Mazza v Montauk Props., LLC
2024 NY Slip Op 35137(U)
November 12, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 617968/2021
Judge: Linda Kevins
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SHORT FORM ORDER

INDEX No. 617968/2021
CAL. No. 202301680OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

P R E S E N T :

Hon. LINDA J. KEVINS
Justice of the Supreme Court

MOTION DATE 2/23/24 (001)
MOTION DATE 2/27/24 (002)
MOTION DATE 4/4/24 (003)
ADJ. DATE 5/14/24
Mot. Seq. # 001 MotD
Mot. Seq. # 002 XMD
Mot. Seq. # 003 MotD

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AMELIA MAZZA,

Plaintiff,

- against -

MONTAUK PROPERTIES, LLC MARTINO PIZZERIA, INC. and MAMA'S PIZZERIA AND RESTAURANT,

Defendants.

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Upon the following papers read on these e-filed motions and cross motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by Montauk, filed January 19, 2024; by Martino, filed February 27, 2024 ; Notice of Cross Motion and supporting papers by plaintiff, filed February 12, 2024 ; Answering Affidavits and supporting papers by Martino, filed February 15, 2024, February 20, 2024, and February 22, 2024; by Montauk, filed March 27, 2024; by plaintiff ,filed April 23, 2024; Replying Affidavits and supporting papers by Montauk, filed March 26, 2024; by Martino, filed May 8, 2024; by plaintiff,filed May 8, 2024; Other __; it is

ORDERED that the motion (seq. #1) by defendant Montauk Properties, LLC for an order granting summary judgment dismissing the complaint and all cross claims asserted against it is granted to the extent of granting summary judgment dismissing the complaint as asserted against it, and is otherwise denied; and it is further

ORDERED that the cross motion (seq. #2) by plaintiff for an order granting summary judgment in her favor on the issue of liability against defendant Montauk Properties, LLC is denied; and it is further

ORDERED that the motion (seq. #3) by defendant Martino Pizzeria, Inc., d/b/a Mama's Pizzeria and Restaurant, for an order granting summary judgment dismissing the complaint and all cross claims asserted against it is granted to the extent of granting summary judgment dismissing the complaint and defendant Montauk Properties, LLC's cross claims for contribution and common-law indemnification as asserted against it, and is otherwise denied; and it is further

ORDERED that upon Entry of this Order, the movant is directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on June 15, 2019, at approximately 6:30 p.m., when she stepped off the curb to a parking lot in the subject premises known as Merrineck Shopping Center in Copiague, New York, which is owned by defendant Montauk Properties, LLC (Montauk Properties). The accident occurred in front of a pizzeria owned and operated by defendant Martino Pizzeria, Inc., d/b/a Mama's Pizzeria and Restaurant (Martino). By her bill of particulars, plaintiff alleges that defendants failed to warn her of a change in elevation between the sidewalk and the parking lot, allowed the painted curb line to wear away, and violated section 191-16 of the Code of the Town of Babylon, which imposes a duty to repair and maintain sidewalks in a safe condition. In their answers, defendants asserted cross claims against each other for contribution and contractual and common-law indemnification.

Plaintiff cross-moves (seq. #2) for summary judgment in her favor on the issue of liability against Montauk Properties on the ground that it failed to keep the sidewalk in good and safe repair and failed to properly maintain the sidewalk in a safe condition, violating Town of Babylon Code and New York State Building Codes. In support, plaintiff submits, *inter alia*, the deposition transcripts of the parties, her affidavit, and the affidavit of her expert, Thomas Turkel.

At her deposition, plaintiff testified that prior to the accident, she and her granddaughter arrived at the parking lot of the subject mall. Plaintiff testified that she walked across the parking lot, stepped onto the sidewalk from the parking lot, and entered a pizzeria without incident. Approximately an hour later, when plaintiff left the pizzeria, she was planning to walk through the area of the accident, because she "thought it would be easier" to get to her granddaughter's vehicle. Plaintiff testified that when she stepped off the curb into the parking lot in front of the pizzeria, she fell to the parking lot. She testified that as her right foot stepped into the parking lot without incident, her left foot "was not balanced on the end of the sidewalk." Plaintiff testified that immediately prior to the accident, she was looking straight, but did not look down into that "specific area that she was about to walk." Plaintiff testified that there was no debris or slippery substance in the area of the accident.

Plaintiffs' expert, Thomas Turkel, a New York registered architect, states that upon inspection of the area of the accident, he observed that there were two handicapped parking spaces in front of the pizzeria restaurant with a blue striped accessible aisle between them. Turkel opines that the handicapped accessible path was required to have a ramp and that the absence of the required ramp violated the New York State Building Code, as specified by provisions of the American National Standards Institute (ANSI) Code A117.1, which requires that "curb ramps . . . shall be provided wherever an accessible route crosses a curb." He opines that the failure to install and maintain a required accessible ramp from the subject sidewalk to the accessible aisle created a hazardous condition. As to the paint on the top of the curb, Turkel observed that it was worn and not clearly visible. Turkel opines that the paint failed to warn plaintiff of a change in elevation between the sidewalk and the parking lot, violating sidewalk requirements specified in the Town of Babylon Code and the New York State Property Maintenance Code.

A plaintiff in a personal injury action who moves for summary judgment on the issue of liability has the burden of establishing, prima facie, that the defendant was negligent (*see* ***Thoma v Ronai***, 82 NY2d 736, 602 NYS2d 323 [1993]; ***Hernandez v Conway Stores, Inc.***, 143 AD3d 943, 40 NYS3d 464 [2d Dept 2016]; ***Phillip v D&D Carting Co., Inc.***, 136 AD3d 18, 22, 22 NYS3d 75 [2d Dept 2015]). Plaintiff is not required to show that defendant's negligence was the sole proximate cause of the accident to be entitled to summary judgment (*see* ***Benny v Concord Partners 46th St. LLC***, 192 AD3d 531, 143 NYS3d 44 [1st Dept 2021]; ***Fernandez v Ortiz***, 183 AD3d 443, 121 NYS3d 867 [1st Dept 2020]).

Here, plaintiff failed to sustain her initial burden of demonstrating that Montauk Properties' alleged code violations were a proximate cause of her injuries. Plaintiff's expert Turkel's opinion regarding the alleged code violations is irrelevant in the absence of evidence connecting said violations to plaintiff's fall (*see* ***Padilla v 567 Realty Co. LLC***, 2022 NY Slip Op 32719[U] [Sup Ct, New York County 2022]). Moreover, in her affidavit, plaintiff avers that "I was looking straight ahead prior to falling and was *paying attention to where I was going*" and that "[t]here was no warning of a change in elevation between the sidewalk and the parking lot" (emphasis added). Plaintiff's affidavit appears to be tailored to suggest that her fall was caused by Montauk Properties' failure to warn her of a change in elevation between the sidewalk and the parking lot. However, plaintiff testified at her deposition that she did not look down to see where she was stepping and that as her right foot stepped into the parking lot without incident, her left foot "was not balanced on the end of the sidewalk." Contrary to plaintiff's contention, her affidavit merely attempts to cure the consequences of her earlier deposition testimony (*see* ***Belmonte v City of New York***, 220 AD3d 727, 197 NYS3d 554 [2d Dept 2023]; ***Colini v Stino, Inc.***, 186 AD3d 1610, 129 NYS3d 826 [2d Dept 2020]). Thus, plaintiff's cross motion (seq. #2) for summary judgment is denied.

Montauk Properties moves (seq. #1) for summary judgment dismissing the complaint and all cross claims asserted against it on the bases that it did not breach any duty to plaintiff and that there was no defective condition in the area of the accident that caused the accident. In support, Montauk Properties submits, *inter alia*, the pleadings, the bills of particulars, the deposition transcripts of the parties, the affidavit of Patricia Schettino, and the affidavit and report of its expert, Douglas Peden.

In his report, Peden, a New York registered architect, avers that upon inspection of the subject curb in October 2023, he measured its height, which was approximately four inches high, and observed that there were no identifiable defects in the curb or the adjacent sidewalk. Peden avers that the height of the curb is reasonable and within the normal range of curb heights, which is typical and common in commercial parking lots. Peden avers that the painted curb was in visual contrast to the walkway and asphalt pavements, although there is no requirement to paint curbs with warning colors. He also avers that the walkway and curb in the area of the accident were maintained according with industry standards and in reasonably good condition in accordance with the Babylon Town Code and the New York State Property Maintenance Code. Peden opined that the accident did not result from a visual obstruction or defect of the subject walkway or curb.

In her affidavit, Patricia Schettino avers that she is a member of Montauk Properties, which owned the subject premises. She avers that there was no prior incident or complaint involving the height of the sidewalk in the area of the accident.

The owner or possessor of real property has a duty to maintain the premises in a reasonably safe condition (*see* ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Tavarez v Pistilli Assoc. III, LLC***, 161 AD3d 1129, 1130, 77 NYS3d 450 [2d Dept 2018]). In a premises liability case, a defendant property owner or possessor who moves for summary judgment has the initial burden of establishing a prima facie case that it did not create the alleged dangerous condition or have actual or constructive notice of its existence for a sufficient length of time to have discovered and remedied it (*see* ***Hamm v Review Assoc., LLC***, 202 AD3d 934, 163 NYS3d 223 [2d Dept 2022]; ***Mowla v Baozhu Wu***, 195 AD3d 706, 145 NYS3d 368 [2d Dept 2021]; ***Steed v MVA Enters., LLC***, 136 AD3d 793, 26 NYS3d 98 [2d Dept 2016]). Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*see* ***Trincere v County of Suffolk***, 90 NY2d 976, 665 NYS2d 615 [1997]; ***Gallis v 23-21 33 Rd., LLC***, 198 AD3d 730, 156 NYS3d 236 [2d Dept 2021]). However, summary judgment in favor of a defendant is appropriate where a plaintiff fails to submit any evidence that a particular condition is actually defective or dangerous (*see* ***Villalba v Daughney***, 214 AD3d 843, NYS3d 755 [2d Dept 2023]; ***Wilks v City of New York***, 144 AD3d 673, 40 NYS3d 504 [2d Dept 2016]; ***Witkowski v Island Trees Pub. Lib.***, 125 AD3d 768, 4 NYS3d 65 [2d Dept 2015]).

Here, Montauk Properties established its prima facie entitlement to summary judgment by presenting evidence that there was no dangerous or defective condition in the subject curb that caused plaintiff's accident. Plaintiff testified that when she stepped off the sidewalk, her left foot was not balanced on the end of the sidewalk. Schettino avers that there was no prior incident or complaint involving the height of the sidewalk in the area of the accident. Montauk Properties' expert opined that there were no identifiable defects in the curb or the adjacent sidewalk in the area of the accident, which were maintained according with industry standards and in reasonably good condition, and that the four-inches height of the curb is reasonable and within the normal range of curb heights. The expert opines that the curb was readily visible and safe, and violated no code.

In opposition, plaintiff has failed to raise a triable issue of fact as to whether the subject curb was defective or whether the allegedly height differential between the curb and the parking lot was a proximate cause of the accident (*see* ***Pecora v Fitness Intl., LLC***, 212 AD3d 644, 182 NYS3d 699 [2d Dept 2023]; ***Touloupis v Sears, Roebuck & Co.***, 155 AD3d 807, 63 NYS3d 518 [2d Dept 2017]; ***DiStefano v Ulta Salon***, 95 AD3d 932, 943 NYS2d 618 [2d Dept 2012]). As discussed above, plaintiff's expert's opinion regarding the alleged code violations is irrelevant in the absence of evidence connecting said violations to plaintiff's fall. Plaintiff testified that she was looking straight ahead and did not look down the area of the accident. Plaintiff failed to raise a triable issue of fact as to whether the subject curb was defective or whether the allegedly defective condition of the curb was a proximate cause of the accident (*see* ***Marzan v Persaud***, 29 AD3d 652, 817 NYS2d 297 [2d Dept 2006]). Thus, the branch of the motion (seq. #1) by Montauk Properties for summary judgment dismissing the complaint against it is granted.

As to the branch of Montauk Properties' motion (seq. #1) for summary judgment dismissing all cross claims against it, it has failed to adequately address any cross claims asserted against it in its motion papers. Therefore, this branch of its motion (seq. #1) is denied (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Dalley v ESS Group, Inc.***, 2014 NY Slip Op 33539[U] [Sup Ct, Queens County 2014]).

