

Pepper v 7-Eleven Inc.
2018 NY Slip Op 34437(U)
February 27, 2018
Supreme Court, Suffolk County
Docket Number: Index No. 15-612477
Judge: Thomas F. Whelan
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SHORT FORM ORDER

ORIGINAL

INDEX No. 15-612477
CAL. No. 17-01322OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 11-15-17
ADJ. DATE 12-18-17
Mot. Seq. #002 MotD

-----X
KELLY PEPPER,

Plaintiff,

- against -

7-ELEVEN INC., MAPLECREST
ASSOCIATES, INC., AHMED FURQUAN,
IFRAN KHAWAJA,

Defendants.
-----X

AGOGIA HOLLAND & AGOGLIA, P.C.
Attorney for Plaintiff
500 North Broadway, Suite 237
Jericho Turnpike, New York 11753

CONGDON, FLAHERTY, O'CALLAGHAN,
REID DONLON, TRAVIS & FISHLINGER
Attorney for Defendants
333 Earle Ovington Blvd., Suite 502
Uniondale, New York 11553

Upon the following papers read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers dated November 14, 2017, filed by defendants; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers dated December 8, 2017 filed by plaintiff; Replying Affidavits and supporting papers dated December 12, 2017; Other ___; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by the defendants for summary judgment dismissing the complaint is granted as set forth herein, and is otherwise denied.

The plaintiff, Kelly Pepper, commenced this action to recover damages for personal injuries she allegedly sustained on March 18, 2013, when she tripped and fell in a 7-Eleven parking lot located in Oakdale, New York. The plaintiff alleges, *inter alia*, that she tripped at or near a parking space in front of the store, which was owned and operated by defendants 7-Eleven, Inc. ("7-Eleven"), Maplecrest Associates, Inc. ("Maplecrest"), Ahmed Furquan, and Ifran Khawaja. The plaintiff claims that the defendants created and had actual or constructive notice of a dangerous condition on their premises, and were negligent in the maintenance, ownership, and operation of the premises.

Pepper v 7-Eleven
Index No. 15-612477
Page 2

The defendants now move for summary judgment dismissing the complaint on the grounds that: (1) the alleged condition was no more than a trivial defect; (2) the plaintiff did not identify the reason for her fall; (3) the plaintiff's conduct was the sole proximate cause of her injuries; (4) the defendants did not have actual or constructive notice of the defect; and (5) three of the four defendants had no duty of care to the plaintiff. In support of their motion, the defendants submit the pleadings; the plaintiff's deposition testimony; the deposition testimony defendants Khawaja and Ahmed; the deposition testimony of a representative of Maplecrest; the deposition testimony of a representative of 7-Eleven; photographs of the parking lot; and the lease agreement between Maplecrest and 7-Eleven. The plaintiff opposes the motion arguing, *inter alia*, that she clearly stated that the cause of her accident was the defective condition of the parking lot; that the defect existed for a "considerable period of time" prior to her accident; and that photographs depict that the parking lot contained a dangerous condition. The plaintiff further asserts that the deposition testimony of Khawaja is unsigned, thus, it should not be considered by the Court, and that the defendants failed to meet their burden to eliminate all triable issues of fact.

At her deposition, the plaintiff testified that she was employed by the United States Postal Service as a letter carrier at the time of the accident. On March 18, 2013, at approximately 11:15 a.m., the plaintiff parked her mail truck between faded yellow lines in the 7-Eleven parking lot. After parking, she turned off her engine, held two pieces of mail, and prepared to exit the truck. She stepped out of the truck with her left foot while looking "straight ahead." Her left foot "twisted," and as she placed her right foot on the ground, she fell. When the plaintiff looked at the area where she fell, she observed a pothole that was approximately two inches deep, six to eight inches wide, and "a few feet long." The weather was clear and dry, and there was no snow or ice in the parking lot. The plaintiff had been delivering mail to the 7-Eleven location in Oakdale for approximately eight years, but she had not observed the condition of the parking lot prior to her accident. After a "few minutes" on the ground, the plaintiff went into the 7-Eleven store to drop off the mail, but she did not inform the store employees that she fell. The plaintiff returned to her mail truck, and called her supervisor to inform him that she may have broken her foot. Her supervisor arrived at the 7-Eleven shortly after the phone call, and created an incident report. He also captured photographs of the area where the incident occurred, and the plaintiff identified the photographs.

