| **Chester v Mini Mall Props., LLC** |
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| 2019 NY Slip Op 34761(U) |
| June 20, 2019 |
| Supreme Court, Nassau County |
| Docket Number: Index No. 607271/16 |
| Judge: James P. McCormack |
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**SUPREME COURT - STATE OF NEW YORK**
**TRIAL/IAS TERM, PART 21 NASSAU COUNTY**

**PRESENT:**
*Honorable James P. McCormack*
**Justice of the Supreme Court**

______________________________________x

**Index No. 607271/16**

**CATHERINE CHESTER, Individually and As Executrix of the Estate of JAMES CHESTER,**

**Motion Seq. No.: 004 & 005**
**Motion Submitted: 5/3/19**

**Plaintiff(s),**

**-against-**

**MINI MALL PROPERTIES, LLC and PORT WASHINGTON FEDERAL CREDIT UNION,**

**Defendant(s).**

______________________________________x

The following papers read on this motion:

Notices of Motion/Supporting Exhibits..........................................XX
Affirmations in Opposition/Supporting Exhibits.............................XX
Affirmation in Partial Opposition..................................................X
Reply Affirmations.......................................................XX

Defendant, Mini Mall Properties, LLC (MMP), moves this court (Motion Seq. 004) for an order, pursuant to CPLR 3212, granting it summary judgment and dismissing the complaint against it. Defendant, Port Washington Federal Credit Union (PWFCU) partially opposes the motion. Plaintiff, Catherine Chester (Catherine), Individually and as Executrix of the estate of James Chester (James). opposes the motion. PWFCU moves

separately (Motion Seq. 005) for an order granting them summary judgment and dismissing the complaint against them. Plaintiff opposes the motion.

Plaintiff commenced this negligence action by service of a summons and complaint dated August 31, 2016. Issue was joined by the service of an answer with cross claims by PWFCU dated October 13, 2016. MMP interposed an answer with cross claims dated September 29, 2016. The case certified ready for trial on September 6, 2018 and a note of issue was filed on January 18, 2019.

This matter involves Catherine's allegations that she was caused to slip and fall in a parking lot adjacent to PWFCU and owned by MMP. She alleges she exited the passenger side of the car, and her feet got stuck on something. She held onto the door for a while but then fell to the ground. She stayed on the ground for 45 minutes. Both PWFCU and MMP move for summary judgment, arguing that Catherine did not know what caused her to fall, and PWFCU alleges it owed no duty to Catherine.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *Alvarez V. Prospect Hospital,* 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the

sufficiency of the opposing papers (*see Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment 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 5557 [1980], *supra*).

Within the context of a summary judgment motion that seeks dismissal of a personal injury action the court must give the plaintiff the benefit of every favorable inference which can reasonably be drawn from the evidence (*see Anderson v. Bee Line*, 1 N Y 2d 169 [1956]). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579 (1st Dept 1992), and it should only be granted when there are no triable issues of fact (*see also Andre v. Pomeroy*, 35 NY2d 361 [1974]).

A defendant who moves for summary judgment in a slip-and-fall-action has the initial burden of making a *prime facie* demonstration that it neither created the dangerous condition, nor had actual or constructive notice of its existence (*see Manning v. Americold Logistics, LLC*, 33 AD3d 427 [1st Dept 2006]

In support of their motions, both Defendants submit, *inter alia*, the deposition transcripts of Catherine, Anna Campos, representative of PWFCU, and James Cangiani, representative of MMP. Catherine testified she was very familiar with the parking lot in which she fell. She visited the area to go to PWFCU "a few hundred times". PWFCU

was part of a string of stores in the small strip mall, and parking lot was "L" shaped. On no prior occasion did she ever have a problem traversing the parking lot either leaving her car to go into PWFCU, or leaving PWFCU to go back to her car. On the date of the accident, her husband, James, who has since passed away, was driving a Chevy Tahoe, which she described as an SUV. On the day of her deposition, she was unable to recall what time the accident occurred, but she did recall it was snowing "very, very lightly". She described her fall as follows:

> I opened the door. I stepped out, and all of a sudden I was twisted. I couldn't get my feet out from under me, and I leaned over. I didn't lean over. I kind of got thrown back... I don't know. I knew both feet were on the ground. I don't know exactly how, whether I turned my body and put both feet down at the same time, or whether I put one foot down. I would think I put both feet down, because I was holding onto the door. Then all of a sudden, I couldn't get ahold of myself anymore, and I fell backwards.

