Mordkovich v Home Depot U.S.A., Inc.
2017 NY Slip Op 30271(U)
February 2, 2017
Supreme Court, Kings County
Docket Number: 507364/2013
Judge: Debra Silber

FILED: KINGS COUNTY CLERK 02/09/2017 INDEX NO. 507364/2013
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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2nd day of February, 2017.

PRESENT:

HON. DEBRA SILBER

Justice.

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FAINA MORDKOVICH,

Plaintiff,

- against -

HOME DEPOT U.S.A., INC., KIOP MIL BASIN, L.P., KIR PORTFOLIO I, L.P. AND KIMCO REALTY CORP.,

Defendants.

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DECISION / ORDER

Index No. 507364/13

Mot. Seq. # 1

The following papers numbered 1- 19 to read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-15, 16
Opposing Affidavits (Affirmations)	17, 18
Reply Affidavits (Affirmations)	19
Affidavit (Affirmation)	
Other Papers	

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Upon the foregoing papers, defendants Home Depot U.S.A., Inc., KIOP Mill Basin, L.P. s/h/a KIOP Mil Basin, L.P., KIR Portfolio I, L.P., and Kimco Realty Corp. move for an order, pursuant to CPLR 3212, granting summary judgment dismissing the plaintiff's complaint and any and all cross-claims.

This is an action for personal injuries allegedly sustained by the plaintiff, Faina Mordkovich, in the afternoon of November 4, 2011, in the parking lot of a shopping center located at 5716 Avenue U, Brooklyn, New York, also known as the Mill Basin Shopping Center. Plaintiff alleges that she tripped and fell on a concrete curb divider located within the shopping center parking lot and sustained injuries as a result. At the time of the accident, defendant KIOP Mill Basin, L.P. s/h/a KIOP Mil Basin, L.P. (KIOP), a subsidiary of defendant Kimco Realty Corp. (Kimco), owned the Mill Basin Shopping Center where a Home Depot store was located. Defendant Home Depot U.S.A., Inc. (Home Depot) was a tenant leasing store space at the shopping center pursuant to a lease agreement with KIOP. Pursuant to the terms of that lease agreement, Home Depot was not responsible for operating, maintaining or repairing any of the common areas of the shopping center, which included the subject parking lot. Instead, KIOP, as the landlord, was the one responsible for the maintenance and repair of such areas.

During her deposition, plaintiff testified that, on the day of the accident, it was a beautiful, warm and sunny day. The plaintiff had taken a bus on Avenue U and after she exited the bus, she proceeded to walk through the parking lot in order to go to a store which was located in the shopping center. The Home Depot store was also located in the shopping

center. Plaintiff testified that the accident occurred as soon as she walked into the parking lot. According to plaintiff, she was walking through the parking lot diagonally in order to get around the parked cars. The plaintiff testified that the sun was very bright that day. She was walking toward the store she intended to go into, and while walking to get around a parked car and to avoid the moving cars, one of her feet came in to contact with something which caused her to trip and fall. Plaintiff did not see what caused her to trip prior to her fall. It was not until after she was helped to her feet that she noticed she had tripped over a concrete curb in the parking lot. When plaintiff was shown a photograph of the accident location, marked as "Defendants' Exhibit C," she indicated that she tripped over the concrete curb divider depicted in the photo, which extended out from an adjacent flower bed.

Plaintiff subsequently commenced this action against defendants to recover damages for the personal injuries she allegedly sustained as a result of the accident. Defendants Kimco, KIOP and KIR Portfolio I, L.P. (KIR) joined issue, with service of a Verified Answer on or about January 15, 2014, and Home Depot joined issue by service of a Verified Answer on or about January 8, 2014. In her bill of particulars, plaintiff alleges that the defendants were negligent in their ownership, operation, management, maintenance and control of the premises and in allowing a defective, dangerous and hazardous condition to exist. The parties conducted discovery and plaintiff filed a Note of Issue and Certificate of Readiness with the County Clerk's office on December 15, 2015. Defendants Home Depot, Kimco, KIOP and KIR (collectively, defendants) now seek summary judgment dismissing the plaintiff's complaint and any and all cross-claims. At oral argument on October 20, 2016, the

plaintiff's action insofar as it pertains to defendant Home Depot U.S.A., Inc., was dismissed as against said defendant, along with any and all cross-claims, on the record in light of plaintiff's failure to oppose this relief.