Martino moves (seq. #3) for summary judgment dismissing the complaint and all cross claims asserted against it on the grounds that it did not own, occupy, possess, or put to a special use the area where plaintiff fell. Martino also alleges that it was not negligent because it did not create the alleged dangerous condition and that the allegedly defective condition of the curb was not a proximate cause of the accident. In support, Martino submits, *inter alia,* the pleadings, the bill of particulars, the transcript of deposition testimony and affidavit of Gaetano Pinello, and the lease with Montauk Properties.

At his deposition, Pinello testified that he was the owner of Martino at the time of the subject accident. He testified that while the tenant was responsible for the inside of the leased premises, Montauk Properties, the landlord, was responsible for maintaining the sidewalks and the curbs. Pinello testified that he only cleaned the sidewalks in front of Martino's restaurant by sweeping and blowing with an electric blower every morning and that Martino had never "touched" the sidewalk, the curb, or the parking lot. In his affidavit, Pinello avers that prior to the accident, Martino did not perform any repair or replacement work to the walkway, curb or parking lot, and that the only maintenance work which Martino did was to blow and sweep papers and debris away. Further, paragraph 44 (B) of the lease rider provides, in pertinent part, that "Tenant shall at its' own expense . . . 2) Make all repairs and replacements to any sidewalks and curbs adjacent to the Premises made necessary by the negligence of Tenant."

Liability for a dangerous condition on property is generally predicated upon ownership, occupancy, control, or special use of the property (*see* ***Orellana v Cannon***, 227 AD3d 1013, 212 NYS3d 182 [2d Dept 2024]; ***Toner v Trader Joe's E., Inc.***, 209 AD3d 690, 176 NYS3d 278 [2d Dept 2022]). Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective

condition of the property (*see* ***Smith v 4 Empire Mgt. Group, Inc.***, 208 AD3d 811, 172 NYS3d 632 [2d Dept 2022]; ***Bartlett v City of New York***, 169 AD3d 629, 91 NYS3d 718 [2d Dept 2019]).

Here, Martino has established its prima facie entitlement to judgment as a matter of law by demonstrating that it did not own, occupy, possess, or put to a special use the subject sidewalk and curb where plaintiff fell, and that it had no obligation to maintain this area (*see* ***Casale v Brookdale Med. Assoc.***, 43 AD3d 418, 841 NYS2d 126 [2d Dept 2007]; ***Franks v G & H Real Estate Holding Corp.***, 16 AD3d 619, 793 NYS2d 61 [2d Dept 2005]). While the lease provides that the tenant is responsible for repairs and replacements to the sidewalk and the curb made necessary by its negligence, it is silent as to whose responsibility it was to maintain the area in a situation in which there is no negligence on the part of the tenant. Moreover, Martino has established that it did not create the alleged dangerous condition.

In opposition, plaintiff contends that Martino placed barriers on the sidewalk in front of its restaurant, which directed its customers to go through the area of the accident. However, plaintiff failed to proffer any evidence to support such claim. Plaintiff testified that she chose to go through the area of the accident because the path would be easier to get to her granddaughter's vehicle. Plaintiff's argument concerning alleged Town Code violation is also unavailing, as discussed above. Thus, the branch of Martino's motion (seq. #3) for summary judgment dismissing the complaint against it is granted.

As to Montauk Properties' cross claims against Martino for contribution and contractual and common-law indemnification, Martino demonstrated its prima facie entitlement to summary judgment dismissing such claims by establishing that it was free from fault in the happening of the accident and that it did not have a duty of care owed to plaintiff (*see* ***Duncan v 112 All. Realty, LLC***, 163 AD3d 769, 770, 81 NYS3d 178 [2d Dept 2018]; ***Troia v City of New York***, 162 AD3d 1089, 80 NYS3d 117 [2d Dept 2018]). In opposition, plaintiff failed to provide opposition as to Montauk Properties' cross claims against Martino, and Montauk Properties does not oppose Martino's motion. Thus, the branch of Martino's motion for summary judgment dismissing Montauk Properties' cross claims against it for contribution and common-law indemnification against it is granted. However, as Martino has failed to adequately address Montauk Properties' cross claim for contractual indemnification against it in its motion papers, the branch of Martino's motion (seq. #3) for summary judgment dismissing said cross claim is denied.

Anything not specifically granted herein is hereby denied.

The foregoing constitutes the Decision and **Order** of the Court.

Dated: 11.12.24

LINDA KEVINS, JSC

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION