

**Ferreira v Ayelet Mgt., LLC**

2014 NY Slip Op 31954(U)

June 4, 2014

Sup Ct, Bronx County

Docket Number: 301698/10

Judge: Mary Ann Brigantti-Hughes

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti-Hughes

X

JUANA FERREIRA,

Plaintiff,

-against-

**DECISION/ORDER**

Index No.: 301698/10

AYELET MANAGEMENT, LLC., and NEW CLEAN  
CITY INC. d/b/a CLEAN CITY,

Defendants.

X

AYELET MANAGEMENT, LLC.,

Third-Party Plaintiff,

Index No.: 83926/11

-against-

NEW CLEAN CITY INC. d/b/a CLEAN CITY,

Third-Party Defendant.

X

The following papers numbered 1 to 16 read on the below motions noticed on January 6 and January 10, 2014 and duly submitted on the Part IA15 Motion calendar of **March 10, 2014**:

<u>Papers Submitted</u>	<u>Numbered</u>
Ayelet's Affirmation in support of motion, exhibits	1,2
New Clean's Affirmation in support of motion, exhibits	3,4
Pl.'s Aff. In Opposition, exhibits	5,6
Pl.'s Amended Aff. In Opposition, Exhibits	7,8
Ayelet's Aff. In Partial Opp., Exhibits	9,10
Ayelet's Aff. In Reply	11
New Clean's Aff. In Partial Opp., Exhibits	12,13
New Clean's Aff. In Reply, Exhibits	14,15
New Clean's Aff. In Reply	16

Upon the foregoing papers, defendant/third party plaintiff Ayelett Management, LLC ("Ayelett") moves for summary judgment, dismissing the complaint of the plaintiff Juana Ferreira ("Plaintiff"), as well as any cross-claims, pursuant to CPLR 3212. Ayelett also moves for summary judgment on the issue of liability on its third-party claims for contractual

indemnification against New Clean City, Inc., d/b/a Clean City ("New Clean"). The motion is opposed by Plaintiff and partially opposed by New Clean.

Separately, New Clean moves for summary judgment, dismissing Plaintiff's complaint and any cross-claims, as well as the third-party complaint of Ayelett. The motion is opposed by Plaintiff and Ayelett. The above motions are consolidated and disposed of in the following Decision and Order.

I. Background

This matter arises out of an alleged trip and fall accident on a curb outside of a commercial property occupied by tenant New Clean and owned by Ayelet. The commercial property is a laundromat located at 2200 Grand Concourse, Bronx, New York. The accident allegedly occurred on December 13, 2009 at approximately 7:00 PM. In the interest of judicial economy, this Court will first address defendants' motion for summary judgment, dismissing Plaintiff's complaint.

Plaintiff testified that this accident occurred as she was exiting the laundromat, while pushing a laundry cart in front of her. Plaintiff had no problems entering the establishment, although she testified that she did not notice concrete curbs on either side of the entrance door. Later, Plaintiff exited the premises by pushing the door outwards. There was no ice or snow on the ground. After walking through the doorway, Plaintiff testified that she tripped on a concrete curb located on her left. Photographs depict the accident location as raised concrete curbs located on both sides of the exit door. Plaintiff testified that there were no orange cones on the concrete structure at the time. She allegedly tripped when her foot struck the corner of the curb. Plaintiff testified that she was holding her head up and not looking down at the time of her fall. Plaintiff testified that there were no problems with the lights and there was nothing hindering her view when she left the laundromat. She was not trying to step up onto the curb when she tripped. Plaintiff did not allege that the curb itself was defective.

The defendants submit photographs of the alleged accident location annexed to an expert affirmation. The expert concludes that this egress area was properly designed and did not violate any New York City Building Codes. The expert, who examined the location, states that the concrete area located along the premise was not a walkway, but was constructed to protect the

building front. He opined that there was nothing obstructing egress from the building, and that Plaintiff would have avoided her accident had she exited the door properly and walked straight ahead. An individual from Ayelet testified that he had never encountered any problems with the curb nor did any prior tenants make any complaints regarding the curb.

In support of its separate motion, New Clean offered testimony that employees would place bright orange cones on top of the concrete curbs "twenty four hours a day" to warn customers of the storefront's glass. Plaintiff herself testified that the lighting conditions were "normal" and the area was "well-lit." Plaintiff had to walk to her left because vans were parked in designated spots outside. At her second deposition, Plaintiff testified that her right foot tripped over the concrete area. She was unaware if a portion of the laundry cart she was pushing ever came into contact with the concrete curb. Plaintiff marked the corner of the curb where she allegedly tripped.

Both defendants now move for, among other things, summary judgment dismissing the Plaintiff's complaint.

Plaintiff opposes both motions. Plaintiff alleges that there are issues of fact as to whether the concrete curb was open and obvious, since she testified that she did not notice the curb as she was leaving. She did not realize that the curb area was "higher" than street level. The defendants, therefore, had a duty to warn about the height differential so as to prevent unsuspecting customers from tripping when entering or leaving the business. Plaintiff also alleges that there are fact issues as to whether orange cones were placed on top of the concrete curbs prior to this accident. Even if they were so placed, Plaintiff argues that the cones are evidence that defendants had notice of prior incidents involving the concrete structure in front of the premises. Plaintiff asserts that "the photographic record... depicts the unlevel nature of the subject concrete abutting the sole means of ingress/egress..." Plaintiff concludes that the defendants have failed to meet their initial burdens of demonstrating the open and obvious nature of the condition, or that it was not inherently dangerous. Plaintiff also submits an expert report from professional engineer Stanley Fein. The expert inspected the accident area and opines that the subject entranceway was dangerous and hazardous since it was an "unexpected trap" and violated "good and accepted engineering practices."

