

Gallub v Popel's Clam Bar, Ltd. of Deer Park

2011 NY Slip Op 31300(U)

March 30, 2011

Supreme Court, Nassau County

Docket Number: 22222/08

Judge: F. Dana Winslow

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

FRANCES GALLUB AND ARTHUR GALLUB,

**TRIAL/IAS, PART 4
NASSAU COUNTY**

Plaintiffs,

-against-

**MOTION SEQ. NO.:001, 002, 003
MOTION DATE: 12/10/10**

**POPEI'S CLAM BAR, LTD OF DEER PARK,
GRAND REALTY BLVD, INC., AIRPORT
INDUSTRIAL PARK, LLC and AVENTURA
CONSTRUCTION SERVICES, LLC.,**

INDEX NO.: 22222/08

Defendants.

**POPEI'S CLAM BAR, LTD OF DEER PARK and
GRAND REALTY BLVD., INC.,**

Third Party Plaintiffs,

-against-

AVENTURA CONSTRUCTION SERVICES, LLC.,

Third Party Defendant.

The following papers having been read on the motion (numbered 1-6):

Notice of Motion.....1
Notice of Cross Motion.....2
Plaintiffs Notice of Cross Motion for Summary Judgment.....3
Affirmation in Opposition.....4
Reply Affirmation.....5
Reply Affirmation.....6

Motion by defendants/third-party plaintiffs Popei's Clam Bar, Ltd. of Deer Park and Grand Realty Blvd., Inc. for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint as against them is **granted**.

Cross-motion by defendant Aventura Construction Services, LLC

("Aventura") for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint as against it is **granted**.

Cross-motion by plaintiffs for an order pursuant to CPLR 3212 granting them summary judgment in their favor is **denied**.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Frances Gallub on October 12, 2007 at approximately 12:00 p.m. Plaintiff alleges that she tripped and fell while walking in the parking lot of the premises known as 760 Grand Boulevard, Deer Park, New York. Specifically, plaintiff alleges that she fell on "the first wheel stop on and/or adjacent to the pedestrian walkway leading to the front entrance of Popei's Clam Bar, approximately 50 feet from said front entrance" (¶¶ 2 and 6 of Bill of Particulars). The wheel stop is located inside the parking space of a handicap spot.

Background

On February 10, 2006, Popei's and Aventura entered into a proposal/ contract requiring Aventura to supply and install one (1) twelve foot (12') section and three (3) ten foot (10') sections of guardrails that are twenty-four (24") inches higher. On March 4, 2006, a change order was executed requesting that Aventura install wheel stops instead of forty-two feet (42') of guardrail. The change order noted that it was estimated that wheel stops would be needed for five (5) of eight and one half feet (8.5') wide parking spaces. On April 3, 2006, another change order was executed which required Aventura to furnish five (5) six feet (6') wheel stops with yellow reflective and concrete hardware, and then noted that another five (5) wheel stops were needed.

Donna Reale, the secretary, treasurer and shareholder of Popei's, states in her affidavit that the scope of the work was to replace the railroad ties with wheel stops. Mrs. Reale did not select the spot where the wheel stops would be placed in the various parking spots. (See Exhibit Q annexed to main motion). It was Mrs. Reale's understanding that the wheel stops would serve the same purpose as the railroad ties, which was to protect cars from driving into the building of Popei's (*Id.*). The wheel

stops are located inside the handicap spot, as indicated in the survey of the land drawn on July 17, 2002. This survey was drawn prior to the subject construction in preparation for adding an outside deck to Popei's.

Defendant Popei's moves for summary judgment dismissing the complaint on the grounds that the wheel stops are open, obvious and not inherently dangerous. In support thereof, Popei's relies upon the deposition testimony of plaintiff Frances Gallub wherein she testified that in the year 2007, she had gone to Popei's about five times and she never had any problems with the parking lot and that as she was walking towards the entrance of Popei's, on the day of the accident she did not see the wheel stops (Exhibit M, pgs. 95, 30 and 104). Popei's also relies upon the deposition testimony of Donna Reale wherein she testified that prior to October, 2007, she was not aware of any accidents or claims regarding the parking lot of Popei's and that no accident report was filled out at the time of the subject incident (Exhibit N, pgs. 36, 37); and the deposition testimony of Frank DeMeyer, the owner and president of Aventura since 2007. Mr. DeMeyer was previously the managing partner of Aventura which was formed in January, 2001. Mr. DeMeyer testified that he did not consult with anyone, other than defendant Popei's in terms of where to place the wheel stops (Exhibit P, pg. 36) and he was not aware that the subject wheel stops, closed to the public sidewalk, could create any type of tripping hazard to customers entering Popei's.

Defendant Aventura moves for summary judgment arguing that a wheel stop is not inherently dangerous, is open and obvious and readily observable by the use of one's senses.

Plaintiff moves for summary judgment asserting that the evidence demonstrates that the accident was caused by defendant's negligence in creating, maintaining and failing to abate an inherently dangerous condition which violated applicable building codes and industry standards. In support thereof, plaintiff relies upon an affidavit of Joseph Cannizzo, P.E., a professional engineer. Mr. Cannizzo opines as follows:

“The design, construction and configuration of the parking lot, the wheel stop and purported handicap space, and the brick walkway in the vicinity of the accident, were unreasonably dangerous, violated applicable building codes and industry standards, and that these deficiencies caused Mrs. Gallub’s accident.

The failure of defendants to provide the mandated signage for the subject handicap parking space, in my professional engineering opinion, violated the code and contributed to the accident by depriving Mrs. Gallub of a needed visual cue or marker which could have clearly and sufficiently alerted her to the presence of the handicap space and its wheel stop.

Lastly, neither Aventura nor Popei’s submitted their plans to renovate Popei’s building and the parking lot, which included the installation of wheel stops, to the Town of Babylon Department of Buildings and did not obtain the permits for this work that were required by law. The inexcusable omission constitutes a gross departure from accepted and prevailing practice on the part of both Aventura and Popei’s. It is my professional engineering opinion that the Town of Babylon, for the reasons stated herein, would have rejected Popei’s and Aventura’s renovation plans had these plans been submitted for approval as required by law.”

Law

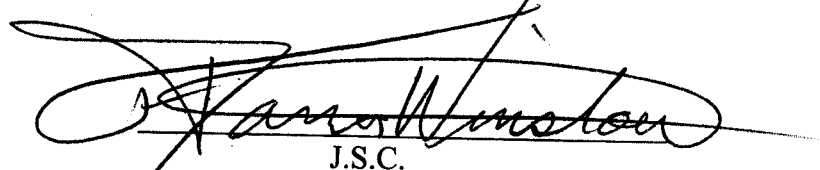
While a landowner has a duty to maintain the premises in a reasonably safe manner (*see Basso v Miller*, 40 NY2d 233 [1986]), there is no duty to protect or warn against an open and obvious condition which is not inherently dangerous. *Pipitone v 7-Eleven, Inc.*, 67 AD3d 879 [2nd Dept. 2009]; *Giambruno v Wilbur Breslin Dev. Corp.*, 56 AD3d 520, 521 [2nd Dept. 2008]; *Gagliardi v Walmart Stores, Inc.*, 52 AD3d 777 [2nd Dept. 2008]. Generally, “[a] wheel stop or concrete parking lot divider which is clearly visible presents no unreasonable risk of harm” *Pipitone v 7-Eleven, Inc.*, *supra*; *Giambruno v Wilbur Breslin Dev. Corp.*, *supra*; *Cardia v Willchester Holdings, LLC*, 35 AD3d 336, 337 [2nd Dept. 2006].

Popei’s and Aventura made a *prima facie* showing that the wheel stop over which the plaintiff tripped was not an inherently dangerous condition, and was readily observable to those employing the reasonable use of their senses (*see Albano v Pete Milano’s Discount Wines & Liqs.*, 43 AD3d 966, 967 [2nd Dept. 2007]; *Scalfani v WQashington Mut.*, 36 AD3d 682 [2nd Dept. 2007]; *Cardia v Willchester Holdings, LLC*, *supra*; *Gaines v Shell-Mar Foods, Inc.*, 21 AD3d 986, 987 [2nd Dept. 2005]; *Zimkind v Costco Wholesale Corp.*, 12 AD3d 593, 594 [2nd Dept. 2004]). In opposition to the motion, the affidavit of the plaintiffs’ expert was insufficient to raise an issue of fact as to whether the wheel stops in the parking lot violated accepted industry standards or applicable municipal code or filed an application therewith (*see Miller v Kings Park Cent. School Dist.*, 54 AD3d 314 [2nd Dept. 2008]; *Cardia v Willchester Holdings, LLC*, *supra*; *Davidson v Sachem Cent. School Dist.*, 300 AD2d 276, 277 [2nd Dept. 2002]).

In view of the foregoing, Popei’s motion and Aventura’s cross-motion are **granted**. The cross-motion is **denied**.

This constitutes the Order of the Court.

Dated: March 30, 2011


J.S.C.

ENTERED

MAY 10 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE