

**Langan v Simon Prop. Group**

2010 NY Slip Op 33043(U)

October 21, 2010

Supreme Court, Nassau County

Docket Number: 013884/08

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

**JUSTICE**

TRIAL/IAS PART 20

\_\_\_\_\_ X

PAIGE LANGAN,

Plaintiff,

Index No.: 013884/08

Motion Sequence...02

-against

Motion Date...08/18/10

**XXX**

SIMON PROPERTY GROUP d/b/a  
ROOSEVELT FIELD MALL,

Defendant.

\_\_\_\_\_ X

Papers Submitted:

Notice of Motion.....X

Affirmation in Opposition.....X

Reply Affirmation.....X

Upon the foregoing papers, the motion by the Plaintiff, pursuant to CPLR § 2221, granting her leave to reargue the Order of this Court dated June 17, 2010, which granted the Defendant's summary judgment motion, is determined as hereinafter provided.

The Plaintiff's complaint alleges that on September 22, 2007, upon exiting Houston's restaurant, located at the Roosevelt Field Mall in Garden City, the Plaintiff was caused to fall when she stepped on a plastic actuator cover in a grassy area leading to the parking lot. Specifically, the Plaintiff alleges that the plastic cover was in a defective

condition which caused her foot to fall into the hole containing an actuator thereby causing injury to her foot. After discovery was complete, the Defendant filed a motion for summary judgment which was granted by this Court (Marber, J., 06/17/10), based upon the Plaintiff's failure to raise a triable issue of fact as to whether the Defendant created the defective condition or had any actual or constructive notice of same. The Plaintiff now moves, pursuant to CPLR § 2221, seeking reargument of the Defendant's prior motion for summary judgment on the grounds that the Court inadvertently did not address the Plaintiff's primary argument in opposition to the Defendant's motion, to wit: that pursuant to New York law, where the claim of lack of constructive notice is being alleged as a defense, absent proffered evidence that inspection programs or procedures are in place to inspect the area, such as where the Plaintiff's accident occurred, summary judgment cannot be granted as a matter of law.

In support of her motion to reargue, the Plaintiff contends that summary judgment was not proper as a matter of law due to the Defendant's failure to offer any evidence or proof of reasonable inspections, or any standards or procedures in place for reasonable inspections to be conducted, of the property where the Plaintiff was injured. The Plaintiff argues that this failure imputes constructive notice to the Defendant as a matter of law. The Plaintiff states that the Defendant's failure to conduct reasonable inspections was the "gravamen" of the Plaintiff's argument in opposition to the Defendant's underlying motion and the Court's inadvertent failure to address same is sufficient grounds for

reargument.

In support of her motion, the Plaintiff relies on, among other cases, *Personius v. Mann*, 20 A.D.3d 616 (3rd Dept. 2005). She contends that if no program of inspection is in place of an object capable of deteriorating, which is not readily visible or easily seen, then constructive notice of the defect is imputed. The Plaintiff agrees that the failure to make a diligent inspection constitutes negligence only if such an inspection would have disclosed the defect. In this regard, the Plaintiff references portions of sworn testimony of a representative of the Defendant to establish that there were no procedures in place to inspect the actuator cap and that the inspections that were conducted, were not routine or regular.

The Plaintiff sets forth the standard, in her moving papers, that the Defendant owner, who is responsible for maintaining the premises, has the initial burden of making a prima facie showing that it neither created the hazardous condition, nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it. *Arzola v. Boston Prop., Ltd. Partnership*, 63 A.D.3d 655 (2nd Dept. 2009). The Plaintiff further contends that to satisfy the foregoing burden, the Defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the Plaintiff fell, citing to *Braudy v. Best Buy Co., Inc.*, 63 A.D.3d 1092 (2nd Dept. 2009).

The Plaintiff also cites to *Pampillonia v. Burducea*, 2009 WL 4984550 (2nd Dept. 2009). In *Pampillonia*, the defendants moved for summary judgment claiming that the defect was open and obvious. The Court ruled that the defendants failed to meet their burden

that their premises was in a reasonably safe condition. The Court found that it need not examine the sufficiency of the plaintiff's papers submitted in opposition in light of the determination that the defendants failed to meet their initial burden. In the instant matter, the Plaintiff urges this Court to similarly find that the Defendant failed to meet its initial burden and, as such, the Plaintiff's papers in opposition to the summary judgment motion should not have been considered. In comparing the case at bar to *Pampillonia*, the Plaintiff states that the Defendant has not and cannot rely on the open and obvious defense, as it is clear that the defect here, was not open and obvious.

In opposition to the Plaintiff's motion, the Defendant refers to the testimony of William Devlin, who testified at an Examination Before Trial that he did, in fact, conduct periodic inspections of the area where the Plaintiff's accident occurred. Specifically, Mr. Devlin testified that he would visit the area where the accident occurred approximately two to three times per week, although not daily. Mr. Devlin further testified that if emergency repairs were necessary, then he would provide that information to his direct supervisor. The Defendant states that Mr. Devlin admittedly did not physically inspect the actuator cap, and argues that it was not reasonable for him to do so. The Defendant argues that to uncover the alleged defect, the inspection would require physically touching, turning and manipulating the actuator cap. The Defendant further argues that the mere visual inspection of the area would not uncover the alleged defect in the actuator cap.

Based upon the foregoing arguments, the Defendant submits that it satisfied

its initial burden and that it is incumbent upon the Plaintiff to come forward with a showing of evidentiary facts from which a jury can infer constructive notice from the amount of time that the dangerous condition existed. In support of its motion, the Defendant cites several cases where the defendant's motion for summary judgment was based upon the plaintiff's failure to establish actual or constructive notice of an open and obvious defect which caused the plaintiff's fall. The Defendant states that the Plaintiff failed to meet her burden as she failed to present any evidence that a reasonable inspection of the actuator cap would have uncovered the defect. The Defendant cites to *Duran v. Bushwick House, LLC*, 2009 WL 2611335 (Kings Cty. Aug. 25, 2009) citing *Applegate v. Long Island Power Auth.*, 53 A.D.3d 515, 516 (2nd Dept. 2008), for the proposition that when a defect is latent and would not be discoverable upon a reasonable inspection, constructive notice will not be imputed.

“Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or mistakenly arrived at its earlier decision.” *Viola v. City of New York*, 13 A.D.3d 439, 440 (2nd Dept. 2004), *lv den.* 5 N.Y.3d 706 (2005), citing *Perez v. Linshar Realty Corp.*, 259 A.D.2d 532 (2nd Dept. 1999); *Loland v. City of New York*, 212 A.D.2d 674 (2nd Dept. 1995).

Based on the foregoing standard, the Court finds that it overlooked one of the Plaintiff's legal arguments in opposition to the Defendant's motion for summary judgment. However, upon reargument, for the reasons set forth below, the Court finds that its

inadvertent failure to consider the Plaintiff's arguments regarding reasonable inspections does not change the decision previously rendered by this Court.

Summary judgment is a drastic remedy and should only be granted where there are no triable issues of fact. *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). A Defendant who moves for summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover or remedy it (see *Joachim v. 1824 Church Ave. Inc.*, 12A.D.3d 409, 410 (2nd Dept. 2004); *Goldman v. Waldbaum, Inc.*, 228 A.D.2d 436 (2nd Dept. 1998)). Once the Defendant meets its burden, the Plaintiff must come forward with evidence that raise a triable issue of fact.

The Plaintiff argued in opposition to the Defendant's summary judgment motion and in the instant motion that Defendant had a duty to conduct reasonable inspections of the area where the Plaintiff's accident occurred. However, the Plaintiff's arguments presume that a duty exists to conduct reasonable inspections, yet fail to set forth to what extent this duty exists. A reasonable inspection is generally where, upon visual inspection, the defect would be disclosed. Here, the Plaintiff concedes that the defect was not open and obvious. See Plaintiff's Affirmation in Support, ¶ 29. "[C]onstructive notice will not be imputed where the defect is latent, i.e., where, as here, the defect is of such a nature that it would not be discoverable even upon a reasonable inspection. The failure to make a diligent inspection constitutes negligence only if such an inspection would have disclosed the defect".

*Lee v. Bethel First Pentecostal Church of America, Inc*, 304 A.D.2d 798 (2nd Dept. 2003).

In the absence of any evidence of a warning of a hidden defect, the Defendant is under no duty to use extraordinary measures to discover the defect. *Monroe v. City of New York*, 67 A.D.2d 89 (2nd Dept. 1979). It is clear from Mr. Devlin's sworn testimony that the defect that allegedly caused the Plaintiff's accident could not have been disclosed upon visual observation, and thus, could not have been disclosed upon reasonable inspection. The Plaintiff's own submission indicates that the actuator cap was green, the same color as the grass. Indeed, no evidence was submitted by the Plaintiff that tends to prove that the defect located on the grassy area outside of Houston's restaurant was readily observable. The Court declines to impose a duty upon the Defendant that would require a landowner to physically remove and/or dismantle an object to disclose a defect. None of the cases cited by the Plaintiff persuade this Court that a higher standard is warranted. Several of the cases cited by the Plaintiff pertain to an open and obvious defective condition that caused the plaintiff's accident, i.e. icy condition, defective carpeting on a staircase, slippery condition on defendant's floor. These cases are readily distinguishable as the defect here is admittedly not open and obvious. The other cases cited by the Plaintiff primarily pertain to a defendant's duty to reasonably inspect its premises, all of which support the determination herein.

In light of the evidence in the record that indicates that the defect was not open and obvious and could not have been disclosed upon a reasonable inspection, the Defendant met its initial burden. The Plaintiff, however, failed to present any evidence to rebut the

Defendant's showing that, even upon a reasonable inspection, the defect could not have been discovered.

The Plaintiff's remaining contentions are without merit.


Accordingly, it is hereby

**ORDERED**, that the Plaintiff's motion to reargue, pursuant to CPLR § 2221, is **GRANTED**, and it is further,

**ORDERED**, that upon reargument, the Defendant's motion for summary judgment is **GRANTED** and the Plaintiff's complaint is **DISMISSED**.

This decision constitutes the decision and order of the court

DATED: Mineola, New York  
October 21, 2010

  
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Hon. Randy Sue Marber, J.S.C.  
XXX

**ENTERED**  
OCT 26 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE