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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. Justice

PART 8

Dorian Nisinson

-v-

Greenvale Townhouse Restaurant

INDEX NO. 102048/10

MOTION DATE 3-29-12

MOTION SEQ. NO. 002

The following papers, numbered 1 to 14, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	No(s). 1-9
Answering Affidavits — Exhibits	No(s). 10-13
Replying Affidavits	No(s). 14

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6-12-12

JOAN M. KENNEY, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

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Dorian Nisinson and David Nisinson,
Plaintiffs,

-against-

Greenvale Townhouse Restaurant, Mary Jannotta Perri and Joseph Perri,
Defendants.

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DECISION AND ORDER

Index Number: 102048/10
Motion Seq. Nos.:002

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of these motions to dismiss.

Papers	**Numbered**
Notice of Motion, Affirmation, and Exhibits	1-9
Opposition Affirmation, and Exhibits	10-13
Reply Papers	14

In this personal injury action, defendant, Greenvale Townhouse Restaurant[1], moves for an Order, pursuant to CPLR 3212, dismissing the complaint.

Factual Background

On October 10, 2008, plaintiff Dorian Nisinson allegedly tripped, fell, and sustained a number of personal injuries in the parking lot located at 49 Glen Cove Rd., Greenvale, NY (the accident). Defendant, Greenvale Townhouse Restaurant owns, operates, and maintains the premises (the premises). On the date of the accident, plaintiff alleges that she left the premises at approximately 10:00PM and started walking to her car in the parking lot. Plaintiff was walking on the road bed, while her son and his

[1]After reviewing the file, defendants Mary Jannotta Perri and Joseph Perri have not answered the complaint or otherwise appeared in this action.

girlfriend were walking next to plaintiff on the sidewalk. Specifically, plaintiff states she was walking between the raised curb of the sidewalk and cement car stops, which were approximately one foot wide and were along the first three parking spaces. When plaintiff reached the fourth parking space, the cement car stop was apparently flush with the sidewalk, and as a result, plaintiff tripped on the car stop and fell. Plaintiff injured, *inter alia*, her left shoulder. It is undisputed that the car stop itself was not cracked, broken or chipped. (Dorian Nisinson Examination Before Trial [EBT] at 28).

Plaintiff claims that the lighting in the parking lot was initially satisfactory, but as one walked toward the rear of the parking lot, the lighting got progressively worse. Plaintiff avers that the area that caused her fall was not lit at all. Plaintiff further asserts that the lack of proper lighting, combined with the placement of the car stop relative to the curb, caused her to trip and fall. Plaintiff's expert, a professional engineer, opines "with a reasonable degree of engineering certainty, [that] the combination of the above defects...contributed to" a dangerous condition at the location. (See Exhibit 3 of plaintiff's opposition papers; Silberman Expert Opinion at 6).

According to defendant's general manager, Fereos Theosevis, the lighting in the area of the accident was more than sufficient because there were multiple lighting fixtures in the area at issue. (Theosevis EBT at 76-79). Furthermore, defendants claim that there

was nothing inherently dangerous about the placement of the car stop.

Arguments

Defendant argues that the complaint should be dismissed because: (1) there is no evidence of any negligence on behalf of the defendants; (2) defendants did not have notice of any alleged defective condition; and (3) the subject car stop was an open and obvious condition. Defendant also contends that plaintiff, David Nisinson's claim of loss of consortium, should be dismissed because the primary claim of negligence by Dorian Nisinson is legally defective.

Plaintiffs contend that defendant's summary judgment motion must be denied because: (1) defendants violated applicable safety standards; (2) defendants created the dangerous condition at issue and, at minimum, had actual or constructive notice of the condition; (3) the dangerous condition was not open and obvious; and (4) there are disputed issues of fact that necessitate a trial of this matter.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action, nor that the cause of action or defense does not have merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense is

established sufficiently to warrant the judgment as a matter of law. Except as provided in 3212(c) of this rule, the motion shall be denied if any party demonstrates facts sufficient to require a trial. If it appears that any party other than the moving party is entitled to a summary judgment, the court may grant reverse summary judgment without the necessity of a cross-motion."

The rule governing summary judgment is well established: "The 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 eliminate any material issues of fact from the case." (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 AD2d 201 [1st Dept 1999]). Where the movant fails to meet this burden, the motion should be denied even if the papers in opposition are inadequate. (*Pastoriza v State*, 108 AD2d 605 [1st Dept. 1985]).

In order to establish a prima facie case of negligence in a trip and fall action, plaintiff must demonstrate that defendant either, created a dangerous condition, or had actual and/or constructive notice of the defective condition alleged (see *Judith D. Arnold v New York City Housing Authority*, 296 AD2d 355 [1st Dept 2002]). A genuine issue of material fact exists when defendant fails to establish that it did not have either actual or constructive notice of a hazardous condition. (*Aviles v 2333 1st Corp.*, 66 AD3d 432 [1st Dept. 2009]; *Baez-Sharp v New York City Tr. Auth.*, 38 AD3d 229 [1st Dept. 2007]). "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 [the owners'] employees to discover and remedy it." (*Segretti v Shorenstein Co., E., L.P.*, 256 AD2d 234, 235 [1998]).

Defendant has failed to set forth a prima facie entitlement to the relief sought because the basis of its argument regarding the actual physical appearance of the car stop does not by itself prove it was not defective. Plaintiff clarified during her EBT that her claim is based upon the positioning of the car stop, along with poor lighting conditions in the parking lot; not any physical defect attendant the car stop itself. (Dorian Nisinson EBT at 39). Plaintiff did not claim that the car stop was "cracked" or "broken." Therefore, dismissal based on arguments not raised in opposition is not warranted.

Defendant's claim that it did not have notice of the alleged defective placement of the car stop cannot be sustained. Defendant's general manager testified that the location of the car stop was exactly the same since 1985 up until 2010. (Theosevis EBT at 51-52, 60). The fact that the location of the car stop had been the same for 23 years prior to the accident is sufficient to establish actual notice (and at minimum, constructive notice) of the car stop's alleged dangerous location. The sufficiency of the lighting in the parking lot is a question for the finder of fact to decide. The general manager testified that he could not recall the last time the bulbs for the walkway in the parking lot were changed. (Theosevis EBT

at 92).

Defendant's third argument that the case should be dismissed because of the lone statement that the placement of the car stop was an open and obvious condition is insufficient. Defendant failed to support its contentions for dismissal based upon this unsubstantiated statement. Plaintiff has failed to establish a prima facie showing of entitlement to summary judgment as a matter of law. Defendant is under no obligation to come forward with evidentiary proof creating a triable issue of fact. (see *Marie Christiana v Joyce International Inc.*, 198 AD2d 690 [3rd Dept. 1993]).

A movant's failure to sufficiently demonstrate a right to summary judgment requires a denial of the motion regardless of the sufficiency, or lack thereof, of the opposing papers. (*Winegrad v NYU Med. Center*, 64 NY2d 851 [1985]; *Zuckerman v City of NY*, 49 NY2d 557 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [2000]; *Lurie v Child's Hosp.*, 70 AD2d 1032 [3rd Dept. 1979]; *Cugini v System Lumer Co.*, 111 AD2d 114 [1st Dept. 1985]).

Lastly, defendant argues for the dismissal of the loss of consortium claim because it is derivative and cannot survive because the primary cause of action must be dismissed. It is undisputed that the cause of action for loss of consortium is derivative. (*Belanoff v Grayson*, 98 AD2d 353 [1st Dept. 1984]). "The concept of "consortium" includes not only loss of support or services, but also such elements as love, companionship, affection, society, sexual relations, solace and more." (*Millington v Se. Elevator Co.*, 22 NY2d

498 [1968]). Since the primary cause of action remains, and defendant has failed to address the merits of the consortium claim, defendant's application for its dismissal, is also denied. Accordingly, it is hereby

ORDERED that named defendant's summary judgment motion, is denied, in its entirety; and it is further;

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants Mary Jannotta Perri and Joseph Perri, and against plaintiffs, dismissing the complaint solely against these defendants for plaintiffs' failure to prosecute this action against them and/or failure to seek a default judgment within one year after default (see CPLR 3215(c)); and it is further;

ORDRED that the parties proceed to mediation, forthwith.

Dated: 6-12-12

ENTER:

Joan M. Kenney, J.S.C.