

<b>Dionne v Nowick Family, LLC</b>
2014 NY Slip Op 30555(U)
February 24, 2014
Supreme Court, Suffolk County
Docket Number: 10-9489
Judge: Denise F. Molia
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INDEX No. 10-9489  
CAL No. 13-00329OT

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 39 - SUFFOLK COUNTY

**PRESENT:**

Hon. DENISE F. MOLIA  
Acting Justice of the Supreme Court

MOTION DATE 6-25-13 (#003)  
MOTION DATE 7-16-13 (#004)  
ADJ. DATE 9-13-13  
Mot. Seq. # 003 - MG  
# 004 - MG; CASEDISP

-----X

PATRICIA DIONNE,  
  
Plaintiff,

- against -

THE NOWICK FAMILY, LLC, CAPITAL ONE  
FINANCIAL CORPORATION, T/A CAPITAL  
ONE BANK, BASER-KAUFMAN KINGS  
PARK, LLC and BASER-KAUFMAN  
MANAGEMENT CORP.,  
  
Defendants.

-----X

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Upon the following papers numbered 1 to 17 read on these motions for summary judgment ; Notices of Motion/ Order to Show Cause and supporting papers 1 - 4, 5 - 9 ; Notice of Cross Motion and supporting papers      ; Answering Affidavits and supporting papers 10 - 16 ; Replying Affidavits and supporting papers      ; Other Letter with Executed EBT 17 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that motion (#003) by defendant Capital One Financial Corporation, T/A Capital One Bank for summary judgment is granted and the complaint is hereby severed and dismissed against this defendant; and it is further

**ORDERED** that the motion (#004) by defendants the Nowick Family, LLC, Basser-Kaufman Kings Park, LLC and Basser-Kaufman Management Corp. for summary judgment is granted and the complaint and all cross claims asserted against these defendants are hereby severed and dismissed.

*EST*

Plaintiff commenced two separate negligence actions, one against defendants The Nowick Family, LLC (“Nowick”) and Capital One Financial Corporation, t/a Capital One Bank (“Capital One”), and the other against defendants Basser-Kaufman Kings Park, LLC (“BKKP”) and Basser-Kaufman Management Corp. (“BK Management”). In the two separate actions, plaintiff sought to recover damages for personal injuries she sustained on the morning of November 1, 2009, when she slipped and fell from the sidewalk onto the parking lot in front of the Capital One bank branch in the shopping center at 742 East Main Street in Kings Park, New York (the “shopping center”).

In both complaints, as amplified by her bill of particulars, plaintiff maintains that the defendants were negligent in failing to provide her with a safe place to walk and allowing a defective and dangerous condition to exist. She alleges that the walkway and handicapped persons ramp leading to the parking lot contained an unexpected drop and improper delineation which caused her to fall to the ground and become injured. Plaintiff also alleges that the unexpected drop created a hazard and a snare which the defendants knew or upon reasonable inspection thereof, should have discovered as such condition existed for a long and unreasonable length of time. Additionally, plaintiff alleges that “the existence of a non-delineated asphalt ramp leading from a cement walkway to an asphalt parking lot constituted a dangerous and defective condition” and that “the aforementioned dangerous and defective condition caused a certain ‘drop off’ from the cement walkway area to the asphalt parking lot.” Plaintiff also alleges that the “defendants violated the Building Code of the State of New York Chapter 11 and BC-1105 and those provisions of the Americans With Disabilities Act and Fair Housing Act incorporated therein.” Plaintiff further states in her bill of particulars that she “makes no claim of a ‘substance’ contributing to this occurrence.”

In its answer, Capital One denies liability and interposes several affirmative defenses including that the accident occurred as a result of the plaintiff’s culpable conduct and her comparative negligence. Capital One also asserts cross claims against Nowick for common law indemnification, contribution, and contractual indemnification based on a lease provision requiring it be named as an additional insured on the liability policy of insurance.

In its answer Nowick denies liability and interposes numerous affirmative defenses, including in general that the plaintiff’s accident was the result of her own culpable conduct or comparative negligence and specifically that it did not own, operate, control or maintain the location of the plaintiff’s accident (fourth affirmative defense), and that the alleged condition claimed to have caused plaintiff’s accident was open and obvious and not created by this defendant (eleventh affirmative defenses) and so slight and trivial in nature as not to be actionable as a matter of law (thirteenth affirmative defense). In their answer, BKKP and BK Management deny liability and interpose the same affirmative defenses. Nowick has also answered Capital One’s cross claims, denying each and every allegation.

