SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE TRIAL/IAS PART 18

X

LAURA MURPHY and GERARD MURPHY,

Plaintiffs,

-against

Index No.: 017344/08
Motion Sequence...01
Motion Date...02/04/11

FIFTH AVENUE OF LONG ISLAND REALTY ASSOCIATES, AMERICANA AT MANHASSET and CASTAGNA REALTY CO., INC.

Defendants.

X

Papers Submitted:
Notice of Motion.....x
Memorandum of Law.....x
Affirmation in Opposition.....x
Reply Affirmation.....x

Upon the foregoing papers, the Defendants' motion, seeking an order pursuant to CPLR § 3212, dismissing the Plaintiffs' complaint, on the basis that it is not liable for the injuries sustained by the Plaintiff, LAURA MURPHY ("LAURA"), due to a trip and fall on an alleged dangerous condition on the Defendants' premises, is decided as hereinafter provided.

As an initial matter, this Court must decide whether or not to deny the Defendants' motion as untimely. The Court's Certification Order dated June 4, 2010

specified, *inter alia*, that all motions for summary judgement must be filed within sixty (60) days of filing the Note of Issue. The Note of Issue in this matter was filed on June 17, 2010. Sixty (60) days from that date is August 16, 2010, a Monday. The affidavit of service attached to the Defendants' motion indicates that the motion was served by mail on the Plaintiff on August 16, 2010. A printout from the County Clerk's office shows that the motion was recorded, and the motion fee was paid, on August 25, 2010.

The Certification Order unequivocally states that the motion for summary judgment must be filed, not served, within sixty (60) days of the filing of the Note of Issue. The Defendants failed to comply with a Court Ordered deadline and failed to proffer any reasonable excuse for their failure. Accordingly, the Defendants' motion for summary judgment is **DENIED**, as untimely.

Notwithstanding the timeliness of the Defendants' motion, the motion for summary judgment is **DENIED** based upon its merits.

The Plaintiff, LAURA, commenced this action on or about September 17, 2008, seeking damages for personal injuries allegedly sustained as a result of a dangerous condition that existed in the parking lot of the Defendant, AMERICANA AT MANHASSET ("AMERICANA"). The Plaintiff subsequently amended her summons and complaint to add a cause of action for loss of services by her husband, GERARD MURPHY.

The Plaintiff, LAURA underwent an Examination Before Trial on January 5, 2010. At her deposition, the Plaintiff testified that on May 4, 2007, while she was traversing

in the parking lot of the AMERICANA mall, she was caused to trip and fall due to a defective and dangerous condition on a speed bump. The Plaintiff testified that, prior to the accident, she saw a speed bump that was broken and cracked with white paint on it. *See* Examination Before Trial of Laura Murphy, dated January 5, 2010, attached to the Defendants' Notice of Motion as Exhibit "E". On the day of the incident, the weather conditions were dry and sunny. At the time of the accident, the Plaintiff testified that she was wearing Marrill sneakers which went up to her ankle. As she was attempting to walk over the speed bump, the Plaintiff testified that she tripped on something. She testified that her left foot got stuck, the sneaker came off, and she went "flying", falling forward. *Id.* The Plaintiff extended both her arms to break her fall and her body came into contact with the pavement of the parking lot.

After the Plaintiff fell, she testified that she went to a security guard and remained there for approximately 15 minutes. Thereafter, the security guard requested to see where the Plaintiff fell. According to the Plaintiff, when she showed the security guard the spot where she fell, he began "kicking gravel" into the crack that was located on the speed bump.

The Defendants rely on the Plaintiff, LAURA's testimony in support of their argument that the condition was open and obvious, thereby absolving the Defendants from liability. Specifically, the Defendants cite the Plaintiff's sworn testimony indicating that she saw the speed bump approximately two car lengths away from her prior to the accident and

made a conscious decision to attempt to walk over the speed bump anyway. The Defendants further submit that the condition was trivial in nature and not inherently dangerous.

In support of the motion, the Defendants also submit the testimony of Robert Ronzoni, the project manager for the Defendant, CASTAGNA REALTY. Mr. Ronzoni testified that he first received notification of the Plaintiff's accident from an incident report that was filled out by the mall security personnel. Mr. Ronzoni further testified that, after receiving notification of the incident, he inspected the area where the Plaintiff's accident occurred and observed a speed bump that was painted white with a crack in it.

Mr. Ronzoni testified that he conducts inspections of the area of the parking lot where the accident occurred on a weekly basis. Mr. Ronzoni testified that prior to the Plaintiff's accident, he had no notice of the condition of the speed bump, nor had there been any incidents of people tripping and falling on the speed bump.

The Defendants also rely on the testimony of Javier Avalos, the maintenance supervisor for the Defendant, CASTAGNA REALTY, who testified that everyday he was in the parking lot where the Plaintiff's accident occurred. He testified that if a condition that needed repair was detected, he would either repair it himself or hire an outside contractor to repair the condition.

In light of the Plaintiff's testimony that the speed bump was readily observable and the testimony of the witnesses on behalf of the Defendants, the Defendants urge that the Plaintiffs' complaint should be dismissed as a matter of law.

In opposition to the motion, the Plaintiffs' counsel argues that it can be inferred from the appearance and nature of the broken portion of the speed bump that the condition did not occur overnight, but rather, was one which took time to develop and should have been readily observable by the employees of the Defendants. The Plaintiffs' counsel references the photographs taken of the defective condition (attached to the Defendants' Notice of Motion as Exhibit "K") which shows a significant crack on the speed bump.

The Affidavit of the Plaintiff, LAURA MURPHY, states that the cracked portion of the speed bump appeared to have been painted over with white paint. *See* Affidavit of Laura Murphy, dated January 17, 2011, attached to the Plaintiffs' Opposition as Exhibit "A". The Plaintiff states in her affidavit that the cracked, missing portion of the speed bump appeared to have been approximately 12 inches by 12 inches which created a tripping hazzard of between 2 to 3 inches in height with loose gravel and dirt surrounding the crack. The Plaintiff, GERARD MURPHY, also submitted an affidavit which states that a large portion of the asphalt was missing from one end of the speed bump, creating a tripping hazzard. *See* Affidavit of Gerard Murphy, dated January 17, 2011, attached to the Plaintiffs' Opposition as Exhibit "B".

Generally, the issue of whether a dangerous or defective condition exists depends on the particular facts of each case, and is properly a question of fact for the jury. *Trincere v. County of Suffolk*, 90 N.Y.2d 976 (1997); *Hawkins v. Carter Community Hous. Dev. Fund Corp.*, 40 A.D.3d 812 (2d Dept. 2007); *Riser v. New York City Hous. Auth.*, 260

A.D.2d 564 (2d Dept. 1999). It is well settled that a landowner is under no duty to warn of a dangerous condition that is open and obvious. However, recent case law on this issue is clear that proof that an alleged dangerous condition is open and obvious does not preclude a finding of liability against the landowner. Rather, it is relevant with respect to the level of the plaintiff's comparative fault. *Cupo v. Karfunkel*, 1 A.D.3d 48 (2d Dept. 2003); *see also Ruiz v. Hart Elm Corp.*, 44 A.D.3d 842 (2d Dept. 2007); (*Holly v. 7-Eleven, Inc.*, 40 A.D.3d 1033 (2d Dept. 2007); *Fairchild v. J. Crew Group, Inc.*, 21 A.D.3d 523 (2d Dept. 2007) (the fact that a defect may be open and obvious does not negate a landowner's duty to maintain its premises in a reasonably safe condition, but may raise an issue of fact as to the plaintiff's comparative negligence); *see also Simmons v. Saugerties Cent. School Dist.*, __N.Y.S.2d __, 2011 WL 814435 (March 10, 2011) (open and obvious nature of large hole in bus circle, and student's allegedly long-standing knowledge of it, did not bar inquiry into whether allegedly dangerous condition resulted from school's negligent maintenance of its property); *Custodi v. Town of Amherst*, 81 A.D.3d 1344 (4th Dept. 2011) (it is well settled that "the open and obvious nature of the allegedly dangerous condition ... does not negate the duty to maintain [the] premises in a reasonably safe condition but, [instead], bears only on the injured person's comparative fault").

The Defendants are correct in their assertion that, given the above, a court is not precluded from granting summary judgment to a landowner on the ground that the condition complained of by the plaintiff was both open and obvious and, as a matter of law,

was not inherently dangerous. *Cupo, supra*, 1 A.D.3d at 52.

In determining whether a defect is trivial, the 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 circumstances' of the injury". *Trincere, supra*, 90 N.Y.2d 976, 978 (1997), *quoting Caldwell v. Village of Is. Park*, 304 N.Y. 268, 274 (1952).

Here, based upon the Court's review of the photographs of the speed bump, which the Plaintiff, LAURA MURPHY, confirmed fairly and accurately represented the accident site, and the Plaintiff's description of the circumstances surrounding the accident, the Defendants failed to establish, prima facie, that the alleged defect was trivial and, therefore, not actionable. While the speed bump in and of itself may have been open and obvious, there is an issue of fact as to whether the crack in the speed bump, large enough for the Plaintiff, LAURA MURPHY's sneaker to get caught in, was in fact readily observable. Even in the event the open crack in the speed bump was readily observable, the issue is a factual inquiry as to the extent of the Plaintiff's comparative fault.

The Defendants also posit that they were not on notice of the defective condition of the speed bump. The Plaintiffs aver that the Defendants had constructive notice of the defect as it was visible and apparent and existed for a sufficient length of time prior to the accident that it could have been discovered and corrected.

Viewing the evidence in a light most favorable to the plaintiffs and according the Plaintiffs the benefit of every reasonable inference (*Sagorsky v. Malyon*, 307 N.Y. 584,

(1954)), it cannot be said, as a matter of law, that the evidence is insufficient to permit the jury to draw the necessary inference that a dangerous condition existed for a sufficient length of time prior to the accident to permit the Defendants' employees to discover and remedy the condition. Mr. Ronzoni testified that, after the Plaintiff's accident, upon inspection of the speed bump, he observed the crack. He also testified that he inspects the parking lot on a regular basis and had not seen the defective condition prior to the Plaintiff's accident. It is reasonable to infer that a crack large enough for a pedestrian's sneaker to become trapped in should be readily visible to the employees who are responsible for detecting such defects. As such, the Court cannot find, as a matter of law, that under the particular facts and circumstances presented in this case, the Defendants did not breach their duty of ordinary care to maintain the parking lot in a reasonably safe condition.

Accordingly, it is hereby

ORDERED, that the Defendants' motion, seeking an order pursuant to CPLR § 3212, dismissing the Plaintiffs' complaint, on the basis that it is not liable for the injuries sustained by the Plaintiff, LAURA, due to a trip and fall on an alleged dangerous condition on the Defendants' premises, is **DENIED**.

This constitutes the decision and order of the Court.

DATED: Mineola, New York
April 6, 2011

Hon. Randy Sue Marber, J.S.C.