S

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

Present: HON. WILLIAM R. LaMARCA
Justice

BEVERLY MEISSNER and GEORGE MEISSNER,

Plaintiffs,

-against-

ANDOW OPTICAL, LTD., IRIS SANDOW and ROBERT SANDOW,

Defendants.

Motion Sequence # 2
Submitted March 19, 2008
XXX

INDEX NO: 6479/2004

The following papers were read on this motion:

Notice of Motion.....1
Affidavit in Opposition.....2
Plaintiffs' Memorandum of Law in Opposition.....3
Reply Affirmation.....4

Requested Relief

Defendants, SANDOW OPTICAL, LTD., IRIS SANDOW and ROBERT SANDOW (hereinafter collectively referred to as "SANDOW"), move for an order, pursuant to CPLR §3212, granting them summary judgment dismissing plaintiffs' complaint. The plaintiffs, BEVERLY MEISSNER and GEORGE MEISSNER, oppose the motion, which is determined as follows:

Background

In this negligence action, plaintiff, BEVERLY MEISSNER, alleges that she sustained serious personal injuries on August 30, 2002, including a fracture dislocation of her left ankle, as a result of a fall on the premises of SANDOW OPTICAL, LTD., a business located in a strip mall in Monticello, New York, that is owned by defendants IRIS SANDOW and ROBERT SANDOW. It is plaintiff's position that she slipped on an accumulation of sand in the parking lot of the strip mall which she claimed she did not notice until after she had fallen and was lying on the ground. In essence, plaintiff claims that the defendants were negligent in maintaining the driveway and in allowing an unsafe and defective condition to remain in the driveway area and in not warning the plaintiff of said condition.

In support of the motion to dismiss, defendants annex the deposition transcripts of the parties. BEVERLY MEISSNER testified that she had a vacation home in Sackett Lake, New York, where she and her husband spent their summers. She stated that, on the date of the accident, after golfing and eating lunch at a nearby diner, she drove to the optical store where she had brought her prescription some two (2) weeks earlier. She stated that she made a right turn into the driveway and parked her Lexus in front of two (2) vehicles that were parked alongside a planter that separated the street from the driveway, and which was surrounded by a wood edging. She described the planter as being four (4) feet wide and the length of the strip mall, and stated that she had no difficulty exiting her vehicle from the driver side door, which was parked about one (1) foot from the edge of the planter, walking to the front of her car and then straight into the store. She further testified that she stayed in the store about twenty (20) minutes and then exited the store and took

the same route back to her vehicle. She stated that when she reached the left hand side of her Lexus, while looking at her car, she noticed that there was just black dirt in the planter. At that time, she claimed that her left foot slipped on gravel and white sand which was on the asphalt, and that the inside of her left ankle came into contact with the wood planter and the outside of her left ankle contacted the car. She claimed that she twisted her body as she fell and landed seated in the dirt part of the planter. She stated that, after she fell, while seated, she observed "whitish" sand on the asphalt area between the planter and the car that was about a quarter of an inch in depth. She testified that there was no other debris such as leaves, pebbles or garbage in the area. She stated that she did not notice the sand as she walked into the store or as she exited. (Transcript of Plaintiff's deposition, Exhibit "G" to the moving papers). Photographs of the accident site, taken by her husband, GEORGE MEISSNER, about one year after the accident, were produced at the deposition and are annexed to the moving papers as Exhibit "H".

Additionally, defendants annex the deposition transcript of defendant, ROBERT SANDOW, who testified that he owned the subject property and was responsible for maintenance of same. He testified that he replaced a lot of the asphalt driveway in 1995, and that the Village of Monticello required him to put a planter on the property, which was to deter people from pulling in an out of the driveway in a "helter-skelter" manner and was required in order for him to obtain a certificate of occupancy. He stated that the planter was built by Lonnie Smith, a plumber/contractor, and described it as seventy (70) feet long, five (5) to six (6) feet wide and six (6) inches deep. He testified that, in 1995 when the planter was built, he did not see sand in the driveway area except in the winter time when the driveway is plowed and they put sand and salt in the driveway area and some residue

could remain. However, he asserted that he had never had any complaints about sand in his driveway and no one had ever fallen in the driveway, or was injured or made a claim of injury with regard to the planter. (Transcript of SANDOW's deposition, Exhibit "I" to the moving papers).

The deposition of non-party witness, Lonnie Smith Jr., the plumber/contractor who built the planter, reflects that he worked for ROBERT SANDOW doing plumbing and repair work. He stated that the planter was made of landscape ties filled with top soil and peat moss. He testified that there was no sand in the planter, that the area where the planter is located is pretty flat, that at no time does he recall seeing sand build up in the parking lot and that he never received any complaints about the blacktop area around the planter.

Counsel for defendants asserts that there is no evidence that defendants had actual or constructive notice of the alleged defect or that they created the condition or had an opportunity to remedy it. Counsel argues that the alleged defect, a slight layer of fine sand, is not a hazard that a reasonably prudent owner would anticipate a danger from slipping or sliding, citing *Wit v State of New York*, 19 AD2d 941, 244 NYS2d 350 (3rd Dept. 1963); *affd.*, 14 NY2d 805, 251 NYS2d 36, 200 NE2d 216 (C.A. 1964). Counsel for defendants urges that the complaint be dismissed in its entirety.

In opposition to the motion, BEVERLY MEISSNER states that she slipped on sand that accumulated in the parking lot that was dirty and spread out in patterns indicating that it was there for quite some time. In support of her position, she annexes laser photos of the pictures taken by her husband one (1) year after the accident which she states shows the sand in substantially the same quantity and distribution patters as existed on the date of the accident. (Exhibit "A" to the opposition papers). Plaintiffs assert that the defendants

knew or should have known of this dangerous accumulation of sand which constituted a slipping hazard to pedestrians. An affidavit of plaintiff's husband, GEORGE MEISSNER, who has interposed a derivative action for loss of services, reiterates his wife's claims that the sand was "strewn about the area where Plaintiff had fallen", and had clearly been there for quite some time.

The Law

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (*see, Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]. Indeed, "[e]ven the color of a triable issue, forecloses the remedy" *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2nd Dept. 1993]). Moreover "[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate" (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]; *see also S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party's pleadings must be accepted as true (*see Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (See, *Mosheyev v Pilevsky*, *supra*). The burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence

of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 [C.A.1993]; *Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 (C.A. 1985); *Drago v King*, 283 AD2d 603, 725 NYS2d 859 [2nd Dept. 2001]). If the initial burden is met, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR§ 3212, subd [b]; see also *GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 498 NYS2d 786, 489 NE2d 755 [C.A. 1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [C.A. 1980]). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. (*Mgrditchian v Donato*, 141 AD2d 513, 529 NYS2d 134 [2nd Dept. 1988]).

In an action for negligence, the law provides that a defendant is not an insurer, and negligence may not be inferred solely from the happening of an accident, but rather claimant must prove that the defendant breached a duty of care owed to claimant and that the breach of duty proximately caused the claimant's injury. *Valentine v State of New York*, 192 Misc. 2d 706, 747 NYS2d 282 (Court of Claims, 2002). *Patrick v Bally's Total Fitness*, 292 AD2d 433, 739 NYS2d 186 (2nd Dept. 2002), instructs that, while the owner or possessor of property has a duty to maintain the property in a reasonably safe condition and may be held liable for injures arising from a "dangerous condition" on the property, liability attaches to the owner or possessor only if the owner possessor created the condition or had actual knowledge or constructive notice of it, and a reasonable time to remedy it. To constitute constructive notice, "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's

employees to discover and remedy it". *Gordon v American Museum of Natural History*, 67 NY2d 835, 501 NYS2d 646, 492 NE2d 774 (C.A. 1986).

In *Trincere v County of Suffolk*, 90 NY2d 976, 665 NYS2d 615, 688 NE2d 489 (C.A. 1997), the Court of Appeals held that whether a 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. However, in some instances, the *trivial nature* of the defect may loom larger than another element. In *Trincere*, a case that dealt with a defective sidewalk slab, the Court rejected a mechanistic approach based exclusively on the dimension of the sidewalk defect in favor of consideration of the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstances of the injury, and found that no triable issue of fact existed against the municipality based upon plaintiff's fall on a ½ inch raised slab. Cases which have found that the alleged defect upon which plaintiff tripped was too trivial to be actionable are, as follows: *Hagood v City of New York,* 13 AD3d 413, 785 NYS2d 924 (2nd Dept. 2004); *Morris v Geenburgh Central School District No.7*, 5 AD3d 567, 774 NYS2d 74 (2nd Dept. 2004); *Penella v 277 Bronx River Road Owners, Inc.,* 309 AD2d 793, 765 NYS2d 531 (2nd Dept. 2003); *Tallis v Fleet Bank*, 306 AD2d 400, 761 NYS2d 287 (2nd Dept. 2003). However, [e]ven a trivial defect can sometimes have the characteristics of a snare or trap". *Defazio v Hage,* 272 AD2d 964, 708 NYS2d 657 (4th Dept. 2000)

Discussion

After a careful reading of the submissions herein, it is the judgment of the Court that plaintiffs have failed to come forward with sufficient evidence to defeat defendants' motion

for summary judgment. The affidavits in opposition fail to raise a triable issue of fact that defendants either created the alleged defective condition or had actual or constructive notice of the "accumulation of sand" in the parking lot. A review of the pictures annexed to the opposition papers at Exhibit "A" allegedly depicts the condition in the parking lot as similar to that on the date of the accident and leads the Court to conclude that the sand residue found in the parking lot is not a dangerous condition that would lead a prudent landowner to anticipate slipping or sliding accidents. *Wit v State of New York, supra*, but rather is too trivial to be actionable. A trivial defect in a walkway not constituting a trap or nuisance may not be actionable. *Hagood v City of New York, supra*. Viewing the photos taken on plaintiff's behalf together with the deposition testimony of the parties and witnesses herein, the Court concludes that the alleged defective condition, which consists of a slight residue of sand on an outdoor driveway, is not inherently dangerous as a matter of law. Nor does it have the characteristics of a snare or a trap and no questions of fact remain that require a trial.

Conclusion

Based upon the foregoing, it is hereby

ORDERED, that the SANDOWS' motion for an order dismissing the complaint and granting them summary judgment against the plaintiffs is granted and the case is dismissed.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: June 30, 2008

WILLIAM R. LaMARCA, J.S.C.

TO: Coffinas & Coffinas, LLP
Attorneys for Plaintiffs
275 Madison Avenue
New York, NY 10016

Paganini, Gambeski, Cioci, Cusumano & Farole, Esqs.
Attorneys for Defendants
1979 Marcus Avenue, Suite 220
Lake Success, NY 11042

meissner-sandowoptical,#2/sumjudg