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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

TRIAL/IAS PART 2
NASSAU COUNTY

LORRAINE ECKERT,

Plaintiff,

ORIGINAL RETURN DATE: 02/10/12
SUBMISSION DATE: 03/15/2012
Index No. 010647/2010

-against-

CHABAD OF ROSLYN, CHABAD OF ROSLYN, INC., and CHABAD OF OLD WESTBURY, INC.,

MOTION SEQUENCE # 1

Defendants.

The following papers read on this motion:

Notice of Motion	1
Affirmation in opposition	2
Reply Affirmation	3

Defendants move for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint its entirety as to all of the defendants; or an order pursuant to CPLR 3126 and 3116(a) striking the corrections made by plaintiff to her deposition transcript and precluding the use of said corrections for any purpose; and an order, pursuant to CPLR 3212, granting summary judgment dismissing the action as to defendant, Chabad of Old Westbury, Inc.

The underlying action was commenced by plaintiff to recover damages for personal injuries she allegedly sustained on September 20, 2008, when she purportedly fell on gravel while attending a Bar Mitzvah at Chabad of Roslyn, located at 75 Power House Road in Roslyn Heights, New York (the "subject premises"). On said date, the subject premises, which are allegedly owned and operated by defendants, were under construction necessitating the presence of several trailers on site. As recited in the deposition testimony, plaintiff stated that upon her arrival at the subject premises, she began traversing a driveway

comprised of blacktop and proceeded toward a series of three trailers, two of which were serving as restroom facilities and the third of which was being utilized as a temporary Temple (Ex. E, pp. 14, 15, 16, 17, 21, 22).

Plaintiff testified that the blacktop upon which she was walking "ended * * * went down a little" and thereafter became "little stones," which plaintiff described as "gravel" (Id. pp.14, 22). Mrs. Eckert stated that she "went from the blacktop, * * * put [her] foot on to the gravel, and * * * went over" (Id. p.22).When asked as to what precisely caused her to fall, the plaintiff originally stated that she did not know but subsequently corrected her answer to state that she fell due to "stepping onto gravel" (Id. pp. 23, 93, 136). Plaintiff alleges that as a result of her fall, she has sustained physical injuries to her right foot (Id. pp. 29, 44, 47, 66, 70, 91).

The underlying action was ultimately commenced by plaintiff on June 2, 2010. Plaintiff alleges that defendants were negligent in the ownership, operation, control, maintenance, management and supervision of the subject premises. The within application made by the moving defendants thereafter ensued and is determined as set forth hereinafter.

In support of defendants' motion, counsel initially asserts that the corrections made by plaintiff vis a vis her original deposition testimony should be disregarded inasmuch as the corrected entries do not contain a reason therefor as is required by CPLR 3116(a). Counsel further contends that the changes are an improper attempt by plaintiff to establish a new verison of the facts and to ameliorate deficiencies in her original testimony in which she was unable to identify the cause of her fall.

Counsel additionally posits that defendants did not create any defective condition on the subject premises and did not possess either actual or constructive notice thereof. Counsel provides the affirmation of Rabbi Aaron Konikov, the Executive Director and Rabbi of the Chabad of Roslyn, Inc., who avers that as part of his responsibilities he "routinely inspect[s] and take[s] note of any hazardous, dangerous or defective conditions which may affect persons coming" to the subject premises. Rabbi Konikov further states that "[b]ack in September 2008, it was [his] custom and practice before prayer services and events at the Chabad of Roslyn to inspect the exterior of the premises, including the parking lot, for hazardous, dangerous or defective conditions" (¶2). He further avers that he "performed such an inspection less that twenty-four (24) hours before the Bar

Mitzvah ceremony which was held at the Chabad of Roslyn on September 20, 2008, and observed no hazardous, dangerous or defective conditions in the parking lot or in the area surrounding the trailers on the premises" (¶3).

In addition to the foregoing, counsel for defendants asserts that a blacktop driveway changing to a gravel surface is not a dangerous condition and that such a transition was readily observable to pedestrians . In support of said assertion, counsel makes particular reference to the deposition testimony of Sheldon Saftchick, a non-party who accompanied plaintiff to the Bar Mitzvah, who testified that just prior to the accident he walked on the same area upon which plaintiff fell without incident.

Finally, and with particular respect to defendant, Chabad of Old Westbury, counsel argues that in the event the action is not dismissed in its entirety, it should nonetheless be dismissed against Chabad of Old Westbury inasmuch as said defendant has no affiliation with Chabad of Roslyn, Inc.

In opposing the instant application, counsel for plaintiff initially contends that as defendants impermissibly rely upon their attorney's affirmation as the source of the relevant facts herein and have neglected to provide an expert affidavit attesting to the absence of any defective condition, they have failed to demonstrate entitlement to judgment as a matter of law. Counsel additionally posits that the plaintiff adequately described how she fell and any contradictions with respect thereto existing in her deposition testimony are to be resolved by the trier of fact.

In addition to the foregoing, counsel contends that there are issues of fact as to whether defendants either created or had constructive notice as to the alleged transition from blacktop to gravel. Finally, counsel asserts that the corrections made as to the plaintiff's original deposition testimony should not be stricken inasmuch as they were an honest effort by plaintiff to clarify her prior testimony to more clearly reflect what it was that caused her to fall.

The Court initially addresses that branch of defendants' application which seeks an order striking plaintiff's corrections made in connection to her deposition testimony. CPLR 3116(a) provides the following, in pertinent part: "[t]he deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to

make shall be entered at the end of deposition with a statement of the reasons given by the witness for making them."

