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SHORT FORM ORDER

INDEX No. 08-22254

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 9-23-10 (#003)
MOTION DATE 2-16-11 (#004 & #005)
ADJ. DATE 7-20-11
Mot. Seq. # 003 - MG
004 - XMD
005 - XMD

ANN DUGGAN,

Plaintiff,

- against -

CRONOS ENTERPRISES, INC., DE RAFFELE MFG, CO., INC., DAWN ESTATES TRUST, DAWN ESTATES SHOPPING CENTER, DAWN ESTATES, INC., BERNARD KAPLAN, THEODORE KAPLAN, and JOHN GNERRE,

Defendants.

GRUENBERG & KELLY, P.C.
Attorney for Plaintiff
3275 Veterans Memorial Highway, Suite B9
Ronkonkoma, New York 11779

CASCONE & KLUEPFEL, LLP
Attorney for DeRaffele MFG. Co., Inc.
1399 Franklin Avenue, Suite 302
Garden City, New York 11530

FISCHETTI & PESCE, LLP
Attorney for Bernard Kaplan, Theodore Kaplan as Trustees for Dawn Estates and Dawn Estates Trust
310 Old Country Road, Suite 201
Garden City, New York 11530

CRONOS ENTERPRISES, INC.
2101 Middle Country Road
Centereach, New York 11720

Upon the following papers numbered 1 to 63 read on this motion and these cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers 24 - 36; 37 - 44; Answering Affidavits and supporting papers 15 - 21; Replying Affidavits and supporting papers 22 - 23; 45 - 47; 48 -51; 52; 53; 54 - 61; Other sur-reply by defendant DeRaffele MFG, Co.; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant DeRaffele Manufacturing Company., Inc. seeking summary judgment dismissing plaintiff's complaint is granted; and it is

ORDERED that the cross motion by defendants Dawn Estates Trust, Dawn Estates Shopping Center, Dawn Estates, Inc., Bernard Kaplan, Theodore Kaplan seeking to strike the errata sheet of Thomas Ravo, or in the alternative, directing Thomas Ravo to appear for a further deposition is denied; and it is further

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ORDERED that the cross motion by defendant 2101 Diner Corp., d/b/a Suffolk Diner, Inc. seeking to strike the errata sheet of Thomas Ravo, or in the alternative, directing Thomas Ravo to appear for a further deposition is denied.

Plaintiff Ann Duggan commenced this action against defendants Cronos Enterprises, Inc., DeRaffele Manufacturing Company, Inc., Dawn Estates Trust, Dawn Estates Shopping Center, Dawn Estates, Inc., Bernard Kaplan, Theodore Kaplan, and John Gnerre to recover damages for injuries she allegedly sustained as a result of a trip and fall on a cement handicapped ramp at the Suffolk Diner, which is located at 2101 Middle Country Road in Centereach, New York. It is alleged that on November 21, 2005, plaintiff tripped and fell as she was stepping up onto the curb of the cement handicapped ramp of the diner. Defendant Cronos Enterprises, Inc. d/b/a Suffolk Diner (hereinafter "Cronos") owns and operates the Suffolk Diner, and defendant DeRaffele Manufacturing Company, Inc. (hereinafter referred to as "DeRaffele") constructed the subject diner. Defendants Dawn Estates Trust, Dawn Estates Shopping Center, Dawn Estates, Inc., Bernard Kaplan, and Theodore Kaplan (hereinafter collectively referred to as "Dawn Estates") owns the land where the diner was constructed and leased the property to Cronos. Defendant John Gnerre was DeRaffele's architect for the subject diner.

On April 21, 1994, DeRaffele entered into a construction contract with Cronos for the construction of a diner to be located at 2101 Middle Country Road in Centereach. DeRaffele prepared and provided Cronos with an elevation plan for the diner, which included a schematic for the exterior of the diner, including a handicapped ramp, setting forth its length and elevations. After the diagrams were given to Cronos, Cronos allegedly had all of the exterior work, including the handicapped ramps for the subject premises, performed in accordance with the specifications provided to them by DeRaffele. DeRaffele constructed the building in sections at its factory in New Rochelle, New York. The sections were transported to the subject location, where the construction of the diner was completed.

