SHORT FORM ORDER

INDEX No. 07-33628

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Justice of the Supreme Court

MOTION DATE 2-3-09
ADJ. DATE 6-4-09
Mot. Seq. # 001 - MG; CASEDISP

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CECELIA CELLUCCI,

Plaintiff,

- against -

KMART CORPORATION and SAYVILLE MENLO, LLC,

Defendants.

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Upon the following papers numbered 1 to 17 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 12 - 16 ; Replying Affidavits and supporting papers 17 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Kmart Corporation and Sayville Menlo, LLC for summary judgment dismissing the complaint against them, is granted.

This is an action to recover damages for personal injuries sustained by the plaintiff, Cecelia Cellucci, when she allegedly tripped and fell on September 13, 2006, on grating surrounding a tree well outside a store located at 5151 Sunrise Highway, in Bohemia, New York. The store, after a series of sales and lease assignments, was at the time of the accident, owned by defendant Sayville Menlo, LLC (hereinafter "Menlo") and leased to defendant Kmart Corporation (hereinafter "Kmart"). The plaintiff's verified bill of particulars alleges that the defendants were negligent in allowing a raised cover of a tree well to exist on their property.

The defendants now move for summary judgment dismissing the complaint against them. First, defendant Menlo argues that the complaint against it should be dismissed because it was an out-of-possession landlord with no obligation to inspect, maintain or repair the subject premises. In support of its motion, Menlo submits a copy of the lease for the property and points to Article 6, Section 6.01 wherein Kmart assumed full and sole responsibility for the condition, construction, operation, repair,

replacement, maintenance and management of the premises. In addition, Menlo submits the affidavit of Robert Ambrosi, a manager of Menlo, who alleges that Kmart was responsible for the inspection, maintenance, or repair of the premises, including the sidewalk and tree wells, and that Menlo did not have any of these responsibilities. Mr. Ambrosi also alleges that Menlo did not undertake any steps to inspect, repair, or maintain the premises, and that there were no employees of Menlo located on the premises at any time before or after the alleged accident.

In addition, defendant Kmart alleges that the complaint against it should be dismissed because the alleged defect was trivial. Kmart argues that, assuming that it owed the plaintiff a duty to maintain the area where she fell in a reasonably safe condition, the plaintiff has not presented any proof to demonstrate the existence of a dangerous condition such that it breached this duty. In support of its argument, Kmart submits, *inter alia*, a transcript of the plaintiff's deposition testimony wherein she testified that she had gone to Kmart with her daughter, and then they decided to go next door to Office Max. The plaintiff explained that the accident happened on the grating surrounding the first tree well in front of Kmart and that she tripped because the grating was protruding from the sidewalk. The plaintiff alleged the grating was protruding upward about two inches and that the length of the protrusion was about twelve inches. However, the plaintiff acknowledged that she did not actually measure the protrusion. The plaintiff also testified that the accident happened on the sidewalk-side (which is the north side) of the tree well, as opposed to the street-side (which is the south side) of the tree well. The plaintiff then examined several photographs of the tree well, testifying that they accurately depicted how the tree well looked on the date of the accident and circling the exact location of her fall.

In further support of its motion, Kmart submits a transcript of the deposition testimony of Pamela A. Coleman, a Kmart Loss Prevention Manager, whose duties include liability issues and minimizing waste. Ms. Coleman testified that she was employed at the Bohemia Kmart for five years, from 2002 to 2007. She alleged that she was off on the day of the plaintiff's accident, but an associate informed her of the incident the day after. Ms. Coleman testified that she recalled going to look at the grating, and although she observed the grating on the south side of the tree was raised, she observed that the grating on the sidewalk-side (that is, the north side) of the tree, was not raised at all. Additionally, Kmart submits the photographs of the grating that were identified by the plaintiff as reflecting the alleged protrusion. Kmart argues that scrutiny of the photographs support a conclusion that, as a matter of law, the alleged defect has no characteristics of a trap or a nuisance, and is too trivial to be actionable.

Kmart also alleges that the complaint should be dismissed against it because the accident was caused by an open and obvious condition of which the plaintiff should have been aware. Again, the plaintiff's deposition testimony reveals that: she had been to this Kmart six or seven times prior to the date of the accident; the accident occurred on September 13, 2006, at approximately 1:45 in the afternoon; it was a beautiful, sunny day; the sidewalk was about six feet wide; the area around the tree well was clean with no debris; her daughter was walking on the sidewalk to her left; and she was looking straight ahead. Kmart asserts that had the plaintiff used her senses reasonably, there can be no doubt that she would have seen the grating surrounding the tree well. It contends that it should not be held liable because the plaintiff chose to walk on the tree well grating rather than the sidewalk.

Additionally, Kmart claims that the complaint should be dismissed against it because the plaintiff has not come forward with any evidence that it created the condition which caused her accident. Ms. Coleman's deposition testimony indicates that in the five years that she worked at store, she never saw anyone performing maintenance to the tree or the grating. Furthermore, argues Kmart, the plaintiff cannot establish that it had actual notice of the alleged condition. In support of this argument, Kmart again points to Ms. Coleman's deposition testimony wherein she alleged that she was not aware of any complaints about this particular grate, that she did not know of any other incidents involving someone tripping on a grate, and that she could not recall ever seeing a grate in a mis-leveled position. Lastly, Kmart argues that it did not have constructive notice of the alleged condition. It alleges that it had a comprehensive inspection program in place to ensure that the sidewalks, including the gratings surrounding the tree wells, were properly maintained and free from tripping hazards. Specifically, Ms. Coleman alleged at her deposition that part of her duties included inspecting the sidewalks for tripping hazards, and that they do a safety inspection once a month. She testified to the effect that prior to the plaintiff's September 13th accident, she would have performed a safety inspection during the last week of August. She also stated that she would have looked at that grating as part of her inspection and that she could not recall making any notations about the grating in monthly audits in 2006. Kmart concludes that such proof establishes that it did not have constructive notice of the condition that allegedly caused the plaintiff's accident.

The plaintiff opposes the defendants' motion for summary judgment. As to defendant Menlo, the plaintiff asserts that it retained the right to reenter the premises and, therefore, it is liable for her injuries. She points to Section 6.07 of the lease wherein in it states in pertinent part, "Landlord... may enter upon the Demised Premises... for the purpose of inspecting the Demised Premises and... for the purpose of making any repairs thereto and performing any work that may be necessary by reason of the Tenant's failure to make such repairs or perform such work." Based upon such language, argues the plaintiff, there is a triable issue of fact as to whether or not Menlo was an out-of-possession landlord. The plaintiff also maintains that a design defect permitted the grating surrounding the tree to become dangerously uneven and, thereby, constituted a defective condition which caused her to trip and fall. Further, argues plaintiff, the defective condition violated Section 302.3 of the Property Maintenance Code of the State of New York, which provides, "All sidewalks, walkways, stairs, driveways, parking spaces and similar areas shall be kept in a proper state of repair, and maintained free from hazardous conditions." The plaintiff contends that as such, Menlo's motion for summary judgment should be denied

The plaintiff alleges that Kmart's motion for summary judgment must be denied because a dangerous condition existed. The plaintiff points to her deposition testimony wherein she testified that the protrusion reached a height of approximately two inches and a length of approximately twelve inches. She contends that her testimony together with the photographs raise a triable of fact as to whether the defect was too trivial. The plaintiff also maintains that the grating defect was not open and obvious, since the Kmart employee charged with inspecting the sidewalk never made a notation concerning the defect.

In addition, the plaintiff argues that Kmart created the dangerous condition and had notice of it. She points to her deposition testimony wherein when she was asked if she knew hat caused the grating to

protrude, and she answered, "I would imagine maybe a root, tree roots uplifting it... I don't know." The plaintiff also points to Ms. Coleman's deposition testimony wherein she testified to the effect that, it was her opinion roots had pushed up the grating on the south side of the tree. The plaintiff further alleges that merely because Ms. Coleman testified that she was not aware of any complaints or other tripping accidents, is not a sufficient basis to support Kmart's claim that it did not have actual notice. As to the issue of constructive notice, the plaintiff contends that if the grating was raised by roots as suspected, then it was something that occurred not overnight, but over an extended period of time, which is sufficient to raise a triable question of fact.

As to defendant Menlo, "It is well settled that an out-of-possession owner or lessor is not liable for injuries that occur on the premises unless the owner or lessor has retained control over the premises or is contractually obligated to repair or maintain the premises" (***Eckers v Suede***, 294 AD2d 533, 743 NYS2d 129, 130 [2002], quoting ***Dalzell v McDonald's Corp.***, 220 AD2d 638, 639, 632 NYS2d 635, 636 [1995], *lv denied* 88 NY2d 815 [1996]). Reservation by an out-of-possession owner or lessor of the right to enter the premises for the purpose of inspection and repair may, however, constitute sufficient retention of control of the premises to impose liability upon such owner or lessor for injuries caused by a dangerous condition, "but only when a specific statutory violation exists and there is a significant structural or design defect" (***Rhian v PABR Associates, LLC,*** 38 AD3d 637, 638, 832 NYS2d 590, 592 [2007]; ***Stark v Port Auth.***, 224 AD2d 681, 639 NYS2d 57 [1996]). In this case, defendant Menlo, an out-of-possession landlord, established its prima facie entitlement to judgment as a matter law (***Rhian v PABR Associates, LLC***, 38 AD3d 637 [2007], *supra*). In opposition, the plaintiff has failed to submit any evidence that the alleged defect involved a significant structural or design defect (*see* ***Stark v Port Auth.***, 224 AD2d 681 [1996], *supra*; ***Henderson v Hickory Pit Restaurant***, 221 AD2d 161, 633 NYS2d 31 [1995]). Moreover, the provision of the Property Maintenance Code of New York State, upon which the plaintiff relies, is non-specific and reflects simply a general duty to maintain the premises (***Ortiz v RVC Realty Co.***, 253 AD2d 802, 677 NYS2d 598[1998]). Accordingly, Menlo's motion for summary judgment dismissing the complaint against it is granted.

