Mehrkar v White Plains Shopping Ctr. Assoc., LLC
2019 NY Slip Op 34800(U)
July 3, 2019
Supreme Court, Westchester County
Docket Number: Index No. 53109/2017
Judge: Linda S. Jamieson
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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Disp _x___ Dec ___ Seq. No. __2__ Type _SJ__

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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CHERYL MEHRKAR and SHAHIN S. MEHRKAR,

Plaintiffs,

-against- Index No. 53109/2017

WHITE PLAINS SHOPPING CENTER ASSOCIATES, LLC, ROBERT ORLOFSKY REALTY, INC., and ATLANTIC ASPHALT and EARTH, INC.,

Defendants.

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WHITE PLAINS SHOPPING CENTER ASSOCIATES, LLC, and ROBERT ORLOFSKY REALTY, INC.,

Third-Party Plaintiffs,

-against-

ATLANTIC ASPHALT AND EARTH, INC.,

Third-Party Defendants.

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The following papers numbered 1 to 4 were read on this motion:

Paper	Number
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Partial Support and Partial Opposition	2
Affirmation and Exhibits in Opposition	3
Reply Affirmation and Exhibit	4

Defendant Atlantic Asphalt and Earth, Inc. ("Atlantic") brings its motion for summary judgment in this trip and fall action. Atlantic is the company that installed the speed bump on which plaintiff tripped. White Plains Shopping Center

Associates, LLC ("Shopping Center") is the owner of the premises where the accident occurred. It appears that defendant Robert Orlofsky Realty, Inc. ("RORI") is the management company for the Shopping Center.

The following facts are not in dispute. Plaintiffs were tenants in a shopping center in White Plains, where they operated a karate school. Plaintiffs were very familiar with the parking lot, as plaintiff Cheryl Mehrkar had campaigned for several years to improve the safety of the parking lot. Plaintiff complained about the layout of the parking lot, which she stated was confusing to cars, which tended to drive recklessly there. Despite her activism about the parking lot, however, there is no evidence that plaintiff had ever complained about the pedestrian crosswalks or the speed bumps[1] in the parking lot. (There were five speed bumps in the parking lot. Coincidentally, this Court has previously found that any alleged defects in the speed bump at issue in this action were trivial, in a Decision and Order dated December 14, 2018, in Index Number 60024/2016.)

On the day in question, plaintiff was leaving work for the evening and heading to her car. It was not yet dark out. Plaintiff's car was parked directly in front of the school, at the end of a crosswalk. The crosswalk began at the edge of the

[1]According to Mr. Orlofsky, the principal of RORI, no permits were needed for the speed bumps, and the Town of Greenburgh is at the shopping center "all of the time," and would have given him a citation had there been a violation of any codes.

sidewalk directly outside the school; the most direct way for plaintiff to have gotten to her car would have been to walk directly in this crosswalk. However, there was a car double-parked in the crosswalk, at the sidewalk edge. Instead of walking along the sidewalk to the next crosswalk, which was only a few feet away, plaintiff instead left the crosswalk and walked through the parking lot. Plaintiff testified at her deposition that she "started to walk along the row of cars to the next crosswalk." This was in the parking lot, not on the sidewalk.

Plaintiff testified that when she got to the second crosswalk, she looked both ways and saw a car coming towards her, slowly, in the wrong direction. Although plaintiff believed that the driver would stop to let her continue walking, this was not the case. Plaintiff testified that the car kept "coming. So I kind of jump out of the way onto the speed bump and bam, fell. Tripped." There is no dispute that the speed bump was painted with yellow reflective paint. There is also no dispute that plaintiff was very familiar with the crosswalks and speed bumps in the parking lot. According to plaintiffs' expert,[2] the speed bump was 35 inches away from the crosswalk. Although plaintiffs contend that that was far too close to the crosswalk, their own expert does not state that this distance was too close. Nor does

[2]Atlantic raises many issues with plaintiffs' expert's report. The Court declines to address these issues, as they are not relevant.

the testimony cited by plaintiffs support plaintiffs' contention that Atlantic and RORI believed that the speed bumps were too close to the crosswalks. Rather, Atlantic's principal testified that they took care to ensure that the crosswalks were far enough away from the speed bumps that the front end of a car would not be in a crosswalk "by the time the driver realized he was on the bump."

The law is well settled that "although a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party, an exception exists where a contractor who undertakes to perform services pursuant to a contract negligently creates or exacerbates a dangerous condition so as to have launched a force or instrument of harm." *Prenderville v. Int'l Serv. Sys., Inc.*, 10 A.D.3d 334, 337, 781 N.Y.S.2d 110, 113 (1st Dept. 2004). As there is no contractual obligation between plaintiffs and Atlantic, Atlantic can only be liable to plaintiffs if it negligently created a dangerous condition in the parking lot.

Atlantic has established its prima facie showing that it did not create a dangerous condition in the parking lot. The speed bumps, which had been there for some time - as plaintiff herself admits - were "open and obvious," and Atlantic has established, prima facie, that they were not defective in any way. "While a landowner has a duty to maintain its premises in a reasonably

safe manner, there is no duty on the part of a landowner to warn against an open and obvious condition, such as a speed bump, that is readily observable by those employing the reasonable use of their senses and is not inherently dangerous." *Brande v. City of White Plains*, 107 A.D.3d 926, 927, 966 N.Y.S.2d 911 (2d Dept. 2013). *See also Rivera v. City of New York*, 57 A.D.3d 281, 282, 870 N.Y.S.2d 241, 243 (1st Dept. 2008) ("Defendant established its prima facie entitlement to summary judgment by showing that the speed bump was plainly observable and did not pose any danger to someone making reasonable use of his or her senses."). Atlantic has established that the only reason that this accident occurred is because plaintiff was forced to "jump out of the way" when a car, going the wrong direction (albeit slowly), refused to stop for plaintiff.

In response to this prima facie showing, plaintiffs fail to rebut Atlantic's showing that the speed bump was open and obvious, well known to plaintiff from her extensive experience with the configuration of the parking lot. They also ignore the fact that the accident would not have happened but for the wrong way driver, who did not yield to plaintiff. Even plaintiffs' expert does not assist them, as he only opines that "the speed bump poses a trip and fall hazard for pedestrians and should not be used in parking lot aisles where it is foreseeable that pedestrians will cross them. Where speed bumps are placed on the

traffic access aisles, it is foreseeable that pedestrians will trip on them and fall." But it is **not** foreseeable that pedestrians will walk in the traffic access aisles; rather, it is foreseeable that pedestrians will walk in the multiple crosswalks that were placed throughout the parking lot. Plaintiff was, in fact, in a crosswalk just prior to the accident, but jumped out of the way onto a speed bump because of a dangerous driver. This was not foreseeable.

Accordingly, the Court grants Atlantic's motion, and dismisses the complaint in its entirety. As a result, the action is dismissed as to both Shopping Center and RORI. The third-party action is dismissed as well.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
July 3, 2019

HON.
LINDA S. JAMIESON
Justice of the Supreme Court

To: Shafran & Rock, PLLC
Attorneys for Plaintiffs
730 Broadway
Kingston, NY 12401

Wilson, Elser et al.
Attorney for Atlantic
150 E. 42nd St.
New York, NY 10017

Margaret G. Klein & Associates
Attorneys for Shopping Center and RORI
200 Madison Ave., 2d Fl.
New York, NY 10016