

SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 24
NASSAU COUNTY

KEN DICAMILLO and KATHLEEN DICAMILLO,

Plaintiff,

-against-

**CESAR E. DEFEO dba PINE HOLLOW COMPANY
and THE STOP & SHOP COMPANIES, LLC,**

Defendant.

**MOTION SUBMITTED:
February 10, 2009
MOTION SEQUENCE:01
INDEX NO. 020570-07**

The following papers are read on this motion:

Notice of Motion	1
Affidavit in Opposition	2
Reply Affirmation	3

This motion by the co-defendant THE STOP & SHOP SUPERMARKET COMPANY, LLC. s/h/a THE STOP & SHOP COMPANIES, LLC, (hereinafter "STOP & SHOP") for summary judgment, pursuant to CPLR 3212, dismissing plaintiffs' complaint in so far as asserted against it is granted. The remainder of the motion, dismissing any cross-claims that may have been interposed, is denied as academic because it does not appear that any other named co-defendant has appeared or interposed any cross-claim against STOP & SHOP, nor have any such pleadings been submitted in support of that branch of the motion (*see* CPLR 3212 [b]).

Plaintiff brought suit, *inter alia*, to recover for injuries allegedly sustained as a result of STOP & SHOP'S negligence with respect to property leased by STOP & SHOP. Specifically, it is alleged in the complaint that, "the defendant DeFeo was and remains the owner of property located in section 27 block K Lot 577,578 in the State of New York, County of Nassau"; It is that "the defendant Stop & Shop Companies, LLC was a corporation doing business in the state of New York and did operate a supermarket known as Store # 569 in the shopping center owned by the defendant DeFeo" (Exhibit "A" to the motion at p.1); that on March 6, 2005 at approximately 7:30 - 8:00 P.M., "the plaintiff while lawfully in and about the premises owned by

the defendant DeFeo and leased to the defendant Stop and Shop was caused to sustain severe and permanent personal injuries as a result of the negligence of the defendants” (Id. at p. 2). In particular, it is alleged that STOP & SHOP’S negligence consisted of “the failure to maintain the property in a reasonably safe condition; the failure to warn the plaintiff of a dangerous and hazardous condition which existed for a period of time that the defendants knew or should have know of * * * but failed to correct; [and that] the defendants permitted a hazard and a trap to exist in and about their property which without warning caused plaintiff to fall” (Id. at p. 2).

The complaint also pleads a second cause of action on behalf of the co-plaintiff Kathleen DiCamillo for the loss of services of and consortium with her husband (Id. at pp. 2,3).

In its motion to dismiss, STOP & SHOP initially points out that at the time of the alleged accident it did not own, operate, control or maintain the premises described in the complaint. More specifically, in the fourth affirmative defense contained in STOP & SHOP’S answer, it is alleged that “at the time period alleged in the complaint, [STOP & SHOP] did not own, operate, control or maintain the instrumentality, object or portion of the premises and/or location [where] plaintiffs’ (sic) accident is alleged to have occurred” (Exhibit “B” to the motion). In support of these contentions, STOP & SHOP submits documents obtained from the Nassau County Department of Assessment pertaining to the parcels of land located at the section, block and lot set forth in the complaint which indicate that STOP & SHOP is not, in fact, located there (Exhibit “C” to the motion). Movant further contends that the co-defendant Cesar E. Defeo d/b/a Pine Hollow Company is not the landlord of the parcel of land where STOP & SHOP is located, and that the proper section, block and lot designations for the parcel of land where STOP & SHOP is located are section 27, block K, lots 41W, 41X, 41Y, 605A and 605B. Movant points out that none of these plots match those that are referenced by plaintiff in the summons and complaint. In addition, movant points out that plaintiffs’ bill of particulars, verified by the co-plaintiff Ken DiCamillo, specifies the accident location as the “[c]urb to the parking lot area of premises located at 265 Pine Hollow Road, Oyster Bay, New York 11771 and more particularly shown in the photograph annexed “(exhibit “E” to the motion). Once again, it appears that the street address set forth in plaintiff’s bill of particulars is not correct (Exhibit “C” to the motion).

In a supplemental bill of particulars, verified by the co-plaintiff Ken DiCamillo, it is admitted that “the defendant did not itself construct the area where plaintiff had his accident,” but that the defendant “did obtain a special use over said area,” in particular the walkway and curblin, by exercising “dominion and control over same” (Exhibit “F” to the notice of motion).

This same argument is repeated in the affidavit of Ken Dicamillo submitted in opposition to the motion, wherein it is alleged that STOP & SHOP’S responsibility or duty with respect to the alleged accident site derives from STOP & SHOP’S “special use” of the location. To support this contention, deponent references the deposition testimony of Rafael J. Monroy, who was allegedly employed as a store manager of a STOP & SHOP located at 575 Pine Hollow Road in Oyster Bay, New York at the time of the alleged accident. Affiant also references Mr. Monroy’s deposition testimony in an attempt to establish that STOP & SHOP had a duty to maintain the premises, including the location at issue (Affidavit in Opposition at pp. 9-13). The deposition transcript of Mr. Monroy (annexed to the Affidavit in Opposition as Exhibit “F”) is, however

submitted by plaintiff without explanation as to why the transcript is unsigned and unsworn. Under the circumstances, the transcript cannot be considered (CPLR 3116; e.g. *McDonald v. Mauss* 38 AD3d 727 [2d Dept 2007]).

In any event, plaintiff's attempt to rely upon the "special use" doctrine as a basis for liability is unavailing. As previously noted, plaintiff has admitted¹ that STOP & SHOP did nothing to create or cause the alleged defective condition through such special use (see *Adorno v. Carty*, 23 AD3d 590 [2d Dept 2005]).

The specifics of the alleged accident are set forth in the opposing affidavit of the co-plaintiff Ken DiCamillo, wherein he alleges that "[o]n March 6, 2005 at approximately 7:30-8:00 p.m. your deponent was involved in an accident on the curb of the walkway outside the STOP & SHOP located at 275 Pine Hollow Road, Oyster Bay, New York" (emphasis added). Again, it is noted that plaintiff's verified bill of particulars set forth the address of STOP & SHOP as 265 Pine Hollow Road, Oyster Bay, New York and that neither address appears to be correct (emphasis added). The precise location of the accident site is described as "a half moon cut out" in the "curb of the walkway outside the STOP & SHOP" which was done "to accommodate a storm drain". The deponent references photographs (annexed to the affidavit in opposition as Exhibit "A") as depicting the "cut out" in an otherwise straight curbing, which plaintiffs' claim constitutes a hazardous and dangerous condition. Deponent further alleges that, while stepping backwards to avoid a car making a turn, he misstepped, lost [his] balance and fell down to the ground." Plaintiffs aver "that the sudden change/transition from straight curbing to the shape shown in the photograph" caused deponent's fall and injuries, and that "defendant gave no warning of the [alleged hazardous condition]." Finally, deponent avers that he "had a right to rely on the curb being the same in character (straight) for my left foot as it was for my right when I stepped [backwards]" (affidavit in opposition at pp. 2-3).

In further opposition to the motion, plaintiffs submit an affidavit from Stanley Fein, a licensed professional engineer, as an expert in the area of safety (annexed to the opposing papers following the affidavit of Ken DiCamillo). In his affidavit, Mr. Fein alleges that he arrived "at an opinion as to whether the area where plaintiff had his accident" was "defective, dangerous and/or hazardous" by reviewing, *inter alia*, the pleadings, the examinations before trial "of plaintiff and representative of the defendant" (as in original), and the photographs annexed to the affidavit in opposition as Exhibit "A". Plaintiffs' expert alleges that "plans filed with the Town of Oyster Bay Buildings Department [incorrectly referenced as Exhibit "F" to the affidavit in opposition] [indicate] that the storm drain which is shown in the area where plaintiff stepped back is accommodated with a straight and level curb throughout." Deponent further alleges that "the actual curbing constructed at the location where the accident occurred contained a half moon indentation." Deponent avers that when plaintiff stepped backwards "he had every right to expect that his left foot * * * would also land on a straight curb." Deponent concludes "with a reasonable degree of scientific and engineering certainly that the cut out of the curb line to a half moon shape to accommodate the storm drain did result in * * * a dangerous and hazardous

¹Plaintiff's supplemental verified bill of particulars, annexed to the notice of motion as Exhibit "F", at p 11.

condition, a trap which was a substantial factor resulting in plaintiff's fall" (Fein affidavit pp. 2,3). There is no indication that plaintiffs' expert visited the location at issue.

Upon reviewing the photographs submitted by plaintiffs, the court observes that the indentation complained of appears to have been designed to accommodate a manhole cover, not a storm drain. The court further observes that the curb is not, in fact, "cut out in a half moon shape" as plaintiff's expert opines, but rather the curb is indented in a slight arc, less than the width of the curb itself. The particular section of curb where the indentation occurs is painted bright yellow, and the words "NO PARKING FIRE LANE" are written in bright yellow, capital letters facing out from the curb. The manhole, which is located at approximately street level, is located between the words "parking" and "fire". A second bright yellow line is painted on the street several feet from and parallel to the curb, at the base of the letters. No obstacles appear that might impede a person's view of the curb or the indentation.

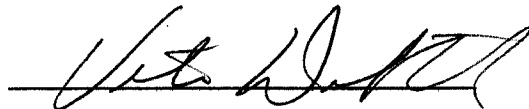
In the reply affirmation, defense counsel points out that plaintiff was admittedly walking backwards and not looking where he was going when he fell; that the curb in question was painted bright yellow; and that there was nothing to obstruct plaintiff's view. He further affirms that the town has duly issued certificate of occupancy for the building, and that plaintiff's expert failed to adduce any code or statute violations. Defense counsel also affirms that STOP & SHOP was the tenant, not the owner of the building; and that the curb indentation complained of constitutes a trivial defect that is not actionable as a matter of law.

Aside from the deficiencies inherent in plaintiff's submissions concerning STOP & SHOP'S alleged interest in, or responsibilities with respect to the premises at issue, judgment would nevertheless be granted dismissing plaintiffs' complaint. A landowner has no duty to warn of conditions that are not inherently dangerous and are readily observable by the use of one's senses (*see Pirie v. Krasinski*, 18 AD3d 848 [2d Dept 2005]; *see also, DiGeorgio v. Morotta* 47AD3d 752 [2d Dept 2008]; *Errett v Great Neck Park District*, 40 AD3d 1029 [2d Dept 2007]).

For the foregoing reasons, the motion by STOP & SHOP for summary judgment dismissing plaintiffs' complaint is granted.

This constitutes the decision and order of the court.

Date: April 14, 2009



Hon. Vito M. DeStefano J.S.C.

ENTERED
APR 17 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE