Rector v Moriano
2020 NY Slip Op 34638(U)
October 6, 2020
Supreme Court, Orange County
Docket Number: Index No. EF008356-2018
Judge: Catherine M. Bartlett

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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SHIRLEY RECTOR,

Plaintiff,

-against-

PATRICIA MORIANO d/b/a MORIANO REALTY, et al.,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF008356-2018
Motion Date: September 8, 2020

The following papers numbered 1 to 7 were read on Defendants' motion for summary judgment:

Notice of Motion - Affirmation / Exhibits - Affidavit - Expert Affidavit 1-4

Affirmation in Opposition / Exhibits - Expert Affidavit 5-6

Reply Affirmation / Exhibit 7

FACTUAL BACKGROUND

Plaintiff Shirley Rector commenced this action to recover for personal injuries allegedly caused by a trip and fall accident on October 30, 2015 at approximately 4:00 p.m. at a strip mall owned by Defendants in Pine Bush, New York. Plaintiff parked her car and was approaching a Chinese restaurant with her grandson walking before her. The restaurant, one of a number of storefronts in the mall, is located immediately to the right of Pine Bush Dental, her place of employment for a period of several years prior to October 2015. She claims to have tripped

on what she described in her bill of particulars as an "uneven, unmarked walking surface" or "uneven sidewalk," but what per her deposition testimony was in fact a portion of the curb, bordering the asphalt parking lot, of a concrete walkway in front of the row of storefront businesses in the mall. Defendants move for summary judgment on the ground that no defective condition existed, and in any event that they lacked knowledge of any purported tripping hazard.

A. Plaintiff's Testimony

Plaintiff identified the place where she tripped on photographs depicting the scene. The photographs reveal that to the left of the situs of her accident, the concrete walkway was essentially flush with the parking lot. At the point where Plaintiff tripped, the curb was sloping gently upwards, and the asphalt of the parking lot began to slope gently downwards, such that within two feet or so to Plaintiff's right the curb was approximately five to six inches above the surface of the parking lot. Where she tripped, the height differential was about two (2) inches.

Although Plaintiff had worked at Pine Bush Dental for years, she had never previously been to the Chinese restaurant because she disliked Chinese food. She made a special trip there on October 30, 2015 because her grandson wanted Chinese food. Concerning the circumstances leading up to the accident, Plaintiff testified:

Q How would you describe the pace with which you walked from your car to the Chinese restaurant; were you walking hurriedly, were you walking normal pace or slowly ?

A Normal pace.

Q And how would you describe Daniel's pace; was he walking quickly or running towards the restaurant or something else ?

A He was ahead of me.

Q I understand that part, but was he running or walking fast or jogging or something else ?

A Just walking. Q Okay. A Walking faster than me.

Q Got it. And as you were walking towards the Chinese restaurant, where were you looking ?

A In front of me at him.

B. Defendants' Property Manager

Defendants' property manager testified that the parking lot was last repaved in 2010. In his affidavit, he further averred that at no time prior to Plaintiff's accident had there been any complaints from tenants or visitors to the mall that a tripping hazard existed in the area where the curb meeting the parking lot in front of the Chinese restaurant. In 2015 it was his practice to visit three to four times per week to inspect the premises, and he never found or heard of any tripping hazards in the area.

C. Defendants' Expert

Defendants' expert, Scott A. Cameron, R.A., AIA, describes the physical layout as follows:

4. Close examination of the Plaintiff-marked photographs shows that she recalled tripping at a point along the cast-in-place concrete curb at the outer edge of the sidewalk at a location that aligned with a stainless steel handrail mounted to the front facade.

5. ...The curb follows the slope of the sidewalk from five-inches (5") to six-inches (6") high...down to zero-to one-half inch (0" to ½") high at the edge of the painted cross-hatched ADA walkway.

7. The majority of the shopping center – including the area in front of the Chinese restaurant (and Pine Bush Dental) entrances have a flush (or less than one-half inch [½"] per foot) transition between the sidewalk/curb concrete outer edge and the asphalt pavement. This allows for wheelchair/handicapped access at most

areas without the need for separate marked dropped curbs. The entire storefront sidewalk/parking lot frontage is also equipped with yellow painted diagonal cross hatches and warnings stating "Fire Lane."

8. The far south end of the shopping center was equipped with a section of traditional concrete curb. The curb was measured to be between five-inches (5") to six-inches (6") high....The south end storefront curb remains standard height until a point measured to be ten-feet eleven-inches (10'-11") from the flush entrance pavers.

9. The continuous curb transitions down from five-inches (5") to zero-inches (0") (i.e., flush) along the ten-feet eleven-inches (10'-11") distance....The location where the Plaintiff claimed she tripped when ascending the curb and up onto the storefront sidewalk was one and one-half inches (1-1/2") to two-inches (2") high. There was clear and readily visible edge demarcation between the light gray sidewalk/curb and black asphalt pavement. Further, there were the diagonal yellow paint cross hatches along the pavement edge near the curbing.

Mr. Cameron proceeds to discuss the New York City Administrative Code "Definition of Sidewalk Tripping Hazard," New York State Highway Law §330, and the Americans with Disabilities Act Accessibility Guidelines pertaining to "curb ramps," but, in the Court's view, fails to demonstrate that any of these authorities are directly applicable to the situation here.

Mr. Cameron concludes by opining:

16. It is the undersigned's opinion, within a reasonable degree of architectural certainty, that the subject storefront curb and sidewalk met all applicable current codes and also met all Building and Department of Transportation (DOT) codes at the time of the accident (October 30, 2015). No defects, New York State Code violations or tripping hazards were observed to have existed at the time of the accident. The curb and sidewalk along the Chinese Restaurant storefront were not hazardous

17. Varied height curbs are to be expected by design to accommodate dropped curbs and allow handicapped/wheelchair access at traditional orientations and layouts. At the Valley Supreme Shopping Center, the varying curb height is not traditional and is caused by a varying asphalt surface elevation (following the regional topography) and level sidewalk/curb. While not traditional, the layout, design and orientation at this location was Code compliant and in my

opinion presented no hazardous conditions, traps or tripping hazards. No geometry issues existed.

18. There was a clear and readily-visible edge demarcation between the light gray sidewalk/curb and black asphalt pavement where plaintiff was walking. Further, there were the diagonal yellow paint cross hatches along the pavement edge near the curbing to apprise her of the curb in this area.

D. Plaintiff's Expert

Plaintiff's expert, Alfred A. Fusco, Jr., P.E., cites Property Maintenance Code §302.3 – which provides in general terms that "[s]idewalks, walkways...and similar areas shall be kept in a proper state of repair, and maintained free from hazardous conditions" – and opines that the area of Plaintiff's fall was "not maintained free from hazardous condition." More specifically, Mr. Fusco states:

d. The difference in height between the asphalt and the sidewalk was a hazardous condition and was not Code compliant.

e. The area in front of the Chinese Restaurant where [Plaintiff] identified as the place of her fall had a difference of height between 1 inch and 3 inches and no warning paint, signage, etc. to prevent an accident from occurring.

f. The difference in height between the asphalt and sidewalk was definitely a tripping hazard and in fact was a trap because the majority of the rest of the sidewalk on that side was level with the parking lot.

g. The varying curb height in the area of the plaintiff's fall is not traditional and is caused by a varying asphalt surface elevation and level sidewalk/curb.

h. The difference in height between the asphalt and the sidewalk was caused when the parking lot was repaved as testified to by the defendant's witness at his examination before trial. That hazardous condition existed since at least the time of the repaving and continued through the time of plaintiff's fall.

i. Had the repaving been done properly and in accordance with accepted building, construction and maintenance practices, the blacktop in the area of where plaintiff fell, would have been flush with the sidewalk as it was in nearly the entire rest of the length of the building.

LEGAL ANALYSIS

A. The Burden of Proof On Defendants' Motion For Summary Judgment

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York University Medical Center,* 64 NY2d 851, 853 (1985). The movant's failure to meet this burden of proof "requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v. New York University Medical Center, supra; Lesocovich v. 180 Madison Avenue Corp.,* 81 NY2d 982, 985 (1993). If, on the other hand, the movant establishes *prima facie* entitlement to summary judgment, the opponent, to defeat the motion, "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980).

