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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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VALARIE GRIZZELL AND PAUL GRIZZELL,

Plaintiffs,

-against-

JQ ASSOCIATES, LLC, JQII ASSOCIATES, LLC., JQ III ASSOCIATES, LLC, WE'RE ASSOCIATES INC., METROPOLITAN SUBURBAN BUS AUTHORITY d/b/a MTA LONG ISLAND BUS and METROPOLITAN AUTHORITY d/b/a MTA REGIONAL BUS OPERATIONS,

Defendants.

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TRIAL PART: 10

NASSAU COUNTY

INDEX NO:2473-10

MOTION SEQ NO.: 2,3

SUBMIT DATE:04/24/12

The following papers having been read on this motion:

Notice of Motion.....1
Notice of Cross Motion.....2
Opposition.....3
Reply.....4

Motion by defendants, Metropolitan Suburban Bus Authority d/b/a MTA Long Island Bus and Metropolitan Transportation Authority d/b/a MTA Regional Bus Operations ("MTA defendants"), for an Order of this Court granting Summary Judgment pursuant to CPLR §3212, dismissing the complaint of the plaintiffs, Valerie Grizzell and Paul Grizzell, is granted.

Cross Motion by defendants, We're Associates, Inc., JQ 1 Associates LLC s/h/a JQ Associates, LLC, JQ II Associates, LLC and JQ III Associates, LLC. (" JQ defendants") for an Order of this Court granting Summary Judgment pursuant to CPLR §3212, dismissing the complaint of the plaintiffs is granted, and all cross claims are rendered moot.

The instant motions arise from an underlying personal injury case, filed by plaintiffs in this Court in February, 2010. The plaintiffs, therein, allege, inter alia, acts of negligence in that the defendants breached their duty by failing to provide a safe place for the plaintiff, Valarie Grizzell, a passenger on a commuter bus, to alight. She alleges that she was caused to step down onto a speed

bump and such speed bump was not only defective, but it was illegally installed in the middle of a marked bus stop. Paul Grizzell, Valerie Grizzell's husband, alleges a loss of consortium due to his wife' s injuries.

FACTS

On February 18, 2009 at 8:40 a.m., plaintiff, Valarie Grizzell, a passenger on the N48 bus, a route that originates from the Hempstead Bus Terminal in Hempstead and ends in Jericho, attempted to exit the bus at the bus stop near the Jericho Quadrangle, located at 100 Jericho Turnpike, in Jericho, New York, when she slipped and fell. According to plaintiff, the bus stopped two feet from the bus stop and near a speed bump and/or hump. She disembarked from the bus and directly onto the calming device, which she described as cracked, and partially obscured by sand. As a result, she tripped and fell, sustaining injuries.

Plaintiff customarily traveled that bus route to get to her place of employment, located in the office complexes of the Jericho Quadrangle. The quadrangle consists of roadways, and parking lots which are owned by the JQ defendants and maintained by defendant, We're Associates, Inc.

ARGUMENTS

The MTA defendants contend that once the plaintiff safely stepped off the bus, in that both her feet were on the ground when she fell, their duty to her ended. Additionally, if plaintiff, pursuant to her testimony, was not able to see the alleged defect, the defendant's bus driver would have been in a less favorable position to see it based on his vantage point. Further, implicit in plaintiff's allegation that the area should have been cordoned off, is a claim that the property was not properly maintained and that there was a duty to warn. Such claims should be against the owners of the property, and not the MTA defendants. In support of their motion, the defendants submit copies of the pleadings, and copies of the transcripts of the examinations before trial of the plaintiff, Valerie Grizzell, Cal Fromer, bus driver at time of subject accident, and Robert Bloom, Vice-president of defendant entity, We're Associates.

In opposition, plaintiffs argue that the MTA defendants owed plaintiff, V. Grizzell, a duty to provide a reasonably safe area for her to exit the bus, and the bus driver's stopping the bus on a speed bump, a violation of company and/or industry policy, created an unsafe condition. Further, the defendants owed a duty to maintain the area, and that the speed bumps were either not maintained

and/or illegally/improperly placed in the bus stop area. Plaintiffs submit as evidentiary support, copies of the pleadings; the above referenced copies of transcripts; photographs of the accident site indicating the location and condition of the speed bump (it is noted that the picture is undated and the speed bump is painted yellow); an article entitled; "Guidelines for the Design and Application of Speed Humps", A *Proposed Recommended Practice* of the Institute of Transportation Engineers; affidavit from expert engineer regarding the location of speed bumps in Kohl's Department Store parking lot, in Yonkers, New York, dated March, 2008; and Town of Hempstead survey of the quadrangle, indicating that there is no existence of the subject speed bump.

The JQ defendants, in their cross motion, argue that the plaintiff's testimony is contradictory in that she attributes the cause of her slip and fall to the sand on the speed bump and then claims it was caused by her exiting the bus onto the speed bump. In addition, there is nothing in evidence to support that defendants had knowledge of the alleged defective condition prior, and they were not aware of any complaints and/or records regarding any prior similar accidents or incidents, including the subject accident on bar.

DISCUSSION

The standards for summary judgment are well established. A Court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is therefore entitled to summary judgment as a matter of law (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 324 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter. Rather, its task is to determine whether or not there exists a genuine issue for trial (*Miller v. Journal-News*, 211 AD2d 626 [2nd Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of material issue of fact (*Ayotte v. Gervasio*, 81 NY2d 1062 [1993]). Once the initial burden has been met by movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form, sufficient to create material issues of fact requiring a trial to resolve (*Stukas v. Streater*, 83 Ad3d 18, 25 [2d Dept 2011]). Mere conclusions and unsubstantiated allegations or assertions are insufficient (*Zuckerman v. New York*, 49 NY2d 557, 562 [1980]) even

if alleged by an expert *(Aghabi v. Serbo*, 256 AD2d 287 [2nd Dept. 1998]).

Generally, a defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie case that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*Sloane v. Costco Wholesale Corp.*, Ny Slip Op 1938 [2nd Dept 2008]).

It has been long settled that 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 defendant's employees to discover and remedy it (*Spindell v. Town of Hempstead*, 92 AD3d 669,670-671 [2nd Dept, 2012]; *Negri v. Stop & Shop*, 65 NY2d 625, 626 [1985]). Accordingly, that a property owner who has actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of that condition (*Petri v. Half Off Cards,* 284 AD2d 444 [2nd Dept 2001]); *Osorio v. Wendell Terrace Owners Corp.,* 276 AD2d 540 [2nd Dept 2000]; *Benn v. Municipal Hous. Auth. for City of Yonkers,* 275 AD2d 755 [2nd Dept 2000]).

It is noted that the plaintiff, in order to allege liability against both sets of defendants, argues negligence in that the MTA bus driver caused her to alight from the bus on to a dangerous condition and that the JQ defendants failed to maintain the speed bumps and the bus stop area, and illegally installed the speed bumps. The Court will first review the issue of liability against the MTA defendants.

While it is the law that a common carrier owes a duty to its passengers to stop at a place where they may safely disembark and leave the area, liability rests upon a finding that the placement of the bus dictates that the passenger, in order to exit the bus, must negotiate a dangerous or defective path. (*Malawer v. New York City Transit Authority*18 AD3d 293, 295 [1st Dept 2005]). Whether a common carrier has breached its duty in this regard is generally a question of fact to be determined by the jury. *Id.* To prevail on their motion for summary judgment, defendants are required to set forth evidentiary facts sufficient to entitle them to judgment as a matter of law. *Id.*

"A bus company may be held liable for a passenger's injuries where such passenger is struck by a car upon crossing the street after having alighted from the bus at an unscheduled stop or where a defect in the condition of the ground in the immediate vicinity where a passenger alighted from the bus caused the passenger to trip and fall" (*Kadymir v. New York City Transit Authority,* 55 AD3d

549 [2nd Dept 2008]). The fact that plaintiff had both feet on the ground after she alighted the bus, does not, in and of itself, relieve the MTA defendants from liability.

In analyzing the instant matter under *Garcia-Martinez v. City of New York, 20 Misc. 3d 1111 (A) [Sup. Ct. 2008] order aff'd, 68 AD3d 428, 891) [1st Dep't 2009],* where that plaintiff slipped on ice immediately after exiting the New York City bus, that court noted that her husband safely exited the bus in the exact same location without slipping and falling. The court granted the defendant bus company's motion for summary judgment. *Id.* Here, the plaintiff, at her deposition, testified that two passengers safely disembarked in the exact same location immediately before she did.

In sum, the MTA defendants have met their prima facie burden in that they contend they did not receive any reports of any such hazard nor did the bus driver let his passengers disembark on a speed bump, nor was he obligated to inspect the area prior to making the stop (*see Engram v. Manhattan and Bronx Surface Transit Operating Authority*, 190 AD2d 536 [1st Dept 1993]). There is nothing in the record to indicate that the defendants were aware, or reasonably should have been aware, of any defect in the area near the bus stop where the plaintiff tripped and fell (*see Forminio v. City of New York*, 68 AD3d 924 [2nd Dept 2009]). Based on the plaintiff's own description of the condition, that the "depressed" bump was the same color as the asphalt, the driver could not possibly see the defect from his vantage point, particularly if she, who was closer to the alleged condition, did not see it herself until after she fell.

The JQ defendants contend that they had no actual or constructive knowledge of any defective and/or hazardous condition. There were no prior incident reports regarding any pedestrian accidents in the area where the subject accident occurred. There was no accident report on record regarding the plaintiff's accident, which was supported by the plaintiffs herself in that she did not file a report.

Once the movants have met their burdens, the burden shifts to the non-movants to rebut the inference of entitlement to summary judgement (*Zuckerman v. City of New York*, 49 N.Y. 2d 557, 562 [1980]). The plaintiffs, in opposition, submit a plethora of evidence regarding speed bumps and their improper placement to support that a dangerous condition existed. They also argue that the lots and roadways of the quadrangle were not properly maintained, while also decrying the effectiveness of its sanding operations for the treatment of snow and ice. The foregoing, however, does not speak

to the issue as to whether the MTA defendants failed in their duty to safely discharge the plaintiff from the bus.

To support their position, plaintiffs submit expert testimony. Although there is no documentation as to when the matter was certified for trial, it is undisputed that the expert was not identified until after such certification. However, even if this Court were to allow the expert testimony, it must be disregarded on other grounds. Opinion evidence must be based upon facts in the record or personally known to the witness (*Espinel v. Jamaica Hosp. Med. Ctr.*, 71 AD3d 723, 724 [2nd Dep't 2010]).

The expert in the instant matter has no knowledge of the facts of the case and his opinion was given to support a different and completely unrelated matter. Plaintiff's reliance on *Brancaccio v. Kohl's Dept. Stores, Inc.*, 67 AD3d 618 [2nd Dep't] is also misplaced as the facts at bar are distinguishable. In *Brancaccio,* the plaintiff tripped over the decayed end of a speed bump in the parking lot of defendant's store. *Id.* In response to the defendant's motion, the plaintiff submitted the affidavit of the professional engineer, who opined that there were other yellow painted lines on the surface which could cause a pedestrian to incorrectly discern whether there was an elevation where the yellow painted speed bump was located. *Id.* Such a condition is not present in the instant case.

As to the evidence, the "Guidelines for the Design and Application of Speed Humps", the Court takes note of the introductory language, *Proposed Recommended Practice* of the Institute of Transportation Engineers. In general, evidence of guidelines is not conclusive, and such evidence is not a necessary element of a plaintiff's proof (*Ellis v. Eng,* 70 AD3d 887, 891 [2nd Dep't 2010]). Although noncompliance with such a customary practice or industry standard may be evidence of negligence, the failure to abide by guidelines or recommendations that are not generally-accepted standards in an industry will not suffice to raise an issue of fact as to a defendant's negligence (*Carlino v. Triboro Coach Corp.*, 22AD3d 624, 625 [2nd Dep't 2005]). Accordingly, plaintiff cannot convert these industry recommendations to an industry standard in order to avoid summary judgment (*see Diaz v. New York Downtown Hosp* ., 287 AD2d 357 [1st Dep't 2001]). Regarding the pictorial evidence, although plaintiff identified certain photographs as being accurate depictions of the location of the fall, there is no evidence as to when the photographs were taken and she did not testify that the supposedly defective condition reflected in the photographs was in fact substantially

the same condition as that which existed at the time of her fall. Accordingly, there is no proof that this alleged defective condition existed to justify the inference that the defendants had constructive notice of it. Further, in the absence of the necessary evidence to authenticate the photographs, they are therefore not competent evidence (*see Saks v. Yeshiva of Spring Valley*, Inc., 257 AD2d 615 [2nd Dep't 1999];*Truesdell v. Rite Aid of New York, Inc.* 228 AD2d 922 [3rd Dep't 1996]). What is left of plaintiffs' evidence is Valerie Grizzell's own testimony and the pleadings. Plaintiffs, in their description of the "calming device" and/ or speed bump/hump, referred to it as "cracked, corroded, uneven, upraised, depressed and partially obscured by sand and failing to extend to the curb of the bus stop..." (*see* Affirmation in Opposition, Exhibit A, ¶ thirty-second, p.9). It is noteworthy that the plaintiffs describe the calming device as both *upraised* and depressed.

Viewing the evidence in the light most favorable to the plaintiffs, and affording them the benefit of every reasonable inference, this Court finds Valerie Grizzell's testimony as to the cause of her accident, to be inconsistent. Plaintiff first attributed the cause of her fall to the sand on the speed bump:

Q...Did you ever come to learn or figure out what caused you to actually slip?

A. I slipped on the speed bump because I *guess* it was sandy.

Q. ...Did you see or feel ice, sand, or anything as the accident was happening?

A. Sand.

Q. You saw it or you felt it?

A. Felt it and saw it.

Q. When for the first time did you see sand on the speed bump?

A. When I was down there with the speed bump on the ground.

Q. Right after the accident?

A. Right. (Affirmation in Opposition, Exhibit G, Tr. V. Grizzell, p. 37, ln. 8 -25)

Then, later in her deposition, plaintiff testified that the sand had nothing to do with her slipping and falling:

Q. Are you claiming that there was sand on the speed bump that made you slip or the mere stepping onto the speed bump caused you to slip?

A. Stepping onto the speed bump.

Q. So it had nothing to do with the sand that you saw laying there?

A. No...."

(p. 80 ln. 9 - 16).

It is also noted that plaintiff also testified that she did not take a look at the speed bump at any point immediately following the accident (p. 29, ln. 20-24), which contradicts her later testimony that she saw and felt the sand on the speed bump right after the accident. Further, she could not recall dimensions, like how high the speed bump was raised from the ground, only recalling that it was the same color as the ground (p. 30 ln. 1-24). Additionally, plaintiff identified the area where she fell from being shown the photographic evidence but the only thing that she was able to recall with certainty was that the speed bump was not painted yellow as represented in the pictures. There is no other evidence to support that contention, nor is there evidence indicating that the pictures were taken during the time period as to when the accident occurred.

This casts doubt not only as to whether plaintiff actually slipped on a speed bump, but also as to whether the speed bump was in the condition as described in the complaint. After a review of the plaintiff's deposition testimony, it is clear that she cannot state exactly what condition caused her to trip and fall, and cannot describe in any meaningful way the dimensions or nature of that condition (see *Schectel v. Southland Corp.*, 264 AD2d 512 [2nd Dept 1999]). Further, plaintiff also testified that she did not experience a slippery condition in the parking lot at any time prior to the accident:

Q. Are you aware of any other people or incidents involving people slipping on any speed bumps in that quadrangle prior to the accident?

A. No.

Q. Did you ever complain to anybody about speed bumps or slippery conditions in the parking lot and in the quadrangle at any time before the accident?

A. No..."

(p. 48, Ln. 23 -25, p.49 ln. 1 - 8).

A plaintiff's inability to identify the cause of the fall is fatal to the cause of action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation. In opposition, the plaintiff failed to raise a triable issue of fact. The varying

arguments as set forth in plaintiff's deposition testimony was that she slipped and fell because there was sand on the speed bump, and because the bus driver let her exit from the bus on a speed bump--sand not being a factor. Since it is just as likely that the plaintiff's fall could have been caused by a loss of balance or a misstep given that there is nothing in the record to support that other passengers had fallen due to similar condition, or that the condition she described even existed on the day of her accident, the plaintiff failed to raise a triable issue of fact as to the cause of the accident. The plaintiff's remaining contentions either are without merit or need not be reached in light of this Court's determination (see *Alabre v. Kings Flatland Car Care Center, Inc.,* 84 AD3d 1286 [2nd Dept 2011]). Accordingly, plaintiffs did not meet their prima facie burden to defeat the defendants' motion and cross motion to dismiss the complaint. The MTA defendants motion to dismiss is granted, the JQ defendants cross-motion to dismiss the complaint is granted, and the cross-claims are therefore rendered moot.

This constitutes the decision and order of this Court.

DATED: June 22, 2012

ENTER

HON. ARTHUR M. DIAMOND
J. S.C.

ENTERED
JUN 26 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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