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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 17 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

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LINDA RIZZUTI,

Plaintiff(s),

-against-

TOWN OF HEMPSTEAD, DANIEL P. VARGHESE AND SOSAMMA DANIEL,

Defendant(s).

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Index No. 12034/07

Motion Submitted: 3/12/10
Motion Sequence: 001

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendants Varghese and Daniel ("the homeowners") move this Court for an Order, pursuant to CPLR §3212, granting summary judgment in their favor on the grounds that the homeowners did not owe a duty to the plaintiff with respect to the condition of the public sidewalk abutting their property, nor did the homeowners create the alleged defective and dangerous condition, or make special use of the sidewalk. Defendants also request dismissal of plaintiff's complaint and all cross claims. Plaintiff opposes the requested relief.

The plaintiff commenced this action for personal injuries allegedly sustained when she tripped and fell on a chunk of concrete protruding from the public sidewalk abutting the homeowners' property, in an area where a tree had previously been removed by the Town of Hempstead ("the Town"). Plaintiff contends that the defendant homeowners owed a duty to the plaintiff, and to the general public, to maintain the sidewalk abutting their property in a safe and proper manner, and that they failed to do so by creating, or permitting to exist, a defective and dangerous condition.

The defendant homeowners reside at 13 John Avenue, Elmont, New York. The plaintiff resides at 17 John Avenue, Elmont, New York. The incident giving rise to this action occurred on April 19, 2006, at approximately 4:30 p.m., after plaintiff exited the front passenger side of her car, which was parked in front of the defendant homeowners' residence. As the plaintiff began to walk to her residence, she tripped and fell on a piece of concrete located at the upper right-hand corner of a small grassy and mulched area where a tree had once stood.[1] Plaintiff's Exhibit E shows that the concrete chunk that allegedly caused plaintiff to fall is attached to, and is part of, the concrete sidewalk area abutting defendant homeowners' property.

The Town removed a tree from the grassy area in May 2005, and removed its stump in November 2005, based on the defendant homeowners' 2004 complaint that the tree was dead and posed a danger to passersby. Aside from the removal of the tree and its stump, no sidewalk inspection was performed by the Town until after plaintiff filed her notice of claim following this incident.[2] Additionally, neither the homeowners, nor the plaintiff, made any complaints to the Town about the sidewalk area prior to plaintiff's fall. The homeowners testified at their respective depositions that they did not know when the defect in question first appeared, but that they used their driveway and walked on the sidewalk on a regular basis and never encountered a problem.[3] The homeowners also did not place the red mulch on the grassy area, which plaintiff alleges made it extremely difficult to see the protruding chunk of concrete.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most

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[1]Referring to plaintiff's Exhibit E (photographs) contained in plaintiff's Affirmation in Opposition to defendants' motion for summary judgment.

[2]The Town's sidewalk inspection in June 2006 indicated that the sidewalk was in need of repair because of cracks in the same general area of the piece of concrete that allegedly caused plaintiff to trip and fall, but the inspection sketch produced by the Town did not note the piece of concrete that allegedly caused plaintiff to trip and fall. Moreover, the plaintiff did not allege that she tripped on a cracked sidewalk.

[3]Plaintiff's allegation that the defendants have submitted unsworn deposition testimony in support of their motion is incorrect. A review of defendants' exhibits reveals that all of the deposition testimony submitted, including that of the plaintiff, is sworn testimony.

favorable to the non-moving party, herein the plaintiff (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

The Town's Code defines the term "sidewalk" as "includ[ing] all land lying between the curb line of the public highway and the building line of the premises abutting thereon which has been surfaced or improved with concrete or other paving material" (Code of the Town of Hempstead, Part VII, Chapter 181, Sidewalks, Roads and Streets, §§181-4 [B], 181-14[B]). Based on plaintiff's own Exhibit E, it is clear to this Court that the concrete upon which plaintiff alleges that she tripped is part of the "sidewalk," as it is located on the land lying between the curb and defendant homeowners' front lawn.

Plaintiff's reliance on the testimony of Andrew Brust, a sidewalk inspector for the Town, that the area where plaintiff tripped and fell is not part of the "sidewalk" is unavailing and inadmissible. Mr. Brust testified that he based his "determination" that the area between the sidewalk and the curb is not part of the public thoroughfare on "the way [he] was trained." Aside from his "training," Mr. Brust did not provide any factual basis for his determination. Plaintiff has also failed to offer any other evidence establishing that the area where she fell is not part of the sidewalk.

