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SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA

JUSTICE

----------X **PART 6**

KAREN A. GNOLFO,

Plaintiff,

INDEX NO. 4593/10

-against-

MOTION DATE: 03/20/12
SEQUENCE NO. 001

100 CLEVELAND AVENUE REALTY LLC and HASSEL BMW,

Defendants.

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Notice of Motion, Affs. & Exs.....1
Affirmation in Opposition & Exs.....2
Reply Affirmation.....3

Upon the foregoing papers, defendants' motion for summary judgment, pursuant to CPLR §3212, is denied.

This is an action for personal injuries allegedly sustained by the plaintiff on August 6, 2009 when she fell while walking to her vehicle on the driveway of the defendants' premises located at 100 Cleveland Avenue in Freeport, New York.

Defendants move for summary judgment on liability grounds. In support of their motion, the defendants submit the plaintiff's verified bill of particulars, the plaintiff's deposition transcript, and color copies of photographs of the location where the plaintiff fell.

At her deposition, plaintiff testified that she had brought her vehicle to the defendants' dealership to be repaired and had gone to retrieve the vehicle on the day of her accident. She was invited to test drive the vehicle and was walking behind defendants' service manager, Michael, when the accident happened. She was following him to her vehicle, which was parked next to a yellow painted curb. Plaintiff was walking on the driveway and began to lift her right leg up to

step over the yellow painted curb, when she lost her balance and began to fall to the ground. Plaintiff testified that she grabbed onto a green pole that was located adjacent to the curb, but same was not mounted into the ground and, therefore, did not stop her fall. After she fell to the ground, she observed two "deep holes" in the pavement of the driveway, next to the curb which she had been attempting to step over when she fell. She testified that the holes were muddy and wet and that mud got onto her left arm. Plaintiff did not see the holes in the ground prior to her fall. Contrary to defendants' contentions, when plaintiff was asked at her deposition what caused her to fall, she testified that "those two holes in the ground" caused her fall. She later testified, in response to questions posed by her own attorney, that her left foot was partially in the hole when she fell. She also testified that she felt her foot give way and that she could not catch her balance by grabbing the pole before she fell. She further testified that she felt her foot roll off of the flat service and into the hole. Later still, plaintiff again testified that "after I had fallen, I realized that there were the holes there. There is no other reason that I would have fallen. The holes is what made me fall down."

Defendants first contend that the indentations on the driveway, which are alleged to have caused plaintiff's fall, were not inherently dangerous and that because they were in plain view, open, obvious, and readily observable by those employing the reasonable use of their senses, the defendants had no duty to protect or warn plaintiff against such conditions. Defendants further contend that any alleged negligence on the part of the defendants was not a proximate cause of plaintiff's injuries, as plaintiff's failure to observe her surroundings was the sole proximate cause of her fall. Lastly, the defendants contend that the plaintiff was not able to identify what caused her to fall, and, as such, she cannot make out a prima facie case of negligence against the defendants.

A landowner must act as a reasonable person in maintaining his or her property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk. (*Roros v. Oliva*, 54 A.D.3d 398, 863 N.Y.S.2d 465 (2d Dept. 2008)). "Landowners who hold their property open to the public have a general duty to maintain it in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries. Encompassed within this duty is the duty to warn of potential

dangerous conditions existing thereon, whether they are natural or artificial." *(DeLaurentis v. Marx Realty Improvement*, 300 A.D.2d 3443, 752 N.Y.S.2d 349 (2d Dept. 2002); *Meyer v. Tyner*, 273 A.D.2d 364, 709 N.Y.S.2d 618 (2d Dept. 2000); *Basso v. Miller*, 40 N.Y.2d 233, 352 N.E.2d 868 (1976)). This duty extends, however, only to those conditions not readily observable, and landowners owe no duty to warn of conditions that are in plain view, open, obvious, and readily discoverable by those employing the reasonable use of their senses. (*Meyer v. Tyner*, 273 A.D.2d 364, 709 N.Y.S.2d 618 (2d Dept. 2000); *DeLaurentis v. Marx Realty Improvement*, 300 A.D.2d 3443, 752 N.Y.S.2d 349 (2d Dept. 2002); *Rivas-Chirino v. Wildlife Conservation Society*, 64 A.D.3d 556, 883 N.Y.S.2d 552 (2d Dept. 2009); *Groon v. Herricks Union Free School District*, 42 A.D.3d 431, 839 N.Y.S.2d 788 (2d Dept. 2007)).

The issue of whether a dangerous condition is open and obvious is fact specific and usually a question of fact for a jury to resolve. (*Cassone v. State*, 85 A.D.3d 837 N.Y.S.2d 197 (2d Dept. 2011); *Gutman v. Todt Hill Plaza*, LLC, 81 A.D.3d 892, 917 N.Y.S.2d 886 (2d Dept. 2011)). Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances. (*Cassone v. State*, 85 A.D.3d 837 N.Y.S.2d 197 (2d Dept. 2011); *Gutman v. Todt Hill Plaza*, LLC, 81 A.D.3d 892, 917 N.Y.S.2d 886 (2d Dept. 2011); *Shah v. Mercy Medical Center*, 71 A.D.3d 1120, 898 N.Y.S.2d 589 (2d Dept. 2010)). While defendants contend that they had no duty to protect or warn plaintiff because the holes in the pavement were not inherently dangerous and were in plain view, open, obvious, and readily observable by those employing the reasonable use of their senses, they failed to submit sufficient evidence of same. The photographs submitted by the defendants depict the holes in the pavement as having the same color as the pavement and being immediately adjacent to the curb. The defendants have failed to submit any evidence regarding the depth of the holes, the condition of the holes, the distance from which one could see the holes, whether the holes would be open and obvious to someone walking behind another, or any evidence that a person who was unfamiliar with the premises could reasonably perceive their existence through the reasonable use of their senses. (*See, Roros v. Oliva*, 54 A.D.3d 398, 863 N.Y.S.2d 465 (2d Dept. 2008); *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 688 N.E.2e 489 (1997); *Cruz v. Deno's Wonder Wheel Park*, 297 A.D.2d 653, 747 N.Y.S.2d 242 (2d Dept. 2002); *See also, Cassone v. State*, 85 A.D.3d 837 N.Y.S.2d 197

(2d Dept. 2011)(defendant failed to establish, prima facie, that the orange cone which caused the plaintiff's fall was open and obvious under the circumstances surrounding the accident, as it may have been obscured or concealed during the walk, given the large number of people traversing the boardwalk)). A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted. (*Cassone v. State*, 85 A.D.3d 837 N.Y.S.2d 197 (2d Dept. 2011); *Katz v. Westchester County Healthcare Corp.*, 82 A.D.3d 712, 917 N.Y.S.2d 896 (2d Dept. 2011); *Gutman v. Todt Hill Plaza, LLC,* 81 A.D.3d 892, 917 N.Y.S.2d 886 (2d Dept. 2011); *Shah v. Mercy Medical Center*, 71 A.D.3d 1120, 898 N.Y.S.2d 589 (2d Dept. 2010); *Mazzarelli v. 54 Plus Realty Corp.*, 54 A.D.3d 1008, 864 N.Y.S.2d 556 (2d Dept. 2008)). Defendants have not submitted an affidavit from any witness or any employee of the defendants, including defendants' manager, Michael, who the plaintiff was following at the time of the accident, as to the condition of the holes or the fact that they were in plain view of the plaintiff. In addition, the defendants have not submitted any expert affidavit regarding the condition of the holes at issue.

The defendants have also failed to establish that any negligence on the part of the defendants was not a proximate cause of the plaintiff's injuries. They have not submitted any deposition testimony or any affidavits from the defendants regarding the maintenance of the driveway, the length of time the holes existed, the defendants' notice of the holes' existence, or their lack of involvement in the creation of the holes. They have failed to submit any evidence to establish that they did not cause or create or have actual or constructive notice of the condition at issue herein. (*Gutman v. Todt Hill Plaza*, LLC, 81 A.D.3d 892, 917 N.Y.S.2d 886 (2d Dept. 2011)). In addition, they have failed to meet their burden of establishing, as a matter of law, that they maintained the premises (and in particular, the driveway at issue) in a reasonably safe condition. (*Beck v. Bethpage Union Free School Dist.*, 82 A.D.3d 1026, 919 N.Y.S.2d (2d Dept. 2011); *Roros v. Oliva*, 54 A.D.3d 398, 863 N.Y.S.2d 465 (2d Dept. 2008); *DeLaurentis v. Marx Realty Improvement*, 300 A.D.2d 3443, 752 N.Y.S.2d 349 (2d Dept. 2002); *Meyer v. Tyner*, 273 A.D.2d 364, 709 N.Y.S.2d 618 (2d Dept. 2000); *Basso v. Miller*, 40 N.Y.2d 233, 352 N.E.2d 868 (1976)).

Lastly, as noted *supra*, contrary to defendants' contentions that plaintiff was unable to

identify the cause of her fall, the plaintiff did, in fact, identify the cause of her fall as the holes in the ground adjacent to the curb that she was in the process of stepping over at the time the accident occurred.

As such, defendants have failed to make a prima facie showing of entitlement to summary judgment. Accordingly, it is not necessary for the Court to review the sufficiency of the plaintiff's opposition papers. (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 501 N.E.2d 572 (1986); *Gutman v. Todt Hill Plaza, LLC*, 81 A.D.3d 892, 917 N.Y.S.2d 886 (2d Dept. 2011)).

Defendants' motion for summary judgment is denied in its entirety.

Dated: May 15, 2012

Anthony L. Parga, J.S.C.

ENTERED
MAY 17 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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