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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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NANCY PALERMO,

Plaintiff,

-against-

TOWN OF OYSTER BAY, NEW YORK MARINE TRADES ASSOCIATION, L.I.F. PUBLISHING COMPANY, TOBAY BEACH & BOAT BASIN and STATEN ISLAND YACHT SALES, INC.,

Defendants.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 12
Index No.: 08671/07
Motion Seq. Nos.: 01 & 02
AMENDED
DECISION AND ORDER

Papers Read on this Motion:

Defendant Town of Oyster Bay i/s/h/a Town of Oyster Bay & Tobay Beach & Boat Basin and New York Marine Trades Association's Notice of Motion	01
Defendant Staten Island Yacht Sales, Inc.'s Cross-Motion	02
Plaintiff's Opposition	xx
Defendant Town of Oyster Bay i/s/h/a Town of Oyster Bay & Tobay Beach & Boat Basin and New York Marine Trades Association's Reply	xx
Defendant Staten Island Yacht Sales, Inc.'s Reply	xx

In motion sequence number one, Defendants Town of Oyster Bay i/s/h/a Town of Oyster Bay and Tobay Beach & Boat Basin and New York Marine Trades Association moves by Notice of Motion for an order pursuant to CPLR §3212 granting them summary judgment and dismissing the Plaintiff's complaint and all cross claims interposed against them.

In motion sequence number two, Defendant Staten Island Yacht Sales, Inc., (hereinafter referred to as "Staten Island") moves by Notice of Cross-Motion for an order granting it summary judgment pursuant to CPLR §3212 and dismissing the Plaintiff's complaint and all cross claims against it.

Plaintiff commenced this action for injury allegedly sustained on September 30, 2006 at

approximately 11:30 a.m. when she was attending the New York Marine Trades Assn. Boat Show at Tobay Boat Basin in the Town of Oyster Bay, N.Y.

Plaintiff alleges she was on a floating dock when she moved over to let three "large men" pass and she fell off the floating dock into the bulkhead.

Defendants contend the floating docks at the show were 6' wide (plaintiff estimated them to be 4' wide) covered with blue carpeting purchased and installed by Sales. Defendants allege the blue carpeting, installed by Staten Island Yacht Sales, inc., contrasted with the "nasty brown color" of the water. Defendants also notes Plaintiff had been to previous boat shows at this location with the same floating dock format and she had been at the show for over an hour before the incident occurred. Thus they allege she was an experienced boat show attendee with floating dock experience and "sea legs," i.e., she was used to the tide and waves moving the dock.

Defendants allege that the Plaintiff should have used her senses to see that the floating dock and the land anchored bulkhead had 1-2' of water between them.

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 NY2d 139 [2003]; *Tagle v Jakob*, 97 NY2d 165 [2001]; *Basso v Miller*, 40 NY2d 233 [1976]).

A landowner has a duty to maintain its premises in a reasonable 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 AD3d 3249 [2d Dept 2004]). A reasonable 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 NY2d 918 [1987]).

In order to establish a *prima facie* case of negligence, a Plaintiff must demonstrate that the

Defendant owed a duty of reasonable care, that a breach of duty occurred and the resulting injury was proximately caused by that breach (*J. Ron Furs, Inc. v Sign Plumbing and Heating Corp.*, 249 AD2d 276 [2d Dept 1998]).

To be entitled to summary judgment in a premise liability action, the property owner/lessor is required to establish that it maintained its premises in a reasonably safe manner, and that it did not create a dangerous condition which posed a foreseeable risk of injury to individuals expected to be present on the property (*Westbrook v WR Activities-Cabrera Markets*, 5 AD2d 69 [2004]).

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 AD3d 474 [2d Dept 2005]; *Plis v North Bay Cadillac*, 5 AD3d 578). 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 and Pacific Tear Company*, 233 AD2d 380 [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 presence of the hazard superfluous (see *Liriano v Hobart Corp.*, 92 NY2d 232 [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 a 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 AD3d 776 [2d Dept. 2006]; *Westbrook v WR Activities-Cabrera Markets*, 5 AD3d 69 [1st Dept 2004]; *DiVietro v Gould Palisades Corp.*, 4 AD3d 324 [2d Dept 2004]).

Even if a jury was 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 (*Capo v Karfinkel*, 1 AD3d 48 [2d Dept 2003]) and would not totally absolve the Defendant of liability (*Hogan v Bader*, 29 AD3d 740 [2d Dept 2006]; *Molony v Wal-Mart Stores, Inc.*, 2 AD3d 508 [2d Dept 2003]). As noted, the fact that a Plaintiff may have been comparatively negligent does not negate the liability of the landlord/tenant who has a duty to keep the premises safe (*Powers v St. Bernadette's Church*, 309 AD2d 1219 [4th 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 AD3d 210 [1st Dept 2004]).

Was there "optical confusion" due to Defendant's failure to properly mark or otherwise distinguish the area in any meaningful fashion as exacerbated by the dark colors and the fact the incident happened in daylight with the possibility of strong shade by the bulkhead (see generally *Chafoulias v 240 E. 55th Street Tenant's Corp.*, 141 AD2d 207 [1st Dept 1998])

Here Plaintiff indicated she was using her senses to avoid pedestrian traffic on the floating slip.

A condition that is ordinarily apparent to a person making reasonable use of his or her

sense may be rendered a trap for the unwary where the condition is obscured or the Plaintiff's attention is otherwise distracted or diverted *(Mauriello v Port Authority of New York and New Jersey*, 8 AD3d 200 [1st Dept 2004]). Did the float involved in Plaintiff's incident, due to its composition, color, location, traffic, etc., constitute a trap? Clearly, Plaintiff has raised this as a viable issue of fact.

The doctrine of the assumption of risk does not exculpate a landowner from liability of ordinary negligence in maintaining a premises (*Sybo v County of Erie*, 94 NY 22 912 [2000]).

Also, the Plaintiff has offered a sworn expert affidavit. Here, Plaintiff's expert, John A. Tylowsky, an engineer (see Exhibit Defendant annexed to Plaintiff's affirmation in opposition) concluded that the float, where a person walking in heavy pedestrian traffic might be more focused on the traffic rather than looking at the edge, might have increased the alleged hazard, especially of it was hard to see and this constituted a trap (see *Glickman v City of New York* 297 Ad2d 220 [1st Dept 2002]).

Tylowsky noted the absence of visual clues (accent lighting, contrasting paint, etc.)

Clearly Tylowsky has raised issues of fact to oppose Defendants' motion and cross motion including whether the float and bulkhead created "optical confusion" (see *Chafoulias v 240 E. 55th Street, Tenants Corp., supra*).

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 AD3d 380 [2d 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 NY2d 607 [1976]).

Of course, a Defendant must have either actual or construction notice of the hazardous condition that caused the Plaintiff to slip and/or fall (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967; *Gordon v American Museum of Natural History*, 67 NY2d 836 [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/lessor (*Talavera v New York City Transit Authority*, 41 AD3d 135 [1st Dept 2007]).

Thus, where the Plaintiff proceeds on the theory of constructive notice, the Plaintiff must ultimately prove at trial that the defect which 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 Ad2d 654 [2d Dept 2002], *lv to app den.* 100 NY2d 501 [2003]).

Photographs may be used to show constructive notice of an alleged defect if the photograph was 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 AD 3d 1130 [4th Dept 2009]; *Trussdell v. Rite Aid of New York, Inc.* 228 AD2d 922 [3d Dept 1996]).

Here photographs have been taken (see exhibit K annexed Town's motion; ex. A annexed to Plaintiff's affirmation in opposition) which show the dark waters and the shadow provided by the dark.

The photograph provided herein offers an idea of the float/bulkhead situation at the time

of the incident.

Defendant notes Plaintiff's prior visits to the boat show and they note she had been at the show, i.e, on the floating dock for over an hour before the incident. Those prior visits and person on the date of the incident would not necessarily prepare Plaintiff for any alleged area specific "optical confusion" -- where the dark carpeting, the dark water and the bulkhead "merged" –when Plaintiff attempted to move and to let other pedestrians pass.

As a general rule, liability for a dangerous condition on property is predicated upon ownership, occupancy, control or special use of the property (*Millman v Citibank NA,* 216 Ad2d 278 [2d Dept 1995]).

Control of the premises may be established by a course of conduct demonstrating that a party has assumed responsibility to maintain a particular portion of the premises (*Chesubini v Testa*, 130 AD2d 380 [1st Dept 1987]).

The proposed agreement between the New York Marine Trades Association and Tobay Beach and Boat Marina (see Exhibit G annexed to Town's motion) for the 30th Annual NYMTA Tobay Beach in the water Boat Show for September 30 to October 9, 2006 indicates no responsibility on Town for the boat show.

The deposition of Travis McCabe, dock master for Town as to the docks in Tobay Beach, had no responsibility for the Tobay Beach in-water show of September 2006 except to inspect the facility (dock) upon the opening and departure of the show (see Exhibit M, pg. 9 annexed to Town's motion). McCabe had no duties at the floating dock and he did not inspect floating dock (pg. 12-13).

The deposition of Jack Gioeli, Assistant Superintendent of Beaches for the Town from 1983-2007 (see Exhibit O annexed to Town: motion), had no job duties or responsibilities as to

the subject 2006Tobay Beach in water Boat Show (p.11).

An out-of-possession landlord was under no contractual duty to maintain or repair anything other than structural elements of a building and did not violate any specific statutory provision sufficient to impose liability in a personal injury suit brought by an allegedly injured patron when he was shocked by an exposed wire hanging from a light fixture attached underneath a shelf; thus the landlord established its prima facie entitlement to judgment as matter of law dismissing the complaint insofar as asserted against it (*Sanchez v Barnes & Noble, Inc.*, 59 AD3d 698 [2d Dept 2009]; *Valenti v 400 Carlls Path Realty Corp.*, 52 AD3d 696 [2d Dept 2008]; *Ingargiola v Waheguru Management, Inc.*, 5 AD3d 732 [2d Dept 2004]).

As an alleged out-of-possession landlord Town correctly claims it should not be held liable since the proposed agreement placed responsibility for everyday maintenance and repairs of the floating docks on the tenant, New York Marine Trades Association.

As to Town/Tobay Beach Boat Basin's motion, the court will deny the request for summary judgment with leave to renew upon a presentation of a signed agreement between Town/Tobay Beach and New York Marine Trades Association for the 2006 Boat Show at Tobay Beach.

As to Staten Island Yacht Sales' (hereinafter refereed to as "Staten island") cross motion, Staten Island installed the blue carpeting on the floating docks at the location of Plaintiff's incident. The blue carpeting, alleges Plaintiff, contributed to creating the optical illusion or the "optical confusion" making it difficult for her to notice where the floating dock ended and the water began. Sales has not demonstrated how its carpeting could not have caused or added to Plaintiff's allegation of "optical confusion" among the carpeted dock and the water. This is especially apparent from the photographs provided (see Exhibit A annexed to Plaintiff's

affirmation in opposition).

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320[1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal News*, 211 AD2d 626[2d Dept. 1994]). Thus, 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[1993]).

Hence, Staten Island has not met its burden. It is hereby

ORDERED, that the parties are directed to appear for trial in DCM on March 3, 2010 at 9:30 a.m.

This constitutes the Decision and Order of the Court.

DATED: February 25, 2010
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

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