Sasso v Sun Enters., LLC
2019 NY Slip Op 34074(U)
April 8, 2019
Supreme Court, Suffolk County
Docket Number: 23146/2014
Judge: Carmen Victoria St. George
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SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

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ELENA SASSO,

Plaintiff,

-against-

SUN ENTERPRISES, LLC and RITE AID OF NEW YORK, INC.,

Defendants.

-- x

Index No. 23146/14

Motion Seq: 001
MG
Decision/Order

The following papers were read upon this motion:

Notice of Motion/Order to Show Cause...........	X
Answering Papers..................................	X
Reply...	X
Briefs: Plaintiff's/Petitioner's......................	
Defendant's/Respondent's.................	

Plaintiff commenced this personal injury action to recover damages that she suffered after she tripped and fell on an allegedly dangerous condition located outside the front entrance to the Rite Aid store located on Montauk Highway, in Shirley, New York. The incident occurred on May 16, 2013, at approximately 1:50 p.m. The dangerous condition is alleged to be a broken, uneven surface of a curb. Defendant Sun Enterprises, LLC is the owner of the property upon which tenant/co-defendant Rite Aid's store is located.

In addition to alleging that the defendants were negligent in permitting the broken, uneven surface of the curb to exist, plaintiff also alleges that defendants were negligent in failing to provide a proper handicapped access sidewalk with ramp at the area designated for handicapped parking. Plaintiff further alleges creation and actual and constructive notice of the alleged defective conditions.

The defendants contend that they are entitled to summary judgment because the alleged defect in the curb is trivial and not actionable, in addition to being open and obvious and not

inherently dangerous. Defendants further maintain that the absence of a handicapped-accessible ramp is not the proximate cause of plaintiff's fall, that there is no private right of action for monetary damages in a personal injury action based upon an alleged violation of the Americans with Disabilities Act (ADA) (***42 USCS § 12182***), nor is there any evidence that the plaintiff was disabled in any respect. Defendants also contend that the ADA does not establish or set a safety standard for walkways. In the alternative, defendants maintain that they did not create or have notice of the alleged defect.

Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (***Makaj v Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]). "The Supreme Court's function on a motion for summary judgment is issue finding, not issue determination" (***Trio Asbestos Removal Corp. v. Gabriel & Sciacca Certified Public Accountants, LLP***, 164 AD3d 864, 865 [2d Dept 2018]).

Before a property owner can be held liable in negligence for a complained-of condition, that condition must first constitute a defect or an inherently dangerous condition, or trap (***Crawford v. Pick Quick Foods, Inc.***, 300 AD2d 431 [2d Dept 2002]; ***Garry v. Rockville Centre Union Free School District***, 272 AD2d 437 [2d Dept 2000]; ***Reynolds v. Reynolds***, 245 AD2d 498 [2d Dept 1997]).

A property owner is charged with the duty to maintain the premises in a reasonably safe condition (***Katz v Westchester County Healthcare Corp.***, 82 AD3d 712, 713 [2d Dept 2011]). A property owner has no duty, however, to protect or warn against an open and obvious condition that is not inherently dangerous as a matter of law (***Neiderbach v 7-Eleven, Inc.***, 56 AD3d 632, 633 [2d Dept 2008]; ***Gagliardi v. Walmart Stores, Inc.***, 52 AD3d 777 [2d Dept 2008]; ***Sclafani v. Washington Mutual***, 36 AD3d 682 [2d Dept 2007]).

Whether a condition is open and obvious cannot be divorced from the surrounding circumstances. A condition that is ordinarily apparent to a person making reasonable use of his senses may be rendered a trap for the unwary where the condition is obscured, or the plaintiff is distracted (***Stoppeli v Yacenda***, 78 AD3d 815, 816 [2d Dept 2010]). Proof that a dangerous condition is open and obvious merely negates the defendant's obligation to warn of the condition but does not necessarily preclude a finding of liability against a landowner for failure to maintain the property in a safe condition (***Cupo v Karfunkel***, 1 AD3d 48, 52 [2d Dept 2003]). Rather, the fact that a condition may have been open and obvious is relevant to the issue of the plaintiff's comparative negligence (***Clark v AMF Bowling Centers, Inc.***, 83 AD3d 761 [2d Dept 2011]; ***Gradwohl v Stop & Shop Supermarket Company, LLC***, 70 AD3d 634 [2d Dept 2010]; ***Westbrook v WR Activities-Cabrera Markets***, 5 AD3d 69 [1st Dept 2004]***; Cupo, supra***).

Although the open and obvious nature of a dangerous condition will not preclude a finding of liability against a landowner who causes a foreseeable risk of harm through a failure to maintain the property in a reasonably safe condition, summary dismissal is appropriate where the complained of condition was both open and obvious and, as a matter of law, was not inherently dangerous. (***Rao-Boyle v Alperstein***, 44 AD3d 1022 [2d Dept 2007]).

"Generally, 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 unless the defect is trivial as a matter of law [citations omitted]. Property owners (and tenants) may not be held liable for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip [citations omitted]. In determining whether a defect is trivial as a matter of law, the court must examine all of the facts presented. . ." (***Milewski v. Washington Mutual, Inc.***, 88 AD3d 853, 855-856 [2d Dept 2011]; see also ***Tagle v. Jakob***, 97 NY2d 165, 169 [issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question, but a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion, on the basis of clear and undisputed evidence]).

Consideration of the facts presented can include the width, depth, elevation, irregularity and appearance of the claimed defect, together with the time, place and circumstances of the incident, as there is no bright-line test exclusively dependent upon the dimension of the defect (***Trincere v. County of Suffolk***, 90 NY2d 976, 977-978 [1997]). "Photographs of a defect which fairly and accurately reflect how it appeared on the date of the accident may be used to demonstrate whether [the alleged defect] is trivial" (***Das v. Sun Wah Restaurant***, 99 AD3d 752, 754 [2d Dept 2012]).

Defendants in this action submit the pleadings, including the Bill of Particulars sworn to on April 8, 2015, plaintiff's deposition testimony, the deposition testimony of two Rite-Aid employees, and photographs of the alleged defect.

Defendants' submissions establish their *prima facie* entitlement to summary judgment as a matter of law by demonstrating that the alleged defect in the curb was not only trivial, but that it was also open, obvious and not inherently dangerous. Moreover, defendants have established that the subject defect situated at the top of the curb is not the location where plaintiff's foot contacted the curb, and that there is no causal connection between the absence of a handicapped ramp and plaintiff's fall.

Plaintiff's own testimony makes clear that she was not handicapped on the date of her fall. She and her ex-fiancée, Richard Colli, arrived in plaintiff's car and parked in the middle of the parking lot, in front of the Rite-Aid store. They parked in a "regular" spot according to plaintiff, not a handicapped parking spot. They each walked unassisted to the point where plaintiff fell outside the front door of the store. Plaintiff testified that she had been to this Rite-Aid store at least ten times, and possibly as many as twenty times, prior to May 16, 2013. She always approached the front door of the store by walking across the blue lines painted on the parking lot surface that were located between two handicapped parking spots situated on either side of those painted lines. She had never fallen at the location of her accident prior to May 16, 2013.

Plaintiff stated that, on May 16, 2013, she was wearing a white shirt, jeans and open-toed Bass sandals, with a flat sole. The weather was clear, and the roadway and parking lot surfaces were dry. According to plaintiff, she and Richard Colli did not go to the Rite-Aid store to pick

up any prescriptions, but just to go shopping. The time of plaintiff's accident was early afternoon, at approximately 1:50 p.m.

When asked where she fell, plaintiff answered, "[f]rom the curb, I lost my footage. I fell, I hit my left knee, and kept going into the glass doors and hit my head" on the glass door. When asked what caused her to lose her footing, plaintiff testified that "there was a broken spot on the curb. My toe or my foot caught that, and I lost my balance, and I just couldn't stop." At the time she tripped, plaintiff was looking down "because [she] had to go up on the curb."

Plaintiff stated that the skin of the big toe on her left foot contacted the very top of the curb, as opposed to the middle or bottom of the curb. After she reviewed her transcript, she submitted a sworn "EBT Transcript Correction Sheet" attesting that, "[t]he part my foot came into contact with was more toward the middle of the curb as opposed to the 'very top.'"

Plaintiff's correction of her deposition testimony is significant because she also identified color photographs at her deposition, recognizing them as depicting the area of the curb and sidewalk where she fell on May 16, 2013. Those photographs were marked as defendants' Exhibits A and B, which are submitted upon the instant motion as part of defendants' Exhibit D. Plaintiff circled the defect that she alleges caused her to fall, which appears to be a chip/divot on the top of the curb in front of the Rite-Aid store. The defect that plaintiff circled in the photographs is located on the top of the curb, not the middle of the curb where plaintiff said her big toe made contact immediately before she fell.

Plaintiff also testified that she never noticed the defect on the top of the curb during any of the ten to twenty prior visits that she made to the subject Rite-Aid store prior to May 16, 2013. She also made no prior complaints to any Rite-Aid personnel about the condition of the curb where she fell.

After she fell, Rite-Aid personnel came to the front of the store with ice. The female employee asked plaintiff what happened, and plaintiff testified that she said, "I told her that I fell over the curb. . ."

The Rite-Aid co-manager, Joanne Bell, testified that she saw plaintiff after she fell, outside and in front of the store. She testified that handicapped ramps are located at the sides of the store and that no one had ever complained about the lack of a ramp directly in front of the store. She also identified a photograph of the front of the store that fairly and accurately depicted what the store looked like on May 16, 2013, including the handicapped parking stalls in front of the store, adjacent to blue striping painted on the parking lot surface.

Another Rite-Aid employee, Joanne Horton, was called to testify, apparently about a 2009 incident involving a man who fell, but she did not recall the incident, and no details were provided during the deposition. Ms. Horton did recall an incident prior to 2011 or 2012 involving a woman catching her flip flop on a curb and falling forward. Ms. Horton was not at the subject Rite-Aid store on the date of plaintiff's accident but testified that Rite-Aid is the tenant at that location.

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Plaintiff's ADA Claim

The Court agrees with defendants' contention that their failure to provide a handicapped ramp at the area designated for handicapped parking, directly in front of the store, does not provide a basis for liability as a matter of law. The "ADA allows litigants to pursue actions only for injunctive relief, and does not provide a private right of action for monetary damages in a personal injury action [internal citations omitted]. Since ADA's purpose is to address issues of discrimination and not safety, the act should not be construed as setting a safety standard for stairs or walkways, even with respect to disabled plaintiffs" (***Lugo v. St. Nicholas Associates***, 18 AD3d 341, 342 [1st Dept 2005]; *see also* ***Fumerelle v. Visone Bros., Inc.***, 57 Misc3d 1217 [A] [Sup Ct Erie County 2016], *aff'd* 155 AD3d 1590 [4th Dept 2017]; ***Chirumbolo v. 78 Exchange Street, LLC***, 137 AD3d 1358 [3d Dept 2016]; ***Corbett v. Adelphia Western New York Holdings, LLC***, 45 AD3d 1293 [4th Dept 2007]).[1] Importantly, plaintiff never testified or even remotely suggested by her deposition testimony that the lack of a handicapped ramp/curb cut in front of the store in any way caused her to fall. Accordingly, plaintiff's claim in this regard is utterly speculative, in addition to it not being actionable to recover monetary damages in this personal injury action.

Nature of the Defect

Plaintiff's own testimony combined with the photographs identified by her at deposition (Defendant's Exhibits A and B annexed to the moving papers as Exhibit D) show that the complained-of condition is a small divot or chip at the top of the curb located in front of the Rite-Aid store. Plaintiff never noticed this defect on the ten to twenty occasions that she frequented the store prior to her accident, which is not surprising given the small size of the chip/divot as it appears in the photographs. Moreover, plaintiff's accident occurred on a clear day, in the early afternoon. There is no testimony that the plaintiff could not see where she was walking due to insufficient lighting conditions or debris or precipitation on the ground; in fact, plaintiff testified that she was looking at the ground because she knew she had to step up onto the curb.

In the photographs, there is nothing sticking above the surface of the curb, nor did plaintiff testify that she stepped into the chip/divot. Plaintiff instead testified that the big toe on her left foot contacted the middle of the curb rather than the "very top" where the chip/divot is pictured, which negates her claim that the alleged defect caused her to fall.

