SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

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

SUSAN MURTHA,

Plaintiff,

-against-

BAYPORT PODIATRY CARE P.C. and GARY MAGGIO,

Defendants.

Index No.
618354/16

Motion Seq:
002 MG
003 MG

Decision/Order

The following electronically-filed papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	27-34; 36-47
Answering Papers.....	53-57
Reply.....	59; 60-61; 62-63
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Susan Murtha commenced this action to recover damages for personal injuries she alleges she sustained on May 18, 2015, due to the defendants' negligence. The plaintiff claims in her November 8, 2017 further Bill of Particulars that she was caused to trip and fall "on the curb area and/or parking lot area adjacent to the handicap ramp located outside the entrance to 671 Montauk Highway, Bayport, New York." This is the location of defendant Bayport Podiatry Practice, which is a tenant of the property owner, co-defendant Gary Maggio.

Each of the defendants moves for summary judgment dismissal of the complaint and any and all cross-claims. Bayport Podiatry Care P.C. (Bayport)'s motion is Motion Sequence 002. Gary Maggio's motion is Motion Sequence 003. Plaintiff opposes both motion sequences.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v. Pomeroy,*** 35 NY2d 361[1974]). 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]).

Bayport's Summary Judgment Motion (Sequence 002)

Bayport maintains that it is entitled to summary judgment dismissal of all claims alleged against it because it owes no duty to the plaintiff or to any other party, nor did it cause or create the alleged dangerous condition.

"Generally, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of the property" (***Russo v Frankels Garden City Realty Co.***, 93 A.D.3d 708, 710 [2d Dept 2012]). Before a defendant may be held liable for negligence, it must be shown that the defendant owes a duty to plaintiff. Whether a defendant owes a duty to a plaintiff is a question of law to be determined by the court (***Purdy v Public Administrator of the County of Westchester***, 127 AD2d 285, 288 [2d Dept 1987]).

In support of its motion, Bayport submits, inter alia, the pleadings, three photographs, and the deposition transcripts of its principal, Dr. Behar, the plaintiff, and Gary Maggio.

Plaintiff testified that she sought the services of a podiatrist because she had completed a five-mile walk for breast cancer the day before and her "toenail was cutting into the side of [her] nail bed" of her left big toe. Plaintiff "was looking to make an appointment with a podiatrist." She had never been to Bayport's offices before, and she did not call Bayport before she arrived; she simply presented herself to the receptionist, but was unable to make an appointment because Bayport required a referral for insurance purposes, which plaintiff did not have. After plaintiff left Bayport's offices, she walked out onto the blacktop parking lot and walked on the blacktop until she reached the end of the hedges. She turned to her right and decided to walk on the cement path toward her car when the subject incident occurred. According to her testimony, the location where she fell was the area for the other medical provider at the premises.

Gary Maggio testified that he is a retired chiropractor and that he and his wife owned the subject premises personally at the time of plaintiff's accident. Dr. Behar of Bayport was a tenant in Suite B. There was only one other suite on the premises, Suite A. Gary Maggio testified that he had a written lease with Bayport, and that he, Gary Maggio, would call anyone needed to make repairs to the parking lot, sidewalk and/or entranceways; he used the services of landscaper, and he provided snow removal services for his property. Gary Maggio further testified that he had the building constructed in 1988, including the parking lot and sidewalk that runs around a portion of the building. He also stated that Dr. Behar of Bayport was not obligated to make any repairs to any curbing on the premises.

Dr. Behar testified that his practice occupied Suite B on the subject premises, pursuant to a written lease with Maggio/Maggio's LLC. Dr. Behar further testified that he is not responsible for maintaining the parking lot at the premises; instead, that is the obligation of the landlord. He identified a photograph at deposition marked as defendant's Exhibit A. Dr. Behar testified that it

was a photograph of the entryway to Suite A, and that that the landlord is responsible for maintenance of that entryway. It is apparently undisputed that the area depicted in Exhibit A is the area where plaintiff claims to have tripped and fallen, which is not the entranceway to Bayport. Bayport's suite has a separate entranceway.

Dr. Behar was not aware of any repairs having been made to the entryway depicted in Exhibit A, or to the parking lot in May of 2015, nor was he aware of any complaints made about the condition of the parking lot or that entryway. Also, Dr. Behar never personally made any complaints to the landlord about the entryway to Suite A or about the parking lot prior to 2015, and he was not aware of anyone else that had fallen in the parking lot area or entryway area of the premises prior to plaintiff's lawsuit.

"Under these circumstances, [Bayport] owed the injured plaintiff no duty of care to maintain or repair the parking lot [and/or any entranceway], and may not be held liable for permitting the existence of a dangerous condition" (***Millman v. Citibank, N.A.***, 216 AD2d 278, 278 [2d Dept 1995]; *see also* ***Kubicsko v. Westchester County Electric, Inc.***, 116 AD3d 737, 739 [2d Dept 2014]). "In the absence of duty, there is no breach and without a breach there is no liability" (***Pulka v. Edelman***, 40 NY2d 781, 782 [1976]).

