

**Propper v Village of Port Jefferson**

2011 NY Slip Op 31502(U)

May 27, 2011

Sup Ct, Suffolk County

Docket Number: 08-24931

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 24 - SUFFOLK COUNTY

**PRESENT:**

Hon. PETER FOX COHALAN  
Justice of the Supreme Court

MOTION DATE 2-16-11 (#002)  
MOTION DATE 2-14-11 (#003)  
ADJ. DATE 4-13-11  
Mot. Seq. # 002 - MD  
# 003 - MD

-----X  
LAWRENCE A. PROPPER, :  
 :  
 :  
 Plaintiff, :  
 :  
 :  
 - against - :  
 :  
 :  
 VILLAGE OF PORT JEFFERSON, :  
 KEK REALTY, INC., and :  
 STARBUCKS CORPORATION, :  
 :  
 Defendants. :  
-----X

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Upon the following papers numbered 1 to 44 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1-15; Notice of Cross Motion and supporting papers (003) 16-28; Answering Affidavits and supporting papers 29-38; Replying Affidavits and supporting papers 39-40; 41-42; Other 43-44; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that motion (002) by the defendant Starbucks Corporation (hereinafter Starbucks) and motion (003) by the defendant KEK Realty, Inc. (hereinafter KEK) are consolidated for purposes of this determination, and it is further

**ORDERED** that motion (002) by the defendant Starbucks pursuant to CPLR §3212 for summary judgment dismissing the plaintiff's complaint and cross claims asserted against it is denied, and it is further

**ORDERED** that cross-motion (003) by the defendant KEK pursuant to CPLR §3212 for an order dismissing the plaintiff's complaint and all cross claims asserted against it is denied.

The plaintiff's complaint arises from a trip and fall incident which occurred on July 11, 2007

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while he was walking on the sidewalk at the premises located at or about 201 Main Street, Village of Port Jefferson, on Long Island, New York (hereinafter Village) as he was exiting the front door of Starbucks. The plaintiff claims that the defendants maintained the premises in a dangerous and defective condition by causing and permitting a cement block to be on the sidewalk by the doorway, thus causing the plaintiff to trip. The plaintiff further claims that the defendants created the dangerous condition, had actual and constructive knowledge of the cement block on the sidewalk, and failed to warn of the same.

This Court, in an order, dated October 2, 2009, granted summary judgment to the Village and the complaint and cross claims were dismissed against it. This Court determined that the subject cement block located by Starbuck's front door was within Starbuck's property boundary at 201 Main Street and was not part of the Village owned sidewalk and/or property.

In motion (002) Starbucks seeks summary judgment dismissing the complaint and cross claims asserted against it. However, Starbucks has not submitted a copy of the answers served by the co-defendant KEK for this Court to determine if KEK asserted cross claims against Starbucks. In its answer, Starbucks has asserted a cross claim against KEK for indemnification, contribution and to be held harmless. In searching the record, the Court notes that KEK has asserted a cross claim against Starbucks for common law and contractual indemnification and for contribution. In motion (003), KEK seeks summary judgment dismissing the complaint and all cross claims asserted against it.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been produced, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [1979], *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980].) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the Court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of motion (002), Starbucks has submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, its answer, and the plaintiff's verified bill of particulars; copies of the unsigned transcripts of the examinations before trial (hereinafter EBT) of the plaintiff, Lawrence A. Propper, dated December 8, 2009, Thomas Kane (hereinafter Kane) on behalf of KEK, dated June 21, 2010, and Melissa Dooley (hereinafter Dooley) on behalf of Starbucks, dated December 8, 2009; an unauthenticated copy of an incident report form; and a copy of a commercial lease dated September 29, 1995 entered into between KEK and Starbucks.

In support of motion (003), KEK has submitted, inter alia, an attorney's affirmation; copy of the summons and complaint, answers served by all defendants, and the plaintiff's verified bill of particulars; a copy of this Court's order, dated October 2, 2009, photographs; an unsigned copy of the transcript of the hearing conducted pursuant to GML 50(h), dated February 11, 2008; unsigned copies of the transcripts of the EBT's of the plaintiff Lawrence A. Propper, dated December 8, 2009, Dooley on behalf of Starbucks. dated December 8, 2009, and Kane on behalf of KEK, dated June 21, 2010; and photographs.

The unsigned copies of the EBT transcripts submitted in support of motion (002) and cross motion (003) are not in admissible form as required by CPLR §3212 (see, *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2<sup>nd</sup> Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2<sup>nd</sup> Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2<sup>nd</sup> Dept 2006]), and are not accompanied by an affidavit pursuant to CPLR §3116. CPLR §3212 requires that a motion for summary judgment be supported with an affidavit or a deposition transcript on behalf of the moving party in admissible form. Motion (002) and cross-motion (003) are not supported by an affidavit or a signed copy of the EBT's in admissible form on behalf of Starbucks or KEK, and, thus, both motions fail to comport with CPLR §3212.

In opposition to the motion and cross-motion, the plaintiff has submitted, inter alia, a signed copy of the EBT transcript of the plaintiff, Lawrence A. Propper, dated December 8, 2009; unsigned copies of the EBT transcripts of Dooley, dated December 8, 2009, and Kane, dated June 21, 2009; photographs; a copy of the affidavit of Kevin Koubek, P.E. from the Village, dated April 14, 2009; and a copy of a survey.

Even if the defendants' motions comported with the requirement of CPLR §3212, Starbucks and KEK have not established prima facie entitlement to summary judgment dismissing the complaint as there are factual issues which preclude the same.

At his EBT, the plaintiff testified that he went to Starbucks on July 11, 2007 at approximately 3:00 p.m. on Main Street, Port Jefferson, for the purpose of getting coffee and dessert, as he has one hundred times in the past. After being in the store for about five minutes, with about thirty other people present in the store, he exited the building using the front door, which served as both the entrance and exit. Although there were two doors, only one door opened and the other door was locked. As he was exiting through the door, a woman was backing up with a stroller to enter into the store. There were children standing around the stroller and the street was very crowded. He had to move to the left to get out of her way and tripped on the concrete abutment to his left. He described the abutment as gray/white concrete, six to eight inches high, about four inches wide, and about two feet long. It was located about a foot and a half from the doorway. He did not see it immediately before he tripped on it. A green pole was adjacent to the concrete abutment.

At her EBT, Dooley testified that she had been employed by Starbucks for about seven years as the Port Jefferson store manager and was at the store in July 2007. She believed both doors at Starbucks were operational on the date of the incident and that they opened out toward Main Street, permitting entry and exit through either door. There were occasions in which one door would be kept locked, such as when it was cold out. She did not have a specific recollection if both doors were unlocked on the date of the accident. The concrete abutment was located inches from the door and the door would touch it when opened all the way. She did not know why the cement abutment was there and was not aware of any complaints about the abutment. She stated there were no signs

posted to warn of the abutment, and it was not painted a different color. She testified that Kane, her landlord, came to the Starbucks store on a few occasions and entered through the front door. Starbucks employees did snow removal from the sidewalk and also swept it. When the district managers for Starbucks came to visit the store several times per month, they never commented on the abutment. Strollers were permitted in the store.

At his EBT, Kane testified that he was president of KEK which, in 1994, purchased the subject premises. On September 28, 1995, KEK entered into an agreement with Starbucks wherein it leased the premises to Starbucks. This lease agreement was in effect on the date of the incident. He testified that on July 11, 2007, there was one entrance for customers into Starbucks, and another entrance on the corner of Main and Arden for employees. When he purchased the building, there was a lally column or pole and a cement block located on the right side of the entryway on Main Street and a planter in the front of the building to the left of the door. He did not know the purpose of the concrete block or abutment to the right of the door which the plaintiff claims he tripped over, and he never made any inquiries about the cement abutment. He indicated that the cement block ran from the front of the building to one of the lally columns in front of the building. He further testified that the property line coincides with the footprint of the building or the exterior walls of the building. The second floor of his building extends beyond the first floor walls and the cement block is located underneath this extension. He visited the building on numerous occasions and never considered removing the concrete abutment because he thought it appeared to be part of the building. He stated he did not consider it to be a safety hazard or a tripping hazard as it was large enough to be seen. He described it as a dirty white in color and about eighteen inches by four inches and about two feet in length. No one ever complained to him about the cement block at any time. The tenants cleared the exterior of the building of snow, leaves, and other debris pursuant to the lease agreement.

A landlord has a duty to maintain its premises in a reasonably safe condition. When moving for summary judgment, a landlord has the initial burden of establishing that it did not create the defective condition or have actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (see, *Rashid v Clinton Hill Partments Owners Corp.*, 70 AD3d 1019, 895 NYS2d 524 [2<sup>nd</sup> Dept 2010]). Here it has been established that KEK, the landlord, had actual knowledge of the existence of the cement abutment upon which the plaintiff claims to have tripped, but determined that it was not a danger. Therefore, it did not take any action either to remove the abutment or warn of its existence. KEK claims that the condition was open and obvious, and thus, it had no duty to warn of the condition. However, the fact that a condition is open and obvious does not preclude a finding of liability against the landowner; rather, it is relevant with respect to the level of the plaintiff's comparative fault (see, *Murphy v Fifth Avenue of Long Island Realty Associates*, 2100 NY Slip Op 30967U [Sup Ct, Nassau County, 2011]). Here, there are factual issues concerning whether the condition was open and obvious and whether the concrete abutment closely situated to the doorway constituted a dangerous and defective condition. Whether a condition is open and obvious does not negate a landowner's duty to maintain its premises in a reasonably safe condition (*Murphy v Fifth Avenue of Long Island Realty Associates*, supra). The issue of whether a dangerous condition is open and obvious is fact-specific, and usually a question for the jury (*Mazzarelli v 54 Plus Realty Corp.*, 53 AD3d 1008, 864 NYS2d 554 [2<sup>nd</sup> Dept 2008]).

At his EBT, the plaintiff testified that only one of the front doors was unlocked at the time of the accident and therefore the same door had to be used for patrons entering or exiting the Starbucks premises.

Strollers were permitted entrance into the store and had to enter or exit through the same doorway from which patrons were exiting or entering. The door closest to the cement abutment was the door which is claimed to have been unlocked on the date of the accident. When that door was opened, the cement abutment prevented it from opening fully. Moreover, there are factual issues concerning whether Starbucks created an unsafe condition by keeping only one door unlocked when there were many patrons using the facility at the same time strollers were entering and exiting the store.

Accordingly, motions (002) and (003) by Starbucks and KEK for summary judgment dismissing the complaint and respective cross claims as asserted against them are denied.

Dated:     MAY 27 2011    

    *Pete Fohler*      
J.S.C.

     FINAL DISPOSITION      X   NON-FINAL DISPOSITION