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| <b>Richards v Passarelli</b>   |
| 2009 NY Slip Op 33300(U)   |
| July 8, 2009   |
| Supreme Court, Richmond County   |
| Docket Number: 100417/2006   |
| Judge: Judith N. McMahon   |
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND**

-----X

**MARGARET RICHARDS,**

**Plaintiff(s),**

**-against-**

**GUIDO PASSARELLI, LUCY PASSARELLI, THE  
PASSARELLI FAMILY PARTNERSHIP, L.P.,  
A NEW YORK LIMITED PARTNERSHIP, AND**

**PIER I IMPORTS,**

**Defendant(s).**

-----X

**GUIDO PASSARELLI, LUCY PASSARELLI, THE  
PASSARELLI FAMILY PARTNERSHIP, L.P.,  
A NEW YORK LIMITED PARTNERSHIP,**

**Third-Party Plaintiff(s)**

**-against-**

**ARROW LINE STRIPING CO.,**

**Third-Party Defendant(s),**

-----X

**GUIDO PASSARELLI, LUCY PASSARELLI, THE  
PASSARELLI FAMILY PARTNERSHIP, L.P.,  
A NEW YORK LIMITED PARTNERSHIP,**

**Second Third-Party Plaintiff(s),**

**-against-**

**CALVANICO ASSOCIATES, INC.,**

**Second Third-Party Defendant(s).**

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**DCM PART 5**

**Present:**

**HON. JUDITH N. MCMAHON**

**DECISION AND ORDER**

**Index No. 100417/2006**

**Motion No. 008, 009, 010,  
011, 012**

**Index No. A100417/2006**

**Index No. B100417/2006**

**GUIDO PASSARELLI, LUCY PASSARELLI, THE  
PASSARELLI FAMILY PARTNERSHIP, L.P.,  
A NEW YORK LIMITED PARTNERSHIP**

**Third-Third Party Plaintiff(s)**

**-against-**

**EIP LEASING SERVICES, INC.,**

**Third-Third Party Defendant(s).**

**X**

The following papers numbered 1 to 19 were used on this motion this 16th day of June 2009:

|  |    |
|--|----|
| Notice of Motion [008][Calvanico Associates](Affirmation in Support).....      | 1  |
| Notice of Motion [009][Pier I Imports](Affirmation in Support).....            | 2  |
| Notice of Motion [010][Guido Passarelli, et. al.](Affirmation in Support)..... | 3  |
| Notice of Motion [011][EIP Leasing](Affirmation in Support) .....              | 4  |
| Notice of Motion [012][Guido Passarelli, et. al.](Affirmation In Support)..... | 5  |
| Affirmation in Opposition to EIP [Arrow Line Striping].....                    | 6  |
| Affirmation in Opposition to Passarelli [Arrow Line Striping].....             | 7  |
| Affirmation in Opposition [Calvanico].....                                     | 8  |
| Affirmation in Opposition to Passarelli [EIP].....                             | 9  |
| Affirmation in Opposition [Plaintiff] .....                                    | 10 |
| Affirmation in Support [Pier I] .....  | 11 |
| Affirmation in Opposition [Passarelli] .....                                   | 12 |
| Affirmation in Opposition [Passarelli] .....                                   | 13 |
| Supplemental Affirmation [EIP].....  | 14 |
| Affirmation in Reply [Calvanico].....  | 15 |
| Affirmation in Reply [Calvanico] .....   | 16 |
| Reply Affirmation [Passarelli].....  | 17 |
| Reply Affirmation [EIP] .....  | 18 |
| Reply Affirmation [Pier I] .....   | 19 |

On April 9, 2005, the plaintiff sustained injuries when she was caused, allegedly by the negligence of the defendants, to drive her vehicle over a retaining wall in the parking lot of Pier I Imports, located at 2194 Richmond Avenue, Staten Island, New York. The plaintiff commenced this action on or about February 2, 2006. The defendants Guido Passarelli, Lucy Passarelli, The Passarelli Family Partnership, L.P., A New York Limited Partnership (hereinafter "Passarelli"), who served as the general contractor to the

construction of the Pier I store, thereafter commenced three third party actions against Arrow Line Stripping, as the parking lot painting company, Calvanico Associates, as the architect's providing design services to the defendants, and EIP Leasing, who repaved the parking lot in 2005. The instant motions are brought by defendant's Calvanico, Pier I Imports, Guido Passarelli et. al., and EIP Leasing seeking summary judgment dismissing the complaint.