DeRaffele now moves for summary judgment on the basis that it neither owns, controls, or makes special use of the subject premises where plaintiff's accident occurred, nor did it create the alleged defective condition. Alternatively, DeRaffele asserts that it is not liable for plaintiff's injuries because the defective condition that plaintiff alleges caused her accident was open and obvious, and not inherently dangerous. DeRaffele, in support of the motion, submits copies of the pleadings, plaintiff and DeRaffele's deposition transcripts, and copies of photographs of the situs of the accident. DeRaffele also submits nonparty witness Denise Lombardi's deposition transcript, the affidavit of Joseph DeRaffele, and the schematics for the subject diner.

Plaintiff opposes the motion on the ground that there are material issues of fact as to whether the subject defect was open and obvious. Plaintiff also contends that the construction of the cement handicapped ramp violated New York State Building Code §1100 and the American National Standards Specifications for making Buildings and Facilities Accessible and Usable by Physically Handicapped, because the ramp extended into the handicapped parking spot, and its color, which was the same as the curb, failed to provide a visual cue differentiating between the ramp and the curb. Plaintiff, in opposition to the motion, submits photographs of the accident site and the affidavit of her expert, William Marletta, a safety professional. Dawn Estates also opposes DeRaffele's motion, arguing conflicts between the testimony of Joseph DeRaffele and Thomas Ravo demonstrate the existence of

material issues of fact requiring a trial.

A court's task on a motion for summary judgment is issue finding rather than issue determination (*see* ***Sillman v Twentieth Century Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]), and it must view the evidence in the light most favorable to the party opposing the motion (*see* ***Boyce v Vazquez***, 249 AD2d 724, 671 NYS2d 815 [3d Dept 1998]). Therefore, in determining a motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (see ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]). In the first instance, the moving party bears the burden and must tender evidence sufficient to eliminate all material issues of fact (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once such showing has been made, the burden shifts to the nonmoving party to demonstrate the existence of material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). Mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]).

To establish a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and that the breach of that duty was a proximate cause of the plaintiff's injury (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Kievman v Philip***, 84 AD3d 1031, 924 NYS2d 112 [2d Dept 2011]; ***Demshick v Community Hous. Mgt. Corp.***, 34 AD3d 518, 824 NYS2d 166 [2d Dept 2006]). A landowner has a duty to maintain his or her property in a reasonably safe condition in view of the existing circumstances (*see* ***Tagle v Jacob***, 97 NY2d 165, 737 NYS2d 331 [2001]; ***Demshick v Community Hous. Mgt. Corp.***, *supra*). The nature and scope of that duty and the persons to whom it is owed require consideration of the likelihood of injury to another from a dangerous condition on the property, the seriousness of the potential injury, the burden of avoiding the risk, and the forseeability of a potential plaintiff's presence on the property (***Galindo v Town of Clarkstown***, 2 NY3d 633, 636, 781 NYS2d 249 [2004] *quoting* ***Kush v City of Buffalo***, 59 NY2d 26, 29-30, 462 NYS2d 831 [1983]; *see* ***Peralta v Henriquez***, 100 NY2d 139, 144, 760 NYS2d 741 [2003]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]).

Additionally, to impose liability upon a defendant in a trip and fall action, there must be evidence that the defendant either created the condition or had actual or constructive notice of it (*see* ***Hayden v Waldbaum, Inc.***, 63 AD3d 679, 880 NYS2d 351 [2d Dept 2009]; ***Denker v Century 21 Dept. Stores, LLC***, 55 AD3d 527, 866 NYS2d 681 [2d Dept 2008]). A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident so that it could have been discovered and remedied (*see* ***Gordon v American Museum of Natural History***, 67 NYS2d 836, 501 NYS2d 646 [1986]). However, a landowner does not have a duty to warn or protect against a condition that is open and obvious, and that is not inherently dangerous (*see* ***Losciuto v City Univ. of N.Y.***, 80 AD3d 576, 914 NYS2d 296 [2d Dept 2011]; ***Weiss v Half Hollow Hills Cent. School Dist.***, 70 AD3d 932, 893 NYS2d 877 [2d Dept 2010]; ***Bretts v Lincoln Plaza Assoc., Inc.***, 67 AD3d 943, 890 NYS2d 87 [2d Dept 2009]; ***Murray v Dockside 500 Mar., Inc.***, 32 AD3d 832, 821 NYS2d 608 [2d Dept 2006]).

Based upon the adduced evidence, DeRaffele established its prima facie entitlement to judgment

as a matter of law that it is not liable for plaintiff's accident (*see* ***Winegrad v New York Umiv. Med. Ctr.***, *supra*; ***Dugue v 1818 Mgt. Corp.***, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]). "The law imposes a duty to maintain property free and clear of dangerous and defective conditions only upon those who own, occupy, or control property, or who put the property to a special use or derive a special benefit from it" (***Segura v City of New York***, 70 AD3d 670, 670, 892 NYS2d 870 [2d Dept 2010] *quoting* ***Guzov v Manor Lodge Holding Corp.***, 13 AD3d 482, 483, 787 NYS2d 84 [2d Dept]; *see* ***Aversano v City of New York***, 265 AD2d 437, 696 NYS2d 233 [2d Dept 1999]; ***Turrisi v Ponderosa, Inc.***, 179 AD2d 956, 957, 578 NYS2d 724 [3d Dept 1992]), and "where none of these factors are present, a party cannot be held liable for injuries caused by [an] allegedly defective condition" (***Grover v Mastic Beach Prop. Owners Assn.***, 57 AD3d 729, 730, 869 NYS2d 593 [2d Dept 2008]; *see* ***Sanchez v 1710 Broadway, Inc.***, 79 AD3d 845, 915 NYS2d 272 [2d Dept 2010]).

The record demonstrates that DeRaffele did not own, control, or make special use of the parking lot or cement handicapped ramp where plaintiff fell and, therefore, did not owe a duty to plaintiff to ensure that the parking lot or the cement handicapped ramp was maintained in a safe condition (*see* ***Cerrato v Rapistan Demag Corp.***, 84 AD3d 714, 921 NYS2d 648 [2d Dept 2011]; ***Segura v City of New York***, *supra*; ***Gauthier v Super Hair***, 306 AD2d 850, 762 NYS2d 736 [4th Dept 2003]; ***Aversano v City of New York***, *supra*). Moreover, Joseph DeRaffele, testifying on behalf of DeRaffele, explained that DeRaffele is a family-owned business, and that it builds and renovates diners. Joseph DeRaffele testified that Cronos is the owner of the Suffolk Diner, and that under the 1994 contract, Cronos was required to complete all foundation work for the placement of the diner and all exterior on-site work, including sidewalks, handicapped ramps, curbs, etc. He testified that although DeRaffele provided the schematic for the diner, including the elevation plans for the handicapped ramp, it "does not have a hand in how the actual exterior work is performed," and that the handicapped ramp provided for in the elevation plans is the main handicapped ramp leading into the dinner, and not the side ramp that leads into the parking lot. He further testified that the side handicapped ramp connects with the parking lot was constructed after DeRaffele had completed its work on the Suffolk Diner project, that Suffolk Diner was not open while DeRaffele's employees were working on site, and that DeRaffele was not involved in the asphalting or repaving of the Suffolk Diner's parking lot.

In addition, DeRaffele demonstrated, prima facie, its entitlement to summary judgment by submitting evidence, inter alia, in the form of photographs of the accident scene, that the side splay of the cement handicapped ramp that connects to the parking lot was not concealed, but was an open and obvious condition that was not inherently dangerous (*see* ***Turcotte v Fall***, 68 NY2d 432, 510 NYS2d 49 [1986]; ***Soussi v Gobin***, 87 AD3d 580, 928 NYS2d 80 [2d Dept 2011]; ***Capasso v Village of Goshen***, 84 AD3d 998, 922 NYS2d 567 [2d Dept 2011]; ***Russ v Fried***, 73 AD3d 1153, 901 NYS2d 703 [2d Dept 2010]). Plaintiff testified at her deposition that she did not know what caused her to fall, that she just fell forward, and that she did not know whether she had tripped or fallen. In addition, nonparty witness Denise Lombardi, plaintiff's granddaughter, testified that the curb that is alleged to have caused plaintiff's accident was an "average curb," even though she did not have a tape measure with her.

In opposition to DeRaffele's prima facie showing, plaintiff failed to adduce evidence sufficient to raise a triable issue of fact as to whether DeRaffele owned, controlled or maintained the subject

premises, or whether it created the alleged defect that caused plaintiff's injury (*see* ***Zuckerman v City of New York***, *supra*; ***Chahales v Westchester Joint Water Works***, 47 AD3d 610, 850 NYS2d 145 [2d Dept 2008]; ***Fedrescordero v 2527 Boston Rd. Corp.***, 301 AD2d 401, 753 NYS2d 83 [2d Dept 2003]). Although Denise Lombardi testified that plaintiff tripped and fell on the curb of the ramp, because it was not "flush" with the rest of the cement handicapped ramp, plaintiff testified that she did not know what caused her to fall. In addition, plaintiff testified that she had been to the subject premises on numerous occasions, that she never noticed any defects on the cement handicapped ramp or in the parking lot prior to her accident, and that she was unaware of any complaints ever being made about the cement handicapped ramp or the parking lot before her incident. "Proximate cause may be established without direct evidence of causation, by inference from the circumstances of the accident; however, mere speculation as to the cause of an accident, when there could have been many possible causes, is fatal to a cause of action" (***Costantino v Webel***, 57 AD3d 472, 472, 869 NYS2d 179 [2d Dept 2008]). "Since it is just as likely that the accident could have been caused by some other factor, such as misstep or loss of balance, any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation" (***Manning v 6638 18th Ave. Realty Corp.***, 28AD3d 434, 435, 814 NYS2d 178 [2d Dept 2006] *quoting* ***Teplitskaya v 3096 Owners Corp.***, 289 AD2d 477, 478, 735 NYS2d 585 [2d Dept 2001]).

Additionally, the affidavit of plaintiff's expert, William Marletta, fails to raise a triable issue of fact as to whether DeRaffele created the alleged defective condition, since his conclusions are based upon mere speculation (*see* ***Bilinksi v Bank of Richmondville***, 12 AD3d 911, 784 NYS2d 708 [3d Dept 2004]). Marletta's assertion that the handicapped ramp deviates from good and accepted industry standards constitutes pure conjecture and surmise, because he failed to demonstrate that the guidelines establish or are reflective of a generally-accepted standard or practice (*see* ***Romano v Stanley***, 90 NY2d 444, 661 NYS2d 589 [1997]; ***Norman v City of New York***, 60 AD3d 830, 875 NYS2d 232 [2d Dept 2009]; ***Levy v Kung Sit Huie***, 54 AD3d 731, 863 NYS2d 498 [2d Dept 2008]). In his affidavit, William Marletta states that he personally conducted an inspection of the accident location, and that after his inspection he concluded that the cement handicapped ramp located at the subject premises deviates from good and accepted safe practice, because "it is poorly constructed, improperly located, provides an abrupt transition, and is contrary to one's expectation." Also, Marletta avers that a significant factor in plaintiff's accident was the absence of any warning or visual cue to alert plaintiff to the difference in height elevation between the parking lot and the cement handicapped ramp's side splay, and that the side splays of the cement handicapped ramp, which are approximately 8.2 degrees, should not have been more than 5.7 degrees. "Ordinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendant" (***Murphy v Conner***, 84 NY2d 969, 972, 622 NYS2d 494 [1994]). Here, however, plaintiff testified that she did not know what caused her to fall, and Marletta's affidavit contains speculative assertions that merely theorize that a dangerous condition was created (*see* ***Azzaro v Super 8 Motel, Inc.***, 62 AD3d 525, 880 NYS2d 14 [1st Dept 2009]; ***Matos v Challenger Equip. Corp.***, 50 AD3d 502, 857 NYS2d 77 [1st Dept 2008]; ***Xhika v Trizechahn Regional Pooling, LLC***, 49 AD3d 719, 854 NYS2d 449 [2d Dept 2008]; ***Goldman v Waldbaum, Inc.***, 297 AD2d 277, 746 NYS2d 44 [2d Dept 2002]). Moreover, Marletta's affidavit fails to address DeRaffele's showing that it does not own, maintain, control, or make special use of the subject premises. Therefore, Marletta's affidavit is insufficient to defeat DeRaffele's motion for summary judgment (*see* ***Diaz v New York Downtown***

Hosp., 99 NY2d 542, 754 NYS2d 195 [2002]; ***Gonzalez v 98 Mag Leasing Corp.***, 95 NY2d 124, 711 NYS2d 131 [2000]; ***Rizzo v Sherwin-Williams Co.***, 49AD3d 847, 854 NYS2d 216 [2d Dept 2008]).

Dawn Estates also failed to raise a triable issue of fact, since it submitted no evidence to substantiate its allegations that Joseph DeRaffele's deposition testimony conflicted with Thomas Ravo's deposition testimony. In addition, it failed to show that DeRaffele owned, maintained, controlled, or made special use of the subject premises, or created the alleged defect.

Accordingly, DeRaffele's motion for summary judgment is granted. Having granted DeRaffele summary judgment dismissing plaintiff's complaint, the cross motions by Dawn Estates and 2101 Diner Corp. are denied, as moot. The action is severed and continued as against the remaining defendants.

Dated: OCT 14 2011

J.S.C.
HON. JEFFREY ARLEN SPINNER

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION