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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

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BARBARA McLEAN and EDWARD McLEAN,

Plaintiffs,

- against -

SPENCER REALTY, INC., J&B RESTAURANT PARTNERS, INC. d/b/a Friendly's a/k/a Friendly's Ice Cream Shop and FRIENDLY'S ICE CREAM CORPORATION,

Defendants.

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TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 19455/08
Motion Seq. No.: 01
Motion Date: 03/24/10

**The following papers have been read on this motion:**

| | Papers Numbered |
|---|---|
| Notice of Motion, Affirmation and Exhibits | 1 |
| Affirmation in Opposition and Exhibits | 2 |

Defendants move, pursuant to CPLR § 3212, for an order granting summary judgment and dismissing plaintiff's complaint. Plaintiff opposes defendants' motion.

This personal injury action arises from a trip and fall accident on August 25, 2007, at the entrance/exit of the Friendly's Ice Cream Shop located at 1826 Hempstead Turnpike, East Meadow, New York. At the time of the accident, defendant, Spencer Realty Inc. ("Spencer") was the owner of the subject premises. Defendants J&P Restaurant Partners. Inc. d/b/a Friendly's a/k/a Friendly's Ice Cream Shop and Friendly's Ice Cream Corporation (herein after collectively "Friendly's") were the tenants in possession of the subject premises on the date of the accident. It is alleged that, at the aforementioned location, on the aforementioned date, plaintiff Barbara McLean ("BM"), when exiting defendant Friendly's Ice Cream Shop, tripped

on a protruding section of molding and trim which served as a decorative base to a colonial-style column that had been constructed outside and immediately alongside the entrance/exit door to defendant Friendly's Ice Cream Shop. Plaintiffs also allege that there was a "cracked, depressed, unleveled" doorway threshold in the same area where she tripped. Plaintiffs contend that the base molding of the column protruded into and obstructed the entrance/exit passageway causing plaintiff BM to trip and fall. Said trip and fall caused plaintiff BM to sustain a fractured patella which required an open reduction internal fixation. As a result of said injuries, plaintiff BM now walks with a limp and requires the use of a cane at all times. On or about October 27, 2008, plaintiff commenced the present action by service of a Summons and Verified Complaint. On or about April 3, 2009, issue was joined.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra.* When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498

(1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. See *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

It is the existence of an issue, not its relative strength that is the critical and controlling consideration in the determination of a summary judgment motion. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964). Summary judgment is rarely granted in negligence cases. *See Connell v. Buitekant*, 17 A.D.2d 944, 234 N.Y.S.2d 336 (1st Dept. 1962).

Defendants submit that they are entitled to summary judgment as they claim that they did not create the condition which allegedly caused plaintiff BM's accident and that they did not have constructive notice of said condition. First, defendants contend that they are entitled to summary judgment as "the alleged dangerous condition was open and obvious." Defendants argue that plaintiffs have not proved that the alleged accident was caused by defendants' negligence, thus plaintiffs have failed to state a cause of action. Defendants conclude that "[t]he defendants are not liable as there was an open and obvious danger to the plaintiff." Defendants submit that plaintiff testified that she had been at the defendant Friendly's numerous times before the incident and should have been aware of the layout of the restaurant. Defendants state that "[t]he day of the alleged accident, plaintiff arrived at the restaurant during the daylight and if there was any obstructions to the doorway it would have been obvious. Furthermore, the plaintiff admitted there was nothing blocking her view or hindering her ability to watch where she was going."

Second, defendants argue that they are also entitled to summary judgment as "plaintiffs have failed to establish that defendants created the hazardous condition or had actual or

constructive notice of the hazardous condition." Defendants state that "plaintiff, by her own testimony, has established the fact that defendants had no notice of the alleged condition that caused her to fall. This fact is evidenced by plaintiff's failure to see the alleged obstruction prior to her accident. In fact, plaintiff testified that she did not see the molding that was allegedly the cause of her fall and has provided no evidence that there was any molding protruding out, let alone that it was the reason she fell. Clearly, plaintiff has failed to establish a prima facie case of negligence as plaintiff has failed to establish that Defendants created the condition and has failed to establish that defendants has actual or constructive notice of the condition." Defendants argue that the record is void of any notice on the part of defendants.

In opposition to defendants' motion, plaintiffs argue that defendants owed plaintiffs a duty to maintain the premises in a safe condition. Plaintiffs further argue that defendants created the hazardous and dangerous condition as the molding that plaintiff BM allegedly tripped on was a post-construction add-on to the door facade. In support of this argument, plaintiffs submitted as part of their moving papers an Expert Affidavit of Stanley Fein, P.E., a licensed professional engineer. In said affidavit, Mr. Pomeranz stated his opinion, with a reasonable degree of engineering certainty, that the "base molding where the plaintiff tripped has to be installed after the premises received a certificate of occupancy and would not have been part of the original building plans. This is supported by the fact that the molding does not fit into the brick wall design and by the fact that the molding had to be cut to clear the preexisting pathway curb, and by the fact that it protruded 2 inches into the exit passageway exit area....The base molding protruded into the exit passage area creating an extreme tripping hazard that came upon the pedestrian as a dangerous and unexpected trap." Plaintiff claims that Mr. Fein's affidavit demonstrates the existence of a triable issue of material fact thereby mandating the denial of defendants' summary judgment motion.

Plaintiffs additionally submit that defendants failed to meet their burden of proof in that it had the burden of demonstrating, *prima facie*, that it did not create the alleged hazardous condition or have actual constructive notice of its existence for a sufficient length of time to discover and remedy it. Plaintiffs state that defendants' affirmation in support of their summary judgment motion did not address the claim that the defendants created the said defective condition. Plaintiffs contend that there is no place in defendants' moving papers where there is any denial that any of the defendants created the alleged dangerous and defective condition. "In

fact, there is not even a denial that the alleged condition that caused the plaintiff to trip and fall was dangerous and defective. On the contrary, defendants' attorney's affirmation alleges that the dangerous and defective condition was 'open and obvious' and should have been seen or observed by the plaintiff. This assertion begs the question, 'if the danger and defect was so open and obvious, then why didn't the defendant, Spencer Realty, Inc., as owner of the property, or defendant J&B Restaurant Partners, Inc., as tenant occupant of the property, repair or remedy the condition?'" Plaintiffs argue that it is well settled in law that the owner of the property and the lawful tenant occupant of the property owe a duty of safe ingress and egress upon the property to all persons who could reasonably and forseeably enter upon it.

Based upon this evidence and legal argument, the Court finds that defendants have failed to meet their burden and failed to demonstrate *prima facie* that they neither created or had actual or constructive notice of the condition alleged to have caused plaintiff's fall. On the other hand, plaintiff's have established a *prima facie* case establishing the elements and merits of plaintiffs' claim and raising triable issues of material fact. Consequently, defendants' motion for summary judgment is hereby denied.

All parties shall appear for trial in Nassau County Supreme Court, DCM Trial Part on September 29, 2010 at 9:30 a.m.

This constitutes the decision and order of this Court.

**ENTER:**

**DENISE L. SHER**
**A.J.S.C.**

Dated: Mineola, New York
September 9, 2010