After issue was joined, the two actions were consolidated for all purposes, discovery completed and the note of issue filed. Capital One now moves for summary judgment dismissing the complaint (motion seq. #003) on the grounds that pursuant to the master lease, it did not owe a duty to plaintiff and did not create or have actual notice of the alleged dangerous condition of the sidewalk. Alternatively, Capital One seeks summary judgment on its cross claims for contractual and common law indemnification against defendant BKKP. Nowick, BKKP and BK Management, together, move for summary judgment dismissing the complaint (motion seq. #004) on the grounds that there is no evidence of a dangerous or defective condition; that Nowick is an out-of-possession owner that did not have a contractual obligation to maintain the shopping center, and

did not endeavor to do so; and that no statutes or regulations were violated. As to BK Management, it is argued that summary dismissal of the complaint is warranted as it does not have any nexus to the shopping center.

During her deposition, plaintiff testified that she went to the shopping center to use the ATM at the Capital One bank branch. At the time, Capital One bank was the only business in the shopping center. She parked her car in a non-handicapped spot, stepped up on the sidewalk from the parking lot, and walked to the building without incident and entered the bank. She described the ground as very wet as it had been raining, and covered with leaves. She also testified that her accident occurred on a Sunday and the parking lot was empty. Plaintiff testified that she had gone to that Capital One bank branch for over six years, two to three times per week, and that the physical layout of the bank and the parking lot had remained the same throughout those years. According to plaintiff, the ATM was not working so she left the bank, walking back to her car in a different direction than she used to walk to the bank. When she got to the curb next to the handicapped persons ramp, she stepped down from the sidewalk and fell onto the asphalt parking lot. Plaintiff explained that the area was covered with leaves so she did not realize there was a “drop off” of about five inches. She testified that as she put her right foot down, there was nothing under her foot, which caused her to lose her balance and fall.

Also deposed were Paul N. Reese (“Reese”), the director of property management for the numerous Basser-Kaufman entities and affiliates; Curtis F. Dia (“Dia”), who reports to Reese and is the property manager for the shopping center; and Scott Hannon (“Hannon”), assistant vice president facility manager for Capital One bank branches throughout Nassau and Suffolk Counties. These three deponents agreed that on the day of the plaintiff’s accident, BKKP was responsible for the subject sidewalk and parking lot pursuant to the terms of the master lease.

The master lease is annexed to both motions. Based on the terms thereof, Nowick owned the strip mall, and by lease dated April 12, 1970, leased the shopping center to HGSU Realty Corp. as master tenant. On April 6, 1971, HGSU Realty Corp. assigned its interest as master tenant to Barmat Corp., who in turned on October 31, 2008, assigned its interest to Walbaums, Inc. Thereafter, on February 27, 2009, Walbaums, Inc. assigned its interest as master tenant to defendant Basser-Kaufman Kings Park, LLC (“BKKP”). Thus, at the time of the subject accident, Nowick’s interest in the shopping center was as the fee owner, and BKKP’s interest therein was as the master lease holder/tenant.

A landlord has a duty to maintain the premises in a reasonably safe condition (*Kellman v 25 Tiemann Assoc.*, 87 NY2d 871, 638 NYS2d 937 [1995]; *Alnashmi v Certified Analytical Group, Inc.*, 89 AD3d 10, 929 NYS2d 620 [2d Dept 2011]). However, generally an out-of-possession landlord who has relinquished control over the premises, will not be liable for personal injuries caused by a dangerous condition on the leased premises unless the landlord had a duty imposed by statute, by contract, or by a course of conduct (*see Vialva v 40 West 25th St. Assocs. LP*, 96 AD3d 735; 945 NYS2d 723 [2d Dept 2012]; *Alnashmi v Certified Analytical Group, Inc., supra*).

