| **Baldasano v Baldasano** |
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| 2015 NY Slip Op 32645(U) |
| May 6, 2015 |
| Supreme Court, Nassau County |
| Docket Number: 600497/2011 |
| Judge: F. Dana Winslow |
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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**TRIAL/IAS, PART 3**
**NASSAU COUNTY**

**ANN BALDASANO and LOUIS BALDASANO,**

**Plaintiffs,**

**-against-**

**MOTION SEQ. NO.: 006**
**MOTION DATE: 12/5/14**

**LONG ISLAND UNIVERSITY, LONG ISLAND UNIVERSITY C.W. POST CAMPUS, and TILLES CENTER FOR THE PERFORMING ARTS,**

**INDEX NO.: 600497/2011**

**Defendants.**

**The following papers having been read on the motion (numbered 1-3):**

**Notice of Motion.....1**
**Memorandum of Law.....1-A**
**Affirmation in Opposition.....2**
**Affirmation in Reply.....3**

Motion by defendants, Long Island University, Long Island University C.W. Post Campus, and Tilles Center For The Performing Arts, for an Order of this Court, pursuant to CPLR §3212, granting Summary Judgment dismissing the complaint of the plaintiffs, Ann Baldasano and Louis Baldasano, with prejudice is determined as follows.

The instant motion arises from an underlying personal injury action where the plaintiff, Ann Baldasano, allegedly slipped and fell while walking on the defendant university premises. The plaintiffs commenced the underling action by filing a summons and complaint in this Court in June, 2011.

The plaintiffs, in their Bill of Particulars allege that the accident was caused by, inter alia, the defendants' negligence in:

> "causing allowing and permitting said premises at the place above mentioned to be created, become and remain for a period of time after notice, either actual or constructive, in a dangerous and/or hazardous

condition; in causing, allowing and permitting a trap like condition to exist at said location; in failing to maintain the aforesaid premises in a reasonably safe and proper condition;...in causing, allowing, creating and permitting the existence of a defective area on the aforesaid premises..."

Louis Baldasano, Ann's husband, alleges that he was deprived of his wife's services, society, companionship and consortium as a result of the accident.

FACTS

On May 21, 2008 at about 4:10 p.m., on the sidewalk of the Tilles Center of the C.W. Post College in Brookville, New York, the plaintiff, Ann Baldasano, while walking to the parking lot after attending a dance recital, tripped and fell over a "thing in the sidewalk raised" (see Notice of Motion, Exhibit E, Tr. Ann Baldasano, ln. 5-6, p. 16). The plaintiff claims that she sustained injuries as a result.

ARGUMENTS

The defendants claim that the alleged condition, which allegedly caused the accident, was trivial, and that the plaintiff could not identify the cause of her fall. Further, there were no records of any prior incidents in and/or near the area where the accident occurred. Finally, defendants argue the plaintiffs were chronically late in the submission of their opposition, and their papers should be rejected by this Court.

The plaintiff contends that the testimony of the defendants' witness supports that defendant created the dangerous and/or hazardous condition in that the sidewalk was newly constructed before the accident. Further the pictorial evidence indicates that the portion of the sidewalk where the plaintiff fell was raised, and the defendants failed to provide specific measurements of the defect. Consequently, plaintiffs argue that the defendants have not established their prima facie burden.

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of material issue of fact (*Ayotte v. Gervasio*, 81 NY2d 1062 [1993]). Once this initial burden has been met by movant, the burden shifts to the party opposing the motion to submit evidentiary proof in

admissible form, sufficient to create material issues of fact requiring a trial to resolve.

Generally, a defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition *nor* had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it. In other words, as to constructive notice, a *defect must be visible and apparent* (see *Petri v. Half Off Cards,* 284 AD2d 444 [2nd Dept 2001]); *Osorio v. Wendell Terrace Owners Corp.,* 276 AD2d 540[2nd Dept 2000]; *Benn v. Municipal Hous. Auth. for City of Yonkers,* 275 AD2d 755[2nd Dept 2000]).

Further, in a slip and fall case, a plaintiff's inability to identify the cause of a subject fall is fatal to his or her cause of action, since, in that instance, the trier of fact would be required to base a finding of proximate cause upon nothing more than speculation ( see *Melnikov v. 249 Brighton Corp.*, 72 AD3d 760 [2nd Dept 2010]).

In light of the foregoing, the crux of the defendants' argument is that the alleged defect that has been cited as the cause of the plaintiff's accident, is trivial in nature, and trivial defects on a property are not actionable. To make such a determination, a court must examine all of the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect, along with the time, place, and circumstances of the injury. Here, the defendants submitted photographs both which were taken by the plaintiffs, and their deposition testimony, to depict the appearance of the subject condition.

Generally, the question of whether a dangerous or defective condition exists on the property of another so as to create liability is generally a question of fact for the jury; however, when the trivial nature of the defect outweighs other factors, the case need not be submitted to a jury ( see *Lansen v. SL Green Realty Corp.,* 103 AD3d 521 [1st Dept 2013]). In addition, it is noted that the plaintiff's husband, testified that he did not see "anything odd in the sidewalk or notice anything about the sidewalk" prior to the accident. Further, he stated that he, his daughter and granddaughter already "passed over the raised portion of the sidewalk", without incident . Additionally, the daughter and granddaughter did not note anything as to the condition of the sidewalk ( see Notice of Motion, Exhibit E. Tr. Louis

Baldasano, p.21-22).

