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SHORT FORM ORDER

INDEX No. 09-21796
CAL No. 12-00249 OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 3-27-12 (#003)
MOTION DATE 4-30-12 (#004)
MOTION DATE 7-9-12 (#005)
ADJ. DATE 7-16-12
Mot. Seq. # 003 - MotD
004 - MG
005 - MD

JOSEPHINE GRUNDERSON, Plaintiff, - against - GREGORY PAPADOPOULOS, JAY NATHAN, M.D., ORTHOPAEDIC ASSOCIATES OF GREAT NECK, LLP, DELICATO CHIROPRACTIC, P.C. AND DR. RAYMOND BARTOLI, Defendants.	LAURENCE A. SILVERMAN, ESQ. Attorney for Plaintiff 1772 E. Jericho Turnpike, Suite 2 Huntington, New York 11743 BAXTER SMITH & SHAPIRO, P.C. Attorney for Gregory Papadopoulos 99 North Broadway Hicksville, New York 11801 JASON S. PERGOLIZZI, ESQ. Attorney for Jay Nathan M.D. 8208 18th Avenue, Suite #1, P.O. Box 140504 Brooklyn, New York 11214
GREGORY PAPADOPOULOS, Third-Party Plaintiff, - against - DELICATO CHIROPRACTIC, P.C., AND DR. RAYMOND BARTOLI, Third-Party Defendants.	HUENKE & RODRIGUEZ Attorney for Orthopaedic Associates One Huntington Quadrangle, Suite 2S02 Melville, New York 11747 ZWIRN & SAULINO, P.C. Attorney for Delicato Chiropractic & Dr. Raymond Bartoli 2606 East 15h Street, Suite 205 Brooklyn, New York 11235

Upon the following papers numbered 1 to 82 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; 15 - 41; 42 - 57; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 58 - 63; 64 - 67; Replying Affidavits and supporting papers 68 - 70; 71 - 76; 77 - 82; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (# 003) by defendants Delicato Chiropractic, P.C. and Dr. Raymond Bartoli, the motion (# 004) by defendant Dr. Jay Nathan, and the motion (# 005) by defendant Gregory Papadopoulos are consolidated for purposes of this determination; and it is further

ORDERED that the motion (# 003) by defendants Delicato Chiropractic, P.C. and Dr. Raymond Bartoli in the main action for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint in the main action and all other claims against them is decided as follows; and it is further

ORDERED that the motion (# 004) by defendant Dr. Jay Nathan in the main action for an order pursuant to CPLR 3211 (a)(1) and (7) and CPLR 3212 granting summary judgment dismissing the complaint in the main action and all cross claims against him is granted; and it is further

ORDERED that the motion (# 005) by defendant Gregory Papadopoulos in the main action for an order pursuant to CPLR 3211 (a)(7) and CPLR 3212 granting summary judgment dismissing the complaint in the main action against him is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff in the main action, Josephine Grundstrom, on December 15, 2008 when she tripped and fell on the premises at 294 Burr Road in Commack, New York, which is allegedly owned by defendant/third-party plaintiff Gregory Papadopoulos ("defendant Papadopoulos") and occupied by the defendants herein in the main action. The gravamen of the complaint in the main action is that defendants were negligent in failing to properly maintain, manage and control the premises, creating a hazardous condition.

Prior to the accident, defendant/third-party defendant Delicato Chiropractic, P.C. ("Delicato Chiropractic") entered into a verbal agreement with defendant Papadopoulos to rent space at the subject premises. It was allegedly agreed that Delicato Chiropractic would rent one or two examination rooms on a per-use basis every Monday only between 12:00 p.m. and 5:00 p.m. Delicato Chiropractic would be allowed to use the reception area as well as the fax machine, telephone, photocopy machine, and office supplies, as needed. It was also agreed that defendant Papadopoulos would maintain sole responsibility for any maintenance or repairs of the premises, both to the interior and exterior.

Defendants Delicato Chiropractic and Dr. Raymond Bartoli now move for summary judgment dismissing the complaint in the main action against them on the ground that they are not liable for the plaintiff's accident. Delicato Chiropractic and Dr. Bartoli contend that they are not responsible for maintaining the area of the accident, and that they neither created the alleged dangerous condition nor had actual or constructive notice of the condition. Delicato Chiropractic and Dr. Bartoli also seek summary judgment dismissing all claims against Dr. Bartoli as an individual on the ground that he did not purport to bind himself individually under the contract with defendant Papadopoulos. In support, they submit, *inter alia*, the pleadings, a bill of particulars, plaintiff's deposition testimony dated October 19, 2010, defendant Papadopoulos' deposition testimony dated October 19, 2010 and October 11, 2011, the deposition testimony dated October 14, 2011 given by Susan DeLorenzo, a representative of Delicato Chiropractic, and the affidavit dated March 1, 2012 of Dr. Raymond Bartoli.

At her examination before trial on October 19, 2010, plaintiff testified to the effect that, on the day of the accident, she arrived at the subject premises between 4:00 p.m. and 4:30 p.m. for a medical

examination. After parking her vehicle, she went to the front door of the building and observed a piece of paper stating "doctor's office in the rear." There was no walkway from the front door to the rear of the building. Rather, there was a gravel area from the front entrance all the way around to the back, and at the end of the gravel area, there was a brick patio. She walked from the front door to the rear of the property on the gravel, and tripped and fell as she attempted to step onto the patio because of the approximately one-inch height difference. Prior to the accident, she did not observe that the patio was raised.

At his deposition on October 19, 2010, Mr. Papadopoulos testified to the effect that he is a chiropractor and the sole owner of the subject property, consisting of a "split level ranch with an extension off the back that is [his] office." He stated that he has allowed other doctors who are not associated with his practice to use his office. At the time of the accident, he entered into a verbal agreement with Delicato Chiropractic to rent space at the subject premises one day a week, and that as a result of the agreement, Drs. Jay Nathan and Robert Michaels were allowed to come on site to conduct independent medical exams. Defendant Papadopoulos stated that he did not enter any agreement with Dr. Nathan or Dr. Michaels, and that neither Delicato Chiropractic nor Dr. Nathan has a key to an examination room. Defendant Papadopoulos added that the parking lot on the subject property is made of "asphalt," and that Dr. Nathan was not responsible for maintaining the parking lot.

At his deposition on October 11, 2011, Mr. Papadopoulos testified to the effect that, pursuant to the rental agreement, Delicato Chiropractic used the office in the subject premises one day a week, including phones, bathroom, table and waiting room. Defendant Papadopoulos stated that he was responsible for maintaining the grounds at the premises including pathways and parking facilities. He further stated that he had no agreement with Delicato Chiropractic as far as its responsibilities for maintaining the premises or for indemnification. He stated that, after the subject accident, he observed the plaintiff sitting up on the patio by the handicapped ramp. He continued that Delicato Chiropractic was not using the patio area when it rented the space.

At her deposition on October 14, 2011, Susan DeLorenzo testified to the effect that she is employed by Delicato Chiropractic, whose business is handling the scheduling of independent medical exams. She stated that neither Delicato Chiropractic nor Dr. Nathan was responsible to maintain the subject property.

In his affidavit, Dr. Raymond Bartoli states that he is the founder and sole proprietor of Delicato Chiropractic. He states that no one representing Delicato Chiropractic had an opportunity to discover and/or repair any alleged defect in the subject property, and that Delicato Chiropractic was not even authorized to inspect and/or repair the area of the subject accident.

Liability for a dangerous or defective condition on 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 (*see* ***Breland v Bayridge Air Rights, Inc.***, 65 AD3d 559, 884 NYS2d 143 [2d Dept 2009]; ***Ruffino v New York City Tr. Auth.***, 55 AD3d 819, 865 NYS2d 674 [2d Dept 2008]; ***Noia v Maselli***, 45 AD3d 746, 846 NYS2d 326 [2d Dept 2007]). A defendant moving for summary judgment in a personal injury action has the burden of establishing that he or she did not create the defective condition (*see* ***Noia v Maselli***, *supra*; ***Franks v G & H Real Estate Holding Corp.***, 16 AD3d 619, 793 NYS2d 61 [2d Dept 2005]).

Here, defendants Delicato Chiropractic and Dr. Bartoli have established their prima facie entitlement to judgment as a matter of law by demonstrating that they did not own, occupy, possess, or put to a special use the parking lot where the plaintiff fell, and that they had no right or obligation to maintain this area (*see* ***Casale v Brookdale Med. Assoc.***, 43 AD3d 418, 841 NYS2d 126 [2d Dept 2007]; ***Franks v G & H Real Estate Holding Corp.***, *supra*). Moreover, there is no evidence that Delicato Chiropractic and Dr. Bartoli created the alleged dangerous condition that caused the plaintiff's accident or had actual or constructive notice of the alleged defect (*see* ***Italia DePompo v Waldbaums Supermarket, Inc.***, 291 AD2d 528, 737 NYS2d 646 [2d Dept 2002]).

In opposition, plaintiff contends that defendants Delicato Chiropractic and Dr. Bartoli made special use of the walkway leading to the subject patio where the plaintiff fell because the walkway is the only way to get into and out of the building, resulting in a special benefit to Delicato Chiropractic and Dr. Bartoli. The principle of special use, a narrow exception to the general rule, imposes an obligation on the abutting landowner, where he puts part of a public way to a special use for his own benefit and the part used is subject to his control, to maintain the part so used in a reasonably safe condition to avoid injury to others (*see* ***Breland v Bayridge Air Rights, Inc.***, *supra*; ***Noia v Maselli***, *supra*). The special use is a use different from the normal intended use of the public way, and thus, the special use exception is reserved for situations where a landowner whose property abuts a public street or sidewalk derives a special benefit from that property unrelated to the public use (*see* ***Poirier v City of Schenectady***, 85 NY2d 310, 624 NYS2d 555 [1995]; ***Zarnoch v Williams***, 83 AD3d 1373, 919 NYS2d 694 [4th Dept 2011]). Plaintiff failed to present evidence that would support a finding of special use.

Accordingly, Delicato Chiropractic and Dr. Bartoli are entitled to summary judgment dismissing the complaint in the main action against them; in light of the dismissal, their remaining request for summary judgment dismissing all claims against Dr. Bartoli as an individual is denied as academic (*see* ***Manning v Brown***, 91 NY2d 116, 667 NYS2d 336 [1997]).

Defendant Dr. Jay Nathan moves for an order pursuant to CPLR 3211 (a)(1) and (7) and CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against him on the ground that he is not liable for the plaintiff's accident. In support, Dr. Nathan submits, *inter alia*, the pleadings, the bill of particulars, the affidavit of Dr. Raymond Bartoli, plaintiff's deposition testimony dated October 19, 2010, defendant Papadopoulos' deposition testimony dated October 19, 2010 and October 11, 2011, defendant Dr. Nathan's deposition testimony dated December 15, 2010, and the deposition testimony dated October 14, 2011 given by Susan DeLorenzo, a representative of Delicato Chiropractic.

A review of the moving papers and the opposing papers submitted on this motion reveals that the parties have clearly charted a summary judgment course. Defendant Dr. Nathan's notice of motion specifically demands such relief, and both sides submit extensive documentary evidence and affirmations in support of their respective positions (*see* ***Harris v Hallberg***, 36 AD3d 857, 828 NYS2d 579 [2d Dept 2007]). Under these circumstances, the Court, in determining this motion, is free to apply the standard applicable to summary judgment motions without affording the parties notice of its intention to do so (*see* ***Mihlovan v Grozavu***, 72 NY2d 506, 534 NYS2d 656 [1988]; ***Doukas v Doukas***, 47 AD3d 753, 849 NYS2d 656 [2d Dept 2008]; ***Fuentes v Aluskewicz***, 25 AD3d 727, 808 NYS2d 739 [2d Dept 2006]).

At his deposition on December 15, 2010, defendant Dr. Nathan testified to the effect that he is an orthopedic surgeon and a partner of defendant Orthopaedic Associates of Great Neck, LLP. He stated that he is employed by Delicato Chiropractic, for whom he performs orthopedic independent medical examinations, and that there is no business relationship between Delicato Chiropractic and Orthopaedic Associates of Great Neck, LLP. On the day of the accident, after he had heard that someone was injured, he went outside to the parking lot, and observed the plaintiff sitting in the patio area. He asked her if she could get up, and told her that there was an ambulance called. He did not offer her any medical attention or assistance. Several months later, he was "informed that [the plaintiff] had an appointment to meet with him that day" for independent medical exams. At the time of the accident, he went to the subject premises twice a month, and spent five hours per day performing independent medical examinations. Prior to the subject accident, he has never received nor made complaints regarding any dangerous condition at the subject property.

Here, defendant Dr. Nathan has established his prima facie entitlement to judgment as a matter of law by demonstrating that he did not own, occupy, possess, or put to a special use the parking lot where the plaintiff fell, and that he had no right or obligation to maintain this area (*see* ***Casale v Brookdale Med. Assoc.***, *supra*; ***Franks v G & H Real Estate Holding Corp.***, *supra*). Moreover, there is no evidence that Dr. Nathan created the alleged dangerous condition that caused the plaintiff's accident or had actual or constructive notice of the alleged defect (*see* ***Italia DePompo v Waldbaums Supermarket, Inc.***, *supra*).

Defendant Papadopoulos moves for an order pursuant to CPLR 3211 (a)(7) and CPLR 3212 granting summary judgment dismissing the complaint against him on the ground that the alleged defect is trivial and is not actionable as a matter of law. In support, defendant Papadopoulos submits, *inter alia*, the pleadings, a bill of particulars, plaintiff's deposition testimony dated October 19, 2010, and defendant Papadopoulos' deposition testimony dated October 19, 2010 and October 11, 2011.