In addition, whether a dangerous or defective condition exists generally depends on the peculiar facts and circumstances of the individual case and is properly a question of fact for the jury (***Trincere v County of Suffolk,*** 90 NY2d 976, 665 NYS2d 615 [1997]; *see also* ***Guerrieri v Summa***, 193 AD2d 647, 598 NYS2d 4 [1993]). However, not every injury caused by a cracked or uneven surface need be submitted to a jury (*see* ***Hymanson v A.L.L. Associates***, 300 AD2d 358, 751 NYS2d 756 [2002]). Trivial defects, not constituting a trap or a nuisance, as a consequence of which a person might merely stumble or trip over a raised projection, are not actionable (***Riser v New York City Housing Authority***, 260 AD2d 564, 688 NYS2d 645 [1999]). In determining whether a defect is trivial, a court must review all the facts of the case, including the width, depth, elevation, irregularity, and appearance of the defect, along with the time, place, and circumstances of the injury (***Smith v A.B.K. Apartments, Inc.***, 284 AD2d 323, 725 NYS2d 672 [2001]).

In the case at bar, defendant Kmart has made a prima facie showing, through deposition testimony and the photographs identified as accurately depicting the condition of the grating, that the alleged defect did not constitute a trap or a nuisance and was plainly a trivial defect which is not actionable as a matter of law (*see* ***Joseph v Villages at Huntington Home Owners Association, Inc.***, 39

AD3d 481, 835 NYS2d 231 [2007]; *see also* ***Hargrove v Baltic Estates***, 278 AD2d 278, 717 NYS2d 320 [2000]). Significantly, the photographs reveal that any height differential between sections of the grating on the north side of the tree well, the area where the plaintiff testified she fell, was negligible. The fact that there may have been some slight height differential between portions of the grating on the south side of the tree well, where the plaintiff did not fall, is irrelevant. Moreover, Ms. Coleman testified that she did not observe the grating to be raised at all on the north side of the tree well, and the plaintiff admittedly never measured the alleged protrusion. Furthermore, the accident occurred outdoors, in the middle of the day, with the sun shining, and in an area that was clean and free of debris. Thus, any minimal height variation in the grating should have been readily observable (*see* ***Dobert v State***, 8 AD3d 873, 779 NYS2d 143 [2004]). In opposition, the plaintiff has failed to raise a triable issue of fact demonstrating that the condition was dangerous or constituted a trap.

In any event, even if the Court were to assume arguendo that the condition of the grating was dangerous, a possessor of property may be held liable for injuries arising from a dangerous condition on the premises only if the possessor either created the condition or had actual or constructive notice of it (*see* ***Patrick v Bally's Total Fitness***, 292 AD2d 433, 739 NYS2d186 [2002], *lv denied* 98 NY2d 605 [2002]). "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 defendant's employees to discover and remedy it" (***Gordon v American Museum of Natural History***, 67 NY2d 836, 837; 501 NYS2d 646, 647 [1986]). In this case, Kmart has made a prima facie showing, through the deposition testimony of Ms. Coleman, that it did not create the alleged condition and that it had no notice, actual or constructive, of such condition. The plaintiff's argument in opposition that Kmart created the condition because a root raised the grating, is totally speculative. The plaintiff admittedly did not know whether a root was the cause, and Ms. Coleman acknowledged that she did not recall actually seeing a root at the time she looked at the grating. Additionally, Kmart's alleged failure to control the roots of a tree, would at most amount to nonfeasance, not affirmative negligence (*see*, ***Lowenthal v Theodore H. Heidrich Realty Corp.***, 304 AD2d 725, 759 NYS2d 497 [2003]). Moreover, with regard to constructive notice of the defect, there is simply no proof as to how long the condition existed prior to the plaintiff's accident. Finally, in response to the questions posed by the plaintiff's attorney, "Are you aware of any complaints about this particular grate... prior to the accident?" and "Do you know of any other incidents before this particular incident... where somebody tripped on a grate?" Ms. Coleman answered unequivocally "No." Contrary to the plaintiff's argument, such responses were sufficient to establish lack of actual notice. Therefore, the plaintiff has failed to raise an issue of fact. Accordingly, the motion by defendant Kmart for summary judgment dismissing the complaint against it is granted.

Dated: 9/14/06

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION