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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 17 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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EDYTHE BRAM,

Plaintiff(s),

-against-

THE GREAT ATLANTIC AND PACIFIC TEA COMPANY d/b/a WALDBAUMS, INC. NW-EAST MEADOW-GROCERY, LLC and BENENSON EAST MEADOW, LLC,

Defendant(s).

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Index No. 20577/08

Motion Submitted: 4/20/10
Motion Sequence: 001

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.....

Defendants move this court for an Order granting summary judgment in their favor and dismissing the complaint. Plaintiff opposes the requested relief on the merits, and also on the grounds that defendant's motion is untimely, and that plaintiff's deposition testimony is inadmissible because defendant has not proven that the transcript thereof was provided to plaintiff for review.

This action arises from an accident that occurred on August 1, 2008, in front of a Waldbaum's supermarket store in East Meadow, New York. Plaintiff alleges that she sustained personal injuries, including a broken wrist and a fractured vertebra in her back, when her shopping cart came into contact with a defective curb, causing plaintiff to fall, with the shopping cart landing on top of her. Defendants deny plaintiff's allegations, stating that the condition of the curb was open and obvious to all, and that it was not inherently

dangerous.

This Court has determined that the procedural grounds for dismissal of defendants' motion raised by plaintiff are meritless.

In the first instance, it is undisputed that the Note of Issue was filed in this case on December 2, 2009. A motion is "made" when it is served (see ***CPLR §2211; Cruz v. New York City Housing Authority***, 62 A.D.3d 643, 879 N.Y.S.2d 483 (2d Dept., 2009); ***Russo v. Eveco Development Corp.***, 256 A.D.2d 566, 683 N.Y.S.2d 566 [2d Dept., 1998]). In this case, defendants' summary judgment motion was served on plaintiff on March 2, 2010, one day after the ninetieth day specified in both the Preliminary Conference Order and in the original Certification Order for service thereof following the filing of the Note of Issue. The fact that defendants were one day late in making their motion is not a proper basis on which to deny their motion, especially where, as here, plaintiff has failed to demonstrate prejudice resulting from the one-day delay (***Fernandez v. Mark Andy, Inc.***, 7 A.D.3d 484, 776 N.Y.S.2d 305 (2d Dept., 2004) (two-day delay de minimis and lack of prejudice to plaintiff require court to decide motion on the merits); ***Jerry v. New York City Housing Authority***, 285 A.D.2d 531, 728 N.Y.S.2d 497 (2d Dept., 2001) [court improvidently exercised its discretion in denying motion for summary judgment when motion was made only three days after 120-day period had expired and plaintiffs failed to demonstrate any prejudice from delay]).

Plaintiff's allegation that her deposition transcript should not be considered by the Court as part of defendants' summary judgment motion because defendants failed to supply "any proof that the transcript was provided to plaintiff for signing," is spurious. Plaintiff never alleged that she did not, in fact, receive her transcript, but just that proof of same was not provided by defendants. In their Reply, defendants supplied a copy of the cover letter, dated September 30, 2009, sent to plaintiff with the original and one copy of her deposition transcript for her review. In light of this communication, and the fact that plaintiff has not submitted any contradictory evidence, this Court determines that plaintiff's deposition testimony may be fully used as though signed by plaintiff (see ***CPLR § 3116 [a]***).

Turning now to the merits of defendants' motion, this Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, in this case the plaintiff. (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

Although "[a] property owner has no duty to warn of dangers that are readily observable by the reasonable use of one's senses" ***(Pedersen v. Kar***, 283 A.D.2d 625, 626, 724 N.Y.S.2d 776, 777 (2d Dept., 2001); ***Gonzalez v. New York Racing Association, Inc.***, 69 A.D.3d 673, 893 N.Y.S.2d 568 (2d Dept., 2010); ***Pirie v. Krasinski***, 18 A.D.3d 848, 796 N.Y.S.2d 671 [2d Dept., 2005]), a store owner is charged with the duty of maintaining its premises in a reasonably safe condition for its patrons. To be entitled to summary judgment, a defendant is required to show, *prima facie*, that it maintained its premises in a reasonably safe condition and that it did not have notice of or create a dangerous condition that posed a foreseeable risk of injury to persons expected to be on the premises. Proof that a dangerous condition is open and obvious merely negates the defendant's obligation to warn of the condition, but does not preclude a finding of liability against a land owner for failure to maintain the property in a safe condition (***Gradwohl v. Stop & Shop Supermarket Company, LLC***, 70 A.D.3d 634, 896 N.Y.S.2d 85 [2d Dept., 2010]).

In support of their motion, the defendants submitted, *inter alia*, the plaintiff's deposition testimony, photographs of the curb, and the affidavit of Fred Surbito, Waldbaum's store manager on the date of the accident. Plaintiff testified that she had been frequenting that particular Waldbaum's supermarket for the past five years, approximately once per week, to do her food shopping. In fact, she established that she was on a first-name basis with three Waldbaum's employees, including Mr. Surbito. Prior to the date of the accident, she claims that she did not have any difficulties in any areas of the parking lot or sidewalk outside the supermarket, and that she never saw the parking lot or curb being renovated during the years that she frequented the store.

The photographs submitted establish that the area directly in front of the supermarket is graded to provide easy cart access by having the parking lot rise to the same level as the sidewalk. After a span of some ten to twelve feet in front of the doors, the parking lot blacktop begins to slope down, exposing a curb, which is apparently unmarked.

Mr. Surbito's affidavit establishes that he was not aware of any complaints "regarding the curb of the front walkway of the store," nor was there anything present to obstruct the view of the curb from the walkway on the day of the accident. Mr. Surbito also observed that the curb appeared to be level and not cracked or broken. While Mr. Surbito's affidavit serves to establish certain conditions regarding the curb, it does not directly address whether or not the design of the sloping curb created a dangerous condition, or whether or not the fact that the curb was not painted or marked in any way at the point where the blacktop sloped away from it constitutes a dangerous condition. Aside from Mr. Surbito's affidavit, defendants do not provide any evidence in support of their position with respect to these issues.

The fact that the condition of the sloping curb was apparently open and obvious is

relevant to the issue of plaintiff's possible comparative negligence in this action, given the fact that she admittedly was pushing a cart so full of groceries that the items rose above the top of the shopping cart; it does not, however, preclude a finding of liability against defendants for the creation or existence of a dangerous condition (***Cupo v. Karfunkel***, 1 A.D.3d 48, 767 N.Y.S.2d 40 [2d Dept., 2003]).

Inasmuch as defendants have failed to establish that the sloping curb was not inherently dangerous, they are not entitled to summary judgment. Defendants' motion is denied.

Since the defendant did not meet its prima facie burden, it is unnecessary to consider the adequacy of plaintiff's papers (***Winegrad v. New York Univ. Med. Ctr.***, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]).

The foregoing constitutes the Order of this Court.

Dated: June 30, 2010
Mineola, N.Y.

Karen V. Murphy
J. S. C.