Here, Nowick has established its entitlement to summary dismissal of the complaint. Under the terms of the master lease, Nowick is an out-of-possession owner that relinquished control of the shopping center, and did not retain any obligation to maintain the premises, particularly did not retain an obligation to rectify a transient condition of the type that allegedly caused plaintiff’s fall (*see Sorrentini v Netta Realty Group*, 100 AD3d 484, 954 NYS2d 43 [1st Dept 2012]). The master lease specifically provides for the tenant, at its own cost and expense, to “keep, replace and maintain in thorough repair and in good, safe and substantial order and

condition, and free from dirt, snow, ice, rubbish and other obstructions or encumbrances, the sidewalks, parking areas, and curbs on the demised premises.” Thus, based on the explicit terms of the master lease, BKKP as tenant, and not Nowick, was responsible for maintaining the area where the plaintiff’s accident occurred. Indeed, BKKP concedes that on the date of the subject accident it was responsible for the maintaining the subject area. Moreover, based on the deposition testimony, Nowick did not endeavor to perform any maintenance to the shopping center (*see Vialva v 40 West 25th Street Assocs., LP, supra*). Therefore, Nowick cannot be held liable for the plaintiff’s accident.

However, BKKP as the master lessee, is not an insurer of the safety of those coming on the premises, but has a duty to keep the “property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk” (*Basso v Miller*, 40 NY2d 233, 241, 386 NYS2d 564 [1976]; *Jang Hee Lee v Sung Whun Oh*, 3 AD3d 473, 473-474, 771 NYS2d 134 [2d Dept 2004]; *Cupo v Karfunkel*, 1 AD3d 48, 51, 767 NYS2d 40 [2d Dept 2003]). In order for a lessee to be held liable for injuries sustained as a result of an allegedly dangerous condition on its property, the plaintiff must establish that such a condition existed, and that the owner either affirmatively created the condition or had actual or constructive notice of it (*see Basso v Miller, supra; Pena v Women’s Outreach Network, Inc.*, 35 AD3d 104, 824 NYS2d 3 [2006]). Thus, it is axiomatic that before negligence can be found it must be established that the accident causing instrumentality constitutes a dangerous condition (*see Almonte v City of New York* 35 AD3d 772, 826 NYS2d 741 [2d Dept 2006]; *Crawford v Pick Quick Foods, Inc.*, 300 AD2d 431, 750 NYS2d 884 [2d Dept 2002]). Furthermore, there is no “duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous” (*Jang Hell Lee v sung Whun Oh, supra*).

In the case at bar, the condition which allegedly caused plaintiff’s accident does not constitute a dangerous condition. It has long been established that autumn leaves in and of themselves are not dangerous (*Misir v Beach Haven Apartment No. I, Inc.*, 8 Misc3d 1017[A], 803 NYS2d 19 [Sup Ct Kings County 2005], *affd* 32 AD3d 1002, 820 NYS2d 892 [2006], citing *Osborne v Village of North Tarrytown*, 180 AD 224 [2d Dept 1917]; *see also Seelig v Burger King Corp.*, 66 A.D3d 986, 888 NYS2d 123 [2d Dept 2009] [mulched area not inherently dangerous]). Moreover, the fact that the leaves may have been piled against the sidewalk, a pile which plaintiff voluntarily stepped in, does not somehow make them more dangerous (*see Misir v Beach Haven Apartment No. I, Inc., supra*). Furthermore, the condition was open and obvious as plaintiff testified that she saw the leaves before her accident occurred.

The “drop off” which plaintiff alleges constitutes a dangerous condition, is the differential between the sidewalk and the ground of the parking lot, which she testified was approximately five inches. Plaintiff has not provided any evidence that the distance between the sidewalk and the ground was dangerous or in violation of any code. The New York State Building Code provision cited by plaintiff governs handicapped accessible entrances, not the measurement for a sidewalk. As plaintiff does not allege that the failure to provide such an entrance caused her accident, this Code provision is not applicable. In any event, based on the photographs submitted, which plaintiff testified accurately depicted the site at the time of her accident, a handicapped accessible ramp was installed.