Thus, it is this Court's determination that, considering all the facts presented about the subject accident, the defect in the curb that was circled by plaintiff in the photographs is trivial as a matter of law and not actionable, as well as being open, obvious and not inherently dangerous or constituting a trap-like condition. Accordingly, defendants have established their *prima facie* entitlement to summary judgment (***Dery v. K Mart Corporation***, 84 AD3d 1303 [2d Dept 2011]; ***Aguayo v. New York City Housing Authority***, 71 AD3d 926 [2d Dept 2010]).

In opposition, plaintiff submits, *inter alia*, the affidavit of Peter Sarich, Chief Building Inspector for the Village of Patchogue, the surveillance video of plaintiff's fall, still photographs

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[1] As noted, plaintiff in this case was not disabled on May 16, 2013.

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reproduced from the video, the photograph of the alleged defect identified at plaintiff's deposition as Defendant's Exhibit A, the affidavit of Richard Colli, the affidavit of LeRoy Carle related to a 2009 trip-and-fall incident, a "Further Verified Bill of Particulars" that was filed after plaintiff filed her Note of Issue in this case, and a copy of the first page of the lease agreement between Sun Enterprises and Genovese Drug Stores, Inc. identifying Sun Enterprises as landlord.[2]

The surveillance video of plaintiff's fall supplied by plaintiff in opposition to the instant motion not only fails to raise a triable issue of fact sufficient to defeat defendants' summary judgment motion, but it underscores that neither the alleged defect in the curb nor the absence of a handicapped ramp caused plaintiff to fall. The video demonstrates that plaintiff's left foot did not contact the top of the curb; instead, it shows that plaintiff apparently did not pick her left foot up high enough to clear the curb. Her left foot appears to strike the middle to the bottom portion of the curb immediately prior to her fall. The video also demonstrates that plaintiff walked from the middle of the parking lot to the place where she tripped unassisted and without any impaired gait.

Neither Richard Colli's affidavit nor LeRoy Carle's affidavit raises a triable issue of fact sufficient to defeat defendants' summary judgment motion. Mr. Colli did not witness plaintiff's fall at the curb because he was placing something in the trash at the time. The video shows that he was walking ahead of plaintiff and his back was to her when she tripped. The remainder of his affidavit concerning the placement of handicapped ramps is not only speculative,[3] but it is irrelevant to this matter. Mr. Colli's affidavit also confirms that he and plaintiff parked in the parking area provided for the general public and that they walked toward the entrance without any difficulty.

According to his affidavit, Mr. Carle is apparently a former client of plaintiff's counsel. Mr. Carle attests that he has a "combat related disability" as a result of his military service, and that he tripped and fell on the curb in front of the subject Rite-Aid store in 2009 because there was no handicapped ramp located there. Further according to his affidavit, plaintiff's counsel's firm represented him in his claim against the store and property owner and the case was settled "without any trial or other litigation." While the Court is not unsympathetic to Mr. Carle's military service disability, his affidavit is inapposite to this action, and, as noted, there is no private right of action for monetary damages in a personal injury action based upon an alleged violation of the ADA. It also bears repeating that plaintiff in this matter does not allege that she was disabled in any manner on May 16, 2013, nor did she testify that the lack of a handicapped ramp in front of the store caused or contributed to her fall.

The "Further Verified Bill of Particulars" (Further Bill) dated August 7, 2018 was served for the first time in plaintiff's opposition to the instant motion, and almost six (6) months after

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[2] There is no dispute that Sun Enterprises is the landlord and that Rite-Aid is its tenant.

