SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. GEOFFREY J. O'CONNELL**

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

ELSIE WARREN,

Plaintiff(s),

INDEX No. 14717/05

-against-

MOTION DATE: 10/31/06

AMF BOWLING CENTERS, INC., D/B/A AMF SHERIDAN LANES i/s/h/a AMF BOWLING CENTERS, INC. D/B/A SHERIDAN BOWL A/K/A SHERIDAN LANES AND FRAMIKE REALTY CORP.

MOTION SEQ. No. 1-MG XXX

Defendant(s).

The following papers read on this motion:
Notice of Motion/Affirmation/Exhibits
Memorandum of Law
Affirmation in Opposition/Exhibits
Reply/Affirmation/Exhibit

Defendants AMF BOWLING CENTERS d/b/a AMF SHERIDAN LANES i/s/h/a AMF BOWLING CENTERS INC. d/b/a SHERIDAN BOWL a/k/a SHERIDAN LANES ("AMF BOWLING") and FRAMIKE REALTY CORP., all seek an Order dismissing the Complaint and granting them summary judgment pursuant to CPLR § 3212. Plaintiff opposes.

AMF BOWLING operates a bowling alley at the premises known as 199 East Jericho Turnpike, Mineola, New York. FRAMIKE is the landlord.

Warren v. AMF Bowling Centers, Inc.

In her Complaint plaintiff ELSIE WARREN alleges that on September 26, 2002 at approximately 8:20 p.m. she was severely injured as a result of being struck by a vehicle, a van, which exited onto Jericho Turnpike from an entranceway/alley to defendants' parking lot adjacent to the bowling alley. Plaintiff settled a lawsuit with the driver of that vehicle.

In her Complaint plaintiff claims that the accident was caused by dangerous defective and unsafe conditions that existed at the parking lot and that the defendants were negligent in failing to post signs in the area to direct and control the flow of traffic.

At her deposition plaintiff ELSIE WARREN testified that on September 26, 2002 she was 82 years old. She testified that a little after 8:00 p.m. she was leaving an animal hospital across Jericho Turnpike to return to her car parked in front of the defendant bowling alley. Jericho Turnpike is six lanes at this location. Plaintiff testified that as she was crossing Jericho Turnpike, ". . . a car was coming out the wrong way of the bowling alley, he was coming out the entranceway, and hit me as he came out." (Warren EBT, p.27) She testified that when she was hit she was still in the roadway crossing Jericho Turnpike, and had not reached the sidewalk, or the front drivers side door of her car. She testified that she first saw the van in the roadway less that a minute before it struck her. (Warren EBT, pp. 28, 44-48). Plaintiff testified that she did not cross the street at either corner where traffic lights were located. (Warren, EBT pp. 28-30)

AMF produced its Facility Manager, Michael Gravinia for deposition. He testified that he had managed at that location since 1996 or 1997. He testified that at the parking lot there are three entrances, one on Jericho Turnpike and two at the rear of the lot, on a side street, Rudolf Road. He testified that the front entrance has an arrow painted onto the pavement.(Gravinia EBT, pp. 28-29) He testified that the arrow has been there as long as he was worked at that location, and that he is in charge of maintenance of the lot. Gravinia testified that the defendants perform small pothole repairs and repaint the striping, approximately once in the last ten years, which includes repainting the arrow approximately two years ago. (Gravinia, EBT, pp. 31-32) He testified that there are no other signs at the lot.

Based on the proof and deposition testimony, defendants argue that there can be no case alleging negligence by the defendants maintained at this juncture, as the plaintiff has failed to demonstrate a duty owed by the defendants to her which was breached.

Counsel for plaintiff opposes claiming that there is triable issue of fact in dispute. He argues that although the defendants contend that the offending vehicle improperly used the alley as an exit, there was inadequate signage to warn the driver not to do so, which he argues, raises a triable issue of fact as to whether that failure caused or contributed to the accident.

In support of this argument counsel provides an affidavit from an engineer who states that he inspected the lot and there was insufficient signage to warn motorists not to exit from the "entrance". The engineer notes that the ground is marked with an arrow. He also references a Town of Hempstead Code requirement of additional signs. As the location is not within the Town of Hempstead, the Code cited is inapplicable. The engineer fails to note any State, County or other applicable municipal Code requiring additional notice to drivers. (Opposition, Exh. 3) Counsel also provides an affidavit from the offending driver who states that if he had seen a sign he would not have exited from that location. This self-serving statement does not raise a triable issue of fact with respect to the defendants' liability. The Court notes that the driver fails to mention that he disregarded the large yellow arrows on the ground. (Opposition, Exh. 2)

In response to the opposition, defendant also provides an affidavit from an engineer who states that there is no evidence that the parking lot, with marked curb cuts for ingress and egress were built or maintained in violation of any State or municipal code, rule or regulation. He also points out that the Town of Hempstead Code provision referenced by plaintiff's expert, Section182-6(c) relate only to the dimensions of the sidewalk, which are irrelevant to the facts surrounding the occurrence of this accident.

Based on this proof the defendants move for summary judgment, contending that there is no issue of fact with respect to their liability for plaintiff's injury. They argue that the proof presented demonstrates that they provided an appropriate and safe area for parking, and that it was the responsibility of the plaintiff to cross the street properly. They further argue that there is no evidence that they had any control over the offending driver, nor is there evidence that the use of the wrong egress caused or contributed to the accident. Finally they argue that there is no evidence of any prior complaints regarding entrances or exit ways to the lot nor evidence that additional signs were required by law, rule, or regulation, or that the marking on the pavement was inadequate and contributed to the accident.

They argue that they provided all that was required for safe entrance and exit from the lot, and they have no control or responsibility to control offending drivers on the roadway. The defendants further argue that the plaintiff could have crossed at either side street intersection, both of which were governed by traffic lights, but chose to cross the six lane roadway at that location in order to directly enter her car.

Counsel argues that the failure to have more signs informing motorists that the alley was not an exit but only an entrance, was improper and creates a material issue of fact as to whether the failure to have additional signs contributed or caused the accident. Counsel for plaintiff argues that this raises a triable issue of fact whether they provided a safe place and means for entrance and exiting from the lot. He further argues that any negligence of the plaintiff does not absolve the defendants from their duty to provide a safe driveway.

The Court finds plaintiff's expert's opinion is purely speculative and lacking probative value, as it is unsupported by necessary germane foundational facts or regulations. It is insufficient to raise an issue of fact as to the design sufficiency of the lot, nor does it provide a basis for finding that the defendants could have forseen this accident. There is no demonstration that the addition of signs would have prevented this occurrence. There is no demonstration that the defendants had a duty to control the flow of traffic into or out of the lot or the actions of drivers in proceeding onto roadways. *Dekko v. McDonald's Restaurants of New York*, 198 AD2d 208 (2nd Dept. 1993); *Applebee v. State of New York*, 308 NY 502 (1955). In this instance there is no question that there was an arrow painted into the pavement. Further, there is no question that there was another area for crossing the street, which plaintiff could access.

There is no proof that plaintiff could not have parked on the same side of the street as the animal hospital or have crossed at the traffic light. Further, there is no proof that any additional signage would have prevented the accident. There is no proof that anyone ever complained to the defendants that the arrow painted in the pavement was inadequate, unsafe, inconvenient, or unacceptable at any time prior to the accident.

In order to succeed on a premises liability action, a plaintiff must establish that a defendant either created a condition, or had actual or constructive notice it existed, and failed to correct it in a reasonable time. To be considered constructive notice, a defect must be visible and apparent and must exist for a sufficient length of time prior to an accident to permit the defendant to discover and remedy it. *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 (1986).

There is no evidence presented that the defendants were made aware of any potentially unsafe condition which they left uncorrected. There is no evidence of any rule, regulation or standard of design or construction which was violated by this design of the lot and its entrances, or exits, nor is there evidence of other facilities with different more accommodating designs.

Based on the proof presented, the Court agrees with the defendants that the plaintiff has failed to demonstrate a triable issue of fact with respect to their liability as he has not established what duty the property owners breached in the design of this parking lot. While plaintiff claims that the defendants failed to provide sufficient signage , she has not demonstrated that there was a duty to provide more than that which was concededly provided by the defendants, nor has she established that their failure to have additional signs caused or contributed to this accident, occurring in the roadway.

Plaintiff offers no evidence that anyone ever complained about motorists wrongfully exiting from the entrance to the lot, nor does she offer any evidence that the fact the driver exited from that location caused him to strike her.

Where, as here a party demonstrates that it is entitled to summary judgment on the facts, it is incumbent on the party opposing summary judgment to reveal all of its proof to demonstrate that there is a triable issue of fact in dispute. Mere speculation or hopes of demonstrating such an issue at trial are insufficient. *Nel Taxi Corp. v. Eppinger*, 203 A.D.2d 438 (2nd Dept. 1994); *Sarabia v. Hilaire Farm Nursing Home,* 250 A.D.2d 586 (2nd Dept. 1998). Although summary judgment is a drastic remedy which otherwise deprives a litigant of his or her day in Court, it is to be granted where it is clear, as here, that there is no triable issue of fact. Plaintiff, in opposing defendants' applications, has failed to establish that there is an issue with respect to defendant's liability. The mere conclusions and unsubstantiated allegations of plaintiff and his expert are insufficient. *Zuckerman v. City of New York,* 49 N.Y.2d 557 (1980). Plaintiff's and his expert's conclusory allegations, unsubstantiated by any factual evidence, is insufficient to show that there is a triable issue of fact with regard to the defendants' negligence. *Smith v. Johnson Products Co.*, 95 A.D.2d 675 (1st Dept. 1983); *Fishman v. Nassau County*, 84 A.D.2d 806 (2nd Dept. 1981). On a motion for summary judgment, more is required than disputation, denials and assertions that triable issues exist. *Rae v. Rosenberg*, 67 Misc.2d 881 (1971).

Based on the proof presented, the defendants' motion for summary judgment is Granted.

It is, SO ORDERED.

Dated: Jan 4, 2007

HON. GEOFFREY J. O'CONNELL, J.S.C.