

D'Angelo v Deer Park Union Free Sch. Dist.
2024 NY Slip Op 35660(U)
August 21, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 615435/2022
Judge: David T. Reilly
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SHORT FORM ORDER

INDEX No. 615435/2022CAL. No. 202301545OTSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY**P R E S E N T :**Hon. DAVID T. REILLY
Justice of the Supreme CourtMOTION DATE 3/13/24
ADJ. DATE 4/17/24
Mot. Seq. # 001 MD-----X
LISA D'ANGELO,

Plaintiffs,

- against -

DEER PARK UNION FREE SCHOOL
DISTRICT,Defendant.
-----XJONATHAN E. GOLD, ESQ.
Attorney for Plaintiff
900 Walt Whitman Road, Suite 310
Melville, New York 11747CONGDON, FLAHERTY, O'CALLAGHAN,
FISHLINGER & PAVLIDES
Attorney for Defendant
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Upon the following papers read on this e-filed motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendant, dated February 7, 2024 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers by plaintiff, dated April 3, 2024 ; Replying Affidavits and supporting papers by defendant, dated April 16, 2024 ; Other Memorandum of Law ; it is

ORDERED that the motion by defendant Deer Park Union Free School District for summary judgment dismissing the complaint against it is denied.

Plaintiff Lisa D'Angelo commenced this action to recover damages for personal injuries she allegedly sustained on October 15, 2021, while working at a school owned and operated by defendant Deer Park Union Free School District, located at 1 Falcon Place, Deer Park, New York. The accident allegedly occurred when plaintiff, who was walking through the parking lot of the school for the first time toward a field at the back of the premises, tripped over a curb separating the parking lot and the walkway at the front of the school building. By her bill of particulars, plaintiff alleges, among other things, that defendant negligently maintained and controlled the walkway and parking lot by improperly designing, painting, and differentiating the curb in question; that the design of the curb failed to conform to accepted design and construction practices, and that defendant permitted the trap-like condition to exist on their premises for an unreasonable length of time.

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Defendant now moves for summary judgment dismissing plaintiff's complaint on the grounds it did not breach any duty to the plaintiff since the alleged defect was open and obvious, there were no statutory or municipal violations, and it did not have actual or constructive notice of the alleged dangerous condition. In support of the motion, defendant submits, *inter alia*, copies of the pleadings, transcripts of the parties' deposition testimony, photographs of the curb in question, video surveillance of the alleged accident, and an affidavit by Jeffery Laux, P.E. Plaintiff opposes the motion, arguing defendant failed to eliminate significant triable issues from the case as to whether the curb created a trap-like hazard because it was painted white like other pavement markings throughout the parking lot and, as such, reduced the visual conspicuity of the elevation difference between the curb and the adjoining walkway. Plaintiff further asserts that the opinion of defendant's expert is unsubstantiated and conclusory, and fails to adequately address whether the curb conformed to applicable codes and regulations concerning the construction and design of curbs and walkways. Plaintiff's opposition includes, among other things, photographs of the curb in question, as well as an affidavit by her own expert, Robert Fuchs, P.E.

During her General Municipal Law §50-h hearing, plaintiff testified that she had never walked in the area of the parking lot where she fell prior to her accident, and that she was looking straight ahead when the accident occurred. Plaintiff testified that she was walking in the parking lot toward a door at the side of the school building when she tripped over a curb that separated the surface of parking lot and the walkway leading to the school. Plaintiff testified that although she observed a white painted line ahead of her as she was walking, she did not recognize the raised curb until after she tripped and fell. Similarly, at her examination before trial, plaintiff explained that she believed the parking lot and the walkway to be one flat surface, as they were the same gray asphalt color and she did not observe any of the people walking ahead of her step up over a curb onto the surface of the walkway. Plaintiff further testified that she believed the white line between the surface of the walkway and the parking lot to be one flat line on the asphalt, that, as a result, she did not raise her feet when she got to the white line, and that it was only after she fell that she realized that her feet had connected with a small curb at the line.

At his examination before trial, Jeffrey LaFlair, a school custodian, testified that he was not at the school at the time of the accident and did not witness it occur. LaFlair testified that he did not know whether the curb in question was previously painted yellow, that he was unsure whether there were regulations that required it be painted yellow, and that he neither tried try to determine whether the curb and parking lot were compliant with safety codes, nor knew whether any other school official had previously done so. In addition, LaFlair testified that he did not paint the curb white, that he did not know who had done so, and that he was aware that during the Covid-19 pandemic it was difficult to obtain other specific colors for use on the school premises.

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 eliminate any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). Where the moving party fails to carry such burden, its motion should be denied without regard to the adequacy of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, *supra*; *Zuckerman v*

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City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]). Furthermore, in determining a motion for summary judgment, the court's function is not to resolve issues of fact or to determine matters of credibility but rather to determine whether such issues exist (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Therefore, "[o]n a motion for summary judgment the facts are to be construed in a light most favorable to the non-moving party and should be denied where there is any significant doubt whether a material issue of fact exists or if there is even arguably such an issue" (*see Bulger v Tri-Town Agency*, 148 AD2d 44, 47, 543 NYS2d 217 [3d Dept 1989]).

Although landowners who hold their property open to the public have a general duty to maintain it in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see Basso v Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]; *Edwards v Raymour & Flanigan Props., LLC*, 203 AD3d 885, 161 NYS3d 788 [2d Dept 2022]), they will not be held liable for trivial defects not constituting a trap or nuisance over which a pedestrian might merely stumble, stub his toes or trip, such as slight elevations of approximately one inch or less between the slabs of a sidewalk or walkway (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 19 NYS3d 802 [2015]; *Trincere v County of Suffolk*, 90 NY2d 976, 665 NYS2d 615 [1997]; *Abalo v Santorelli*, 115 AD3d 777, 982 NYS2d 332 [2d Dept 2014]). Nevertheless, whether a particular height difference between sidewalk slabs constitutes a dangerous or defective condition depends on the peculiar facts and circumstances of each case, including the depth, width, elevation, irregularity and appearance of the defect, as well as the time, place and circumstances of the injury (*see Trincere v County of Suffolk*, 90 NY2d 976, 665 NYS2d 615; *Krutulis v Daiker's, Inc.*, ___ AD3d ___, 2024 NY Slip Op 03626 [4th Dept 2024]; *Clarke v 90 S. Park Owners, Inc.*, 228 AD3d 722, 213 NYS3d 159 [2d Dept 2024]). Thus, the issue is usually a question of fact for the jury unless defendant's proof establishes, as a matter of law, that the defect is too trivial to be actionable and possesses none of the characteristics of a trap or snare (*see Meldrim v Holiday Meadows, LLC*, 225 AD3d 1269, 207 NYS3d 827 [4th Dept 2024]; *Shapiro v 89th St. Dev. Co. LLC*, 220 AD3d 499, 198 NYS3d 19 [1st Dept 2023]; *Zelichenko v 301 Oriental Blvd., LLC*, 117 AD3d 1038, 986 NYS2d 615 [2d Dept 2014]). Indeed, "[a] condition that is ordinarily apparent to a person making reasonable use of his [or her] senses ... may be rendered a trap for the unwary where the condition is obscured ... or the plaintiff's attention is otherwise distracted" (*Mauriello v Port Authority of New York and New Jersey*, 8 AD3d 200, 779 NYS2d 199, 200 [1st Dept 2004] [internal citation omitted]; *see Keech v 30 E. 85th St. Co.*, 173 AD3d 645, 103 NYS3d 81 [1st Dept 2019]; *Dillon v Town of Smithtown*, 165 AD3d 1231, 87 NYS3d 84 [2d Dept 2018]). Furthermore, proof that a dangerous condition is open and obvious does not preclude a finding of liability against a landowner for the failure to maintain its property in a safe condition. Rather, such proof merely raises a triable issue as to a plaintiff's comparative negligence (*see Cupo v Karfunkel*, 1 AD3d 48, 52, 767 NYS2d 40 [2d Dept 2003]; *Armenta v AAC Cross County Mall, LLC*, 219 AD3d 790, 195 NYS3d 111 [2d Dept 2023]).

Here, defendant failed to establish its entitlement to summary judgment by demonstrating, *prima facie*, that the alleged hazardous condition created by the low curb in question was open and obvious and not inherently dangerous (*see R.B. v Sewanhaka Cent. High Sch. Dist.*, 207 AD3d 607, 172 NYS3d 686 [2d Dept 2022]; *Buonchristiano v Fordham Univ.*, 146 AD3d 711, 46 NYS3d 76 [1st Dept 2017]; *Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89, 924 NYS2d 32 [1st Dept 2011]). Notably, although

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defendant submitted photographs and video surveillance of the happening of the accident, it failed to demonstrate that the alleged hazard created by the height difference between the curb and the walkway was trivial by submitting evidence concerning the precise height and width of the curb in question (*cf Trincere v County of Suffolk*, 232 AD2d 400, 648 NYS2d 126; *Maloid v New York State Elect. & Gas Corp.*, 257 AD2d 712, 682 NYS2d 734). Further, while defendant's expert averred that white paint on the curb provided a sharp visual contrast to the dark gray asphalt, he failed to address the issue of whether a visual contrast existed between the curb and the edge of the adjoining walkway, which also was painted white, and, if not, whether the use of the white paint created a hazardous condition by reducing the visual conspicuity of the elevation difference (*see R.B. v Sewanhaka Cent. High Sch. Dist.*, 207 AD3d 607, 172 NYS3d 686; *Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89, 924 NYS2d 32 ["the concrete on the sidewalk and the walkway were similar shades of gray"]; *Buonchristiano v Fordham Univ.*, 146 AD3d 711, 46 NYS3d 76 [A triable issue existed as to whether the color and position of the step adjacent to school walkway created optical confusion]; *Grefrath v DeFelice*, 144 AD3d 1652, 41 NYS3d 845 [4th Dept 2016] ["no markings on the step or differences in color between the step and the sidewalk"])). Indeed, defendant's own submissions include deposition testimony by plaintiff that the day of the accident was the first time she had ever been in the area of the parking lot where the accident occurred, and that the white paint on the curb and the edge of the walkway created the optical illusion that she was walking on one flat piece of asphalt.

In addition, defendant's submissions failed to adequately address plaintiff's allegation that the design of the curb failed to conform to generally good and accepted industry practice, as they failed to submit any evidence of the same, and the affidavit of their expert merely states, in a conclusory fashion, that the "curb between the parking lot and walkway was properly designed, constructed and maintained in a safe condition." Significantly, the sole regulation referenced by defendant's expert, namely Town of Babylon Code § 213-367, addresses the duty to remove garbage from a landowner's property rather than the design or maintenance of curbs and walkways. Therefore, defendant failed to meet its prima facie burden, and the motion is denied without regard to the sufficiency of plaintiff's opposition (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 487 NYS2d 316).

Dated: August 21, 2024

 HON. DAVID T. REILLY^{J.S.C.}

 _____ FINAL DISPOSITION X NON-FINAL DISPOSITION