

**Lau v Margaret E. Pescatore Parking, Inc.**

2014 NY Slip Op 33638(U)

December 23, 2014

Supreme Court, New York County

Docket Number: 103807-2010

Judge: George J. Silver

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

EA  
12/26/14  
E

PRESENT: Hon. George J. Silver

PART 10

HENRY T. LAU

- v -

MARGARET E. PESCATORE PARKING, INC.  
and TAI MING DEVELOPMENT CORP.

Justice  
**RECEIVED**  
DEC 24 2014  
GENERAL CLERK'S OFFICE  
NYS SUPREME COURT - CIVIL

INDEX NO. 103807-2010

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 004

The following papers, numbered 1 to 8, were read on this motion for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affirmation — Affidavit(s) — Exhibits-----	No(s). <u>1, 2</u>
Notice of Cross-Motion— Affirmation — Affidavit(s) — Exhibits-----	No(s). <u>3</u>
Answering Affirmation(s) — Affidavit(s) — Exhibits -----	No(s). <u>4, 5</u>
Replying Affirmation — Affidavit(s) — Exhibits -----	No(s). <u>6, 7, 8</u>

**FILED**  
DEC 26 2014  
COUNTY CLERK'S OFFICE  
NEW YORK

Upon the foregoing papers, it is ordered that the motion is

In this action to recover for personal injuries allegedly sustained during an accident which occurred on March 10, 2010, Defendant Margaret E. Pescatore Parking, Inc. ("Defendant Pescatore") moves pursuant to CPLR §3212 for an Order granting it summary judgment and dismissing Plaintiff Henry T. Lau's ("Plaintiff") complaint. Defendant Tai Ming Development Corp. ("Defendant Tai Ming") cross-moves pursuant to CPLR §3212 for an Order granting it summary judgment and dismissing Plaintiff's complaint against it. Plaintiff opposes both motions and cross-moves for sanctions against Defendant Pescatore.

According to Plaintiff's complaint, on March 10, 2010, Plaintiff was walking down Bayard Street in New York, New York, when he alleges that he tripped and fell on a cord that was tied from a street sign to a parking barrel in front of a parking lot owned by Defendant Tai Ming and operated by Defendant Pescatore. As such, Plaintiff sustained injuries and brought suit against both Defendants.

In support of its motion for summary judgment, Defendant Pescatore argues that the barrel nor the cord, which Plaintiff allegedly tripped over, was not the responsibility of the parking lot business owner and there is no notice regarding the barrel or the cords location at the site. Secondly, Defendant Pescatore argues that the condition is an open and obvious one that is not inherently dangerous. Defendant Pescatore avers that Plaintiff fell in front of a neighboring property on a construction barrel that was not owned or maintained by Defendant Pescatore. The testimony shows that the barrel was left on the street by someone unaffiliated with Defendant Pescatore and the rope that Plaintiff allegedly tripped on was not owned by Defendant Pescatore. Additionally, Defendant Pescatore did not have notice of the rope tied to the barrel. Where Defendant did not own/control the barrel, Defendant did not create the condition, Defendant had no notice of a defective condition, and the condition was open/obvious and not inherently dangerous, Defendant Pescatore did not owe a duty to Plaintiff regarding the barrel or the cause/nature of the accident.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. Check one:  CASE DISPOSED  NON-FINAL DISPOSITION
2. Check as appropriate: MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. Check as appropriate:  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

On cross-motion, Defendant Tai Ming also argues that Plaintiff's complaint should be dismissed against it. Defendant Tai Ming avers that as a landowner, it owed no duty to Plaintiff with respect to the accident where the causative element of the accident was located on the sidewalk adjacent to the premises owned by Defendant. The "no standing sign" which allegedly had a cord attached to it is located at 102 Bayard Street according to the testimony of the Owner, Norman Lau Kee ("Kee"). Kee states that neither the pole or the barrel were on Defendant Tai Ming's property. Further, Defendant Tai Ming argues that the condition was not defective as defined under Administrative Code 7-210. An abutting landowner can be found liable for failing to maintain a sidewalk in a reasonably safe condition, but this "defect" described by Plaintiff is not one intended to be covered by this section of the code. Lastly, Defendant argues that even if the condition is found to be defective, it was not caused or created by Defendant Tai Ming nor did Defendant Tai Ming have notice of the defect. Plaintiff never saw the cord before the accident occurred and the manager of the parking lot stated that the barrels may have been used by the building next door during its construction projects in order to hold parking spaces in front of its own building. There is no evidence as to how the cord was tied or who tied it to the sign and barrel or how long the condition existed prior to the time of the accident. A landlord will not be held liable unless it created the condition or had notice of it, neither of which exists in this case. Defendant Tai Ming argues it did not maintain the premises, nor did it even have notice of the barrels until it was served with the Summons and Complaint in this lawsuit and for the reasons stated above, Plaintiff's complaint should be dismissed as against Defendant Tai Ming.

In opposition, Plaintiff argues that both Defendants' failed to meet their burdens and as such, each Defendants' motion for summary judgment should be denied. Plaintiff argues that Defendant Pescatore failed to meet its burden where Anthony Maruffi, the manager of the parking lot doesn't recall whether he worked on the date of the accident and where his testimony that Pescatore did not own the barrels is directly contradicted by his father John Maruffi's testimony that Pescatore did own the barrels at issue in this case. Plaintiff avers that either Defendant Pescatore tied the subject barrel to the street sign during the garage's hours or after the garage closed to ensure it remained closed overnight. Where there is no direct evidence in this case, Plaintiff is forced to rely on circumstantial evidence and must show it was more probable than not that the Defendants' actions caused the accident to occur. Here, Plaintiff argues that the jury could rationally infer that the Defendants created the condition, where after the accident, John Maruffi admitted that it owned and controlled the traffic barrel in question.

Plaintiff further avers that Defendant Tai Ming also failed to meet its burden where it failed to submit evidence that the street sign at issue in this case was on its neighbor's property and failed to produce any of its maintenance records. Plaintiff avers that the evidence proves that Defendants created the dangerous condition, where the certified google maps ("google maps") show rectangular barrels (as opposed to the circular barrels at issue) in the same spot where the accident occurred. Plaintiff avers that Defendant Tai Ming's motion must be denied, where normally, out of possession landowners are not liable for accidents that occur on their property unless it has a right of reentry, which is enough to impose liability. Defendant Tai Ming's contention that Defendant Pescatore is responsible for maintenance of the premises is without merit, where the lease is only oral and there is no indication whether the oral lease includes terms as to right of reentry or duty to repair/maintain. Further, Plaintiff argues that there are issues of fact as to Tai Ming's notice of the barrel's placement.

Lastly, Plaintiff argues that where Plaintiff's attorney put Defendant Pescatore on notice of the accident and where Plaintiff tripped over a cord attached to the barrel and the sign, Defendant Pescatore had a duty to preserve the wire which Plaintiff tripped over. Spoliation sanctions are appropriate where the party intentionally or negligently disposes of crucial items of evidence before the adversary has an opportunity to inspect it. Courts have endorsed striking of pleadings or preclusion of evidence as sanctions for spoliation and such sanctions are warranted here. The wire is a crucial piece of evidence in order to determine whether the condition was open and obvious (if the wire was in fact thin) and Pescatore's failure to preserve it warrants sanctions.

In Reply, Defendant Tai Ming argues that Plaintiff's own opposition papers (specifically its exhibits) show that the accident was caused by a cord attached to a pole on a neighboring property and the Court is asked to take judicial notice as to the location of the sign. Further, the testimony of Kee confirms that the traffic barrels also were on the neighbor's side of the property line.

In further Reply, Defendant Pescatore argues that the cross-motion seeking dispositive relief (sanctions for spoliation) is untimely and without merit, where there is no proof who possessed the wire (if it even existed). Further, Antony Maruffi's testimony is appropriate in this case, where he was at the parking lot daily and was very familiar with the routine and operations of the parking lot. Additionally, Defendant Pescatore argues that the Plaintiff lacks any competent evidence to show that Defendant Pescatore was responsible for the tethering of the barrel to the sign and the fact that on a different occasion, the barrels were tied to the fence does not provide proof that Defendant tied the barrel to the street sign to cause Plaintiff's accident. The barrel was on the street, a fact which debunks Plaintiff's theory of ownership and control, as any passerby had access to the barrel and could have tied the barrel to the street sign. Further, Defendant Pescatore argues that the video of John Maruffi should be excluded where it is unclear and there is confusion as to which barrels Plaintiff's attorney is talking about during the questioning of Mr. Maruffi.

In Reply to the opposition to its cross-motion, Plaintiff argues that where Defendant Pescatore admits that it owns a barrel (although not the one in questions) which is verified by the Google images, it demonstrates prior use of these exact means and methods by Defendant Pescatore. Further, Plaintiff's attorney visiting the scene of the alleged accident five days after the incident is not wrong, but rather a basic preliminary investigation which is every lawyer's duty. The testimony of John Maruffi which was elicited at that time by Plaintiff's counsel should not be discounted, and the issue raised as to his dementia or incapacity is made at the behest of Defendant Pescatore's counsel and Anthony Maruffi which is not accompanied by any admissible proof of the fact. Further, the markings on the barrels in question indicate that Defendant Pescatore owns the barrels and a barrel (which is exactly the same as the one which caused the accident) which is permanently affixed to Defendant Pescatore's fence of the parking lot. Further, although Defendant Pescatore disputes owning the barrels, they cannot dispute that they own rope/wire/cord and the purpose is to tie things to traffic barrels. As such, Plaintiff argues it is entitled to spoliation sanctions.

### Analysis

"A party moving for summary judgement must make a *prima facie* showing of entitlement to a judgement as a matter of law, providing sufficient evidence to demonstrate the absence of any material issue of fact." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81, 760 NYS2d 397, 790 NE2d 772 [2003]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Id.*) Defendant Tai Ming, as landowner, has argued that Plaintiff failed to provide proof of its liability. "[A] property owner is subject to liability for a defective condition on its premises if a plaintiff demonstrates that the owner either created the alleged defect or had actual or constructive notice of it (*Mandel v. 370 Lexington Ave., LLC*, 32 A.D.3d 302, 303, 820 N.Y.S.2d 249 [2006])(*Singh v United Cerebral Palsy of New York City, Inc.*, 72 AD3d 272, 275-76 [1st Dept 2010]) However, "liability against defendant landowner may be predicated only upon the owner's possession and control of the premises; an out-of-possession owner who did not create the unsafe condition will not be liable for injuries that occur on the premises unless it has retained control over the premises or is contractually or statutorily obligated to repair or maintain the property"(internal citations omitted). (*Negron v Rodriguez & Rodriguez Stor. & Warehouse, Inc.*, 23 AD3d 159, 160 [1st Dept 2005]) Defendant Tai Ming avers that it did not maintain or repair the premises. While there is no written lease between the two Defendants, Defendant Pescatore is responsible for the repairs and maintenance of the premises. Where, according to Kee's testimony, Defendant Tai Ming's first notice of the barrels at the premises was when it received the summons and complaint in this case. As such, where Defendant Tai Ming is an

out of possession landowner and did not create the defective condition or have notice of the condition, it has made its prima facie case for summary judgment. Plaintiff has failed to raise any genuine issues of material fact as it pertains to Defendant Tai Ming's liability where providing Google maps to show that a year prior, there were barrels in a similar spot to where the accident occurred, is not sufficient to create an issue of fact regarding Defendant Tai Ming's liability as an arguably out of possession landowner. As such, Defendant Tai Ming's motion for summary judgment is granted and the complaint is dismissed against it.

Defendant Pescatore has made its prima facie case that Plaintiff's case should be dismissed against it. "It is well established that a tenant owes a common-law duty of reasonable care to maintain the demised premises in a reasonably safe condition, independent of any obligation that might be imposed by the existence of a lease (*see DeMatteis v. Sears, Roebuck and Co.*, 11 A.D.3d 207, 208, 782 N.Y.S.2d 261 [1st Dept.2004]; *Zito v. 241 Church St. Corp.*, 223 A.D.2d 353, 355, 636 N.Y.S.2d 40 [1st Dept.1996] ) (*Williams v Esor Realty Co.*, 117 AD3d 480 [1st Dept 2014]) Where no written lease exists between the two Defendants, but the parties do not contest that Defendant Pescatore was responsible for maintenance of the property, Defendant Pescatore will be held to the common-law standard duty of reasonable care to maintain the premises in a reasonably safe condition. Defendant Pescatore stated, through the testimony of Anthony Maruffi, that it did not own or control the barrel or the cord in question. Further, Anthony Maruffi testified that Defendant Pescatore has argued that it did not have notice of the defective condition nor did it create the condition. "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility." (*Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 [1st Dept 1990]) In drawing all inferences in favor of Plaintiff, Plaintiff does raise an issue of fact as to whether Defendant Pescatore owns the barrels involved in Plaintiff's accident. However, the issue of ownership is not, in itself, enough to raise an issue of fact as to Defendant Pescatore's liability, where Plaintiff failed to raise issues of fact as to whether Plaintiff created the defect or whether Plaintiff had notice of the defect. Regardless of whether Defendant Pescatore owns the barrels in question, there is no evidence or issue of fact as to who created the defective condition outside of pure speculation. "Speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact." (*Castore v Tutto Bene Rest. Inc.*, 77 AD3d 599 [1st Dept 2010]). Plaintiff relies solely on circumstantial evidence, which, at times, can be used to defeat a motion for summary judgment. "Cases grounded on wholly circumstantial evidence require a showing of sufficient facts from which the negligence of the defendant and the causation of the accident by that negligence can be reasonably inferred. The law does not require the plaintiff's proof to exclude every other possible cause of the accident, other than the defendant's negligence. However, the record must render the other possible causes sufficiently remote to enable the trier of fact to reach a verdict based upon the logical inferences to be drawn from the evidence, not upon speculation (*internal citations omitted*)." (*Thomas v New York City Tr. Auth.*, 194 AD2d 663, 664 [2d Dept 1993]) Further, a plaintiff who is relying on circumstantial evidence must "prove that it was 'more likely' or 'more reasonable' that the alleged injury was caused by the defendant's negligence than by some other agency" (*internal citation omitted*)" (*Grob v Kings Realty Assoc., LLC*, 4 AD3d 394, 395 [2d Dept 2004]) In drawing every inference in favor of Plaintiff, including that Defendant Pescatore owned the barrel, that the rope was tied between the sign and the barrel, and that Plaintiff tripped and fell over this defect. Plaintiff's explanation and evidence as to Defendant Pescatore's creation of the defect consists of a series of pictures from 2009 and 2011 that show that there were similar barrels on Defendant Pescatore's property and close to the area where Plaintiff's accident occurred. Further, Plaintiff attaches two pictures dated 5/21/12 and 9/21/11 which depict a similar barrel to the one in question tied to Defendant Pescatore's fence. Even, again, drawing all inferences in favor of the Plaintiff, the explanation of the creation the defect is not enough to reasonably infer that the condition was created by Defendant Pescatore.

Lastly, where the complaint against Defendant Pescatore has been dismissed, the issue of spoliation sanctions need not be addressed.

Accordingly, it is hereby

ORDERED that Defendant Tai Ming Development Corp's cross-motion for summary judgment is granted and the complaint against Defendant Tai Ming Development Corp. is dismissed; and it is further

ORDERED that Defendant Margaret E. Pescatore Parking, Inc's motion for summary judgment is granted and the complaint against Defendant Margaret E. Pescatore Parking, Inc is dismissed; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon all parties within thirty (30) days of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

*George J. Silver*  
George J. Silver, J.S.C.

Dated: **DEC 28 2014**  
New York County

**GEORGE J. SILVER**  
**FILED**

**DEC 26 2014**

**COUNTY CLERK'S OFFICE**  
**NEW YORK**