In reply, the defendants argue, *inter alia*, that the court should not consider Plaintiff's

expert disclosure since the report was not served prior to filing the Note of Issue. Nevertheless, both defendants argue that the expert affidavit was overly conclusory and insufficient to raise a genuine issue of fact.

## II. Standard of Review

To be entitled to the “drastic” remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case.” (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46<sup>th</sup> Street Development LLC.*, 101 A.D.3d 490 [1<sup>st</sup> Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire’s Hospital*, 82 N.Y.2d 738,[1993]).

## III. Applicable Law and Analysis

Both defendants contend that they are entitled to dismissal of this action because the allegedly hazardous condition was open and obvious, and not inherently dangerous. To be considered “open and obvious,” a hazard must be of a nature that could not reasonably be overlooked by anyone in the area whose eyes were open, making a posted warning of the presence of the hazard superfluous (*Westbrook v. WR Activities-Cabrera Mkts.*, 5 A.D.3d 69 [1<sup>st</sup> Dept. 2004]). 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. and N.J.*, 8 A.D.3d 200 [1<sup>st</sup> Dept. 2004]). Whether a condition is open and obvious is generally a jury question, and a court should only determine that a risk was open and obvious as a matter of law when the facts compel such a conclusion, where the basis is clear and undisputed evidence (*Westbrook, supra*, citing *Tagle v. Jakob*, 97 N.Y.2d 165, 169 [2001]). Even so, that would only determine the issue of breach of duty to warn, and not dispose of a landowner's duty to maintain the premises in a safe condition (*Cohen v. Shopwell, Inc.*, 309 A.D.2d 560 [1<sup>st</sup> Dept. 2003])[holding that liability may be premises on a breach of duty to maintain a reasonably safe condition even where the obviousness of the risk negates any duty to warn]). Still, a court is not precluded from granting summary judgment, where the condition complained of is, as a matter of law, not inherently dangerous (*Boyd v. New York City Housing Auth.*, 105 A.D.3d 542 [1<sup>st</sup> Dept. 2013]). "In such circumstances, the condition which caused the accident cannot fairly be attributed to any negligent maintenance of the property" (*Id.*, citing *Cupo v. Karfunkel*, 1 A.D.3d 48, 52 [2d Dept. 2003] ).

In this matter, the defendants have demonstrated prima facie their entitlement to judgment as a matter of law, dismissing Plaintiff's complaint. The photographs show that the concrete curb, located on either side of the laundromat's entrance, was open and obvious, not inherently dangerous, and readily observable by one's reasonable use of his or her senses (*Philips v. Paco Lafayette LLC.*, 106 A.D.3d 631 [1<sup>st</sup> Dept. 2013]). Defendants submitted evidence that they received no previous complaints with respect to the concrete curbs. Whether or not orange cones were placed at the time of the accident does not alter the open and obvious nature of the condition. Plaintiff herself testified that, although she did not notice the curbs prior to her fall, there was nothing obstructing her view and the area was well-lit.

In opposition, Plaintiff fails to raise an issue of fact. As in *Philips*, the evidence establishes that this accident was caused by Plaintiff's own inattentiveness (106 A.D.3d at 632). The photographs of the accident area demonstrate that the condition could not be easily overlooked (*see Boyd v. New York City Hous. Auth.*, 105 A.D.3d 542 [1<sup>st</sup> Dept. 2013]). The expert report must be disregarded since Plaintiff has not demonstrated that the expert was identified prior to the filing of the Note of Issue (*see Scott v. Westmore Fuel Co., Inc.*, 96 A.D.3d 520 [1<sup>st</sup> Dept. 2012]). In any event, the report is unsubstantiated, and therefore insufficient to raise an issue of fact as to whether the concrete curbs were an inherently dangerous condition

(see *Iwelu v. New York City Tran. Auth.*, 90 A.D.3d 712 [2<sup>nd</sup> Dept. 2011]). The expert did not cite to a published industry or professional standard, applicable to these circumstances, that prohibited a concrete structure such as this one near the building's egress, to support his conclusion that the entrance construction violated "good and accepted engineering safety practices" (see *Jones v. City of New York*, 32 A.D.3d 706 [1<sup>st</sup> Dept. 2006]). His opinion, therefore, was overly generalized and conclusory (see *Cardia v. Willchester Holdings LLC.*, 35 A.D.3d 336 [2<sup>nd</sup> Dept. 2006]; *Buchholz v. Trump 767 Fifth Ave., LLC.*, 5 N.Y.3d 1 [2005]).

Accordingly, both defendants' motion for summary judgment, dismissing Plaintiff's complaint, are granted. Based on the foregoing, Ayelet's motion seeking summary judgment over third-party defendant New Clean on their contractual indemnification claim, and New Clean's motion to dismiss those claims, are hereby denied as moot and the third-party action is hereby dismissed by operation of law (see *Berberi v. Fifth Ave. Development Co., LLC.*, 20 Misc.3d 1106[A] [Sup. Ct., Bx. Cty., 2008]).

IV. Conclusion

Accordingly, it is hereby

ORDERED, that the summary judgment motions of defendants Ayelet and New Clean, dismissing Plaintiff's complaint, are granted, and Plaintiff's complaint is dismissed with prejudice, and it is further,


ORDERED, that the summary judgment motions of defendants Ayelet and New Clean on the issue of contractual indemnification are denied as moot, and it is further,

ORDERED, that in light of the foregoing, the third-party complaint is dismissed.

This constitutes the Decision and Order of this Court.

Dated:

6/24/14

  
Hon. Mary Ann Brigantti-Hughes, J.S.C.