The Court has reviewed the corrections duly submitted by plaintiff and finds that contrary to defense counsel's assertions, plaintiff indeed provided reasons for the changes recorded on the Errata sheet. Moreover, while defense counsel has characterized the corrections executed by plaintiff as "wholesale changes" made to salvage prior damaging testimony, this Court disagrees with said characterization. Rather, when reading the corrections in tandem with the plaintiff's deposition, this Court finds that same merely serve to edify the testimony previously adduced with respect to what caused the plaintiff to fall. Accordingly, this branch of the application is hereby denied.

The Court now turns to those branches of the within application seeking summary judgment in accordance with CPLR 3212. It is well settled that a motion for summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue of fact (*Sillman v Twentieth Century Fox,* 3 NY2d 395 [1957]; *Bhatti v Roche,* 140 AD2d 660 [2d Dept 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering admissible proof sufficient to warrant the Court to direct judgment in the movant's favor as a matter of law (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.,* 46 NY2d 1065 [1979]). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation (CPLR 3212 (b); *Olan v Farrell Lines*, 64 NY2d 1092 [1985]).

If a sufficient prima facie showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact (*Zuckerman v City of New York,* 49 NY3d 557 [1980]. When considering a motion for summary judgment, the function of the court is not to resolve factual issues but rather to determine if any such material issues of fact exist (*Barr v County of Albany,* 50 NY2d 247[1980]).

As to that branch of the application specifically seeking summary judgment as to defendant, Chabad of Old Westbury, Inc., the Court finds that said defendant has demonstrated entitlement to judgment as a matter of law *(Winegrad v New York University Medical Center,* 64 NY2d 851 [1985]). In the instant matter, Rabbi Konikov clearly testified that "Chabad of Old Westbury has no affiliation with

Chabad of Roslyn". In opposition, counsel for plaintiff neither rebuts nor even addresses this sworn testimony (*Zuckerman v City of New York*, 49 NY3d 557 [1980]. Therefore, this branch of the application is hereby granted and the complaint is dismissed against Chabad of Old Wesbury, Inc.

Finally, the Court addresses that branch of the instant application seeking dismissal of the complaint as is asserted against the now remaining defendants, Chabad of Roslyn and Chabad of Roslyn, Inc. "A landowner has a duty to maintain its premises in a reasonably safe condition and to warn of a dangerous condition that is not readily observable with the reasonable use of one's senses" (*DiVietro v Gould Palisades Corp.*, 4 AD 3d 324 [2d Dept 2004][internal citations omitted]). "Where a dangerous condition exists on property, the fact that the condition was open and obvious, while relieving the landowner of the duty to warn, will not relieve the landowner of its burden of demonstrating that 'he or she exercised reasonable care under the circumstances to remedy the condition and to make the property safe, based on such factors as the likelihood of injury to those entering the property and the burden of avoiding the risk'" (Id. quoting *Cupo v Karfunkel,* 1 AD3d 48, 52 [2d Dept 2003]). Within the particular context of a trip and fall action, "[a] defendant moving for summary judgment * * * 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" (*Holub v Pathmark Stores, Inc.*, 66 AD3d 741 [2d Dept 2009] quoting *Curtis v Dayton Beach Park No. 1 Corp.*, 23 AD3d 511, 512 [2d Dept 2005]).

Having reviewed the record, the Court finds that the moving defendants have demonstrated entitlement to judgment as a matter of law. Contrary to the assertions of plaintiff's counsel, the recitation of facts set forth in defense counsel's affirmation were predicated upon proof annexed thereto (*Olan v Farrell Lines,* 64 NY2d 1092 [1985]. Moreover, and with particular respect to notice, Rabbi Konikov averred that in the 24 hour period prior to plaintiff's accident he inspected the area surrounding the trailers, as well as the parking area and "observed no hazardous, dangerous or defective conditions"(*Holub v Pathmark Stores, Inc.*, 66 AD3d 741 [2d Dept 2009], *Curtis v Dayton Beach Park No. 1 Corp.*, 23 AD3d 511 [2 Dept 2005], *Molly v Waldbaum, Inc.*, 72 AD3d 659 [2d Dept 2010]).

However, notwithstanding defendants' prima facie showing, the Court finds that upon careful review of the record, there remain unresolved issues of fact precluding summary judgment (*Zuckerman v City of New York,* 49 NY3d 557 [1980]. In the instant matter, while Rabbi Konikov adamantly testified that there was no construction being done on the day of plaintiff's accident, both plaintiff and Mr. Saftchick clearly testified that on the day in issue, the structure which normally served as the Temple was semi-demolished and was undergoing extensive construction. Thus, the Court finds on this record that there exist, factual issues as to whether defendants created the purportedly hazardous condition with respect to the blacktop driveway changing to gravel and whether said condition caused plaintiff to fall.

Based upon the foregoing, those branches of the application respectively seeking orders dismissing the complaint against all of the moving defendants and striking plaintiff's corrections made to her deposition testimony are hereby denied and that branch of the application seeking dismissal of plaintiff's complaint as asserted against defendant, Chabad of Old Westbury, Inc., is hereby granted.

Accordingly, the caption of the action is hereby amended to read as follows:

LORRAINE ECKERT,

Plaintiff,

-against-

CHABAD OF ROSLYN and CHABAD OF ROSLYN, INC.,

Defendants.

All applications not specifically addressed are denied.

This decision constitutes the order of the court under Index No. 010647/2010 (Motion Sequence # 1).

Dated: April 24, 2012

HON. THOMAS P. PHELAN

THOMAS P. PHELAN, J.S.C.

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