"A property owner has a duty to keep the 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' (*Basso v. Miller,* 40 NY2d 233, 241...). Generally, the issue of whether a dangerous or defective condition exists depends on the facts of each case and is a question of fact for the jury (*see Trincere v. County of Suffolk,* 90 N.Y.2d 976, 977...)." *Craig v. Meadowbrook Pointe Homeowner's Ass'n, Inc.,* 158 AD3d 601, 602 (2d Dept. 2018). However, there is no duty to protect or warn against conditions that are not inherently dangerous and that are readily observable by those employing the reasonable use of their senses. *See, e.g., Robbins v. 237 Avenue X, LLC,* 177 AD3d 799 (2d Dept. 2019); *Locke v. Calamit,* 175 AD3d 560, 561 (2d Dept. 2019); *Costidis v. City of New York,* 159 AD3d 871 (2d Dept. 2018); *Fishelson v.*

Kramer Properties, LLC, 133 AD3d 706, 707 (2d Dept. 2015); *Ramos v. Cooper Investors, Inc.,* 49 AD3d 623 (2d Dept. 2008); *Colau v. Community Programs Center of Long Island, Inc.,* 29 AD3d 723 (2d Dept. 2006).

Accordingly, where as here the plaintiff has alleged that a curb (or step, walkway, etc.) constitutes a tripping hazard by virtue of its design or placement, and not by reason of any inherent defect or lack of repair, the property owner may establish *prima facie* entitlement to judgment as a matter of law by demonstrating that the item in question complies with relevant code requirements and that the condition was open and obvious and not inherently dangerous. *See, Fishelson v. Kramer Properties, LLC, supra. See also, Ramos v. Cooper Investors, Inc., supra*; *Alger v. CVS Mack Drug of New York, LLC,* 39 AD3d 928, 930 (3d Dept. 2007); *Guldy v. Pyramid Corporation,* 222 AD2d 815, 815-816 (3d Dept. 1995). The burden then shifts to the plaintiff to adduce "proof demonstrating the existence of an issue of fact as to whether other circumstances prevailed which could lead the trier of fact to conclude that a dangerous condition existed which was a substantial cause of the [accident] resulting in the plaintiff[s]...injury" (*Murray v. Dockside 500 Mar, Inc.,* 32 AD3d at 833...)." *Fishelson v. Kramer Properties, LLC, supra,* 133 AD3d at 707-708.

B. Plaintiff Has Not Demonstrated The Existence Of A Defective Condition

The issue here turns entirely on whether Defendants have established their *prima facie* entitlement to summary judgment, for the Plaintiff, via the affidavit of her expert engineer, has failed to demonstrate the existence of any defective condition. In this regard:

(1) Mr. Fusco provides no foundation, no citation to any specific standard, for his assertion that the difference in height between the parking lot and the sidewalk "was not Code compliant." Reliance on Property Maintenance Code §302.3 is unavailing, as Section

302.3 is "nonspecific and reflect[s] only a general duty of a property owner to maintain all sidewalks in a proper state of repair and free from hazardous conditions." *See, Witknowski v. Island Trees Public Library,* 125 AD3d 768, 770 (2d Dept. 2015) (holding, in case where plaintiff's expert relied on Section 302.3, that plaintiff had failed to raise any issue of fact as to the existence of a defective condition).

(2) Although Mr. Fusco observes that the area where Plaintiff fell had "no warning paint, signage, etc. to prevent an accident from occurring," he does not claim that its absence violated any code or industry custom or practice, much less provide a foundation for any such assertion. His reticence in this regard may well stem from the fact that the photographs show that "the curb's grey color and texture contrasted sufficiently with the surrounding black pavement to provide a visual clue for pedestrians." *See, Alger v. CVS Mack Drug of New York, LLC,* 39 AD3d 928, 930 (3d Dept. 2007). *See also, Guldy v. Pyramid Corporation,* 222 AD2d 815, 815-816 (3d Dept. 1995).

(3) Mr. Fusco's factual assertion that "[t]he difference in height between the asphalt and the sidewalk was caused when the parking lot was repaved" is wholly without support in the record. While the area was repaved in 2010, there is no evidence that the asphalt of the parking lot was flush with the walkway at the point of Plaintiff's accident prior to the repaving.

(4) Mr. Fusco provides no foundation whatsoever for his assertion that "accepted building, construction and maintenance practices" required that repaving of the parking lot be performed so that the blacktop would be flush with the walkway. *See, Alger v. CVS Mack Drug of New York, LLC, supra.*

(5) Finally, Mr. Fusco's assertion that the difference in height between the asphalt and sidewalk was a tripping hazard and a trap simply because the majority of the rest of the sidewalk on that side was level with the parking lot is unsubstantiated and conclusory. *See, e.g., Locke v. Calamit, supra,* 175 AD3d at 561.

Indeed, the case at bar is curiously reminiscent of *Alger v. CVS Mack Drug of New York, LLC, supra.* In that case, the plaintiff tripped on a sloping curb in front of a pharmacy, and alleged that her accident was caused by the lack of uniformity in the curb's height (it sloped from 2 to 6 inches in height), and the absence of paint which would highlight that difference to pedestrians. *Id.,* 39 AD3d at 928-929 and n. 1. Affirming an award of summary judgment to the defendants, the Third Department wrote:

> Notably, in support of their motion, defendants submitted, among other things, expert affidavits which sufficiently demonstrated that the "curb conformed to all applicable building codes and zoning ordinances and was in good repair, free of visible defects and constructed according to accepted industry standards" (*Guldy v. Pyramid Corp,* 222 AD2d 815...). That proof, along with photos of the curb taken around the time of the accident, was sufficient to establish, prima facie, defendants' entitlement to summary judgment [cit.om.].
>
> In response, plaintiffs submitted an affidavit from a licensed professional engineer who, noting the height discrepancy between the curb's original design specifications and the curb as actually constructed, opined that the sloping height of the curb created a tripping hazard and violated sound engineering and construction standards. While it is correct that the design specifications for the new curb called for a uniform height in front of the pharmacy entrance, plaintiffs' expert provided no foundational evidence that the apparent difference violated any specific industry standards "or otherwise constitute[d] a deviation from accepted practice" (cit.om.). Nor was there support or foundational proof substantiating his conclusory opinion that the fact that the curb was not highlighted "with a highly visible paint" violated good industry practices (cit.om.). Moreover, it appears from the information in this records that painting the curb a bright color was unnecessary inasmuch as the curb's grey color and texture contrasted sufficiently with the surrounding black pavement to provide a visual clue for pedestrians (*see Guldy v. Pyramid Corp., supra* at 816...). Given that the statements in the affidavit from plaintiffs' expert are "speculative [and] unsupported by any evidentiary foundation," we agree with Supreme Court that defendants were entitled to summary judgment in their favor (*Diaz v. New York Downtown Hosp.,* 99 NY2d 542, 544...[2002]; [cit.om.]).

Alger v. CVS Mack Drug of New York, LLC, supra, 39 AD3d at 929-930).

Here, likewise, Plaintiff's expert's opinion is conclusory, without support or foundational proof, and hence lacking in probative force and insufficient to demonstrate the existence of any material issue of fact. *See, Alger v. CVS Mack Drug of New York, LLC, supra. See generally, David v. County of Suffolk,* 1 NY3d 525, 526 (2003); *Latalardo v. Town of Clarkstown,* 60 AD3d 913, 914 (2d Dept. 2009).

The sole question, therefore, is whether Defendants established *prima facie* their entitlement to judgment as a matter of law.

C. Defendants Failed To Demonstrate Entitlement To Summary Judgment

A number of considerations lead the Court to conclude that Defendants have failed to demonstrate as a matter of law that the design and configuration of the curb in front of the Chinese restaurant was not inherently dangerous, or that it was readily observable by persons employing the reasonable use of their senses. In this regard, the key portion of defense expert Cameron's opinion (Aff. ¶17) is the following:

> Varied height curbs are to be expected by design to accommodate dropped curbs and allow handicapped/wheelchair access at traditional orientations and layouts. At the Valley Supreme Shopping Center, the varying curb height is not traditional and is caused by a varying asphalt surface elevation (following the regional topography) and level sidewalk/curb.

In the absence of directly applicable Code provisions, Mr. Cameron not unreasonably analogizes the condition at issue here to the now ubiquitous sloped curbs installed as part of "curb ramps" which facilitate wheelchair access to walkways. However, as Mr. Cameron acknowledges (Aff. ¶12), Section 4.7.7 of the Americans with Disabilities Act Accessibility Guidelines (ADAAG) requires that curb ramps be equipped with "detectable warnings":

> Detectable Warnings. A curb ramp shall have a detectable warning complying with 4.29.2. The detectable warning shall extend the full width and depth of the curb ramp.

ADAAG 4.29.2 ("Detectable Warnings on Walking Surfaces") further provides:

> Detectable warnings shall consist of raised truncated domes with a diameter of nominal 0.9 in (23 mm), a height of nominal 0.2 in (5 mm) and a center-to-center spacing of nominal 2.35 in (60) mm) and shall **contrast visually with adjoining surfaces, either light-on-dark, or dark-on-light.**

Hence, if the condition in front of the Chinese restaurant were an ADA "curb ramp" for wheelchairs – which it is not – the requisite "detectable warning" would have provided a clear visual cue to the existence of sloped curbs on either side of the ramp.

Despite Mr. Cameron's suggestion to the contrary, no such visual cue was present here. He states (Aff. ¶18):

> There was a clear and readily-visible edge demarcation between the light gray sidewalk /curb and black asphalt pavement where plaintiff was walking. Further, there were the diagonal yellow paint cross hatches along the pavement edge near the curbing to apprise her of the curb in this area.

The Court concurs that the contrast in color clearly demarcated the boundary between the parking lot and the sidewalk / curb. However, no such color contrast demarcated the transition from the area where the sidewalk was flush with the parking lot to the area where the sloping curb created a height differential between the parking lot and the walkway. The photographs belie Mr. Cameron's statement that "the diagonal yellow paint cross hatches along the pavement edge near the curbing" (denoting the fire lane) apprised Plaintiff of the curb in this area. If anything, the impression conveyed by the continuous yellow cross hatches is one of *continuity* along the entire line of shops in the mall, not one of the *discontinuity* created by the sloping curb on which Plaintiff allegedly tripped. Once again, if the condition here were an ADA curb ramp – which it is not – those yellow cross hatches would presumably have been interrupted by markings indicating the existence of a pathway and thereby visually flagging the discontinuity.

So, Mr. Cameron is forced to acknowledge (Aff. ¶17) that "the varying curb height" in the conditions existing in front of the Chinese restaurant is "not traditional." Whether by this curious locution he means "not constructed according to accepted industry standards" is unclear, but in any event Mr. Cameron does *not* state, never mind demonstrate, that the sloping curb was designed and configured in accord with accepted industry standards. The Court observes that expert proof to that effect was an integral component of the defendant's establishing *prima facie* entitlement to summary judgment in *Alger v. CVS Mack Drug of New York, LLC, supra*,

39 AD3d at 929, a case upon which Defendants *pointedly rely*. *See also, Guldy v. Pyramid Corporation, supra,* 222 AD2d at 815 (same). The absence of such proof here is somewhat telling.

Finally, we come to Plaintiff herself. She is perhaps chargeable with comparative negligence in focusing upon her grandson instead of watching where she was going. However, in assessing whether she should by the reasonable use of her senses have seen the sloping curb in front of the Chinese restaurant, a jury might well consider whether she was encountering this condition for the first time after having repeatedly entered her workplace at Pine Bush Dental, where, just to the left of the restaurant, there was no height differential between the parking lot and the walkway.

In view of the foregoing, the Court concludes that Defendants failed to obviate triable issues of fact whether the design and configuration of the curb in front of the Chinese restaurant was inherently dangerous and whether it was readily observable by persons employing the reasonable use of their senses. Accordingly, their motion for summary judgment must be denied regardless of the insufficiency of Plaintiff's opposing papers. *See, Winegrad v. New York Univ. Medical Center, supra; Craig v. Meadowbrook Pointe Homeowner's Ass'n, Inc.,* 158 AD3d at 603; *Gorokhovskiy v. NYU Hospitals Center,* 150 AD3d 966, 967-968 (2d Dept. 2017).

It is therefore

ORDERED, that Defendants' motion for summary judgment is denied.

The foregoing constitutes the decision and order of the Court.

Dated: October 6, 2020
Goshen, New York

ENTER

HON. CATHERINE M. BARTLETT, A.J.S.C.
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE

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