Discussion

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 evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], *citing Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also, Smalls v AJI Industries. Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

In support of their motion, defendants argue that they are entitled to summary judgment dismissing plaintiff's negligence claim because they breached no duty of care to the plaintiff for the alleged condition that caused her accident. In this regard, defendants argue that the concrete curb divider was open and obvious and not inherently dangerous, and presented no unreasonable risk of harm. In support of their motion, defendants submit the plaintiff's deposition transcript, photographic evidence, as well as the affidavit of a

professional engineer, Timothy J. Carlsen, P.E. In his affidavit, Carlsen opines, based upon his review of the file, including the deposition transcripts, pleadings, and photographs marked as exhibits at the parties' depositions, as well as his review of all the applicable building codes, public records, parking lot design guidelines and historical aerial photographs, that the function of the concrete curb divider on which plaintiff allegedly tripped was to separate a line of parking stalls from the main north/south vehicle pathway that provided access to and from Avenue U. Carlsen further opines, with a reasonable degree of engineering certainty, that the subject curb was visible, discernable and observable to anyone traversing the area, and is of a height typically traversed by the public. He further states that the curb, which measured 4.5 inches high, was of a sufficient height to be easily observed by a pedestrian, and that the color contrast of the grey concrete curb against black/charcoal asphalt was also easily perceived by pedestrians. Carlsen additionally concludes that the subject curb was properly maintained, and that the accident was not caused by crumbling, delaminating or other deterioration. He further states that the subject curb was not located within a delineated pedestrian pathway and therefore would not constitute an obstruction to an intended path of travel. Lastly, Carlsen opines that the parking lot/curb configuration conformed substantially to the approved plans and specifications and the requirements of the City of New York Certificates of Occupancy and all applicable laws, rules and regulations for the use and occupancies specified thereunder.

It is well settled that a landowner has a duty to maintain its premises in a reasonably safe manner for its patrons (*see Basso v Miller*, 40 NY2d 233, 241 [1976]; *Katz v*

Westchester County Healthcare Corp., 82 AD3d 712, 713 [2011]). However, there is no duty to protect or warn against an open and obvious condition which is not inherently dangerous (*see Pipitone v 7-Eleven, Inc.*, 67 AD3d 879 [2009]; *Giambruno v Wilbur F. Breslin Dev. Corp.*, 56 AD3d 520, 521 [2008]; *Gagliardi v Walmart Stores, Inc.*, 52 AD3d 777 [2008]; *Sclafani v Washington Mut.*, 36 AD3d 682 [2007]; *Cupo v Karfunkel*, 1 AD3d 48 [2003]). Significantly, the Second Department has held that a wheel stop or concrete parking lot divider which is clearly visible presents no unreasonable risk of harm (*see Plessias v Scalia Home for Funerals*, 271 AD2d 423 [2000]; *see also Pipitone v 7-Eleven, Inc.*, 67 AD3d at 880; *Giambruno v Wilbur F. Breslin Dev. Corp.*, 56 AD3d at 520; *Albano v Pete Milano's Discount Wines & Liqs.*, 43 AD3d 966, 966 [2007]; *Cardia v Winchester Holdings, LLC*, 35 AD3d 336 [2006]; *Zimkind v Costco Wholesale Corp.*, 12 AD3d 593 [2004]; *Bryant v Superior Computer Outlet*, 5 AD3d 343 [2004]; *Murphy v Kissena Drugs*, 4 AD3d 401 [2004]).

Here, viewing the evidence submitted by the defendants in the light most favorable to the plaintiff, the court finds that the defendants have failed to make the requisite showing entitling them to summary judgment. The evidence submitted by the defendants, which includes the plaintiff's deposition testimony, the affidavit of defendants' expert engineer, as well as photographs of the accident site, does not eliminate all issues of fact as to whether, under the circumstances surrounding the accident in this case, the curb divider was clearly visible, open and obvious and, thus, not inherently dangerous (*see Harris v 11 W. 42 Realty Invs., LLC*, 98 AD3d 1084, 1085 [2012] [defendant's own submissions raised issue of fact

as to whether condition which caused the plaintiff to trip and fall was open and obvious and not inherently dangerous]; *Acevedo v New York City Tr. Auth.*, 97 AD3d 515 [2012]; *Franzese v Tanger Factory Outlet Ctrs., Inc.*, 88 AD3d 763 [2011]).

In this regard, the court notes that the photographic evidence of the accident scene, as submitted by the defendants, reveals that the concrete curb divider at issue appears to be a light grey color, which is similar in color to the surrounding asphalt, which appears worn, cracked and faded (*see* Pludwin Affirmation, Exhibit E). The photographs also show that the concrete curb in question extends beyond the flower bed and is not located in a place that is a "wheel stop" for a parking space.

Additionally, during her deposition, the plaintiff testified that, at the time of the accident, the sun was very bright, she had not been to this shopping mall before, and she did not see the curb prior to tripping over it (Plaintiff's Deposition, at 39, 44, 51, 55). Plaintiff additionally testified that, just before the accident occurred, she was trying to walk around a parked car and avoid other moving cars in the parking lot (*id.* at 55). Based upon the foregoing, an issue of fact exists as to whether the curb divider was clearly visible and, thus, readily discernable, especially under the circumstances alleged by the plaintiff (*see Maio v John Andrew, Inc.*, 85 AD3d 741, 742 [2011]; *Gutman v Todt Hill Plaza, LLC*, 81 AD3d 892 [2011]). Whether an alleged hazard is open and obvious cannot be divorced from the surrounding circumstances. Thus, a condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted (*see Franzese v Tanger Factory Outlet Centers, Inc.*,