A review of the moving papers and the opposing papers submitted on this motion reveals that the parties have clearly charted a summary judgment course. Gregory Papadopoulos' notice of motion specifically demands such relief, and both sides submit extensive documentary evidence and affirmations in support of their respective positions (*see* ***Harris v Hallberg***, *supra*). Under these circumstances, the Court, in determining this motion, is free to apply the standard applicable to summary judgment motions without affording the parties notice of its intention to do so (*see* ***Mihlovan v Grozavu***, *supra*; ***Doukas v Doukas***, *supra*; ***Fuentes v Aluskewicz***, *supra*).

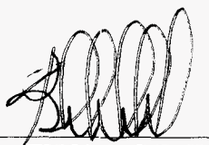
In general, whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*see* ***Clark v AMF Bowling Ctrs., Inc.***, 83 AD3d 761, 921 NYS2d 273 [2d Dept 2011]; ***Moons v Wade Lupe Constr. Co.,*** 24 AD3d 1005, 805 NYS2d 204 [3d Dept 2005]; ***Fasano v Green-Wood Cemetery***, 21 AD3d 446, 799 NYS2d 827 [2d Dept 2005]). A property owner may not be held liable in damages for trivial defects on a sidewalk, not constituting a trap or a nuisance, over which a pedestrian might merely stumble, stub a toe, or trip (*see* ***Zalkin v City of New York***, 36 AD3d 801, 828 NYS2d 485 [2d Dept 2007]; ***Hargrove v Baltic Estates***, 278 AD2d 278, 717 NYS2d 320 [2d Dept 2000]; ***Marinaccio v LeChambord Rest.***, 246 AD2d 514, 667 NYS2d 395 [2d Dept 1998]). In determining whether a defect is trivial, a court must examine all of the facts presented, including the width, depth, elevation, irregularity and appearance of the defect, along with the time, place and circumstance of the injury (*see* ***Bolloli v***

Waldbaum, Inc., 71 AD3d 618, 896 NYS2d 400 [2d Dept 2010]; ***Madero v Pizzagalli Const. Co.***, 62 AD3d 670, 878 NYS2d 434 [2d Dept 2009]; ***Maxson v Brentwood Union Free Sch. Dist.***, 31 AD3d 506, 818 NYS2d 567 [2d Dept 2006]; ***Farichild v J. Crew Group***, 21 AD3d 523, 800 NYS2d 735 [2d Dept 2005]). There is no minimal dimension test or per se rule that a defect must be of a certain minimum height or depth in order to be actionable (*see* ***Trincere v County of Suffolk***, 90 NY2d 976, 665 NYS2d 615 [1997]; ***Schenpanski v Promise Deli, Inc.***, 88 AD3d 982, 931 NYS2d 650 [2d Dept 2011]; ***Grover v State of New York***, 294 AD2d 690, 742 NYS2d 413 [3d Dept 2002]).

Here, defendant Papadopoulos failed to establish his entitlement to judgment as a matter of law. There are questions of fact as to whether a dangerous condition existed on the subject patio area so as to create liability on the part of defendant Papadopoulos; whether the subject parking lot was made of "gravel" or "asphalt"; whether he exercised reasonable care under the circumstances (*see* ***McCummings v New York City Tr. Auth.***, 81 NY2d 923, 597 NYS2d 653 [1993]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]); whether defendant Papadopoulos' alleged negligence was a proximate cause of the subject accident; and whether plaintiff was comparatively negligent (*see* ***Yi Min Feng v Jin Won Oh***, 71 AD3d 879, 895 NYS2d 856 [2d Dept 2010]***; Bruker v Fischbein***, 2 AD3d 254, 769 NYS2d 34 [2d Dept 2003]). Moreover, defendant Papadopoulos has offered no evidence as to the objective measurements of the site of the accident, except for three copies of the photos and the deposition testimony given by himself and plaintiff.

The burden of establishing that the defect is trivial and, therefore, not actionable, rests in the first instance with the defendant moving for summary judgment (*see* ***Blagrove v Metropolitan Transp. Auth.***, 89 AD3d 880, 933 NYS2d 84 [2d Dept 2011]). Here, defendant Papadopoulos has not demonstrated that the alleged defect was trivial by submitting proof of the approximate height and dimensions of the alleged defect. Thus, a question of fact exists as to whether the alleged defect constituted a de minimis or a dangerous condition (*see* ***Trincere v Suffolk***, 90 NY2d 976 *supra*) and, if so, whether defendant Papadopoulos was negligent in failing to adequately inspect the subject walkway and detect the alleged defect. Accordingly, defendant Papadopoulos' motion for summary judgment is denied.

Dated: 9/20/12



THOMAS F. WHELAN, J.S.C.