Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

AMELIA ROUTSOS, x

Plaintiff,

-against-

SPRINGFIELD ASSOCIATES, LLC. And BAYSIDE SUPERMARKET CORP.,

AND A THIRD PARTY ACTION x

Index Number 11005 2009

Motion Date August 2, 2011

Motion Cal. Number 16 & 17

Motion Seq. No. 1 & 2

The following papers numbered 1 to 36 read on this motion by Springfield Associates, LLC (Springfield), to dismiss the complaint and all cross claims against Springfield, and for summary judgment in its favor on its cross claims against Bayside Supermarket Corp. (Bayside); motion by plaintiff for leave to serve an amended complaint to add third party defendant Luigi Masonry Work & Home Improvement, Inc. d/b/a Luigi Cotumaccio Masonry Contracting ("Luigi") as a direct defendant in this action; cross motion by Bayside to dismiss the complaint and all cross claims against it or, alternatively, for summary judgment in its favor on its cross claim against Springfield and on the third party complaint against Luigi; cross motion by Luigi for summary judgment in its favor pursuant to CPLR 3212; and cross motion by Luigi to dismiss plaintiff's proposed amended complaint.

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Upon the foregoing papers it is ordered that the motions and cross motions are jointly decided as follows:

Plaintiff in this negligence action seeks damages for personal injuries sustained in a trip and fall accident in the rear parking lot (near the cart corral) of the Key Food Supermarket located at 6150 Springfield Boulevard, in Bayside, New York (premises). Springfield is the out-of-possession landowner of the premises. Pursuant to a lease agreement, Springfield leased the premises to Bayside Supermarket, the tenant in possession of the premises on the date of the subject accident. Bayside operates a "Key Food" supermarket out of the location. On October 16, 2006, Key Food retained Luigi to perform concrete work at the rear parking lot area near the cart corral. Plaintiff alleges that defendants were negligent in allowing "an irregular mound of cement" to exist at the premises.

Defendants move and cross move, respectively, to dismiss the complaint on the ground that, inter alia, the alleged defect was open and obvious and not inherently dangerous. The motions and cross motions are opposed.

Motion by Springfield

Springfield further moves to dismiss on the ground that it was an out-of-possession landlord and did not cause, create or have notice of the alleged dangerous/defective condition at the premises. While an out-of-possession landlord generally will not be responsible for dangerous conditions existing on leased premises, it is settled that a landlord may be liable for failing to repair a dangerous condition, of which it has notice, on leased premises if the landlord assumes a duty to make repairs and reserves the right to enter in order to inspect or to make such repairs (*Chapman v Silber,* 97 NY2d 9 [2001]). Here, while defendant was, in fact, an out-of-possession landlord, the lease agreement gave it the right to enter the premises for the purpose of inspecting and repairing the building. Specifically, under the lease, Springfield was responsible for repairs to the parking lot. Given defendant's rights and obligations under the lease, its motion for summary judgment is properly denied.

Plaintiff contends that while defendant may not have actually known of the defect in the parking lot, it should have -- given its duties and obligations under the lease—discovered this condition long before the accident occurred and repaired it prior to plaintiff's fall (*see also Litwack v Plaza Realty Invs., Inc.,* 11 NY3d 820 [2008]; *Chapman v Silber,* 97 NY2d 9, 20 [2001]). In that regard, constructive notice of such a condition can be found where the " 'condition was visible and apparent and existed for a sufficient period of time prior to the accident to permit [the] defendant[ ] to discover it and take corrective action' " (*Cantwell v*

Rondout Sav. Bank, 55 A.D.3d 1031, 1032 [2008], quoting *Boyko v Limowski,* 223 AD2d 962, 964 [1996]; *see Page v State of New York,* 72 AD3d 1456, 1460 [2010]). On that issue, evidence was submitted indicating that the mound of cement was "visible and apparent" since October 2006, when Luigi placed it in the parking lot. Springfield's witness testified that the company conducted weekly inspections of the property, including the parking lot. Thus, an issue of fact exists as to whether defendant failed to remedy a dangerous condition in the parking lot and thereby to discharge its "duty of providing the public with a reasonably safe premises, including a safe means of ingress and egress" (*Peralta v Henriquez,* 100 NY2d 139, 143 [2003]).

The branch of the motion by Springfield which seeks summary judgment on the ground that the defect was open and obvious and not inherently dangerous, is denied. "The issue of whether a dangerous condition is open and obvious is fact-specific, and usually a question for a jury" (*Shah v Mercy Med. Ctr.,* 71 AD3d 1120 [2010]; *see Mazzarelli v 54 Plus Realty Corp.,* 54 AD3d 1008, 1009 [2008]). Defendant failed to establish, prima facie, that the alleged condition that caused plaintiff to fall was open and obvious under the circumstances and not inherently dangerous (*see Demuth v Best Buy Stores, L.P.,* 85 AD3d 713 [2011; *Bloomfield v Jericho Union Free School Dist.,* 80 AD3d 637 [2011]; *Carson v Baldwin Union Free School Dist.,* 77 AD3d 878, [2010]; *see generally Cupo v Karfunkel,* 1 AD3d 48 [2003]). Whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances. A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted (*see Stoppeli v Yacenda,* 78 AD3d 815 [2010]; *Villano v Strathmore Terrace Homeowners Assn., Inc.,* 76 AD3d 1061 [2010]; *Shah v Mercy Med. Ctr.,* 71 AD3d 1120 [2010]; *Mazzarelli v 54 Plus Realty Corp.,* 54 AD3d 1008 [2008]). Moreover, the fact that this defect might have been open and obvious does not negate the defendant's duty to maintain its premises in a reasonably safe condition, but rather raises an issue of fact concerning the plaintiff's comparative negligence (*see Cupo v Karfunkel,* 1 AD3d 48 [2003]; *Chambers v Maury Povich Show,* 285 AD2d 440 [2001]; *Morgan v Genrich,* 239 AD2d 919 [1997]).

Further, under the circumstances presented here, it cannot be said as a matter of law that the cement mound was not inherently dangerous (see *Villano v Strathmore Terrace Homeowners Assn., Inc.,* 76 AD3d 1061 [2010]; *Aguirre v Paul*, 54 AD3d 302 [2008]; *Ferber v Treeline Garden City Plaza, LLC,* 16 AD3d 453 [2005]; *Tulovic v Chase Manhattan Bank,* 309 AD2d 923 [2003]; *Massucci v Amoco Oil Co.,* 292 AD2d 351 [2002]). Springfield failed to demonstrate that the "irregular mound of cement" on which the plaintiff tripped was a naturally occurring topographic condition or some other condition that a landowner could not reasonably be expected to remedy, and thus failed to show that it was not inherently dangerous (*see Cupo v Karfunkel,* 1 AD3d at 52 [2003]; *Tulovic v Chase*

Manhattan Bank, 309 A.D.2d at 925 [2003]). As testified to by plaintiff, the concrete patch was "wide, big". Luigi, the concrete contractor, testified that the concrete patch was approximately 18" semi-circular and 6" wide at its widest point. However, the affidavit of plaintiff's expert and photographs depicting the same, indicate that the raised mound of cement in the parking lot was an "undulating, non-uniform and irregular shaped 6 to 6 ½ inches in width, 3 ½ feet in length and a varying and multi-layered 2 to 3 inches in height.

Alternatively, Springfield seeks summary judgment on its cross claims for contractual indemnification against Bayside; and to dismiss Bayside's cross claim for common-law indemnification against it. The branch of the motion which seeks summary judgment on its claim for contractual indemnification from Bayside is denied. Issues of fact exist as to whether defendant was negligent and whether the indemnification provision in the lease agreement between defendant and Bayside "evinces an unmistakable intent to indemnify" defendant for its own negligence (*see Great N. Ins. Co. v Interior Constr. Corp.,* 7 NY3d 412, 417 [2006]).

The branch of the motion which seeks to dismiss Bayside's claim for common-law indemnification is denied. Springfield is not entitled to common-law indemnification from Bayside as Bayside was not an active tortfeasor and did not exercise any actual control or supervision of the work (*see Walker v Trustees of Univ. of Pennsylvania,* 275 AD2d 266 [2000]).

Motion by Plaintiff

Based upon the examination before trial testimony of the defendants and third-party defendant, which was taken in March, 2011, plaintiff seeks leave to amend the complaint to add Luigi as a direct defendant. The motion is granted.

Luigi, which had been impleaded as a third-party defendant prior to the expiration of the limitation period applicable to the plaintiff's claim, was fully aware that a claim was being made against it with respect to the plaintiff's accident, and was a participant in the litigation (*see Duffy v Horton Mem. Hosp.,* 66 NY2d 473 [1985]). The proposed amendment is not palpably insufficient or devoid of merit, and there is no prejudice to Luigi in allowing the plaintiff to amend the complaint to add it as a direct defendant (*see* CPLR 3025[b]; *Richards v Passarelli,* 77 AD3d 903 [2010]; *Emilio v Robison Oil Corp.,* 28 AD3d 417 [2006]).

Cross Motion by Bayside

Bayside cross moves to dismiss the complaint on the ground that the defect is "trivial" and, thus, not actionable and, alternatively, to dismiss Springfield's cross claims asserted against Bayside.

A store owner is charged with the duty of maintaining its premises in a reasonably safe condition for its patrons (*see generally Peralta v Henriquez*, 100 NY2d 139 [2003]). To be entitled to summary judgment, Bayside is required to show, prima facie, that it maintained its premises in a reasonably safe condition and that it did not have notice of or create a dangerous condition that posed a foreseeable risk of injury to persons expected to be on the premises (*see Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69 [2004]; *Luksch v Blum-Rohl Fishing Corp.*, 3 AD3d 475 [2004]; *Thornhill v Toys "R" Us NYTEX*, 183 AD2d 1071 [1992]). Here, the defendant does not argue that it did not create the condition of which the plaintiff complains. Indeed, the defendant acknowledges that it hired Luigi to fix an area in the parking lot and to apply cement to the particular area. Rather, the defendant contends that it is entitled to judgment as a matter of law because the mound of cement was open and obvious and "trivial".

Proof that a dangerous condition is open and obvious merely negates the defendant's obligation to warn of the condition, but does not preclude a finding of liability for failure to maintain the property in a safe condition (*see Cupo v Karfunkel*, 1 AD3d at 52; *see also Slatsky v Great Neck Plumbing Supply, Inc.*, 29 AD3d 776 [2006]; *Vinci v Vasaturo*, 8 AD3d 262 [2004]; *Westbrook v WR Activities-Cabrera Mkts*, 5 AD3d at 71). While such proof is relevant to the issue of a plaintiff's comparative negligence (*see Cupo v Karfunkel*, 1 AD3d at 52; *see also Femenella v Pellegrini Vineyards, LLC*, 16 AD3d 546 [2005]; *Vinci v Vasaturo*, supra; *Westbrook v WR Activities-Cabrera Mkts*, 5 AD3d at 72), a hazard that is open and obvious "may be rendered a trap for the unwary where the condition is obscured or the plaintiff's attention is otherwise distracted" (*Mauriello v Port Auth. of N.Y. & N.J.*, 8 AD3d 200, 200 [2004]; *see Michalski v Home Depot, Inc.*, 225 F3d 113, 120 [2000])

Defendant's argument that the crack was trivial as a matter of law is rejected on the basis of the affidavit from plaintiff's expert and photographs depicting a lengthy irregularity in the cement that might have been capable of causing a plaintiff's fall (*see Jacobsen v Krumholz,* 41 AD3d 128 [2007], citing *Argenio v Metropolitan Transp. Auth.,* 277 AD2d 165 [2000]; *see also Nin v Bernard,* 257 AD2d 417 [1999] [defendant's expert's statement that " 'it was impossible for all but the sharpest heel or toe to fall within the depression' hardly constitutes a conclusive refutation of plaintiff's case"]; *cf Fasano v Green–Wood Cemetery,* 21 AD3d 446, 446 [2005] ["defendant failed to make a prima facie showing that the condition upon which the plaintiff tripped and fell, a difference in elevation between the landing of a concrete staircase and the adjoining walkway, which ranged up to two inches, for a length of approximately two feet, was trivial and nonactionable as a matter of law. The

plaintiff's testimony together with photographs of the defective condition as well as all other relevant factors and surrounding circumstances demonstrated that there exist triable issues of fact"]). There is no per se rule with respect to the dimensions of a defect that will give rise to liability on the part of a landowner or other party in control of premises (*Argenio v Metropolitan Transp. Auth.,* 277 AD2d 165 [2000]). "[E]ven a trivial defect can sometimes have the characteristics of a snare or a trap" (*Herrera v City of New York,* 262 AD2d 120 [1999]). Furthermore, on the issue of triviality, the record contains conflicting evidence regarding the size of the irregular mound of cement such that summary dismissal of the complaint on the ground that the defective condition was trivial is not warranted (*see Bovino v J.R. Equities, Inc*., 55 AD3d 399 [2008]). Accordingly, the branch of the motion by Bayside which is to dismiss plaintiff's complaint on the ground that the alleged defect was trivial, is denied.

Bayside established its entitlement to judgment as a matter of law dismissing Springfield's cross claim for common-law indemnification by showing that Springfield's liability, if any, "would be based on its actual wrongdoing in failing to properly maintain its property, and not on its vicarious liability for [Bayside's] conduct" (*Corley v County Squire Apts., Inc.,* 32 AD3d 978 [2006]; *see Guzman v Haven Plaza Hous. Dev. Fund Co.,* 69 NY2d 559, 568-569 [1987]; *Consolidated Rail Corp. v Hunts Point Term. Produce Coop. Assn., Inc.,* 11 AD3d 341, 342 [2004]). In opposition, Springfield failed to raise a triable issue of fact.

The branch of the motion by Bayside for summary judgment on its claim for common-law indemnification from Springfield, is denied. To establish a claim for common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence ... but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident (*Perri v Gilbert Johnson Enterprises, Ltd.,* 14 AD3d 681, 684–85 [2003]; *Correia v Professional Data Mgt.*, 259 AD2d 60 [1999]; *accord Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493 [2004]) or "in the absence of any negligence" that the proposed indemnitor "had the authority to direct, supervise, and control the work giving rise to the injury" (*Hernandez v Two E. End Ave. Apt. Corp.*, 303 AD2d 556, 557 [2003]). Where the proposed indemnitee's liability is purely statutory and vicarious, conditional summary judgment for common-law indemnification against a proposed indemnitor is premature absent proof, as a matter of law, that the proposed indemnitor "was either negligent or exclusively supervised and controlled plaintiff's work site" (*Reilly v DiGiacomo & Son*, 261 AD2d 318 [1999]; *see Hernandez v Two E. End Ave. Apt. Corp., supra* at 558). Here, Bayside fails to demonstrate *prima facie* that it was free of negligence, and does not point to any evidence demonstrating *prima facie* that Springfield was negligent. (*see id.*)

The branch of the motion by Bayside which seeks summary judgment on its third-party complaint against Luigi, is granted (*see Bodenmiller v Thermo Tech Combustion*, 80 AD3d 719 [2011]). Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]; *Schwint v Bank St. Commons, LLC*, 74 AD3d 1312 [2010]). However, a party contracting to render services may become liable in tort to a third party when, as alleged here, it negligently creates or exacerbates a dangerous condition (*see Espinal v Melville Snow Contrs.*, 98 NY2d at 141-142). Here, Bayside established its prima facie entitlement to judgment as a matter of law by submitting evidence that in its performance of its contractual obligations Luigi created or exacerbated a dangerous condition in the parking lot (*id.*; *see Foster v Herbert Slepoy Corp.*, 76 AD3d 210 [2010]; *Grob v Kings Realty Assoc.*, 4 AD3d 394 [2004]).

Cross Motion by Luigi

For reasons noted above, the branch of the cross motion by Luigi which is to dismiss the complaint and which is for summary judgment in its favor are denied.

Date: October 4, 2011

AUGUSTUS C. AGATE, J.S.C.