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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 22

Present: HON. WILLIAM R. LaMARCA
Justice

LOUISE KELLY,

Plaintiff,

Motion Sequence #009
Submitted April 5, 2006
XXX

-against-

INDEX NO: 1015/00

JOSEPH EDMOND AS ADMINISTRATOR OF THE ESTATE OF DAVID FAILS,

Defendants.

The following papers were read on this motion:

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

Requested Relief

Defendant, JOSEPH EDMOND, as Administrator of the Estate of DAVID FAILS, moves for an order, pursuant to CPLR §3212, granting summary judgment dismissing the complaint. Plaintiff, LOUISE KELLY, opposes the motion, which is determined as follows:

Background

On the evening of November 8, 1998, the plaintiff, LOUISE KELLY, parked her car next to a driveway apron utilized in conjunction with residential premises then owned by the decedent DAVID FAILS. At her deposition, the plaintiff testified that, after exiting FAILS' home, she walked down the driveway toward her parked vehicle and then tripped and fell as she stepped off the curb directly adjacent to the driveway apron. According to the plaintiff, as she was stepping off the curb, there were some chips or upraised places in the curb area which "[e]vidently" caused her to twist her right foot and then fall or "stumble over the sidewalk" . The plaintiff further stated that "she thought she was stepping down from the curb" when she stumbled – although she did not see exactly where her foot alighted immediately before she fell because she was looking straight ahead.

Certain pictures taken of the accident site were presented to the plaintiff during her deposition and she marked the curb location where she allegedly stumbled and fell. The pictures reveal that the accident location identified by the plaintiff is a cracked curb adjacent to the driveway apron. The cracked area is located directly next to a sewer drain incorporated into the curb (*see*, *Benenati v City of New York*, 282 AD2d 418, 723 NYS2d 69 [2nd Dept. 2000]). The pictures also suggest that a portion or slab of the sidewalk area in the path of the driveway was apparently replaced. However, Mr. FAILS' mother, who resided at the home when the accident took place, stated at her deposition that neither she nor anyone associated with her family arranged for or performed the sidewalk repairs. Notably, the replaced sidewalk slab is not in close proximity to the claimed accident site, nor has any allegation been made that it was defective.

By summons and verified complaint, dated June of 2004, the plaintiff commenced the within personal injury action against JOSEPH EDMOND, as Administrator of the Estate of DAVID FAILS. The defendant EDMOND has answered, depositions have been completed and EDMOND now moves for summary judgment dismissing the complaint.

The Law

It is settled that "[a]s a general rule, a landowner will not be liable to a pedestrian injured by a defect in a public sidewalk abutting its premises, unless the sidewalk was constructed in a special manner for the landowner, or the landowner affirmatively caused the defect or negligently constructed or repaired the sidewalk" (*Rendon v Castle Realty*,___AD3d___, 813 NYS2d 479 [2nd Dept.2006]; *see, Hausser v Giunta*, 88 NY2d 449, 646 NYS2d 490, 669 NE2d 470 [C.A. 1996]; *Cannizzaro v Simco Management Co.*, 26 AD3d 401, 809 NYS2d 196 [2nd Dept. 2006]; *Henig v Skoruka*, 17 AD3d 407, 792 NYS2d 336 [2nd Dept. 2005]). Additionally, liability may exists "if 'a local ordinance or statute specifically charges [the] landowner with a duty to maintain and repair the sidewalk' "(*Fishelberg v Emmons Ave. Hospitality Corp.*, 26 AD3d 460, 810 NYS2d 502 [2nd Dept. 2006], *quoting from Hausser v Giunta*, *supra*, at 453; *see also*, *Cordova v City of New York*, 22 AD3d 784, 803 NYS2d 698 [2nd Dept. 2005]; *Immerman v City of New York*, 22 AD3d 726, 804 NYS2d 90 [2nd Dept. 2005]; *Davies v City of New York*, 18 AD3d 420, 794 NYS2d 407 [2nd Dept. 2005]).

Significantly, "[w]here the defect which caused the accident is 'adjacent' to a driveway, * * * [the Second Department] has dismissed causes of action against an abutting landowner on the ground that there was no evidence that the driveway contributed to the defective condition" (*Katz v City of New York,* 18 AD3d 818, 796 NYS2d 639 [2nd

Dept. 2005]; *see, Fishelberg v Emmons Ave. Hospitality Corp., supra; Adorno v Carty*, 23 AD3d 590, 804 NYS2d 798 [2nd Dept. 2005]; *Romero v City of New York,* 5 AD3d 657, 774 NYS2d 735 [2nd Dept. 2004]; *Ivanyushkina v City of New York*, 300 AD2d 544, 752 NYS2d 693 [2nd Dept. 2002]; *Benenati v City of New York, supra.*

On the other hand, "if the defect is in the portion of the sidewalk used as a driveway, 'the abutting landowner, on a motion for summary judgment, bears the burden of establishing that he or she did 'nothing to either create the defective condition or cause the condition through' the special use of the property as a driveway'" (*Adorno v Carty, supra, quoting from, Katz v City of New York, supra, and, Breger v City of New York*, 297 AD2d 770, 747 NYS2d 577 [2nd Dept. 2002]; *see also, Vyadro v City of New York,* 2 AD3d 519, 767 NYS2d 871 [2nd Dept. 2003]; *Dos Santos v Peixoto*, 293 AD2d 566, 742 NYS2d 66 [2nd Dept. 2002]).

Discussion

Here, the defendant's submissions, including the relevant deposition testimony and illustrative photographs of the alleged accident site, have established the defendant's *prima facie* entitlement to judgment as a matter of law (*e.g., Alvarez v Prospect Hosp.,* 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 [C.A.1986]; *Cannizzaro v Simco Management Co., supra*; *Desena v 85 Livingston Tenants Corp.,* 11 AD3d 506,782 NYS2d 846 [2nd Dept. 2004]). Assuming that the damaged curb area actually caused the plaintiff's fall, the pictures contained in the record establish that it is not part of the driveway apron (Def's Ex."G"). Rather, the identified accident location is adjacent to, but separate from, the driveway apron and forms part of a curb area located directly next to a sewer drain which

has been incorporated into the curb (*see, Benenati v City of New York, supra*). Moreover, the cracked portion of the curb is aligned with a sidewalk slab which is similarly not part of the driveway apron.

The opposing theory primarily advanced by plaintiff's counsel, that the alleged defect was caused by vehicular traffic in conjunction with a "special use", is speculative and insufficient to raise a factual issue precluding summary relief (*Cannizzaro v Simco Management Co., supra; Ivanyushkina v City of New York, supra; Moschillo v City of New York,* 290 AD2d 260, 736 NYS2d 26 [2nd Dept. 2005]; *see also , Oettinger v Amerada Hess Corp.,* 15 AD3d 638, 790 NYS2d 693 [2nd Dept. 2005]; *Robinson v Lupo*, 261 AD2d 525, 690 NYS2d 1999]; *Cordova v City of New York, supra.*

The Court has considered the plaintiff's remaining contentions and concludes that none raises issues sufficient to defeat the defendant's motion for summary judgment.

Conclusion

Accordingly, it is hereby

ORDERED, that the motion by the defendant, JOSEPH EDMOND, as Administrator of the Estate of DAVID FAILS, is granted, and the complaint is dismissed.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: June 25, 2006

WILLIAM R. LaMARCA, J.S.C.

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