[3] Without any basis in fact, Mr. Colli states, "I believe there (sic) handicapped signs on either side of the entrance that to my mind served as an invitation to anyone having difficulty walking to use that area to gain entrance to the store," and ". . . [plaintiff] proceeded straight and evidently caught her foot on the curb that did not have a handicapped ramp despite the existence of the handicapped parking spots immediately adjacent to the area."

she filed her Note of Issue on February 22, 2018. The Further Bill newly alleges that the failure to provide a curb cut is a violation of New York State Building Code Sec. 1101.2 "which requires buildings and facilities to be designed and constructed in accordance with the provisions of ANSI A117.1 Accessible and Usable Buildings and Facilities" and of the ADA. No statutory, or regulatory violations were alleged by the original Bill of Particulars dated April 8, 2015. The Further Bill was served without leave of the Court, and in contravention of CPLR § 3042 (b); therefore, it is a nullity (***Elkrichi v. Flushing Hospital Medical Center***, 293 AD2d 706 [2d Dept 2002]; ***Golub v. Sutton***, 281 AD2d 589 [2d Dept 2001]; ***Partamian v. Sukonnik***, 2012 NY Slip Op 33432 [U] [Sup Ct Queens County 2012]).

Moreover, plaintiff's claim in this Further Bill also fails to raise a triable issue of fact on the merits. In support of this claim made in the Further Bill, plaintiff submits the affidavit of Peter Sarich, who identifies himself as the chief building inspector in the Village of Patchogue and as a "safety expert." He also asserts that he is a "member of the committee on Safe Walking Surfaces of the American Standards and Testing Material, International." He states that he reviewed the photograph marked as Defendant's Exhibit A at deposition (whereon plaintiff circled the defect), the summons and complaint, Bill of Particulars, plaintiff's deposition transcript with the errata sheet, Richard Colli's affidavit and the store's surveillance videos of the incident.

He also states that he reviewed "material and pictures of the scene from 2009 when I was previously requested to render an opinion as to the efficacy of the entrance to provide adequate, safe access to the premises in accordance with applicable regulations." Mr. Sarich refers to Mr. Carle's 2009 incident and annexes his report of that incident to his affidavit. He states that, "[i]t is equally clear that the very condition that contributed to the fall of Mr. Carle reported to have occurred on June 19, 2009 similarly contributed to the fall Ms. Sasso took as shown in the video nearly eight years later." The report annexed to his affidavit is not sworn, nor does Mr. Sarich presently attest specifically to the truth of that April 10, 2010 report. The 2010 report does not state any specific conclusion as to the cause of Mr. Carle's fall, but it alludes to the fact that Leroy Carle fell in front of the Rite-Aid store because there was no handicapped curb cut located there. Importantly, Mr. Sarich noted in his 2010 report that Mr. Carle "is disabled and has limited mobility," unlike plaintiff in this action who was not handicapped on May 16, 2013. Also, of note is the fact that Mr. Sarich's 2010 report does not state that Rite-Aid or any other entity was actually in violation of the New York State Building Code or the ADA, but only that the placement of the handicapped curb cuts that exist at the subject property "do not meet the spirit and intent of the codes." Additionally, there is no evidence that Rite-Aid or the property owner received any building code violations/summonses issued by the appropriate municipality.

Mr. Sarich's brief discussion of the painted blue lines on the parking lot surface in front of the store is equally inapposite to this action. He states that the painted lines "are significantly faded," which "only makes a bad situation worse." It is unclear to what "bad situation" Mr. Sarich refers, but the appearance of the lines has nothing to do with plaintiff's fall, as established by plaintiff's own deposition testimony. Also, Mr. Sarich's opinions that the absence of the curb cut "is a departure from acceptable safety standards, practices and procedures" and the "absence of visible blue lines. . . is an aggravation of the pre-existing deficiency" fails to causally relate these conditions to plaintiff's fall. In any event, plaintiff herself never testified

that the absence of a curb cut, or the appearance of the blue lines caused her to fall; instead, she claims that a defect on the top of the curb caused her to fall, which is alleged in her April 8, 2015 Bill of Particulars. As noted, this alleged defect is trivial, and not inherently dangerous as a matter of law, plus plaintiff established that, immediately prior to her fall, her toe contacted the middle of the curb, not the top where the chip/divot was located.

Plaintiff has failed to raise a triable issue of fact sufficient to defeat defendants' motion; accordingly, summary judgment is granted to the defendants and the complaint is dismissed in its entirety.

The foregoing constitutes the Decision and Order of this Court.

Dated: April 8, 2019
Riverhead, NY

CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [X] NON-FINAL DISPOSITION [ ]