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SHORT FORM ORDER

INDEX No. 14-23120
CAL. No. 19-01023OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

Copy

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice of the Supreme Court

MOTION DATE 8-29-19 (006)
MOTION DATE 10-31-19 (007)
ADJ. DATE 1-9-19
Mot. Seq. # 006 - MotD; CASEDISP
007 - MotD

---X

CARLEEN WALSH,

Plaintiff,

- against -

BOHEMIA COMMONS LLC, MILBROOK PROPERTIES, LTD., and PARKING LOT & LAWN MAINTENANCE, INC.,

Defendants.

---X

BOHEMIA COMMONS LLC and MILBROOK PROPERTIES, LTD,

Third-Party Plaintiffs,

- against -

PARKING LOT & LAWN MAINTENANCE, INC.,

Third-Party Defendant.

---X

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Upon the following papers numbered 1 to 73 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 21; 22 - 45 ; Notice of Cross Motion and supporting papers ___: Answering Affidavits and supporting papers 46 - 64; 65 - 66 ; Replying Affidavits and supporting papers 67 - 70; 71 - 73 ; Other ___; it is,

ORDERED that the motion by defendants/third-party plaintiffs Bohemia Commons LLC and Milbrook Properties, LTD and the motion by defendant/third-party defendant Parking Lot & Lawn Maintenance, Inc. are consolidated for the purposes of this determination, and it is

ORDERED that the motion by defendants/third-party plaintiffs Bohemia Commons LLC and Milbrook Properties, LTD for summary judgment dismissing plaintiff's complaint against them and for summary judgment in their favor is determined as follows; and it is further

ORDERED that the motion by defendant/third-party defendant Parking Lot & Lawn Maintenance, Inc. for summary judgment dismissing the complaint and the third-party complaint is determined as follows.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Carleen Walsh as a result of a trip and fall accident that allegedly occurred on March 30, 2012. Plaintiff allegedly tripped and fell on a handicap ramp while she was walking on a sidewalk in the parking lot of a shopping center owned by defendants Bohemia Commons LLC and Milbrook Properties LTD. Defendant/third-party defendant Parking Lot & Lawn Maintenance installed the subject handicap ramp. The bill of particulars alleges that plaintiff fell as a result of the height differential of the ledge of the handicap ramp and that the area was improperly illuminated.

Defendants Bohemia Commons LLC and Milbrook Properties LTD (hereinafter referred to collectively as the Bohemia defendants) now move for summary judgment dismissing plaintiff's complaint on the grounds they did not create or have actual or constructive notice of the alleged dangerous condition. They further moves for summary judgment on their third-party complaint against Parking Lot for common law indemnification as Parking Lot was solely responsible for the installation of the ramp.

Defendant/ third-party defendant Parking Lot & Lawn Maintenance (Parking Lot) moves for summary judgment dismissing the complaint, arguing that it did not have notice of the alleged defect. Parking Lot also moves summary judgment dismissing the third party complaint, arguing that it was not negligent and did not contribute to the cause of the accident.

Plaintiff opposes the motion by the Bohemia defendants, arguing that the negligent construction of the subject curb ramp created a dangerous and defective condition, that the condition created an optical confusion, and that the Bohemia defendants have a non-delegable duty imposed upon them and are vicariously liable for the actions of their independent contractor. Parking Lot opposes the portion of the Bohemia defendants' motion seeking summary judgment as to the third-party complaint, arguing that the construction of the ramp was not negligent and its maintenance of the ramp after it was installed was not the cause of the subject accident.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]).

To prove a prima facie case of negligence in a slip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*see* ***Librandi v Stop & Shop Food Stores, Inc.***, 7 AD3d 679, 776 NYS2d 846 [2d Dept 2004]; ***Luciani v Waldbaum, Inc.***, 304 AD2d 537, 756 NYS2d 886 [2d Dept 2003]; ***Bradish v Tank Tech Corp.***, 216 AD2d 505, 628 NYS2d 807 [2d Dept 1995]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant's employees to discover and remedy it (***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Bykofsky v Waldbaum's Supermarkets, Inc.***, 210 AD2d 280, 619 NYS2d 760 [2d Dept 1994]). Liability can be predicated only on failure of the defendant to remedy the danger after actual or constructive notice of the condition (***Piacquadio v Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [1994]).

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]; ***Dery v K Mart Corp.***, 84 AD3d 1303, 924 NYS2d 154 [2d Dept 2011]). It is well settled that a property owner may not be held liable in damages for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip (*see* ***Outlaw v Citibank, N.A.***, 35 AD3d 564, 826 NYS2d 642 [2d Dept 2006]; ***Hargrove v Baltic Estates***, 278 AD2d 278, 717 NYS2d 320 [2d Dept 2000]). In determining whether a defect is trivial, a court must examine all of the facts presented, including the "width, depth, elevation, irregularity and appearance of the defect along with time, place and circumstance of the injury" (***Trincere v County of Suffolk***, 232 AD2d 400, 648 NYS2d 126 [1996], quoting ***Caldwell v Village of Is. Park***, 304 NY 268, 107 NE2d 441 [1952]; *see* ***Zalkin v City of New York***, 36 AD3d 801, 828 NYS2d 485 [2d Dept 2007]). 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***, *supra*).

Here, the Bohemia defendants and Parking Lot have established their entitlement to judgment as a matter of law in their respective motions by demonstrating, through photographs of the subject area, the parties' deposition testimony, and their expert affidavits that the alleged defect is not actionable, because it is trivial and does not possess the characteristics of a trap or nuisance (*see* ***Milewski v Washington Mut., Inc.***, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]; ***Aguayo v New York City Hous. Auth.***, 71

AD3d 926, 897 NYS2d 239 [2d Dept 2010]; ***Zalkin v City of New York***, 36 AD3d 801, 828 NYS2d 485 [2nd Dept 2007]; ***Joseph v Villages at Huntington Home Owners Assoc., Inc.***, 39 AD3d 481, 835 NYS2d 231 [2nd Dept 2007]). In addition, plaintiff testified at her examination before trial that the lighting conditions did not play a role in her fall.

The Bohemia defendants submit an expert affidavit of Herbert Weinstein, an engineer, who states that he inspected the subject area and found the width of the subject ramp to be 48 inches in width and 40 3/4 inches in length. He explains that according to the United States Access Board, which references the Americans with Disabilities Act (ADA) code, the acceptable slope for a handicap ramp is one inch for every twelve inches in length and the subject ramp's slope was one inch for every 14 inches. With regard to the flared sides, he states that the slope is one inch for every 12.5 inches which also satisfies the ADA requirement. He further states that the width of the ramp is 48 inches, which is greater than the minimum ADA requirement of 36 inches. Weinstein concludes with a reasonable degree of engineering certainty that the subject ramp meets all requirements promulgated by the applicable Codes and Regulations. In addition, he measured the illumination available at the subject ramp and took several light meter readings. He states that the standard issued by the International Dark Sky Association states that for community shopping centers, the average foot-candles illumination is 2.4 and that the foot-candle readings at the subject ramp ranged from 7.0 to 5.4.

Parking Lot submits an expert affidavit of Thomas Turkel, an architect, who states that the subject curb ramp dimensions conformed to the applicable requirements under the American National Standards Institute (ANSI) A117.1. Specifically, he states that the "slope of the subject ramp is 1 in 12 (1:12), which is fully compliant with §4.8.2 of the ADA. He states that if a curb ramp is located where pedestrians must walk across then it shall have flared sides, the "maximum slope must not exceed 1:10 (10%)," and the subject flared sides were sloped at 1.125:12 (9.4%), which is less steep and in full compliance with §4.7.5 of the ADA. With respect to lighting, he states that based on his light meter reading, the illumination at the subject curb ramp is significantly higher than lighting values recommended by the Illumination Engineering Society for safe walkways.

In opposition, plaintiff failed to raise a triable issue of fact (*see* ***Dery v K Mart Corp.***, *supra*; ***Shiles v Carillon Nursing & Rehabilitation Ctr., LLC***, 54 AD3d 746, 864 NYS2d 439 [2d Dept 2008]). Here, the expert affidavit of Harold Krongelb, an engineer, submitted by plaintiff is insufficient to raise a triable issue of fact. While he states that the design of the subject ramp violates the State of New York Building Code, the ADA Standard, and the ANSI Standard, he fails to sufficiently explain which regulations it violated and how it violated those regulations. Moreover, as to the contention that the condition caused an optical confusion, neither plaintiff nor plaintiff's expert has cited to any code provision or authority to support the opinion that visual cues denoting the presence of a ramp leading to the sidewalk should have been installed. Furthermore, in plaintiff's affidavit submitted in opposition, she did not state that the subject ramp area caused an optical confusion. Finally, while plaintiff's affidavit states that the lighting condition in the subject area was not sufficient to illuminate the sidewalk, she does not state that such was the cause of her accident. In any event, it appears to be an attempt to raise a feigned issue of fact in order to avoid the consequences of dismissal (*see* ***Kaplan v DePetro***, 51 AD3d 730, 858 NYS2d 304 [2d Dept 2008]; ***Makaron v Luna Park Hous. Corp.***, 25 AD3d 770 809 NYS2d 520 [2d Dept 2006]).

Thus, the applications by the Bohemia defendants and the motion by Parking Lot for summary judgment dismissing the complaint are granted. As the complaint has been dismissed, the application by the Bohemia defendants for summary judgment in their favor on the third-party complaint for indemnification, and the application by Parking Lot for summary judgment dismissing the third-party complaint are denied, as moot.

Dated: May 18, 2020

Hon. Joseph Farneti
Acting Justice Supreme Court

_X_ FINAL DISPOSITION ____ NON-FINAL DISPOSITION