Specifically, in cases where a pedestrian trips and falls because of an alleged defect in a public sidewalk, the abutting landowner will be liable to the pedestrian only when the landowner created the defective condition, or caused the defect to occur because of some special use of the sidewalk, or when a statute or ordinance placing the obligation to maintain the sidewalk on the landowner expressly makes the landowner liable for injuries caused by failure to perform that duty (***Romano v. Leger***, 2010 N.Y. Slip Op. 3427, 2010 N.Y. App. Div. LEXIS 3385 (2d Dept., 2010); ***Crudo v. City of New York***, 42 A.D.3d 479, 839 N.Y.S.2d 232 (2d Dept., 2007); ***Davies v. City of New York***, 18 A.D.3d 420, 794 N.Y.S.2d 407 (2d Dept., 2005); ***Diaz v. Vieni***, 303 A.D.2d 713, 758 N.Y.S.2d 98 (2d Dept., 2003); ***Picone v. Schlaich***, 245 A.D.2d 555, 667 N.Y.S.2d 57 (2d Dept., 1997); ***Scalici v. City of New York***, 215 A.D.2d 744, 627 N.Y.S.2d 730 [2d Dept., 1995]).

In this case, which involves the same ordinance as that at issue in ***Picone, supra***, (Code of the Town of Hempstead, Part VII, Chapter 181, Sidewalks, Roads and Streets), an obligation is imposed on the abutting landowner to repair sidewalks when directed to do so by the Town, at the landowner's expense. The ordinance does not, however, impose tort liability upon the abutting landowner for injuries caused by a breach of that obligation. Thus, and because no such language is contained in the subject ordinance, plus the fact that the plaintiff has herself established that the area where she fell is part of the "sidewalk" within the meaning of the Town's Code, the defendants are entitled to summary judgment as a matter of law.

The defendants having established their entitlement to summary judgment as a matter of law, the burden now shifts to Plaintiff to raise triable issues of fact with respect to special use of the sidewalk and/or the creation of a dangerous condition by the defendant homeowners. Plaintiff has failed to meet her burden. There is no evidence that the homeowner defendants created the alleged defective and dangerous condition, or that they engaged in a special use of the sidewalk.

Plaintiff's allegation that the homeowners created the dangerous and defective condition by having a dead tree removed from their sidewalk area, which is in and of itself a dangerous condition, is unsupported and is speculative. Plaintiff's reliance on the testimony of Mr. Zaccoli, the engineer who determined that the tree should be removed, is inadmissible. Mr. Zaccoli's testimony is not annexed to plaintiff's opposition papers.[4]

There is also no evidence submitted by plaintiff that the defendant homeowners made a special use of, or derived a special benefit from, the sidewalk in front of their home. "Where a sidewalk is adjacent to but not part of the area used as a driveway, the plaintiff bears the burden of proof on a motion for summary judgment of showing that the special use of the sidewalk contributed to the defect (***Adorno v. Carty, et. al.***, 23 A.D.3d 590, 804 N.Y.S.2d 798 [2d Dept., 2005]). On the other hand, where the defect is in the portion of the sidewalk used as a driveway, and the weight of the traffic on the driveway could have caused the defect, then the summary judgment motion should be denied (**Adorno, supra**).

In this case, plaintiff's Exhibit E clearly depicts that the area where plaintiff tripped and fell on the chunk of concrete is adjacent to, but not part of the area of the sidewalk used as a driveway. Plaintiff also confirms in her affidavit that the location of the protruding piece of concrete is *adjacent* to the homeowners' driveway, not part of the area used by the defendants as a driveway. Thus, the fact that the defendants used their driveway on a regular basis has no bearing on this issue, and plaintiff has not sustained her burden of proof.

Plaintiff's remaining contention that the defendants were negligent in failing to discover, warn or remedy the alleged defective condition at their premises is dismissed in light of the foregoing determination of this Court that plaintiff's trip and fall occurred on the sidewalk in front of defendants' home, in conjunction with the fact that the Town's Code does not impose tort liability on homeowners regarding the sidewalks abutting their property.

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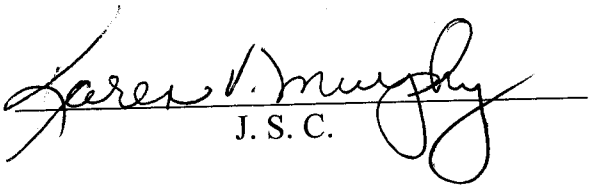
[4]Plaintiff's claim that defendants' motion for summary judgment should be denied based on CPLR §3212(f) is groundless. The Town produced Mr. Zaccoli for deposition and plaintiff relies on his testimony. In addition, the return date of the motion was adjourned to March 12, 2010, giving plaintiff sufficient time to obtain and annex the minutes of Mr. Zaccoli's deposition testimony.

The defendants' motion for summary judgment is granted in its entirety and the complaint and all cross claims as against movants are dismissed.

The foregoing constitutes the Order of this Court.

Dated: June 7, 2010
Mineola, N.Y.



J. S. C.