88 AD3d at 763; *Gutman v Todt Hill Plaza, LLC*, 81 AD3d at 892; *Mazzarelli v 54 Plus Realty Corp.*, 54 AD3d 1008, 1009 [2008]; *Mauriello v Port Auth. of N.Y. & N.J.*, 8 AD3d 200 [2004]). Indeed, it is reasonable to conclude that the curb divider might be overlooked by a pedestrian under the circumstances allegedly confronted by the plaintiff here, where the curb could not be observed because of the glare of the sun, the lack of a color contrast with the surrounding asphalt, coupled with having to walk around a parked car and to avoid moving traffic (*see Villano v Strathmore Terrace Homeowners Ass'n, Inc.*, 76 AD3d 1061, 1062 [2010]; *Mazzarelli v 54 Plus Realty Corp.*, 54 AD3d at 1009).

Furthermore, the court finds that the affidavit from defendants' engineering expert, Carlsen, is conclusory and lacking in detail.[1] Carlsen, who never visited the site or examined the subject curb divider, opines that the curb was visible, discernable and observable to anyone traversing the area, and that its height (4.5 inches) is recognized as safe for pedestrians within the commentary for the "model building code." However, he fails to specify, cite, or otherwise attach to his affidavit any provision of the New York City Building Code or even the commentary to the model code to which he refers. He also fails to attach any of the public records pertaining to the subject property, the parking lot design guidelines or the historical aerial photographs which he claims his opinions are based upon. Thus, the court finds that the defendants' expert affidavit is lacking in any probative value (*see Azzaro v Super 8 Motels, Inc.*, 62 AD3d 525, 526 [2009]). Based upon the foregoing, the court finds that the defendants have failed to meet their initial burden of establishing, prima facie, that

[1]Both sides were granted leave to submit replacement expert reports in admissible form, as those in their papers were not in admissible form. Both sides submitted replacement reports.

the curb divider that allegedly caused the plaintiff to trip and fall was clearly visible, open and obvious and not inherently dangerous (*see Surujnaraine v Valley Stream Cent. High Sch. Dist.*, 88 AD3d 866, 867 [2011]; *Katz v Westchester County Healthcare Corp.*, 82 AD3d 712, 713 [2011]; *Kempter v Horton*, 33 AD3d 868, 869 [2006]; *Shalamayeva v Park 83rd St. Corp.*, 32 AD3d 387, 388 [2006]; *Miner v Northport Yacht Club*, 15 AD3d 362, 363 [2005]; *Scher v Stropoli*, 7 AD3d 777 [2004]).

Additionally, the court notes that this case is distinguishable from the Second Department cases where the court found that a curb divider/wheel stop was open and obvious and not inherently dangerous (*see e.g.*, *Lacerra v CVS Pharmacy,* 143 AD3d 674 [2016] [where plaintiff admitted to seeing wheel stop and attempted to step over it when accident occurred]; *Bellini v Gypsy Magic Enterprises, Inc.,* 112 AD3d 867 [2013] [wheel stop was open and obvious where plaintiff noticed it shortly before her accident and was consciously trying to step over it when she fell]; *Gallub v Popei's Clam Bar, Ltd., of Deer Park,* 98 AD3d 559 [2012][wheel stop that was black with reflective yellow material was open and obvious and not inherently dangerous where plaintiff had been to accident location numerous times before]; *Gallo v Hempstead Tpk., LLC*, 97 AD3d 723 [2012] [wheel stop was open and obvious where it was painted yellow in contrast to the color of the sidewalk to which it was affixed]; *Pipitone v 7-Eleven, Inc.*, 67 AD3d at 880 [wheel stop was painted yellow and plaintiff had been there on prior occasions]). Here, defendants' own submissions indicate that the color of the curb divider blended in with the surrounding asphalt, that the plaintiff

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never saw the curb prior to her fall and she had never been to the shopping center prior to the date of the accident.

In sum, since the defendants did not meet their initial burden of establishing their prima facie entitlement to judgment as a matter of law, the court need not consider the sufficiency of the plaintiff's opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Assuming, *arguendo*, that defendants did meet their burden, the plaintiff's opposition, at the very least, raises a question of fact as to whether the curb divider was open and obvious. In this regard, the plaintiff submitted an affidavit from an expert engineer, Robert Schwartzberg, who avers that he visited the accident location approximately two months after the accident and personally took measurements and examined the curb in question. Based upon his review, Schwartzberg notes that the curb divider appeared "worn, damaged and irregular" and was of a light grey colored concrete, which, in his opinion, blended in with the faded asphalt of the surrounding roadway/parking lot surface, thereby raising an issue of fact as to whether the curb was clearly visible.

Conclusion

Based upon the foregoing, defendants' motion for summary judgment dismissing the plaintiff's complaint is denied as to defendants KIOP, KIR and Kimco and is granted as to defendant Home Depot, along with any cross-claims against this defendant.

The foregoing constitutes the decision and order of the court.

ENTER:

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Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court