At his deposition testimony, Furquan Ahmed testified that he was the only manager employed at the 7-Eleven store on the date of the accident. The store was owned by Ifran Khawaja, and Ahmed did not know the details of any agreement between Khawaja and 7-Eleven. According to Ahmed, the structure of the store was maintained by FM Maintenance, a company contracted by 7-Eleven, and the employees of the store were generally responsible for cleaning the parking lot two times per day. At the time of the accident, the parking lot was in good condition. If there were any complaints about the parking lot, it was Ahmed's responsibility to notify FM Maintenance. Ahmed was not aware of any notification to FM Maintenance concerning the parking lot, and he was not aware of any other person who fell in the parking lot.

Ifran Khawaja testified that he had been a 7-Eleven franchisee for more than 20 years, and he owned more than one 7-Eleven store, including the subject store. Khawaja did not have a set schedule for visiting the store, and he went to the store whenever he had the time to do so. According to Khawaja, he did not know whether any complaints were made about the condition of the parking lot, and if such complaints were made a record would be kept by FM maintenance. The outside of the store was generally cleaned by store employees.

Pepper v 7-Eleven
Index No. 15-612477
Page 3

Frank D'Anna testified that he was the president of Maplecrest at the time of the incident. Maplecrest owned the building where the 7-Eleven store was located, and leased it to Southland Corporation. As per the terms of the lease, Maplecrest was not responsible for maintaining, and did not maintain or repair the parking lot at the 7-Eleven location.

Xochitl Saldana-Pena testified that she was employed as a field consultant for 7-Eleven. As part of her job duties, Saldana was responsible for overseeing ten 7-Eleven stores, including the subject store. At the time of the plaintiff's accident, Saldana was not yet employed as a field consultant but she worked as a store manager at another 7-Eleven location. Saldana testified that if there were any maintenance issues at one of the stores, including the parking lot area, as a field consultant, she would create a "case" and a 7-Eleven maintenance contractor would be contacted to address the issue. Saldana was shown photographs of the area where the plaintiff fell, and she testified that she observed "cracks and [a] pothole." She further testified that if she had observed the cracks and the pothole in her position as a field consultant, she would call maintenance to address the issue because "it could be dangerous."

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

As an initial matter, the deposition testimony of Ifran Khawaja was properly submitted and was considered on this motion inasmuch as the deposition transcript was certified by the stenographer (*Montalvo v United Parcel Serv., Inc.*, 117 AD3d 1004, 1005, 986 NYS2d 551 [2d Dept 2014]), and submitted by the deponent in support of his motion (*see David v Chong Sun Lee*, 106 AD3d 1044, 1045, 967 NYS2d 80 [2d Dept 2013]).

Here, the defendants have met their prima facie burden to show their entitlement to summary judgment dismissing the complaint against defendants Maplecrest and Ahmed. It is axiomatic that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff (*see Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]; *Engelhart v County of Orange*, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005]). Generally, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (*see Dugue v 1818 Newkirk Mgt. Corp.*, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]; *Millman v Citibank*, 216 AD2d 278, 627 NYS2d 451 [2d Dept 1995]; *see also, Butler v Rafferty*, 100 NY2d 265, 762 NYS2d 567 [2003]). Thus, an out-of-possession landlord who has relinquished control over the premises will not be liable for personal injuries caused by a dangerous condition on the leased premises unless the landlord had a duty imposed by statute, by contract, or by a course of conduct (*see Vialva v 40 W. 25th St. Assocs., L.P.*, 96 AD3d 735, 945 NYS2d 723 [2d Dept 2012]; *Butler v Rafferty*, 100 NY2d 265).

Maplecrest's president testified that the property was leased to Southland Corporation (7-Eleven's predecessor), and that Maplecrest was not responsible for maintaining the property. The defendants also

Pepper v 7 Eleven
Index No: 15-612477
Page 4

submitted the lease agreement between Maplecrest and Southland Corporation, in which Southland and Maplecrest agreed that Southland would be responsible for maintaining the parking area of the store. Additionally, although the plaintiff alleges that Ahmend owned and operated the store, the evidence revealed that Ahmed was merely a store manager who worked part-time at the subject store (*Dugue v 1818 Newkirk Mgt. Corp.*, 301 AD2d 561). In her opposition, the plaintiff has failed to raise an issue of fact with respect to Maplecrest's role as a out-of-possession landlord and with respect to Ahmed's status as an employee. Accordingly, the branch of the defendants' motion for summary judgment dismissing the complaint against defendants Maplecrest and Ahmed is granted.

With respect to the remaining defendants, whether a dangerous or defective condition exists on the property of another so as to create liability depends on the facts and circumstances of the case (*see Trincere v County of Suffolk*, 90 NY2d 976, 665 NYS2d 615 [1997]; *Rogers v 575 Broadway Assocs., LP*, 92 AD3d 857, 939 NYS2d 517 [2d Dept 2011]). A trivial defect that does not constitute a trap or nuisance over which a pedestrian might merely stumble, stub his or her toes, is generally not actionable (*see Kehoe v City of New York*, 88 AD3d 655, 656-657, 930 NYS2d 252, 253 [2d Dept 2011]; *Rogers v 575 Broadway Assocs., LP*, 92 AD3d 857). "A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79, 19 NYS3d 802 [2015]; *see Alvarez v Prospect Hosp.*, 68 NY2d 320; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851). Where the defendant establishes its entitlement to judgment as a matter of law, the plaintiff may defeat the motion for summary judgment by submitting sufficient evidence to raise a triable issue of fact (*see Ezzo v 2102 Union Blvd.*, 278 AD2d 447, 447, 717 NYS2d 922 [2d Dept 2000]). It is important to note that the phrase "not constituting a trap" does not limit the means by which a plaintiff may demonstrate the hazard posed by a physically small defect (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 77). The Court of Appeals has recently held that the trivial nature of the defect must "be based on all the specific facts and circumstances of the case, not size alone" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 77; *see Kehoe v City of New York*, 88 AD3d 657 [in determining whether a defect is trivial as a matter of law the court should consider "the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury"]). The relevant question to be answered is whether intrinsic character of a physically small defect made it "difficult for a pedestrian . . . to traverse safely on foot" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 77).

In the instant matter, defendants Khawaja and 7-Eleven failed to establish prima facie their entitlement to summary judgment. Generally, the issue of whether a dangerous or defective condition exists depends on the particular facts of each case, and is properly a question of fact for the jury (*see Taussig v Luxury Cars of Smithtown, Inc.*, 31 AD3d 533, 818 NYS2d 593 [2d Dept 2006]; *Trincere v County of Suffolk*, 90 NY2d 976). It is unclear from the testimony and the photographs submitted in support of the motion whether the alleged defect is trivial or dangerous. The photographs of the accident site are insufficient to demonstrate, as a matter of law, that the alleged defect was too trivial to be actionable (*see Berry v Rocking Horse Ranch Corp.*, 56 AD3d 711, 868 NYS2d 270 [2d Dept 2008]; *Friedman v Beth David Cemetery*, 19 AD3d 365, 796 NYS2d 167 [2d Dept 2005]; *Corrado v City of New York*, 6 AD3d 380, 773 NYS2d 894 [2d Dept 2004]). Furthermore, the plaintiff testified that the pothole that caused her to fall was approximately two inches deep, six to eight inches wide, and "a few feet long." Although the plaintiff's


Pepper v 7 Eleven
Index No: 15-612477
Page 5

description was an estimate, the defendants' representatives did not testify as to whether they measured the pothole.

As to the defendants' argument that Khawaja it is not liable for plaintiff's injuries because 7-Eleven retained its right to re-enter and inspect the store, they submit no evidence, such as the franchisee agreement, to support that claim. Khawaja merely testified that he was a 7-Eleven franchisee, without any additional detail. The defendants also failed to submit evidence sufficient to establish that they did not have actual or constructive notice of the alleged defective condition (*see Franzese v Tanger Factory Outlet Ctrs., Inc.*, 88 AD3d 763, 930 NYS2d 900 [2d Dept 2011]; *Gutman v Todt Hill Plaza, LLC*, 81 AD3d 892, 917 NYS2d 886 [2d Dept 2011]). Although Ahmed testified that he was not aware of any complaints about the parking lot, he also testified that the store employees generally cleaned the parking area two times per day. Khawaja testified similarly. Additionally, the field consultant testified that the outside of the store was generally inspected every one to two weeks.

Accordingly, inasmuch as the remaining defendants failed to demonstrate the absence of material issues of fact, the burden did not shift to the plaintiff to establish the existence of a triable issue of fact, thus, the sufficiency of the plaintiff's papers need not be considered (*see DeLaRosa v City of New York*, 61 AD3d 813, 877 NYS2d 439 [2d Dept 2009]).

Dated: 2/27/18



THOMAS F. WHELAN, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION