SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. JACK L. LIBERT,
Justice.

TRIAL PART 20
NASSAU COUNTY

STEPHON HUTCHERSON,

Plaintiff,

-against-

MOTION # 01
INDEX # 611653/2018
MOTION SUBMITTED:
JUNE 8, 2020

HVCA, INC., BASSER KAUFMAN, INC., HOME GOODS AND THE TJX COMPANIES, INC.,

Defendants.

The following papers having been read on this motion:

Notice of Motion/Order to Show Cause.....1
Cross Motion/Answering Affidavits.....2
Reply Affidavits.....3

Defendants move for summary judgment pursuant to §§ 3211 and 3212 of the CPLR. The motion is denied.

This action arises out of personal injuries allegedly sustained by plaintiff as a result of a trip and fall in the parking lot of a shopping center owned by HVAC a division of Basser Kaufman, Inc. Plaintiff discontinued the action as against defendants Home Goods and TJX.

On March 8, 2015 plaintiff was walking across the parking lot of the shopping center headed towards a Home Goods store when he allegedly tripped and fell. Plaintiff testified as follows:

> I was coming across the street and as I was crossing the path - - walking into the parking lot crossing the path, a car was coming. And I looked left to make sure the other car that was coming his way wouldn't hit me. And by the time I looked the car passed and I fell. (Plaintiff transcript, at p. 36).

Plaintiff acknowledged that he did not see the pothole before the accident and there was nothing obstructing his view. "I got up and I seen [sic] the pothole, so I figured that's what it is" (*Id.*, p. 39, l. 10-14). When shown a picture of the pothole defendant acknowledged it was the pothole which allegedly caused the accident. Plaintiff testified that he never made a complaint about the condition of the parking lot nor was he aware of any other complaints being made (Plaintiff transcript, at p. 53-54).

Curtis Dia, defendants' property manager testified that he managed the property in question for more than six years (Dia transcript, at p. 7). He testified that he had not observed the pothole during his periodic inspections of the parking lot and received no complaints about the pothole prior to the occurrence. (*Id.* at p. 11-13). Dia testified that he inspected the property periodically generally every few weeks and did not notice a pothole. He kept no logs and had no written notes about the condition of the parking lot. He acknowledged keeping a notebook containing items requiring attention but could not locate the notebook (Dia transcript, p. 24).

Summary judgment is a drastic remedy and should only be granted when there are no triable issues of fact (*Andre v. Pomeroy*, 35 N.Y.2d 361 [1974]). The goal of summary judgment is to issue find, rather than issue determine (*Hantz v. Fleischman*, 155 A.D.2d 415 [2nd Dept. 1989]).

The proponent of a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]). Once the movant has demonstrated a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]).

DANGEROUS OR DEFECTIVE CONDITION

Defendants assert that the pothole was not a dangerous or defective condition and as a result did not create a duty to repair it. As a general proposition that assertion is correct (*see Tagle v. Jakob,* 97 N.Y. 2d 165, 757 N.Y.S. 2d 331 [2001]). But the question of whether a condition is dangerous or defective is fact specific. "[A] small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses…" (*Pagano v Rite-Aid Corp.*, 266 A.D. 2d 854 [Fourth Dept., 1999]). There is no hard and fast rule about the size of an alleged defect in a paved surface. That issue does not turn "upon whether the hole or depression, causing the pedestrian to fall, is four inches--or any other number of inches-- in depth" (*Loughran v City of New York*, 298 NY 320, 321-322 [1948]).

"Whether a particular [allegedly dangerous or defective] condition gives rise to liability for negligent maintenance is generally an issue of fact for the jury (*see, Trincere v County of Suffolk, supra*, at 977; *Young v City of New York*, 250 AD2d 383)" *Tesak v Marine Midland Bank,* 254 A.D.2d 717, 678 N.Y.S.2d 226, 1998 N.Y. Slip Op. 08357 [Fourth Dept. 2016]). In the case at bar an issue of fact exists as to whether the pothole was a dangerous or defective condition.

NOTICE OF CONDITION

Defendants assert that they are entitled to summary judgment because they had no notice that there was a pothole on their property. To impose liability upon a defendant in a trip-and-fall action, there must be evidence that the defendant either created the alleged dangerous condition or had actual or constructive notice of it (*see Hayden v. Waldbaum, Inc.*, 63 A.D.3d 679, 880 N.Y.S.2d 351; *Arzola v. Boston Props., Ltd. Partnership*, 63 A.D.3d 655, 880 N.Y.S.2d 352; *Larsen v. Congregation B'Nai Jeshurun of Staten Is.*, 29 A.D.3d 643, 815 N.Y.S.2d 187). It is undisputed that defendants did not have actual notice.

A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected. To meet [their] initial burden on the issue of lack of constructive notice, the defendant[s] must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell (*Birnbaum v. New York Racing Assn., Inc.*, 57 A.D.3d 598, 598–599, 869 N.Y.S.2d 222, [Second Dept., 2008]).

Inherent in determining whether the defendants in the case at bar had constructive notice there are questions of fact concerning the adequacy of the level of maintenance, the frequency of the inspections by the property manager and the lack of maintenance records.

CONDITION WAS OPEN AND OBVIOUS

Defendants argue that the pothole was an open and obvious condition that plaintiff had a duty to avoid. "In their motions for summary judgment, the defendants established their *prima facie* entitlement to judgment as a matter of law by demonstrating that the condition complained of was open and obvious and not inherently dangerous." Defendants cite *Lombardi v Silk Mill Condominiums, Inc* 37 A.D.3d 429, 829 N.Y.S.2d 228, 2007 N.Y. Slip Op. 01089 [Second Dept., 2007, internal citations omitted]). The plaintiff in *Lombardi, supra.* "testified that she was well aware of the condition which allegedly caused her to fall, having previously observed it and having traversed the subject area without incident very shortly before her accident" (*Id.*). In the case at bar, the plaintiff testified he did not see the pothole and had no prior knowledge of it. There is a question of fact as to whether the condition was so obvious that plaintiff should have seen it.

"[P]roof that an allegedly dangerous condition on the property is 'open and obvious' does not preclude a finding of liability against the landowner for the failure to maintain the property in a safe condition but is relevant to the issue of the plaintiff's comparative negligence. Accordingly,

our decisions which stand for the broad proposition that liability under a theory of common-law negligence will not attach when the allegedly dangerous condition is open and obvious should no longer be followed (*see e.g. Sandler v Patel, supra*; *Bojovic v New York City Hous. Auth.*, 284 AD2d 356 [2001])" *Cupo v Karfunkel*, 1 A.D.3d 48, 767 N.Y.S.2d 40, 2003 N.Y. Slip Op. 17760 [Second Dept., 2003]). There is an issue of fact concerning plaintiff's comparative negligence.

Given all the factual issues in this case, defendants' motion is denied.

ENTER

DATED: July 9, 2020

HON. JACK L. LIBERT
J. S. C.

ENTERED
Jul 13 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE