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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Shlomo S. Hagler PART: 17
Justice

RUTH WACHSPRESS, as executor of the estate of MARCIA WACHSPRESS, deceased,

Plaintiff,

- against -

CENTRAL PARKING SYSTEM OF NEW YORK, INC.,

Defendant.

INDEX NO.: 107512 / 2009
MOTION DATE: _____
MOTION SEQ. NO.: 001
MOTION CAL. NO.: _____

Motion by defendant for summary judgment.

	Papers Numbered
Defendant's Notice of Motion with Affidavits/Affirmations & Exhibits 1 through 8	1
Plaintiff's Attorney's Affirmation in Opposition with Marcia Wachspress Affidavit as Exhibit A	2
Defendant's Reply Affirmation	3
Defendant's Letter Submission of Court Requested Additional Case Law	4
Transcript of April 2, 2012 Court Conference and Oral Argument	5

Cross-Motion: ☐ No ☐ Yes **Number of Cross-Motions:** _____

Upon the foregoing papers, it is hereby ordered that defendant's motion is denied as fully set forth in the separate attached Decision and Order.

Dated: August 3, 2012
New York, New York

Hon. Shlomo S. Hagler, J.S.C.

Check one: ☐ **Final Disposition** ☒ **Non-Final Disposition**
Motion is: ☐ Granted ☒ Denied ☐ Granted in Part ☐ Other
Check if Appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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RUTH WACHSPRESS, as executor of the estate of MARCIA WACHSPRESS (deceased),

Plaintiffs,

-against-

CENTRAL PARKING SYSTEM OF NEW YORK,

Defendant.

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Index No. 107512/2009

DECISION/ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

Defendant Central Parking System of New York, Inc. ("Central" or "defendant") moves for an order pursuant to CPLR § 3212 granting defendant summary judgment dismissing the complaint. Plaintiff opposes the motion.[1]

Statement of Facts

Plaintiff Marcia Wachspress ("Wachspress" or "plaintiff") commenced this action to recover damages for personal injuries allegedly sustained from a trip and fall in an open air parking lot on 1-15 West End Avenue, in New York County. Plaintiffs' Verified Bill of Particulars, ¶ 2, attached as Exhibit 3 to the Motion. According to plaintiff, she drove her car to the subject lot with the intention of parking and taking a shuttle bus to Lincoln Center for a matinee performance. Transcript of Examination Before Trial of Marcia Wachspress on June 8, 2010 ("Wachspress EBT"), attached as Exhibit 5 to the Motion, at p. 26. Plaintiff pulled into the lot, drove and parked her car

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1. The original plaintiff, Marcia Wachspress, opposed defendant's motion and submitted a affidavit therein. Subsequently, Marcia Wachspress died and Ruth Wachspress, as executor of the estate of Marcia Wachspress, was substituted as plaintiff, pursuant to a so-ordered stipulation, which also amended the caption to reflect the substitution. A separate prior stipulation had discontinued the derivative claim by Morton Wachspress.

in the right lane of a two lane aisle directly next to the attendant's booth. Wachspress EBT at pp. 53-54, 69. After parking her car, plaintiff indicated to the attendant that she wished to go to the shuttle. Wachspress EBT at p. 55. The attendant pointed and declared that the shuttle pick-up area was "over there." Wachspress EBT at pp. 55-57, 70. Plaintiff then proceeded along the path indicated by the attendant towards the shuttle pick-up area. Wachspress EBT at pp. 55-59, 70-71, 145-146. While looking straight ahead and walking, after a few steps, plaintiff tripped on a low yellow concrete slab or barrier (Wachspress EBT at pp. 70-71, 74-76). These low concrete barriers are also known as "tire stops" and, in this case, were approximately 6 inches high, 6 inches wide and 4 to 4½ feet long and designed to prevent cars from hitting other cars parked near the entrance and exit lanes of defendant's parking lot. Transcript of Examination Before Trial of Margarita Franco on August 2, 2010 ("Franco EBT"), attached as Exhibit 7 to the Motion, at pp. 33-36, 38-40. Upon tripping, plaintiff fell backwards, which allegedly caused her to sustain injuries. Wachspress EBT at pp. 78-79. Plaintiff testified that she did not see the yellow tire stop at any time prior to the accident. Wachspress EBT at p. 81. In addition, defendant neither provided nor designated a marked path or walkway for patrons to use to exit the parking lot. Franco EBT at pp. 73-76.

Summary Judgment

The movant has the initial burden of proving entitlement to summary judgment. Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). "The proponent of 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, 323 (1986) (citations omitted). Furthermore, the remedy of summary judgment is a drastic one, which "should not be granted where there is any doubt as to the existence of a triable

issue (Moskowitz v Garlock, 23 AD2d 943 [3d Dept 1965]), or where the issue is even arguable (Barrett v Jacobs, 255 NY 520, 521 [1931]), since it serves to deprive a party of his [or her] day in court." Integrated Logistics Consultants v Fidata Corp., 131 AD2d 338, 340 (1st Dept 1987). See also Henderson v City of New York, 178 AD2d 129, 130 (1st Dept 1991).

Landowner's Duty of Care and Duty to Warn

A landowner or possessor has a duty to exercise reasonable care to maintain its premises in a safe condition. Basso v Miller, 40 NY2d 233, 238 (1976). For the landowner to be held liable for a dangerous condition on its premises, the injured party must prove that the landowner created the alleged dangerous condition or had actual or constructive notice of the condition. Gordon v American Museum of Natural History, 67 NY2d 836, 838 (1986). However, a landowner's or possessor's duty to maintain reasonable safe premises is separate and distinct from his or her duty to warn of a dangerous condition. Cohen v Shopwell, Inc., 309 AD2d 560, 561 (1st Dept 2003). "[E]ven if the alleged dangerous condition qualifies as 'open and obvious' as a matter of law, that characteristic merely eliminates the property owner's duty to warn of the hazard, but does not eliminate the property owner's broader duty to maintain the premises is a reasonably safe condition." Westbrook v WR Activities-Cabrera Markets, 5 AD3d 69, 72 (1st Dept 2004).

Discussion

Defendant seeks summary judgment arguing that a "tire stop" in a parking lot is an open and obvious condition which is neither a defect nor an inherently dangerous condition. Defendant further posits that a "tire stop" is a standard feature of a parking lot, readily observable by the plaintiff's ordinary senses and, therefore, it does not invoke the property owner's duty to warn.

Open and Obvious Hazards

Whether a hazard is latent or open and obvious is generally fact specific and thus usually an issue that should be decided by the jury. Tagle v Jakob, 97 NY2d 165, 168 (2001). Nonetheless, a court may determine a condition to be open and obvious as a matter of law "when the established facts compel that conclusion and may do so on the basis of clear and undisputed evidence." Id. 97 NY2d at 168 (internal citations omitted).

In support of its motion, defendant cites numerous cases where the courts awarded summary judgment to defendants in trip and fall cases. For example, in the case of Schulman v Old Navy/The Gap, Inc., 45 AD3d 475, 476 (1st Dept 2007), the Appellate Division granted summary judgment to a defendant department store because "a metal bracket on a clothing rack in defendant's store, was open and obvious and not inherently dangerous." Id. at 476. In Shulman, the facts warranted the finding since such metal brackets were present throughout the store and the plaintiff admitted that she knew the bracket was there. Id. at 475. The other cases also involved, after a review of the facts, a finding by the court that the hazard was readily visible and, in many of the cases, the plaintiff also knew that the hazard was present. Also among the cases cited by the defendant are several trip and fall cases involving "tire stops" where the Second Department courts awarded the defendant summary judgment after finding that, based on the facts in those cases, the hazard from the "tire stops" were open and obvious. In these cases, the facts presented showed that the "tire stops" were readily visible and located where it was logically expected that "tire stops" would be placed.

The instant case is distinguishable from the cases cited by the defendant in support of its motion. First, the low concrete barrier that plaintiff tripped over was one of a cluster of only three in the entire parking lot and not placed as regular "tire stops" but to prevent cars from entering an

area reserved for Zipcars.[2] As a result, it is a question of fact as to whether plaintiff was or should have been aware of their existence and placement. Second, the concrete barriers were low to the ground and plaintiff testified that she did not notice them prior to tripping and alleged that she could not have noticed them without looking directly at the ground. This, too, raises a question of fact as to whether the hazard created by the low concrete barriers were, in fact, open and obvious under the circumstances. Third, there was neither a clearly marked nor designated path from the check-in booth to the bus shuttle location or parking lot exit and plaintiff followed the verbal and gestured direction of the parking lot attendant to proceed in the most direct route where the concrete barrier lay unknowingly in her path. As the Appellate Division stated in Westbrook:

> At the outset, the question of whether a condition is open and obvious is generally a jury question, and a court should only determine that a risk was open and obvious as a matter of law when the facts compel such a conclusion. . . . Nor is the mere fact that a defect or hazard is capable of being discerned by a careful observer the end of analysis. The nature or location of some hazards, while they are technically visible, make them likely to be overlooked.

5 AD3d at 72. See also, Mauriello v Port Auth. of N.Y. & N.J., 8 AD3d 200 (1st Dept 2004) ("A condition that is ordinarily apparent to a person making reasonable use of his senses . . . may be rendered a trap for the unwary where . . . the plaintiff's attention is otherwise distracted." [internal citations omitted]); Juoniene v H.R.H. Construction Corp., 6 AD3d 199, 200 (1st Dept 2004) (standpipe shown by photograph to be normally visible "might be overlooked by pedestrian under the circumstances allegedly confronted by plaintiff. . . . Some visible hazards, because of their nature or location, are likely to be overlooked." [citing Westbrook]).

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2. Zipcars are short term rental cars available to and used by subscription members which are often based at parking lot and garages.

Since plaintiff testified that the low concrete barrier in her path over which she tripped was not readily visible to her, it is a question of fact whether the hazard was indeed, open and obvious under these circumstances.

Possessor's Duty to Maintain Property in Reasonably Safe Condition

Even assuming defendant's assertion that the low concrete barrier was an open and obvious condition, defendant would still not be entitled to summary judgment dismissing this action as there is still a issue of whether the defendant maintained its property in a reasonably safe condition. Until recently, courts have dismissed negligence claims where the hazard was considered to be open and obvious holding that "liability under common law negligence will not attach when the dangerous condition complained of was open and obvious." Westbrook, 5 AD3d at 72 (internal citations omitted). However, all four Appellate Divisions now reject this broad application of the open and obvious doctrine. Id. at 723. Instead, "[p]roof that a dangerous condition is open and obvious does not preclude a finding of liability against a landowner for the failure to maintain the property in a safe condition but is relevant to the issue of the plaintiff's comparative negligence." Id. at 72-73. Therefore, even if the hazard of the low concrete barrier was open and obvious, the question still remains whether defendant breached its duty to maintain the premises in a reasonably safe condition. See, e.g., Sweeney v Riverbay Corp., 76 AD3d 847 (1st Dept 2010); Lawson v Riverbay Corp., 64 AD3d 445 (1st Dept 2009); Garrido v City of New York, 9 AD3d 267 (1st Dept 2004).

Conclusion

Inasmuch as there are issues of fact as to whether the hazardous condition was open and obvious and whether the defendant breached its duty to maintain the premises in a reasonably safe condition, summary judgment in this case is inappropriate.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment is denied.

The foregoing constitutes the decision and order of the Court. Courtesy copies of this decision and order are being provided to the parties.

ENTER,

Dated: New York, New York
August 3, 2012

Hon. Shlomo S. Hagler, J.S.C.