Thus, as there is no evidence of defective condition BKKP and BK Management, as well as Capital One are entitled to summary judgment. BK Management is also entitled to summary judgment on another ground. Premises liability for an injury caused by a dangerous condition is predicated upon ownership, occupancy,

control, or special use (see *Ellers v Horwitz Family Ltd. Partnership*, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]; *Casale v Brookdale Med. Assocs.*, 43 AD3d 418, 841 NYS2d 126 [2d Dept 2007]). Where none is present, a party cannot be held liable for injuries caused by any allegedly dangerous condition on the property (see *Breland v Bayridge Air Rights, Inc.*, 65 AD3d 559, 884 NYS2d 143 [2d Dept 2009]; *Ruffino v New York City Tr. Auth.*, 55 AD3d 819, 865 NYS2d 674 [2d Dept 2008]; *Noia v Maselli*, 45 AD3d 746, 846 NYS2d 326 [2d Dept 2007]). Based on the uncontroverted affidavit of Marc Kemp, a principal of BKKP and BK Management, the latter did not lease, occupy, operate, manage maintain or repair the shopping center. Kemp asserts that BK Management had the limited function of obtaining insurance coverage for other Basserk-Kaufman entities. Thus, BK Management cannot be held liable for the plaintiff's injuries.

In opposition, affording plaintiff the benefit of every favorable inference as required on a motion for summary judgment, she has failed to tender proof to establish the existence of a triable issue of fact. Plaintiff relies upon the affidavit of an expert engineer who inspected the site on December 27, 2011, two years after the accident and after the shopping center had been renovated by the subsequent tenant. The expert states that when he visited the accident site, he observed that the concrete walkway and blacktop ramp had been removed, altered and re-paved. Thus, based on these facts alone, the expert's opinion is of questionable probative value (see *Amini v Arena Const. Co., Inc.*, 110 AD3d 414, 972 NYS2d 236 [1st Dept 2013]). However, the expert states that he used the photographs identified by plaintiff at her deposition to establish that the subject handicapped persons ramp was a curb ramp. The curb ramp, the expert states, was not installed/constructed with flared sides or a handrail at the open elevated sides of the ramp as required by the American National Standard for Buildings and Facilities-Providing Accessibility and Usability for Physically Handicapped People.<sup>1</sup> "The State Uniform Fire Prevention and Building Code provides that construction to accommodate handicapped individuals is required to conform to ANSI standard No. A1171.1 (see, 9 NYCRR 1250.3)" (*Bridger v New York State Office of Vocational and Educational Services for Individuals with Disabilities*, 218 AD2d 850, 851, 630 NYS2d 403 [3d Dept 1995]).

Assuming without deciding that sections 4.7 and 4.8 of ANSI standard No. A1171.1, cited by plaintiff's expert were violated, the expert did not connect such alleged violations to the plaintiff's fall (see *Gomez v David Minkin Residence Hous. Dev. Fund Co., Inc.*, 85 AD3d 1112, 927 NYS2d 117 [2d Dept 2011]; see also *Fallon v Duffy*, 95 AD3d 1416, 943 NYS2d 289 [3d Dept 2012]). Indeed, based on the plaintiff's testimony, she was injured because there was an accumulation of leaves against the sidewalk which she stepped in, lost her balance and fell. Thus, the expert's speculation that the presence of a handrail and the proper slope and flare of the ramp would have prevented plaintiff's accident is insufficient to overcome the defendants' prima facie showing. Moreover, a determination that an alleged defect, rather than a misstep or loss of balance was the proximate cause of the plaintiff's accident would be based on sheer speculation (see *Rodriguez v Cafaro*, 17 AD3d 658, 794 NYS2d 113 [2005]).

Inasmuch as plaintiff has failed to show the existence of a defective or dangerous condition, which is fatal to her case (see *Hartman v Mountain Valley Brew Pub, Inc.*, 301 AD2d 570, 754 NYS2d 31 [2003]), the issue of notice is academic (*Pena v Women's Outreach Network, Inc.*, *supra*). Although unfortunate, the mere fact that the plaintiff fell and undisputedly sustained injuries, does not establish negligence on the part

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<sup>1</sup>Commonly cited as "ANSI A117.1" (see *U.S. v Tanski*, No. 1:04-CV-714, 2007 WL 1017020, [NDNY March 30, 2007]).

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of the defendants (*see Drivas v Breger*, 273 AD2d 151, 709 NYS2d 187 [1st Dept 2000]; *Wells v Finnegan*, 177 AD2d 893, 576 NYS2d 653 [3d Dept 1991]).

Accordingly, the defendants are entitled to summary judgment and the complaint is hereby dismissed.

Dated: 2-24-14

**Hon. Denise F. Molia**

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A.J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION