to a duty to perform such inspection in a non-negligent manner (see *West Side Cor. v. PPG Industries*, 225 A.D.2d 459, 639 N.Y.S.2d 342 [1<sup>st</sup> Dept., 1996]). Here, there is an issue of fact as to whether Defendants' employees properly performed inspection of the sidewalk where the incident occurred.

A landowner must act as a reasonable person in maintaining his or her property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, 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); *Basso v. Miller*, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 [1976]). A landowner has a duty to maintain its premises in a reasonably safe condition and to warn of a dangerous condition that is not readily

observable with the reasonable use of one's senses (*DiVietro v. Gould Palisades Corp.*, 4 A.D.3d 324, 771 N.Y.S.2d 527 [2d Dept., 2004]). 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]).

There is no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous (*Capozzi v. Huhne*, 14 A.D.3d 474, 788 N.Y.S.2d 152 (2d Dept., 2005); *Plis v. North Bay Cadillac*, 5 A.D.3d 578, 773 N.Y.S.2d 451 [2d Dept., 2004]). Thus, it is well settled that there is no duty on the part of the landowner to warn against a condition that can be readily observed by those employing the reasonable use of their senses (*Paulo v. Great Atlantic & Pacific Tea Company*, 233 A.D.2d 380, 650 N.Y.S.2d 578 [2d Dept., 1996]). For a hazard or dangerous condition to be open and obvious, such that the property owner has no duty to warn a visitor, the hazard or dangerous condition must be of a nature that would not reasonably be overlooked by anyone in the area whose eyes were open, making a posted warning of the premises of the hazard superfluous (see *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 700 N.E.2d 303, 677 N.Y.S.2d 764 [1998]).

The open and obvious nature of a hazard may obviate a claim that the property owner violated the duty to warn of, or place barriers to protect against, dangers on the premises, but the open and obvious nature of an alleged hazard does not eliminate a claim that the presence of the hazardous condition constituted a violation of the property owner's duty to maintain the premises in a reasonably safe condition (*Slatsky v. Great Neck Plumbing Supply, Inc.*, 29 A.D.3d 776, 815 N.Y.S.2d 201 (2d Dept., 2006)).

Even if a jury were to find that a condition was an open and obvious condition, such finding would be relevant to the issue of the Plaintiff's comparative negligence and would not totally absolve the Defendant of liability (*Hogan v. Baker*, 29 A.D.3d 740, 815 N.Y.S.2d 245 (2d Dept., 2006); *Moloney v. Wal-Mart Stores, Inc.*, 2 A.D.3d 508, 767 N.Y.S.2d 897 [2d Dept., 2003]).

There is no rigid 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 senses 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 [1<sup>st</sup> Dept., 2004]).

For an owner or landlord to be held liable for a defective condition upon the premises, he must have actual or constructive notice of the condition for such a period of time that, in

the exercise of reasonable care, he should have corrected it (*Putnam v. Stout*, 38 N.Y.2d 607, 345 N.E.2d 319, 381 N.Y.S.2d 848 [1976]). Of course, a Defendant must have either actual or constructive notice of the hazardous condition that caused the Plaintiff to slip and fall (*Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967, 646 N.E.2d 795, 622 N.Y.S.2d 493 (1994); *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 492 N.E.2d 774, 501 N.Y.S.2d 646 [1986]).

In a premises liability action, a Plaintiff may satisfy the burden of showing that the property owner was on notice of the dangerous condition that allegedly resulted in the Plaintiff's injury by producing evidence that an ongoing dangerous condition existed in the area of the incident, which condition was left unaddressed by the property owner (*Talavera v. New York City Transit Authority*, 41 A.D.3d 135, 836 N.Y.S.2d 610 [1<sup>st</sup> Dept., 2007]).

Thus, where the Plaintiff proceeds on the theory of constructive notice, the Plaintiff must ultimately prove at trial that the defect that caused the accident was visible and apparent, and that it existed for a sufficient length of time prior to the accident to permit the Defendant (or its employees) to discover and remedy it (*Gordon v. American Museum of Natural History*, *supra*; *Daniely v. County of Westchester*, 297 A.D.2d 654, 747 N.Y.S.2d 239 [2d Dept., 2002]).

Photographs may be used to show constructive notice of an alleged defect if the photographs were taken reasonably close to the time of the incident, and there is testimony that the condition at the time of the incident was substantially as shown in photographs (see *Champagne v. Peck*, 59 A.D.3d 1130, 872 N.Y.S.2d 836 (4<sup>th</sup> Dept., 2009); *Truesdell v. Rite Aid of N.Y.*, 228 A.D.2d 922, 644 N.Y.S.2d 428 [3d Dept., 1996]). Such photographs were offered herein.

Plaza implies the alleged defect is trivial and, thus, not actionable since its employees did not discover or notice it. A property owner may not be held liable in damages for trivial defects on a roadway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble or trip (*Ryan v. KRT Property Holdings, LLC*, 45 A.D.3d 663, 845 N.Y.S.2d 431 [2d Dept., 2007]). However, in determining whether a defect is trivial, a court must consider all the facts presented including width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstances of the injury (*Trincere v. County of Suffolk*, 90 N.Y.2d 976, 688 N.E.2d 489, 665 N.Y.S.2d 615 (1997); *Outlaw v. Citibank, N.A.*, 35 A.D.3d 564, 826 N.Y.S.2d 642 [2d Dept., 2006]).

As a general rule, whether a dangerous condition exists on real property so as to create liability depends on the particular facts and circumstances of each case and thus, 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 per se rule with respect to the dimensions of a defect that will

give rise to liability on the part of a landowner or other party in control of the premises (*Herrera v. City of New York*, 262 A.D.2d 120, 691 N.Y.S.2d 504 [1<sup>st</sup> Dept., 1999]). Even a trivial defect may constitute a snare or trap (*Rivera v. 2300 X-tra Wholesalers, Inc.*, 239 A.D.2d 268, 658 N.Y.S.2d 264 [1<sup>st</sup> Dept., 1997]).

Where a particular height difference constitutes a dangerous or defective condition depends on the peculiar facts and circumstances of each case; the issue is normally a jury question unless the Defendant's proof establishes, as a matter of law, that the alleged defect was too trivial to be actionable (*Wilson v. Time Warner Cable, Inc.*, 6 A.D.3d 801, 774 N.Y.S.2d 584 [3d Dept., 2004]).

Also, credibility of witnesses, truthfulness and accuracy of testimony, whether contraindicated or not, and the significance of the weaknesses and discrepancies on all issues is for the trier of facts (*Lelekakis v. Kamamis*, 41 A.D.3d 662, 839 N.Y.S.2d 773 (2d Dept., 2007); *Pedone v. B & B Equip. Co.*, 239 A.D.2d 397, 662 N.Y.S.2d 766 [2d Dept., 1997]).

For a Defendant owner to prevail on a summary judgment motion regarding a slip and fall action, the property owner is required to establish as a matter of law that it maintained the property in question in a reasonably safe condition, and that it neither created the alleged dangerous condition existing nor had actual nor constructive notice thereof (*Mokszki v. Pratt*, 13 A.D.3d 709, 786 N.Y.S.2d 222 [3d Dept., 2004]). Plaza has not met its burden.

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 Plaza's summary judgment motion, to raise issues of fact that Plaza created the alleged dangerous condition or had actual or constructive knowledge of its existence.

Plaintiff having met her burden of raising an issue of fact as to this condition, the motion is denied.

The foregoing constitutes the Order of this Court.

Dated: August 17, 2009  
Mineola, N.Y.

  
J. S. C.

**ENTFRED**

AUG 26 2009

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**