Furthermore, Bayport has demonstrated that it made no repairs, nor did it cause the premises to be built; therefore, it has also established that it did not create the alleged dangerous condition.

Bayport has tendered sufficient evidence to demonstrate the absence any material issue of fact (***Winegrad v. New York University Medical Center***, 64 MY2d 851, 853 [1985]), thereby demonstrating its *prima facie* entitlement to summary judgment dismissal of the complaint and all cross-claims as a matter of law (***Koutsiaftis v. Alliance Parking Services, LLC***, 175 AD3d 1519, 1520 [2d Dept 2019]; ***Henriquez v. Inserra Supermarkets, Inc.***, 89 AD3d 899, 900 [2d Dept 2011]).

The burden now shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v. Prospect Hospital***, 68 NY2d 320, 324 [1986]).

In opposition, plaintiff submits the affirmation of counsel and a self-serving affidavit that utterly fails to controvert Bayport's establishment that it owes no duty to the plaintiff, nor does plaintiff's affidavit raise a triable issue of fact as to actual or constructive notice of an alleged dangerous condition. Plaintiff's reliance upon ***Milewski v. Washington Mutual***, (88 AD3d 853 [2d Dept 2011]) specifically in relation to Bayport's motion is inapposite since the tenant in that case leased the parking lot where that plaintiff fell. Bayport's submission of the lease in reply conclusively establishes that the landlord, Mr. Maggio, had responsibility to maintain the exterior parking lot, sidewalk, curbing and landscaping.

Plaintiff's argument concerning Bayport's alleged failure to make a *prima facie* showing that it did not create or have actual or constructive notice of the alleged dangerous condition is inapposite to the established fact that Bayport is not responsible to maintain the common parking

lot and entranceway, and the utter lack of any evidence that Bayport has a duty to monitor and report conditions in the parking lot and/or on the entranceway to the landlord (*see* ***Koutsiaftis***, ***supra***; ***Henriquez***, ***supra***).

Plaintiff has not raised a material question of fact as to Bayport's actual or constructive knowledge of the alleged defective condition. Plaintiff's hearsay testimony about what the doctor from the podiatrist office and the doctor from the medical office said (we've got to fix this") is admissible upon a summary judgment motion, but it is insufficient to bar summary judgment since it is vague and speculative (*see* ***Stock v Otis Elevator Company***, 52 AD3d 816 [2d Dept 2008]). When asked at deposition, "[g]ot to fix what?" the plaintiff admitted that "[they didn't say we have to fix this curb, but they looked at the curb. . ." It is not established by plaintiff's testimony or any other evidence where two other people were looking when this statement was allegedly made, aside from plaintiff's conclusory claim that they were looking at the curb. Plaintiff further stated that they said this to themselves, not to her. When asked if she told them that she tripped over a curb, plaintiff stated that she did not remember, and that she did not know. When questioned as to whether she told anyone at the accident scene what she tripped on, she stated, "I don't think so." Furthermore, plaintiff did not identify these two people by name, and her claim that the doctor from the podiatrist's office and the doctor from the medical office made this statement is rendered specious because she testified that she did not seek treatment from the medical office and only met the receptionist at Bayport.

It is this Court's determination that the plaintiff has failed to raise a material triable issue of fact sufficient to defeat Bayport's summary judgment motion. Bayport's motion is granted and the complaint and any and all cross-claims are dismissed as asserted against Bayport.

Gary Maggio's Summary Judgment Motion (Sequence 003)

Defendant Maggio asserts that it is entitled to summary judgment because the plaintiff cannot identify what caused her to trip and fall without engaging in speculation, and because Maggion had no actual or constructive notice of any dangerous or defective condition. Maggio submits, *inter alia*, the pleadings, the same photographs, and the deposition testimony of the parties to this action.

When, a defendant demonstrates that a plaintiff does not know what caused her to fall, the defendant has established its entitlement to summary judgment as a matter of law. Causation cannot be based upon speculation (***Califano v. Maple Lanes***, 91 AD3d 896 [2d Dept 2012]; ***Miles v. County of Dutchess***, 85 AD3d 878 [2d Dept 2011]; ***Aguilar v. Anthony***, 80 AD3d 544 [2d Dept 2011]; ***Martone v. Shields***, 71 AD3d 840 [2d Dept 2010]; ***Skay v. Public Library of Rockville Centre***, 238 AD2d 397 [2d Dept 1997]; ***Leary v. North Shore University Hospital***, 218 AD2d 686 [2d Dept 1995]; ***Vincio v. Marriott Corporation***, 217 AD2d 656 [2d Dept 1995]; ***Lynn v. Lynn***, 216 AD2d 194 [1st Dept., 1995]).

Defendant Maggio has established his *prima facie* entitlement to summary judgment as a matter of law on this basis through plaintiff's testimony alone. At deposition, plaintiff testified, "I think I tripped on the—on that curb that was sticking out." Counsel at deposition then asked,

"[d]id you know what you tripped on? I didn't ask what you think. Do you know what you tripped on?" Plaintiff answered, "No, I don't know."

When plaintiff was shown the photograph marked as defendant's Exhibit A, she stated that it depicted the area where she fell, and that the handrail depicted therein was the handrail and entranceway to the medical doctor from whom she did not seek treatment; she "had to walk all the way down that driveway to get to the podiatrist's [Bayport's] office." The medical doctor's office was closer to where she fell than Bayport. Plaintiff did not point out or mark any specific area on that photograph that caused her to fall. Plaintiff testified that she took the photograph marked as Exhibit A a couple of weeks after the accident, and nothing in the photograph was different than on the day that she fell. Plaintiff stated that Exhibit A fairly and accurately depicted the conditions at the property as they existed on the day of her accident.

The law is clear that "[a] plaintiff's inability to identify the cause of his or her fall is fatal to his or her cause of action" (***Jackson v Fenton***, 38 AD3d 495 [2d Dept 2007]). Accordingly, this Court finds that defendant Maggio has established his *prima facie* entitlement to summary judgment as a matter of law based upon the fact that plaintiff cannot identify what caused her to trip and fall without the necessity of determining the defendants' remaining claims.

Even if the Court were to consider the issue of actual or constructive notice of any dangerous or defective condition, this Court agrees with defendant Maggio's contention that the photographic evidence demonstrates that there was no dangerous or defective condition in the parking lot or the walkway/sidewalk area where plaintiff sustained her accident.

Photographs taken at or about the time of an incident that fairly and accurately represent the condition at the time of an alleged incident can be used to establish the absence of a defective and/or dangerous condition (*see* ***Wachspress v. Central Parking System of New York, Inc.***, 111 AD3d 499 [1st Dept 2013]; ***Philips v. Paco Lafayette LLC***, 106 AD3d 631 [1st Dept 2013]; ***Boyd v. New York City Housing Authority***, 105 AD3d 542 [1st Dept 2013]; ***Bilinski v. Bank of Richmondville***, 12 AD3d 911 [3d Dept 2004]; *see also* ***Kiritsis v. North Shore School District***, 82 AD3d 939 [2d Dept 2011]; ***Lustenring v. 98-100 Realty, LLC***, 1 AD3d 574 [2d Dept 2003]).

Here, the photograph marked as defendant's Exhibit A at deposition, identified by the plaintiff as having been taken by her shortly after the accident and testified to by her as representing the conditions on the date of her fall, clearly demonstrates that there is no dangerous condition depicted therein. The parking lot, curb cut, curbs and neatly trimmed ivy and bush adjacent to the curb cut are open, obvious, unobstructed, and readily observable by one's reasonable use of his or her senses.

In opposition, plaintiff offers the same affirmation of counsel as offered in opposition to Bayport's summary judgment and the same affidavit sworn to in Florida on September 17, 2020. The affidavit is not accompanied by a certificate of conformity; thus, it can be rejected by the Court on this basis alone.

Turning to the merits of the affidavit and annexed photograph, however, plaintiff's affidavit and the newly-marked i-Phone screenshot of Exhibit A are nothing more than self-serving

submissions designed to raise a feigned issue of fact in order to avoid the consequences of her earlier testimony regarding her inability to identify the cause of her fall (*see* ***Wu v. City of New York***, 42 AD3d 451 [2d Dept 2007]; ***Semple v. Sterling Estates, LLC***, 300 AD2d 297 [2d Dept 2002]; ***Regina v. Friedman***, 272 AD2d 461 [2d Dept 2000]). Plaintiff has marked the right side of the curb cut with a circle, and in her affidavit, she states that, "I have marked a circle on the area where I was caused to fall." Not only is this marking and affidavit desperately belated, but the area marked is, as already noted by this Court, open, obvious, unobstructed, readily observable, and without any apparent defect. The Court further notes that the plaintiff has failed to submit any evidence, expert or otherwise, that the area that she has belatedly marked is defective in any way, or violative of any building/construction codes and/or ordinances.

As noted in discussion of Bayport's motion, plaintiff's hearsay testimony about what the doctor from the podiatrist office and the doctor from the medical office allegedly said to each other is vague, speculative, and insufficient to raise a triable issue of fact for the same reasons already enumerated herein.

Accordingly, plaintiff has failed to raise a triable issue of fact sufficient to defeat defendant Maggio's motion. Maggio's motion is granted and the complaint and any and all cross-claims are dismissed as asserted against Maggio.

The foregoing constitutes the Decision and Order of this Court.

Dated: March 24, 2021
Riverhead, NY

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

AS TO BAYPORT PODIATRY CARE P.C. and GARY MAGGIO:

FINAL DISPOSITION [X] NON-FINAL DISPOSITION [ ]