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SHORT FORM ORDER

COPY

INDEX No. 10-27882
CAL No. 14-00002OT

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 2-21-14 (#001 & #002)
MOTION DATE 3-21-14 (#003)
ADJ. DATE 4-25-14
Mot. Seq. # 001 - MG; CASEDISP
002 - MG
003 - MG

JOHN J. KELLY and ROSEMARIE KELLY,

Plaintiffs,

- against -

MALL AT SMITH HAVEN, LLC, E.W. HOWELL, CO., INC. and RF PAVING CORP.,

Defendants.

HARNICK & HARNICK, P.C.
Attorney for Plaintiffs
305 Broadway, Suite 602
New York, New York 10007

O'CONNOR, O'CONNOR, HINTZ, & DEVENEY, LLP
Attorney for Defendants Mall at Smith Haven
One Huntington Quadrangle, Suite 3C01
Melville, New York 11747

E.W. HOWELL, CO., LLC. s/h/a E.W. HOWELL, INC.,

Third-Party Plaintiff,

- against -

RF PAVING CORP.,

Third-Party Defendant.

POLIN, PRISCO & VILLAFANE
Attorney for Defendant/Third-Party Plaintiff, E.W. Howell, Co., Inc.
One School Street
Glen Cove, New York 11542

CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER
Attorney for Defendant/Third-Party Defendant RF Paving Corp.
333 Earle Ovington Boulevard, Suite 502
Uniondale, New York 11553

Upon the following papers numbered 1 to 106 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause (001) and supporting papers 1 - 24 ; Notice of Motion/ Order to Show Cause (002) and supporting papers 25 - 41 ; Notice of Motion/ Order to Show Cause (003) and supporting papers 42 - 64 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 65 - 97 ; Replying Affidavits and supporting papers 98 - 106 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

RST

ORDERED that the motion (001) by defendant third-party plaintiff E.W. Howell, Co., LLC s/h/a E. W. Howell, Inc. for an order granting summary judgment, the motion (002) by defendant Mall at Smith Haven, LLC for an order granting summary judgment, and the motion (003) by defendant RF Paving Corp. for an order granting summary judgment, are consolidated for the purposes of this determination; and, it is further

ORDERED that the motion by defendant third-party plaintiff E.W. Howell, Co., LLC s/h/a E. W. Howell, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiffs' complaint and all cross claims interposed against it is granted; and, it is further

ORDERED that the motion by defendant Mall at Smith Haven, LLC for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiffs' complaint and all cross claims interposed against it is granted; and, it is further

ORDERED that the motion by defendant RF Paving Corp. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiffs' complaint and all cross claims interposed against it is granted.

Plaintiff John J. Kelly commenced this action to recover damages for personal injuries he allegedly sustained on January 18, 2010 at approximately 7:15 p.m., when he was caused to trip and fall as he went to step up onto the sidewalk and his right foot came into contact with the curb. Plaintiff Rosemarie Kelly seeks to recover damages for her loss of services and consortium as a result of the injuries allegedly sustained by her husband, plaintiff John J. Kelly. Plaintiffs allege that the curb was defective, that plaintiff's foot became stuck in a crack in the defective curbing, and that the defect in the curb was caused during its construction.

Defendant E.W. Howell, Co., LLC s/h/a E. W. Howell, Inc. ("defendant Howell") now moves for summary judgment in its favor on the grounds that it owes no duty to plaintiff or to co-defendant Mall at Smith Haven, LLC ("defendant mall"), as it did not own or maintain the curb, it had no knowledge of a dangerous condition, and it had no opportunity or duty to correct the alleged defect. Defendant mall also moves for summary judgment in its favor claiming that any crack or chip that may have been in the curb was not the proximate cause of plaintiffs' alleged injuries and that the inability of plaintiff John J. Kelly to identify the cause of his fall is fatal to his claims. Finally, defendant RF Paving Corp. ("defendant RF") seeks summary judgment in its favor contending that plaintiff stated that he did not lift his foot high enough to clear the surface of the curb thus, causing his own fall, and that defendant RF had received no complaints about the allegedly defective condition and that no person had previously fallen thereat.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141[1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a

denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

Although an owner or possessor of real property generally has a duty to maintain its property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Peralta v Henriquez***, 100 NY2d 139, 760 NYS2d 741 [2003]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]), it is not an insurer of the safety of people on the property (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Donohue v Seaman's Furniture Corp.***, 270 AD2d 451, 705 NYS2d 291 [2d Dept 2000]; ***Novikova v Greenbriar Owners Corp.***, 258 AD2d 149, 694 NYS2d 445 [2d Dept 1999]). To establish liability in a trip-and-fall action, a plaintiff must establish that a dangerous or defective condition caused his or her injuries, and that the defendant owner or possessor created the condition or had actual or constructive notice of it (*see* ***Sermos v Gruppuso***, 95 AD3d 985, 944 NYS2d 245 [2d Dept 2012]; ***Starling v Suffolk County Water Auth.***, 63 AD3d 822, 881 NYS2d 149 [2d Dept 2009]; ***Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc.***, 61 AD3d 629, 876 NYS2d 512 [2d Dept 2009]; *see also* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]). To constitute constructive notice, the dangerous or defective condition must be visible and apparent, and must have existed for a sufficient length of time before the accident to permit the owner to discover and remedy it (***Gordon v American Museum of Natural History***, 67 NY2d 836, 837, 501 NYS2d 646; *see* ***Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc.***, 61 AD3d 629, 876 NYS2d 512; ***Denker v Century 21 Dept. Stores, LLC.***, 55 AD3d 527, 866 NYS2d 861 [2d Dept 2008]; ***Deveau v CF Galleria at White Plains, LP***, 18 AD3d 695, 796 NYS2d 119 [2d Dept 2005]). Further, a defendant in a trip-and-fall case seeking to establish entitlement to summary judgment as a matter of law has the initial burden of demonstrating that the plaintiff's injuries were not caused by a dangerous or defective condition, or that it did not have actual or constructive notice of the alleged dangerous or defective condition (*see* ***Leary v Leisure Glen Home Owners Assn., Inc.***, 82 AD3d 1169, 920 NYS2d 193 [2d Dept 2011]; ***Sampino v Crescent Assoc., Ltd.***, 34 AD3d 779, 825 NYS2d 135 [2d Dept 2006]).

Plaintiff John J. Kelly testified during his examination before trial that his foot "engaged" with a crack which stopped his foot from going forward, that "[he] tripped on a curb and catapulted forward", that he did not see where his right foot came down on the curb, that he had no difficulty seeing, that there was no precipitation coming down or on the ground at the time and place of his fall, that he was looking straight ahead when he fell, and that he did not look down at the curb before he attempted to step onto it with his right foot. Plaintiff John J. Kelly stated several times that he stepped up with his right foot raising it high enough to clear the top of the curb before the accident took place. However, after a brief break in questioning in response to plaintiffs' counsel requesting a moment with his client, plaintiff "corrected" his answers and stated

A. I misunderstood, when I lifted my foot, the curb, the question on the curb, lifting your foot and clearing it.
Q. Let me ask the question again; as you stepped up onto the curb of the surface of the parking lot with your right foot, did you lift your right foot high enough to clear the surface of the curb:
A. No.
Q. Did you have any physical limitation of your own that prevented you from lifting your right foot high enough to clear the curb?
A. No.
Q. And did there come a time that a portion of your right foot made contact with the curb?
A. Yes.
Q. What portion of your foot made contact with the curb first?
A. My front foot toe area where my toe is.
Q. The front of your toe?
A. Front of my sneaker I had on. . . the front of my foot hit the curb.
. . .
Q. Did there come a time that you determined what caused you to fall?
A. I assumed I tripped.
. . .
Q. Did there ever come a time that you determined what caused you to fall?
A. No.

Subsequently, plaintiff testified that he did not see his foot make contact with a crack in the curb, that no part of the curb or sidewalk was raised where he fell, and that he had not seen, on the night he fell or on previous occasions, a "crack" in the curb prior to his fall. With their verified bill of particulars, plaintiffs submitted copies of photographs depicting the "defective, broken, chipped, jagged, [and] cracked" portion of the sidewalk where plaintiff John J. Kelly allegedly fell. The photos show a portion of sidewalk containing a "chip"[1], however it is clear that there is no "crack" in the said sidewalk or curb.

Defendants established a prima facie case of entitlement to summary judgment in their favor by submitting plaintiff's deposition testimony that he is unable to identify what caused him to trip and fall (*see* ***Califano v Maple Lanes***, 91 AD3d 896, 938 NYS2d 140 [2d Dept 2012]; ***McFadden v 726 Liberty Corp.***, 89 AD3d 1067, 933 NYS2d 617 [2d Dept 2011]; ***DeSantis v Lessing's, Inc.***, 46 AD3d 742, 849 NYS2d 580 [2d Dept 2007]; ***Denicola v Costello***, 44 AD3d 990, 844 NYS2d 438 [2d Dept 2007]; ***Manning v 6638 18th Ave. Realty Corp.***, 28 AD3d 434, 814 NYS2d 178 [2d Dept 2006]). The inability to identify the cause of the fall is fatal to plaintiff's "cause of action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on

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[1]Plaintiffs' expert stated that the measurements of the "curb defect" provided to him indicate that the depth from the top of the curb was about 1.75", the length was about 6", the width was about 2.5", and that it begins about 5" above the asphalt parking lot surface (with the curb reveal of about 6.5").

speculation" (***Deputron v A & J Tours, Inc.***, 106 AD3d 944, 945, 964 NYS2d 670 [2d Dept 2013]; *see also* ***Thompson v Commack Multiplex Cinemas***, 83 AD3d 929, 921 NYS2d 304 [2d Dept 2011]). Additionally, plaintiff's testimony that he did not raise his foot high enough to clear the curb and that the toe portion of his foot came into contact with the curb, clearly indicates that it was just as likely that his "misstep" caused the fall and not a defective condition. Thus, "any determination by the trier of fact as to causation would be based upon sheer speculation" and summary judgment dismissing the claim would be proper (***Ash v City of New York***, 109 AD3d 854, 855, 972 NYS2d 594 [2d Dept 2013]).

Plaintiffs' attempts to defeat the summary judgment motions amount to more speculation. Their attorney suggests, but offers no affidavit from plaintiff or other evidence, that plaintiff's foot became "stuck and lodged" in the curb defect. Although plaintiff stated during his deposition that he felt his foot get "stuck" and that he was catapulted forward, he later indicated that he did not lift his foot high enough to clear the curb and that he tripped and fell. Additionally, nothing in the many photographs provided by plaintiffs' private investigator depict a condition from which one could infer that a "foot got stuck," the photos show an area of curbing with a missing "chunk" at least six inches wide with no "crack" present. Plaintiffs' expert avers that, in his opinion, the defect in the curb was the proximate cause of plaintiffs' injuries. However, his findings are speculative, at best, since he did not personally observe the allegedly defective condition, but relied on measurements and findings of others and fails to set forth the basis upon which he finds that the missing piece of concrete caused the fall.

Thus, the motions which request summary judgment dismissing the complaint and all cross-claims are granted and those portions of the motions which seek indemnification are denied as moot.

Dated: 8-6-14

Hon. Denise F. Molia

A.J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION