SUPREME COURT - STATE OF NEW YORK

Present:

HON. TAMMY S. ROBBINS

Acting Justice
TRIAL/IAS, PART 47
NASSAU COUNTY

MARGARET PLOWS,

Plaintiff,

-against-

INDEX N0. 000105/05
MOTION SUBMIT: 9/12/06
MOTION SEQ. NO. 002

L & K HOLDING CORPORATION,

Defendant.

The motion by defendant L & K Holding Corp. ("L&K") seeking an order for summary judgment as to plaintiff's complaint is denied for the reasons set forth herein.

Plaintiff commenced this action for injuries allegedly sustained on May 18, 2004 at approximately 2 p.m. in the parking lot of a strip mall located at 202 Old Country Road, Hicksville, Nassau County, New York. After shopping in one of the mall stores, plaintiff was walking to her car when she allegedly fell on a "speed bump" in the parking lot.

Plaintiff argues that "the rutted, broken and faded speed bump obscured by traffic in defendant's parking lot constituted an inherently dangerous condition ." L&K contends the speed bumps in the lot were painted "traffic yellow" in 2003 (see Exhibit G, pg. 19, the deposition of Paul Doogan, the field manager for L&K) and that there were no prior incidents as to speed bumps in that lot (see Exhibit G, pg. 32). L&K maintains that the speed bumps were not inherently dangerous and were open and obvious. Defendant further asserts that plaintiff had been to the subject parking lot several times prior to this incident and that plaintiff's failure to look where she was going was the cause of this accident.

There is no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous (*Capozzi v Huhne*, 14 AD3d 474; *Plis v North Bay Cadillac*, 5 AD3d 578). Thus, it is well settled that there is no duty on the part of the landowner to warn against a condition that can be readily observed by those employing the reasonable use of their senses (*Paulo v Great Atlantic and Pacific Tear Company*, 233 AD2d 380). For a hazard or dangerous condition to be open and obvious, such that the property owner has no duty to warn a visitor, the hazard or dangerous condition must be of a nature that would not reasonably be overlooked by anyone in the area whose eyes were open, making a posted warning of the presence of the hazard superfluous (*see Liriano v Hobart Corp.*, 92 NY2d 232).

The open and obvious nature of a hazard may obviate a claim that the property owner violated the duty to warn of, or place barriers to protect against, dangers on the premises, but the open and obvious nature of an alleged hazard does not eliminate a claim that the presence of the hazardous condition constituted a violation of the property owner's duty to maintain the premises in a reasonably safe condition (*Slatsky v Great Neck Plumbing Supply, Inc.*, 29 AD3d 776; *Westbrook v WR Activities-Cabrera Markets*, 5 AD3d 69; *DiVietro v Gould Palisades Corp.*, 4 AD3d 324). A landowner must act as a reasonable person in maintaining his or her property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk (*Peralta v Henriquez*, 100 NY2d 139; *Tagle v Jakob*, 97 NY2d 165; *Basso v Miller*, 40 NY2d 233).

Here, the speed bump was constructed of asphalt, the same material as the rest of the parking lot. In the photographs submitted to this Court, the speed bump appears to be worn, the contrasting yellow color appears to be faded and the speed bump is covered by dark tire marks. (see Exhibit C annexed to plaintiff's affirmation in opposition).

To be entitled to summary judgment in a premise liability action, the property owner is required to establish that it maintained its premises in a reasonably safe manner, and that it did not create a dangerous

condition which posed a foreseeable risk of injury to individuals expected to be present on the property (*Westbrook v WR Activities-Cabrera Markets, supra*). To constitute notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit a defendant or employer to discover and remedy it (*Negri v Stop & Shop, Inc.*, 65 NY2d 625).

Here, L&K did not meet their burden in establishing that they did not own or control the parking lot, that they maintained the parking lot in a reasonably safe condition or that they had no actual or constructive notice of the dangerous condition. Moreover, L&K failed to present any evidence that it neither created the allegedly hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy the condition. The court finds that these triable issues of fact preclude an award of summary judgment in L&K's favor (*see Marrone v South Shore Properties*, 29 AD3d 961).

Moreover, the plaintiff has offered a sworn expert affidavit of Nicholas Bellizzi, a licensed professional engineer, in which Mr. Bellizzi states that he inspected the site of the incident. (see Exhibit D annexed to plaintiff's affirmation in opposition). Mr. Bellizzi states that the "subject road bump had no warning signs, no pavement painted words or arrows, and its limited yellow unpatterned paint had become worn away." Mr. Bellizzi concludes that "the subject speed bump was a pavement defect, ineffectively, inadequately and improperly warned of that was a significant contributing cause of Ms. Plow's trip and fall accident and her resulting injuries."

In accordance with the foregoing, defendant's motion is denied in its entirety.

IT IS SO ORDERED.

HON. TAMMY S. ROBBINS

Dated: November 6, 2006