SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present:
Hon. Thomas Feinman
Justice

MARIE VOURAKIS-ARJE and LARRY ARJE,

Plaintiffs,

- against -

WALDBAUM, INC., FEDERAL RENT-A-FENCE, INC., LANE CONSTRUCTION COMPANY, MARTIN YUDELL, Trustee of the Julius Yudell Trust, DONALD SPANTON, Trustee of the Julius Yudell Trust, WENDY WEISER CHAYET, Co-Trustee of the Weiser Family 1992 Irrevocable Trust, SUSAN WEISER FINLEY, Co-Trustee of the Weiser Family 1992 Irrevocable Trust, STANLEY WEISER, Co-Trustee of the Weiser Family 1992 Irrevocable Trust, and JERROLD GILBERT as Successor Co-Trustee of the Trust u/w/o Irene F. Psaty for the Benefit of Michael C. Psaty and Merry P. Gilbert, and JERROLD L. MORGULAS, as Successor Co-Trustee of the Trust u/w/o Irene F. Psaty for the Benefit of Michael C. Psaty and Merry P. Gilbert,

Defendants.

TRIAL/IAS PART 15
NASSAU COUNTY

INDEX NO. 22745/08

MOTION SUBMISSION
DATE: 4/27/10

MOTION SEQUENCE
NOS. 4, 5, 6, 7

The following papers read on this motion:

Notice of Motions, Cross-Motions and Affidavits.....	X
Affirmation in Opposition.....	X
Reply Affirmation.....	X

RELIEF REQUESTED

The defendant, Lane Construction Company, (hereinafter referred to as "Lane"), moves for an order pursuant to CPLR §3212 seeking summary judgment dismissing plaintiffs' complaint as and against Lane. The defendant, Federal Rent-A-Fence, Inc., (hereinafter referred to as "Federal"), cross-moves for summary judgment dismissing plaintiffs' complaint as and against Federal. The defendant, Federal, also moves for an order pursuant to CPLR §3212 granting Federal summary judgment with respect to Federal's cross-claim for indemnification against Lane. The defendants, Waldbaum, Inc., and the remaining defendants, the trustee defendants, (hereinafter referred to as "Waldbaum"), cross-move for an order pursuant to CPLR §3212 granting Waldbaum summary judgment dismissing plaintiffs' complaint as and against Waldbaum. The plaintiffs submit opposition to the pending motions and cross-motions for summary judgment dismissing plaintiffs' action as and against Lane, Federal and Waldbaum. The defendant, Lane, submits opposition to Federal's cross-motion for summary judgment on Federal's cross-claim for indemnification as and against Lane. Lane, Waldbaum and Federal submit reply affirmations.

The movants herein, by way of this Court's prior order dated July 8, 2009, were given permission to renew their prior motions and cross-motions for summary judgment as the prior motions were made prior to discovery having been completed.

BACKGROUND

The plaintiff, Marie Vourakis-Arje, (hereinafter referred to as "Vourakis"), initiated this action to recover for personal injuries sustained on April 12, 2008, at approximately 12:00 p.m., noon, in the parking lot of Waldbaum's shopping center located at 905 Atlantic Avenue, Baldwin, New York. Vourakis alleges, in her bill of particulars, that she stepped off the curb and tripped over a pipe or post protruding from a fence in the parking lot which extended into an area traversed by pedestrians. The plaintiff claims that the defendants created a dangerous condition, a hazardous condition, a tripping hazzard, by placing, and allowing, a protruding pipe to extend in an area traversed by pedestrians. The plaintiff alleges that Waldbaum defendants, owners and managers of the subject area, essentially failed in their non-delegable duty to keep the premises safe, and that Lane and/or Federal negligently placed, or allowed the fence to be constructed or placed, in a dangerous manner.

The defendants submit that the condition which plaintiff claims to have caused her to trip and fall was both open and obvious, readily apparent by the use of her own senses, and was not inherently dangerous. The defendants argue that the support bracket of the temporary constructive fence was simply, open and obvious, clearly visible, readily observable, and did not present an undue risk of harm to one employing the reasonable use of their senses.

The plaintiff testified that she did observe the temporary fence that was put up, apparently to direct pedestrians from entering the construction site. Plaintiff submits that while the defendants assert that the placement of the fence created a path for pedestrians, to keep them away from the construction site, the placement of the base, placed beneath the fence, alongside the curb, obstructed the path and prevented a smooth, safe transition from the sidewalk to the parking lot where it would be foreseeable that a pedestrian would step down from the sidewalk/curb into the parking lot.

Plaintiffs' engineer submits that the manner in which the fence was erected, placed and maintained caused the panel stand to protrude across the walkway next to the fence and create an obscured defect that obstructed plaintiff's path of travel. "The placement of a 1⅜" diameter fence stand at the base of the curb, which exceeds 5" in height, caused the pipe to be obscured by the height of the curb." Furthermore, "the curb and pipe were both yellow creating an optical confusion contributing to the hazzard. The differences in height are not within the normal sight line of the pedestrian."

Simply put, the plaintiff provides that she stepped off the curb and onto a protruding bar or stabilizer bracket, which she could not see at the angle from where she was standing, *to wit*, at or near the curb, as the protruding bar was hidden or obstructed by the height of the curb. Plaintiff maintains that the protruding bar was not open and obvious and not readily observable, and that the placement of the protruding bar, placed underneath the fence and alongside the curb, constituted a tripping hazzard and was inherently dangerous.

APPLICABLE LAW

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 165 NYS2d 498). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 413 NYS2d 141). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 200 NYS2d 627. The role of the court is to determine if bonafide issues of fact exists, and not to resolve issues of credibility. (*Gaither v. Saga* Corp., 203 AD2d 239; *Black v. Chittenden*, 69 NY2d 665).

To impose liability upon the defendant, there must be evidence tending to show the existence of a dangerous or defective condition, and that the defendant either created the condition, or had the actual knowledge of it. (*Gordon v. American Museum of Natural History*, 501 NYS2d 646). In order for there to be constructive notice, the defect must be visible for a sufficient period to allow for discovery and inspection. (*Id*). The Court must decide, as a matter of law, whether the evidence, viewed in the most favorable light to plaintiff, will support a negligence verdict against the owner or possessor of land. (*Akins v. Glens Falls City School Dist.*, 441 NYS2d 644). If varying inferences are permissible, the case must go the jury. (*Quinlan v. Cecchini*, 394 NYS2d 872).

It is well-settled that while a property owner has a duty to maintain his or her property in a reasonably safe condition, there is no duty to protect or warn against an open and obvious condition, which, as a matter of law, is not inherently dangerous. (*Fernandez v. Edlund*, 31 AD3d 601; *Bernth v. King Kullen Grocery Co., Inc.*, 36 AD3d 844; *Tannenbaum v. Best 21 Ltd.*, 15 AD3d 646; *Morgan v. TJX Companies, Inc.*, 38 AD3d 508; and *Espinoza v. Hemar Supermarket, Inc.*, 43 AD3d 855). A landowner demonstrates their *prima facie* entitlement to summary judgment as a matter of law by demonstrating that the alleged complained of condition which caused the plaintiff to fall on, or into, or trip over, was open and obvious, readily observable by those employing the reasonable use of their senses, and was not inherently dangerous. (*Fernandez v. Edlund, supra; Bernth v. King Zkullen Grocery Co., Inc., supra.; Tennenbaum v. Best 21 Ltd., supra; Morgan v. TJX Companies, supra., Sun Ho Chung v. Jeong Sook Joh*, 29 AD3d 677; *Vergara v. A&S Twins Construction Corp.*, 41 AD3d 588). The mere fact that a defect or hazzard is capable of being discerned by a careful

observer is not the end of the analysis and not determative of the issue as it must also be considered whether the nature or location of some hazzards while they are technically visible, may be overlooked. (*Westbrook v. WR Activities-Cabrera Markets*, 5 AD3d 69).

"Where a plaintiff has presented evidence that a dangerous condition exists on the property, the burden shifts to the landowner to demonstrate that he or she exercised reasonable care under the circumstances to remedy the condition and to make the property safe, based on factors as the likelihood of injury to those entering the property and the burden of avoiding the risk. Evidence that the dangerous condition was open and obvious cannot relieve the landowner of this burden. Indeed, to do so would lead to the absurd result that landowners would be least likely to be held liable for failing to protect persons using their property from foreseeable injuries when the hazards were the most blatant." (*Cupo v. Karfunkel*, 1 AD3d 48). The Court also provided that "[w]e do not suggest that a court is precluded from granting summary judgment to a landowner on the ground that the condition was both open and obvious, and, as a matter of law, was not inherently dangerous". (*Id.*)

DISCUSSION

The defendants argue that plaintiff, by her own actions, contributed to the accident since "she tripped and fell upon a pole which was obvious, and which she was aware of". However, the defendants have not made a *prima facie* showing that the complained of condition was not inherently dangerous as a matter of law.

At issue is whether the placement of the base of the fence, the yellow bar or stabilizer bracket, the "pipe that protruded from the base of the fence", which extending into the area where pedestrians traverse, placed alongside a curb, was open and obvious and not inherently dangerous, or whether such condition was a tripping hazzard not readily observable by one who employs the reasonable use of their senses. Upon the record herein, the placement of the base of the fence, coupled with plaintiffs' claim that it was hidden or obscured by the curb, raises triable issues of fact warranting the denial of the summary judgment motions.

As issues of fact exist as to whether the defendants are negligent, Federal's motion for summary judgment in its cross-claim for indemnification is denied as premature. The defendants' claim that the plaintiffs' expert's affidavit should not be considered, is unavailing. The defendants have not demonstrated that there has been any prejudice, or that plaintiff's expert's affidavit submitted in opposition to the motion was intentional or wilful.

However, Federal has made a *prima facie* showing of entitlement to summary judgment. Federal established that it made two separate deliveries of fences at the site on October 8, 2007 and November 6, 2007, and that Lane directed the laborers where to put the temporary fence. Federal has established that its only involvement with the construction project at bar was the delivery of the fence, and it is undisputed that Lane directed the erection of the fence. Plaintiff, in opposition, has failed to raise a genuine issue of fact to warrant the denial of Federal's motion.

CONCLUSION

In light of the forgoing, it is hereby,

ORDERED that the defendant, Lane's, motion for summary judgment is denied, and it is hereby further

ORDERED that the defendant, Federal's, cross-motion for summary judgment is granted and therefore, plaintiffs' action, as and against Federal, is dismissed, and it is hereby further

ORDERED that the defendant, Federal's, motion for summary judgment seeking to enforce the indemnification agreement is denied as premature, and it is hereby further

ORDERED that the defendant, Waldbaum's, summary judgment motion is denied.

ENTER:

J.S.C.

Dated: June 10, 2010

ENTERED
JUN 15 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE

cc: Finz & Finz, P.C.
Sobel, Kelly & Schleier, LLC
Cascone & Kluepfel, LLP
Huenke & Rodriguez