She did not look at the ground before exiting the car. Her feet got "caught", but she never looked down to see what they got caught on. When she fell, her knees hit the ground first, with her feet under her Then she fell backwards. When she fell backwards, her head hit the ground, but she never lost consciousness and was never bleeding. She remained on the ground for 45 minutes, and was able to get her legs out from under her. During those 45 minutes, she did not look at the ground. Some employees from PWFCU came outside to assist her, and held an umbrella for her because she could not get up. Some months after the accident, Catherine and James returned to the parking lot to take pictures of the area where she fell. In one of the pictures, James' car is partially shown,

and it is the same car she was in on the day of the accident. Though earlier in her testimony she denied that the SUV had running boards, these pictures refreshed her recollection that the car did have running boards. She could not recall if while exiting the car she touched the running boards in any way. The pictures show a "rut" in the parking lot that Catherine believes caused her fall. She had seen the rut numerous times before, but did not know if she had stepped on it previously. Further, she did not recall seeing the rut while she was on the ground after the accident.

Ms. Campos testified that she had been working for PWFCU for eight years at the time of her deposition. She was working on the day of the accident and, in fact, actually witnessed the accident:

> Q. Would you say what happened, to the best of your recollection?
> A I remember it was a rainy day, and Ms. Chester fell out of the car.
> Q. When you say she fell out of the car, what do you mean?
> A. She -- she was coming out of her car, and she fell to the side (indicating) directly out of the car. She never put her foot on the ground.
> Q. You saw this?
> A. Yes.
> Q. Where were you when this happened?
> A. I was sitting at my desk, and my desk is in front of two windows that are looking at the parking lot. We have a parking lot here, and then we have a road (indicating).
> Q. What time of day was this?
> A. I'm not sure what time it was. I know it was a gloomy day. It was raining. I don't remember the time exactly.
> Q. Was the car stopped?
> A. Yes. It was parked.
> Q. And she opened the door?
> A. Yes.

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> Q. You were watching them continuously?
> A. Yeah. I was watching her. There was nothing to do at that point because it was raining, and there was [sic] no customers in. I was looking out the window. I was talking to my coworkers about the rain and she was -- she was -I remember it was an SUV she came in, and she fell out of the car.

At the time, Ms. Campos remembered that Catherine had one foot on the running board, and then fell over. According to Ms. Campos, neither of Catherine's feet touched the ground before she fell. Ms. Campos told a co-worker to call 911 and then she ran out to assist Catherine. Catherine was complaining about pain to her back, head and foot. Another co-worker came out with an umbrella because it was raining hard at that point. Regarding maintaining the parking lot, Ms. Campos testified that was not PWFCU's responsibility. If repairs did need to be made, they would call Joseph Canigiani, and he would send over his son James Canigiani to make the repairs, though she never saw James make repairs to the parking lot.

James Canigiani testified that he worked for his father's management company, and that they managed the subject property, parking lot and stip mall. Other than stating his name and his work, Mr. Canigaini's testimony was evasive, nonresponsive and, for the most part, meaningless due to his very selective memory. He did not know if the company he worked for, ran by his father, maintained *any* documents. If they did, his secretary would know, but he refused to provide her name. He knew nothing about the subject accident other than something he received in the mail at some point, but does not recall what it was or who sent it to him. He could not recall if he was ever at the subject

parking lot in 2015, and if he was, he had no idea how many times. He did not know who was responsible for paving the parking lot. Despite the fact that he testified that, at times, he maintained the parking lot himself by cleaning it or using a leaf blower on it, he could not *ever* recall seeing the condition of the parking lot. The one thing his memory appeared clear on was that PWFCU, in terms of maintenance, was responsible for was the sidewalk and small area directly in front of their building.

**MMP'S MOTION FOR SUMMARY JUDGMENT (MOTION SEQ. 005)**

MMP argues it is entitled to summary judgment because Catherine did not know what caused her to fall, that there is no evidence MMP violated any statutes, and that MMP lacked notice. The court finds MMP has failed to established entitlement to summary judgment as a matter of law. The motion will be denied regardless of the sufficiency of the opposition papers. As for Catherine not knowing what made her fall, while the court agrees her testimony is not clear in this regard, it cannot be said for certain she did not know what made her fall. She testified she did not see the rut at the time she fell or while she was on the ground, but that does not mean it is just as likely that she slipped, or tripped over something else. During her deposition testimony, she was adamant that the rut caused her to fall. She does not state that her feet came out from under her, or that something slippery made her fall. She states that her feet got caught, and later stated it was the rut that caused her feet to become caught. It is true she never mentioned the rut to any of the PWFCU employees who came to assist her, or to the EMS

personnel, and those issues, along with Ms. Campos' observations, may cause her trouble at trial, but those are credibility issues which should not impact the court's determination on a summary judgment motion. (*French v. Cliff's Place, Ltd.*, 125 AD2d 292 [2d Dept. 1986]).

As for MMP's denial of notice, they rely on Mr. Canigiani's testimony for that, but the court refuses to credit any of his testimony, other than his statement about PWFCU's responsibilities. Mr. Canigiani was under the impression he was free to not answer any question he did not want to answer, despite being under oath. His memory was conveniently selective, and he had trouble remembering much of anything at all, about anything. One exchange in particular clearly articulates his evasive, and contradictory nature:

> Q. Were you ever to the parking lot in 2015?
> A. Don't recall.
> Q. Were you there once?
> A. Possible.
> Q. Anything's possible. Were you there or weren't you there?
> A. Sure, I was there.
> Q. How many times, to the best of your recollection, were you at the parking lot in 2015?
> A. Wouldn't be able to tell you.
> Q. Do you recall doing any type of work on the parking lot in 2015?
> A. Periodic cleaning of the lot, leaf blower, pick up garbage; that nature.

In other words, he went from not knowing if he ever went to the parking lot in 2015, to saying it was possible he did, to then recalling performing cleaning duties there. Because the majority of his answers were similar to these, the court finds none of them were clear

enough to be considered admissible evidence. Therefore, MMP is unable to establish a lack of notice.

**PWFCU'S MOTION FOR SUMMARY JUDGMENT (MOTION SEQ. 005)**

PWFCU makes the same argument about Catherine not knowing what caused her fall, which the court rejected, *supra*. They also argue that they did not owe Catherine a duty because they were not under an obligation to maintain the parking lot. In support of this argument, they submit their original lease, which indicates that MMP is responsible to maintain exterior areas and public areas. The lease expired in 2008, and there has been some arguing, during discovery, among the parties about the failure to provide a new lease. However, the prior lease, together with the one definitive statement made by Mr. Canigiani that PWFCU was not responsible for the parking lot, entitles PWFCU to summary judgment as a matter of law. The burden will shift to Catherine to raise a material issue of fact requiring a trial of the action.

In opposition, Catherine first argues the motion was premature because a discovery motion made by Catherine was pending, and that motion directly dealt with the issue of the lease. However, by short form order dated April 18, 2019, the court denied the motion as defective. Catherine was granted leave to renew the motion upon fixing the defect, but two months after issuing the order, she has chosen not to do so, leaving the court to assume the discovery issue has since been resolved. Catherine next argues that without production of the lease that was in effect at the time of the accident, it cannot be

established that the same terms were in effect. The court disagrees. Even assuming there is no new lease, it is clear that PWFCU remained a rent-paying tenant once the prior lease would have expired. Therefore, a month-to-month tenancy was created under the same terms of the prior lease. (Real Property Law § 232-c; *Henderson v. Gyrodyne Co. Of Am., Inc.* 123 AD3d 1091 [2d Dept 2014], *quoting City of New York v. Pennsylvania R.R. Co.*, 37 NY2d 298 [1975]). As the court finds PWFCU was not responsible for maintaining the parking lot, they owed no duty to Catherine and cannot be found liable for her injuries.

Accordingly, it is hereby

**ORDERED**, that MMP's motion (Motion Seq. 004) for summary judgment is DENIED in its entirety; and it is further

**ORDERED**, that PWFCU's motion (Motion Seq. 005) for summary judgment is GRANTED in its entirety. The complaint is dismissed against PWFCU. As the court finds PWFCU is not liable, any cross claims against PWFCU are dismissed, and PWFCU's cross claims are dismissed as moot.

This constitutes the decision and order of the court. The court has considered the parties' remaining arguments and finds them to be without merit.

Dated: June 20, 2019
Mineola, New York

JAMES P. McCORMACK, J.S.C.

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