The defendants' witness, Ian Richard, employed as a Public Safety Officer at all relevant times herein, testified that the usual performance of his duties, included the patrol the campus, and he regularly " travers[ed]" the subject area (see Notice of Motion, Exhibit F, Tr. Richard, p. 8, ln. 23-25, p. 25, ln. 21-25). Prior to the accident, he had not seen the raised section of sidewalk. William Kirker, the defendants' Facilities Director, set forth in his affidavit that work orders would be issued if the sidewalks were damaged or in disrepair, and he received no work orders relative to the subject area, during the two years prior to the accident.

As such, upon reviewing photographs of the "raised" sidewalk and considering all other relevant factors, the defendants established, prima facie, that the alleged defect was not actionable as it was trivial and did not possess the characteristics of a trap or nuisance ( see *Aguayo v. New York City Housing Authority*, 71 AD3d 926 [2nd Dept 2010]). In addition, defendants established that they did not have actual or constructive notice, nor did they create the alleged hazardous condition.

In opposition, the plaintiffs cite *Denyssenko v. Plaza Realty Services, Inc.*, 8 AD3d 207 (1st Dept 2004); however, the Court finds it distinguishable from the case at bar. There, the photographic evidence of the alleged hazard, showed a "jagged-edged" pothole filled with water. Further, the pictures indicated that the hazard was an apparent long-standing defect, in that the pictures were taken within two weeks of plaintiff's accident, and the plaintiff testified that the condition existed on the day of her accident. As such, the *Denyssenko* court determined that an issue of fact was raised as to constructive notice, and whether the defect was trivial.

Here, there is nothing in the plaintiffs' opposition to indicate that this was a long standing "defect". Additionally, the area was well traveled as it abutted a public auditorium, and there is nothing in the record to support the claim that there were prior accidents concerning that particular area of the sidewalk.

The plaintiffs also cite *Argenio v. Metropolitan Transp. Auth.*, 277 AD2d 165 (1st Dept 2000); however, there, the plaintiff submitted the affidavit of an expert witness stating that the defect in the flooring, was of sufficient size to entrap the toe of the sneaker worn by plaintiff. The expert also noted that the depression was larger than most defects in the area that had been repaired, and that defendants' failure to maintain the floor in good repair was the sole cause of plaintiff's injury. Here, the plaintiffs did not submit expert testimony, nor was there any evidence of the records of repairs performed on that area of the sidewalk

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As to the plaintiffs' argument that the defendants failed to cite specific measurements and that such failure is fatal to its motion, the court in *Hymanson v. A.L.L. Associates*, 300 AD2d 358 (2nd Dept 2002) considered photographic evidence where the plaintiff was unable to accurately reflect the measurements of the condition of the pavement at the time of her fall. Scrutiny of the photograph and the other evidence in the record supported the conclusion that, as a matter of law, the alleged defect, which did not have any of the characteristics of a trap or nuisance, was too trivial to be actionable.

In addition, the plaintiffs' citation of *Mishaan v. Tobias,* 32 AD3d 1000 (2nd Dept 2006) is unavailing in that the photographs provided by the plaintiff depicting the alleged defect revealed a cracked and broken sidewalk, and that a portion of the sidewalk was raised, at least an inch in height, over the remaining portion of the sidewalk. That condition does not exist in the instant case.

Further, although plaintiff makes much of Ian Richard's testimony that the sidewalk was newly constructed before the date of the incident to support plaintiffs claim that the defendants created the condition, a careful read of the testimony indicates that the defendants hired "someone outside" to do the construction work on the sidewalk. Generally, a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligence ( see *Kleeman, v. Paul D. Rheingold*, 81 NY2d 270 [1993]). Exceptions to this rule exist where the employer is negligent in selecting, instructing or supervising the contractor, where the contractor is employed to do work that is inherently dangerous or where the employer bears a specific nondelegable duty (see *Goodman v. 78 W. 47th St. Corp.*, 253 AD2d 384 (1st Dept 1998).

In light of the foregoing, there is nothing in evidence to evince that any of the exceptions apply. Therefore, the plaintiffs' argument that the defendants created the condition by constructing the sidewalk, is unavailing.

Finally, the plaintiffs' attempt to raise a triable issue of fact in their reference to Richard's testimony, is also futile. Contrary to the plaintiffs' contention that Richard admitted upon inspecting the scene after the plaintiff fell, that he "saw the crack in the sidewalk that is normally there", a further read of the transcript indicates that the referenced cracks were actually "sections of the cement sidewalk" and Richard further explained that it "wasn't damaged', but "it was a section." ( see Notice of Motion, Exhibit F, Tr. Richard, p. 24-25).

In sum, the plaintiff has failed to raise a triable issue of fact. This Court, therefore, does not have to reach the issue as to the late submission of the plaintiffs' opposition papers.

Based on the foregoing it is

ORDERED, that the defendants' motion for summary judgment pursuant to CPLR §3212 is **granted** and the plaintiff's complaint is **dismissed.**

This constitutes the Order of the Court.

Dated: May 6, 2015

J.S.C.