It is well settled that a "proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]). Once the movant has satisfied this burden, "the burden shifts to the [opponent] to lay bare his or her proof and demonstrate the existence of a triable issue of fact" (Chance v. Felder, 33 AD3d 645, 645-646 [2d Dept 2006]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). In this regard, the court is enjoined to accept the evidence tendered by the opposing party as true, and "must deny the motion if there is even arguably any doubt as to the existence of a triable issue" (Fleming v. Graham, 34 AD3d 525 [2d Dept 2006] quoting Barker v. Briarcliff School Dist., 205 AD2d 652, 653 [2d Dept 1994] [internal quotation marks omitted]).

**I. Motion 008: Defendant Calvanico's summary judgment motion**

Defendant Calvanico entered into a contract with the owner, Guido Passarelli, et. al., to prepare site engineering documents for the premises. The plan drafted called for a six inch curb along the Travis Avene side of the parking lot. This is the curb which plaintiff drove over causing her injuries. Calvanico alleges that the plans which owner

Guido Passarelli provided to the contractors differed from the “final plan” they prepared. Presently, defendant Calvanico is moving for summary judgment on the ground that they did not owe a duty to the plaintiffs and/or did not create the alleged defect.

Initially the court notes that the portion of defendant Calvanico’s motion that requests summary judgment on the basis of CPLR § 214(d) has already been decided by this court in a Decision and Order dated April 8, 2008, and will not be addressed herein.

Here, defendant Calvanico has successfully established his entitlement to summary judgment as a matter of law (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]).

Calvanico has provided the court with evidence that the final plan provided to owner Passarelli provided for appropriate curbs and arrows directing patrons. In opposition, codefendant/second third party plaintiff Guido Passarelli has successfully raised questions of fact regarding whether the design of Calvanico was defective and additionally, whether Calvanico failed to exercise reasonable care in the drafting of the plans (Chance v. Felder, 33 AD3d 645, 645-646 [2d Dept 2006]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). As such, summary judgment is inappropriate.

**II. Motion 009: Pier I Import’s motion for summary judgment:**

Defendant Pier I Imports is the tenant of the shopping center in the parking lot where the accident occurred. The parking lot is owned by defendant Guido Passarelli. It is well settled that “liability for a dangerous or defective condition on [real] property is generally predicated upon ownership, occupancy, control or special use of the property . . . Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property” (Usman v. Alexander's Rego Shopping Ctr., Inc., 11

AD3d 450, 451 [2d Dept., 2004])

Here, defendant Pier I has successfully established its entitlement to summary judgment by presenting evidence that it did not possess, own, occupy or control the parking lot where the accident occurred (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Wheaton v. East End Commons Assocs., 50 AD3d 675, 676-677 [2d Dept., 2008][granting summary judgment to tenant where evidence established that they possessed no duty maintain, did not own, specially use, occupy or control the parking area where the accident occurred]; Morgan v. Chong Kwan Jun, 30 AD3d 386, 388 [2d Dept., 2006][finding summary judgment in favor of the tenants where not duty existed to maintain the parking lot]). In opposition, the defendants have failed to raise a triable issue of fact otherwise (id.). The defendants do not present any evidence that Pier I had a duty to maintain the premises nor did they control, occupy, own or use the parking lot in a special manner sufficient to attach liability (Morgan v. Chong Kwan Jun, 30 AD3d 386, 388 [2d Dept., 2006]). As such, summary judgment is appropriate in favor of Pier I on all claims and cross claims.

### III. Motion 010: Guido Passarelli, et. al.'s motion for summary judgment

It is well settled that “an owner of real property has a duty to maintain the property in a reasonably safe condition” (see Basso v Miller, 40 NY2d 233, 241 [1976]). In order to establish a prima facie case of negligence the plaintiff must prove that the defendant either created the condition, or had notice of the condition and had a reasonable time to remedy the situation (Gonzalez v. Jenel Management Corp., 11 AD3d 656, 656 [2d Dept. 2004; Finocchiaro v. AVR Realty Corp., 32 AD3d 819, 819 [2d Dept 2006]). Further, “the scope of a landowner's duty to maintain property in a reasonably safe condition may also include the

duty to warn of a dangerous condition . . . a landowner has no duty to warn of an open and obvious danger” (Ruiz v. Hart Elm Corp., 44 AD3d 842, 844 [2d Dept., 2007]). Generally, “[t]he issue of whether a dangerous condition is open and obvious is fact specific, and thus usually a question for the jury” (*id.*).

Here, in opposition to the Passarelli’s prima facie showing of entitlement to summary judgment, the plaintiffs and co-defendants have successfully raised multiple issues of fact (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Gonzalez v. Jenel Management Corp., 11 AD3d 656, 656 [2d Dept. 2004]). Summary judgment is inappropriate where, as here, questions of fact exists regarding whether the defect was open and obvious, whether the defect was even inherently dangerous, and further whether the Passarelli’s possessed the requisite notice of the condition (*id.*; Ruiz v. Hart Elm Corp., 44 AD3d 842, 844 [2d Dept., 2007]).

#### IV. Motion 011: EIP Leasing’s motion for summary judgment

“To establish a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and that the breach was a proximate cause of the plaintiff’s injury” (Demshick v. Community Hous. Mgt. Corp., [2d Dept., 2006]). Here, the defendant EIP has established his entitlement to summary judgment (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]). Specifically, the defendant EIP established that it did not owe a duty the plaintiff and did not breach that duty by re-paving the parking lot of the Pier I location where the accident occurred more than two years prior to accident.

In opposition, the plaintiff and co-defendants successfully raise triable issues of fact

(Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Demshick v. Community Hous. Mgt. Corp., [2d Dept., 2006]). Questions of fact exists regarding who exactly caused the alleged defect to be present in the parking lot and further, whether EIP contributed to that by failing to mill the lot prior to the re-paving. Further, questions exists regarding whether the defect was open and obvious, as such summary judgment is inappropriate for EIP Leasing.

V. Motion 012: Guido Passarelli et. al.'s cross motion for summary judgment

The court notes that this cross motion is untimely and will be denied as such (Brill v. the City of New York, 2 NY3d 648 [2004]; Riccardi v. CVS Pharmacy Inc., \_\_\_ AD3d \_\_\_, NY Slip Op 1932 [2d Dept., 2009][finding no good cause on defendant's part for a late summary judgment motion warrants dismissal as untimely]). The deadline for filing summary judgment motions was 60 days after the completion of depositions for EIP. EIP depositions were completed on October 24, 2008, and as such, the motion served by Guido Passarelli, et. al. seeking summary judgment against third-third-party defendant EIP Leasing is denied as untimely.

Accordingly, it is

**ORDERED** that the defendant Calvanico Associates' motion is hereby denied in its entirety, and it is further,

**ORDERED** that the defendant Pier I Import's motion is hereby granted, and it is further

**ORDERED** that the complaint and all cross claims are hereby dismissed as against defendant Pier I Imports only, and it is further

**ORDERED** that the defendant Guido Passarelli, et. al.'s motion for summary



judgment is denied in its entirety, and it is further

**ORDERED** that the defendant EIP Leasing's motion for summary judgment is hereby denied in its entirety, and it is further

**ORDERED** that the defendant Guido Passarelli, et. al's cross motion for summary judgment against EIP Leasing is denied as untimely, and it is further

**ORDERED** that any and all additional requests for relief are hereby denied, and it is further

**ORDERED** that the Clerk enter judgment accordingly.

**THIS IS THE DECISION AND ORDER OF THE COURT.**

**Dated: July 8, 2009**

**E N T E R,**

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**Hon. Judith N. McMahon**  
**Justice of the Supreme Court**