

Pergament v Mohr-Mac of Shirley, Inc.

2015 NY Slip Op 30316(U)

February 18, 2015

Supreme Court, Suffolk County

Docket Number: 12-18749

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 4-17-14
ADJ. DATE 6-10-14
Mot. Seq. # 003 - MG; CASEDISP

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MARC A. PERGAMENT, as Trustee of the
Estate of MARIA ROGGENDORF,

Plaintiff,

- against -

MOHR-MAC OF SHIRLEY, INC., d/b/a
McDONALD'S,

Defendant.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant, dated 3/11/14, and supporting papers (including Memorandum of Law dated ____); (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the plaintiff, dated 4/21/14, and supporting papers; (4) Reply Affirmation by the defendant, dated 6/3/14, and supporting papers; (5) Other ____ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion for summary judgment by defendant Mohr-Mac of Shirley, Inc. d/b/a McDonald's is granted and the complaint is dismissed.

Plaintiff, as trustee¹ of the estate of Maria Roggendorf, commenced this action seeking to recover damages for personal injuries Maria Roggendorf ("Roggendorf") sustained on July 31, 2010 when she

¹Marc A. Pergament was appointed trustee by the bankruptcy court.

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tripped on a curb and fell at the McDonald's restaurant operated by defendant at 971 Montauk Highway in Shirley, New York. In the complaint as amplified by the bill of particulars, plaintiff alleges that the defendant was negligent in its ownership, maintenance and operation of the McDonald's in failing to provide Roggendorf with a safe place to walk and a proper ingress and egress to the restaurant, in designing and configuring the drive-thru lane in a way that constrained patrons to traverse same to gain entrance to the restaurant, and in allowing deceptive and misleading roadway markings to remain at the location which were not in accordance with industry standards.

Issue has been joined, discovery completed and the note of issue filed. The defendant now moves for summary judgment dismissing the complaint arguing that plaintiff has failed to prove a defective condition existed at the subject McDonald's or that any condition thereat contributed to Roggendorf's trip and fall. In support of its motion, defendant has submitted the pleadings, the deposition transcript of Roggendorf, and that of its representative, Christopher Prizgent, color photographs and the affidavit of its expert, Paul N. Summerfield, P.E.

Roggendorf testified that she had been a patron at the subject McDonald's three or four times prior to her accident. According to Roggendorf's testimony, on the day of the accident she parked her car in the parking lot on the east side of the McDonald's and proceeded to walk to the east entrance. As she walked from the parking lot towards the entrance, she had to walk between the cars that were in the drive-thru lane. Roggendorf testified that as she approached the sidewalk, her view of the curb was not obstructed, and she did not see any cracks or know if the curb was broken or otherwise defective. Roggendorf attributed her fall to what her counsel characterizes as an "optical illusion" or "optical confusion" created by the yellow stripe delineating the drive-thru lane on the roadway adjacent to the curb. Roggendorf stated that "usually when you walk [the yellow line is] on top of the curb, so when I was walking I was judging the curb by the yellow line." Roggendorf testified that because she thought the yellow stripe on the roadway was actually on the curb, as she attempted to navigate what she thought was the curb (but was actually the roadway), her foot made contact with the curb causing her to fall forward, injuring her left arm.

When asked to explain why it was unsafe to walk where she was walking, Roggendorf responded:

Because the drive in [*sic*] is right there and the cars moving, and when you're walking you're watching the cars coming in that are parking, and then you're walking between cars to get into the store [*sic*], and you're watching to see who is moving around the drive in. They block the door way. They don't leave enough room to walk through, so when you're walking you're watching to see if anybody is moving and that the curb is clear."

However, when questioned further, Roggendorf conceded that she did not see any cars moving in the parking lot, that the cars in the drive-thru lane were stopped, she was able to walk between the cars without a problem and that the curb was visible and the doorway was not blocked.

Prizgent testified he is a supervisor of the subject McDonald's and two other locations owned by defendant in Manorville and Center Moriches. According to Prizgent, the drive-thru lanes at the three locations are striped the same way, i.e., the yellow line is on the roadway delineating the drive-thru lane.

Prizgent also testified that during the seven years he supervised the subject McDonald's, he was unaware of any other incidents or complaints similar to that made by plaintiff. He testified that since the restaurant opened as a McDonald's (it was once a Pizza Hut)², the striping configuration for the drive-thru and the manner of ingress and egress for the restaurant have remained the same.

Paul N. Summerfield, P.E., a professional engineer licensed in New York State, opines in his affidavit that there is no statute or standard in the industry that requires the top of a curb or any portion of the subject curb to be painted yellow. Summerfield also states that there was no violation of the New York Uniform Fire Prevention and Building Code as to the manner in which the McDonald's restaurant parking lot, drive thru lane and curb were constructed and marked. According to Summerfield, the Manual on Uniform Traffic Control Devices ("MUTCD"), section 262.2(a)(2) governs the subject drive-thru lane. This section provides that "[e]dge lines shall be yellow to mark the left edge of the roadway with respect to the direction of travel." Summerfield opines that the yellow line directly adjacent to the curb was appropriate and did not constitute a hazard.

In opposition, plaintiff argues that the design and construction of, and the yellow markings on the drive-thru lane adjacent to the unmarked curb in front of the entrance door to the McDonald's created an optical confusion scenario whereby Roggendorf was unable to perceive the presence of the curb. The confusion was created, plaintiff argues, as only a yellow stripe was painted on the boundary of the drive-thru lane and not on the curb. Additionally plaintiff argues that the layout and configuration of the drive-thru, curb and entrance with the lack of a delineated crosswalk, deviates from that of other McDonald's in the geographic vicinity, and the internal protocols of the McDonald's franchise.

The clear photographs, which plaintiff and Prizgent testified reflect the conditions of the site on the day of the accident, depict the drive-thru lane, the curb, sidewalk and entrance to the McDonald's. The color photographs reveal a well maintained area, with a drive-thru lane clearly delineated with yellow lines, and a clearly defined curb with no visible defects.

A landowner is not an insurer of the safety of those coming on its premises, but has a duty to keep its "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 [2004]). In order for a property owner 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]; *Kuchman v Olympia & York*, 238 AD2d 381, 656 NYS2d 323 [1997]).

Based on the evidence submitted, the defendant has established its prima facie entitlement to

²According to the proffered Certificate of Occupancy, the conversion of an existing Pizza Hut Restaurant to a McDonald's Restaurant occurred April 24, 1997, and conformed substantially with Zoning Ordinances, Building Codes and other laws if any.

judgment as a matter of law by demonstrating that there was no defective condition or negligent design with regard to the curb and the drive-thru which could have caused Roggendorf to fall (see *Jung v Kum Gang, Inc.*, 22AD3d 441, 806 NYS2d 62 [2d Dept 2005]; *Hyman v Queens County Bancorp, Inc.*, 307 AD2d 984, 763 NYS2d 669 [2d Dept 2003], *affd* 3 NY3d 743, 787 NYS2d 215 [2004]; see also *Remes v 513 West 26th Realty, LLC*, 73 AD3d 665, 903 NYS2d 8 [1st Dept 2010]). Thus, the burden shifts to the plaintiff to raise a triable issue of fact. The plaintiff has failed to do so.

The claim by plaintiff's counsel of an "optical illusion" or "optical confusion" finds no basis in Roggendorf's deposition testimony as at no point did she testify to having difficulty seeing the curb or the drive-thru lane (see *Jung v Kum Gang, Inc.*, *supra*; *Serrano v New York City Hous. Auth.*, 268 AD2d 230, 701 NYS2d 35 [1st Dept 2000]). Indeed, she testified that as she walked to the entrance door of the McDonald's, she had an unobstructed view of the curb. Moreover, neither plaintiff nor plaintiff's expert has cited to any code provision or authority to support the opinion that a cross walk in the subject area, visual cues denoting the presence of the curb, traffic control signals or other safety measures to alert motor vehicle operators as to the presence of pedestrians should have been installed. Similarly, unsupported by any building or design code, or section of the MUTCD, is the opinion of the plaintiff's expert that the drive-thru adjacent to the pedestrian entrance is a negligent design. The section of the MUTCD cited by plaintiff's expert does not support the negligent design claim. Section 38.07, entitled "Warrants for Use of Edge Lines" provides

–Edge line markings should not be placed where an engineering study or engineering judgment indicates that providing them is likely to decrease safety

–Edge line markings may be excluded, based on engineering judgment, for reasons such as if the traveled way edges are delineated by curbs, parking or other markings.

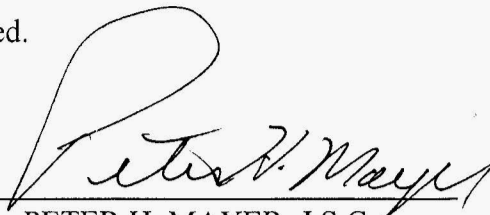
This provision does not expressly require painting the curb, but is a general provision and, thus, does "not constitute a sufficiently specific statutory predicate for liability" (*Friedman v 1753 Realty Co.*, 117 AD3d 781, 782, 986 NYS2d 175 [2d Dept 2014]). Additionally, plaintiff has not submitted any evidence to support the claim that the design deviated from the internal protocols of the McDonald's franchise. Furthermore, the photographs clearly show a defined drive-thru lane delineated with yellow lines on the blacktop roadway and a distinct concrete curb which do not constitute a dangerous or actionable condition (see *Fluksik v Delmar Owners, Inc.*, 248 AD2d 667, 670 NYS2d 321 [2d Dept 1998]; *Stillman v Frankel*, 44 AD2d 821, 355 NYS2d 788 [1st Dept 1974]).

Although unfortunate, the mere happening of the subject accident does not give rise to liability (see *Killeen v State of New York*, 66 NY2d 850, 498 NYS2d 358 [1985]; *Wells v Finnegan*, 177 AD2d 893, 576 NYS2d 653 [3d Dept 1991]; *Stillman v Frankel, supra*). Therefore, summary judgment in favor of the defendant is warranted.

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Accordingly, the motion is granted and the case is dismissed.

Dated: February 18, 2015



PETER H. MAYER, J.S.C.