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Short Form Order

Index No. 7267/2014

SUPREME COURT - STATE OF NEW YORK
I.A.S PART 50 - COUNTY OF SUFFOLK

P R E S E N T:
Hon. Martha L. Luft
Acting Justice Supreme Court

DECISION AND FINDINGS OF FACT AFTER TRIAL

_____x
SUSAN MONTEFUSCO and ANTHONY MONTEFUSCO,

Plaintiffs,

-against-

MAIN STREET L. I., LLC,

Defendants.
_____x

PLAINTIFFS' ATTORNEY
Tinari, O'Connell & Osborn, LLP
320 Carleton Avenue, Suite 6800
Central Islip, NY 11722

DEFENDANT'S ATTORNEY
Farrell Fritz, PC
400 RXR Plaza
Uniondale, NY 11556-1320

Plaintiff, Susan Montefusco, commenced this action for personal injury against defendant, Main Street LI, LLC, the owner of the apartment complex where she lived at the time of the incident giving rise to this case. Plaintiff's husband, Anthony Montefusco has asserted a claim for loss of services resulting from the injury to his wife. A bench trial was conducted before the undersigned, and proposed findings of fact and conclusions of law were subsequently submitted by both parties for the court's consideration.

By consent of both parties, both liability and damages were considered together, rather than the trial being bifurcated. At trial, plaintiff presented her own testimony, as well as that from her husband, and from two former employees of the defendant, Dawn Rice and Lisa Lemp. Ms. Lemp's testimony was presented through reading portions of her deposition transcript because she had relocated to Florida since the time of the incident. On the issue of damages, plaintiff presented testimony from her treating physician, Dr. Itchak Schwarzbard, an orthopedic surgeon. Defendant presented testimony from Elizabeth Joy, a retired employee of the

defendant,[1] Evelyn Gillespie, employed currently by defendant as a field manager and Robert J. Prisco, employed by defendant as a maintenance technician. On the issue of damages, defendant presented expert testimony from Dr. Isaac Cohen, an orthopedic surgeon.

Based upon careful consideration of the evidence presented at trial, the court makes the following findings of fact, established by a fair preponderance of the evidence, and renders the following determination in this matter.

Plaintiff and her husband resided at the apartment complex located at 75 Ryder Avenue in Patchogue, New York ("Ryder Avenue Apartments") at the time of the incident that is the subject of this action, May 14, 2013, having moved in about three years earlier. The facts as to how the incident occurred are essentially not in dispute. Plaintiff and her husband were planning to meet friends for breakfast. Plaintiff's husband had brought the car around from the other side of the apartment building and parked it closer to where their unit was located. He was standing in proximity to the car, and was chatting with the son of one of the neighboring tenants. Plaintiff exited her apartment and walked onto a sidewalk toward the car. There was a grassy strip, narrower that the sidewalk, between the sidewalk and the curb that formed the edge of the parking lot. The sidewalk itself led to a curb that abutted a driveway or driving lane that provided egress from the parking lot to the street.

Plaintiff observed that a mother and her three children, one of whom was in a stroller, were on the sidewalk, awaiting the school bus. Plaintiff walked around them, cutting across the grassy area toward where her husband had parked the car, in the last spot of the parking spaces abutting the curb on the edge of the grassy area. She did not want to walk around the car by going into the driving lane since cars frequently drove fast on their way toward the street. As she walked toward the passenger side of the car, her foot went into a hole that was mostly obscured by grass. She fell down onto her buttocks, with her foot still in the hole. It was established at trial that the hole was about sixteen and a half inches deep and four by four inches wide. The police and an ambulance arrived and plaintiff was taken to Brookhaven Hospital.

The facts that were hotly contested pertained to the issue of whether defendant had notice of the hole. Plaintiff stated that the hole came about approximately two years before the incident, when someone removed a handicapped parking sign that had been posted there. She testified that she had repeatedly registered complaints about the hole to the employees designated by the defendant as the appropriate people to take such complaints, Dawn Rice and Lisa Lemp. A photograph of a portion of the painted line forming one side of the spot plaintiff's husband parked in reflects remnants of a blue line beneath the yellow paint, indicating it had been a handicapped spot at some point.

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[1]Ms. Joy testified that she worked for Barjan Corporation, which has the same owner as defendant. Both are real estate management companies. Although she testified that Barjan was not responsible for managing the Ryder Avenue Apartments, she evidently was involved in handling complaints that came in from that location.

Mr. Montefusco also testified to the existence of the hole and to the fact that his wife registered verbal complaints about the hole at the local office when they went to pay the rent.

Ms. Rice corroborated plaintiff's testimony. As a leasing agent, and later a leasing coordinator, she was responsible for receiving complaints from tenants, who were instructed in writing where to direct complaints. She recalled receiving between five and ten complaints from plaintiff or her husband either by phone or when they would come in to pay their rent. The procedure Ms. Rice then followed was to email the main office of the defendant with information about the complaint. The next step in the procedure would be for a work order to be generated in the office and then sent to a property maintenance worker. Ms. Rice's responsibilities did not extend to following up on whether the work order was completed.

Ms. Lemp's testimony supported that of the plaintiff also. As a leasing agent, she also received complaints about the hole, including between three and five from the plaintiff. She passed these complaints along to defendant on numerous occasions. She also testified that she personally observed the hole.[2]

Defendant's witnesses testified, in essence, that there had been no complaints made about this hole and that there had never been a handicapped parking sign in that location. Elizabeth Joy, a retired office manager and assistant to the owner of defendant, confirmed that tenants were instructed on their rent bills to contact the local offices, such as the locations where Ms. Rice and Ms. Lemp worked, to register complaints by phone. At the time of the incident in this case, Ms. Joy was the main contact person with whom local agents registered the tenants' complaints. Most complaints came in by fax, but some came through emails or handwritten notes. Ms. Joy would then type up a work order reflecting what needed to be addressed and send it to the appropriate local office where the property manager would receive it. No file was maintained of the faxed or handwritten complaints[3], nor of the work orders at the main office. Ms. Joy performed no follow up regarding whether the work orders were completed.

Ms. Joy's testimony was contradictory with regard to whether complaints about problems inside and outside were treated differently. On direct examination, she stated that complaints from tenants at the Ryder Avenue Apartments pertaining to either inside or outside would not be treated differently. However, on cross-examination, she said that she never got complaints about problems outside, such as a hole. She testified that those type of complaints would be handled at the level of the local offices, and that she knew nothing about outside repairs.

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[2]Although defendant argues that Ms. Lemp lacked credibility as a disgruntled former employee, the court found no reason to do so since her testimony was consistent with that of other witnesses on the major issues.

[3]She also testified that any written complaints submitted to the local offices by a tenant would be maintained in the tenant's file. However, all of plaintiff's complaints were oral, in accordance with the instructions on the rent bills.

Evelyn Gillespie, who worked as a bookkeeper for defendant at the time of the incident, confirmed that the process for tenants to register a complaint was to call the local office. She noted that a situation involving a dangerous condition would be phoned in to the main office and help would be sent. She then stated that she was not aware of any complaints about a hole at the Ryder Avenue Apartments during the time frame of the incident in this case. Although she stated that this type of complaint would be phoned in, she performed a search of her emails and her computer and found no reference to such a complaint. She also looked at the plaintiff's tenant's file and found no written complaints, despite the fact that plaintiff never stated that she registered a complaint in writing. She confirmed that any complaint faxed in from a leasing agent would be discarded once the work was done.

Ms. Gillespie testified that there was no handicapped parking sign at the location of the hole into which plaintiff stepped. She personally had been at the site in the summer of 2011, when plaintiff said the sign was removed, but not in the area near plaintiff's apartment.

The final witness on behalf of the defendant was Robert J. Prisco, a maintenance technician. He stated that his duties included cutting the grass at the Ryder Avenue Apartments, and that he did so during 2011 through 2013, but he never noticed any holes. He stated there never was a handicapped parking sign in the location of the hole that caused the plaintiff's injury, and that he knew of no report about a missing sign. He testified that he never received written work orders for jobs he was to perform from the main office, but rather he would receive a phone call from Ms. Joy or Ms. Gillespie telling him what to do. He was not involved with the leasing agents in this regard. No written documentation was made when a job was completed.

The defendant requests that the court draw a negative inference against the plaintiffs based upon their failure to call as a witness either the tenant's son with whom Mr. Montefusco was chatting at the time of the incident or the mother who was standing on the sidewalk with her children. It has long been established that a party need not call a witness "who is in a legal sense a stranger to him and is equally available to the other side." ***Hayden v New York Rys. Co.***, 233 NY34, 35 (1922); *see also* ***Follett v Thompson***, 171 AD2d 777, 567 NYS2d 497 (2d Dept. 1991) (must show evidence of friendship or loyalty sufficient to demonstrate witness is under party's control to support missing witness charge); ***Houlihan Parnes Realtors v. Gazivoda***, 106 AD2d 550, 483 NYS2d 69 (2d Dept. 1984) (missing witness charge improper where witness is equally available to other party). In the present matter, there is nothing in the record to support a finding that either the neighbor's son or the mother had any sort of special or close relationship with the plaintiffs such that one could consider either as being under the control of the plaintiffs. They were as available to the defendant, as they were to the plaintiffs. Thus, the court will not draw the negative inference requested.[4]

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[4]It also appears that the request for a negative inference was untimely, having been made in closing arguments. ***Follett v Thompson***, 171 AD2d at 778.

The owner of real property, such as the defendant in this matter, has a duty to maintain the property in a reasonably safe condition, so as to prevent the occurrence of foreseeable injuries. ***Peralta v Henriquez***, 100 NY2d 139, 760 NYS2d 741 (2003); ***Torre v Aspen Knolls Estates Home Owners Ass'n, Inc.***, 150 AD3d 789, 54 NYS3d 84 (2d Dept. 2017). To establish liability on the landowner's part to a plaintiff "who is injured as a result of an allegedly defective condition upon property, it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence (citations omitted)." ***Lezama v 34-15 Parsons Blvd, LLC***, 792 NYS2d 123, 124 (2d Dept. 2005). A landowner has constructive notice when the "condition is visible and apparent and has existed for a sufficient length of time to afford defendant a reasonable opportunity to discover and remedy it (citation omitted)." ***Torre v Aspen Knolls Estates Home Owners Ass'n, Inc.***, 150 AD3d at 790.

There is no question that the plaintiff was injured due to a sizable hole in the ground at the Ryder Avenue Apartments. The photographs make clear that the most natural way for someone to enter his/her car parked in that area from the building is to cut across the grass. It is, thus, foreseeable that an injury could occur from a hole in the grassy area. The credible evidence shows that the defendant had actual notice of the hole's existence by means of the plaintiff's repeated complaints about it. Plaintiff followed the process that all witnesses agreed was the proper one by informing the local agents of the situation. There were key discrepancies in the explanations of the defendants' witnesses as to how complaints and work orders were handled that militated against a finding of lack of actual notice.

The credible evidence also shows that the defendant had constructive notice of the condition. Defendant's own witness testified to cutting the grass in that area regularly. By its very size, the hole would have been apparent and visible to someone tending to the entire grassy area.

Having found the defendant to be liable for the dangerous condition, the court must address whether there is any culpability on the part of the plaintiff, as asserted by the defendant. Defendant relies upon the principle that relieves landowners of liability if a condition is readily observable by use of one's senses or if the condition is inherent or incidental to the nature of the property and could be reasonably anticipated. ***Stanton v Town of Oyster Bay***, 2 AD3d 835, 769 NYS2d 383 (2d Dept. 2003).

The facts, however, do not support the application of this principle to the present matter. Certainly a hole the size of the one into which the plaintiff stepped is not "inherent or incidental" to a strip of lawn between a sidewalk and a parking lot in an apartment complex. As to the second arm of the principle, it is firmly established that the issue of whether a dangerous condition is open and obvious is fact-specific and must be assessed in light of surrounding circumstances. ***Shah v Mercy Medical Center***, 71 AD3d 1120, 898 NYS2d 589 (2d Dept. 2010); ***Frank v JS Hempstead Realty, LLC***, 136 AD3d 742, 24 NYS3d 714 (2d Dept. 2016). The facts show that the hole had become obscured by grass overgrowth, and cannot be said to be

"open and obvious" or readily observable.

Having found the defendant liable for the dangerous condition, and having found that the condition was neither inherent to the site, nor open and obvious, the court need not reach the issue of whether plaintiff bore some culpability for her injuries. The fact that plaintiff had reported this hole repeatedly during the two years prior to the incident does not absolve defendant of its responsibility. It was in no sense unreasonable for a tenant to cut across the grass to get to her car. For most cars along the curb in question, that was the most direct route. Even a condition that might be "ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary when the condition is obscured or the plaintiff is distracted. (*citations omitted*)." ***Shah v Mercy Medical Center***, 71 AD3d at 1120, 898 NYS2d at 590. Plaintiff was distracted by the family blocking the sidewalk in this case, and she merely forgot about the hole on that occasion. Thus, she bears no culpability under these circumstances.

Based upon the foregoing, the court finds the defendant bears 100 % liability for the injuries sustained by the plaintiff.

In regard to the facts pertaining to the damages sustained by the plaintiff, the parties were in agreement to a large extent. There is no dispute that plaintiff suffered a trimalleolar fracture of her left ankle. When taken to the hospital on the day of the accident, two closed reductions were performed on her ankle. A week later on May 20, 2013, plaintiff underwent surgery consisting of an open reduction and internal fixation of the left ankle through the insertion of plates and screws. By all accounts the surgery was a success.

Following ten days in recovery at the hospital, plaintiff was transferred to an in-patient rehabilitation center to allow her to become weight-bearing on her injured ankle. She was there for approximately three weeks. When discharged home on June 12, 2013, plaintiff was still not weight-bearing, and continued with her physical therapy on an out-patient basis, three times a week. For several weeks after her discharge home, plaintiff required a wheelchair and, thereafter, had to use a walker for about two months thereafter. She completed her outpatient rehabilitation at the end of September, 2013. She was discharged from care by her orthopedic surgeon in March, 2014.

There is no doubt that plaintiff made a good recovery from her serious injury, and the evidence shows she is not a complainer. However, those facts do not negate the fact that she experienced pain and suffering from the time of the injury to the time of trial, nor does it negate the fact that she will continue to suffer in the future. Defendant's reliance upon case law involving wrongful death actions in which there was a question as to whether the decedent was even conscious between the time of the injury and the time of death, [***Phiri v Joseph***, 32 AD3d 922, 822 NYS2d 573 (2d Dept. 2006); ***Espinal v Vargas***, 101 AD3d 1072, 956 NYS2d 504 (2d Dept. 2012)], is misplaced. Plaintiff was conscious, despite the fact that she did not have a clear recollection of certain periods of time following the accident. Indeed, the fact that she was in

such a debilitated state that she did not recognize who was visiting her on a number of occasions only demonstrates the severity of her situation. Moreover, her husband testified to observing her in pain.

Based upon the foregoing, the plaintiff is awarded $200,000.00 for pain and suffering from May 14, 2013 until the date of this decision, and $85,000.00 for pain and suffering from this date through the period of years plaintiff is expected to live, according to the Life Expectancy Tables for a female of her age which is 16.2 years. She is also awarded $8,600.00 for unreimbursed medical expenses, as well as the $1,400.00 Medicare lien. Thus, her total award is $295,000.00

The evidence does not support an award for loss of consortium to Mr. Montefusco. While he clearly cared for her and tended to her attentively and lovingly during her surgery and rehabilitation, he did not testify to the type of effect upon his relationship with his wife that would amount to a loss of consortium. Consortium "represents the marital partners' interest in the continuance of the marital relationship as it existed at its inception. (*citation omitted*)" ***Buckley v National Freight, Inc.***, 90 NY2d 210, 214, 659 NYS2d 841, 843 (1997). The only difference alluded to was some extra help with the housework. However, according to Mr. Montefusco's description, their relationship continues to be the very close one it was before the injury.

Submit judgment.

ENTER

Date: December 26, 2017
Riverhead, New York

Martha L. Luft
MARTHA L. LUFT, A.J.S.C.

✓ FINAL DISPOSITION

___ NON-FINAL DISPOSITION