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.

FILED
AND ENTERED
ON 8-17-2011
WESTCHESTER
COUNTY CLERK

SUPREME COURT: STATE OF NEW YORK
COUNTY OF WESTCHESTER
----------X

PAUL GALLO,

Plaintiff,

-against-

SENTRALE CONTRACTING CORPORATION AND YONKERS RACING CORPORATION,

Defendants.
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DECISION & ORDER

Index No.: 22562/07

ADLER, J.

The following papers numbered 1 through 35 were read on defendants Sentrale Contracting Corporation's ("Sentrale") and Yonkers Racing Corporation's ("YRC") motion for summary judgment pursuant to CPLR §3212:

Papers	Papers Numbered
Notice of Motion; Affirmation of Alexander Gizzo, Esq.; Memorandum of Law in Support; Exhibits	1-12
Notice of Motion; Affirmation of Vincent W. Crowe, Esq.; Exhibits	13-24
Memorandum of Law in Support	25
Affirmation in Opposition of Arnold Bernstein, Esq.; Memorandum of Law in Opposition; Exhibits	26-33
Reply Affirmation of Vincent W. Crowe, Esq.	34
Reply Affirmation of Alexander Gizzo, Esq.	35

Plaintiff alleges that he was injured when he stepped into a "divot" several inches wide and "probably a few inches deep on a sloped contour" when he dismounted from his truck while delivering propane on defendant YRC's property. Plaintiff commenced

this action to recover damages for personal injuries allegedly sustained as a result of that fall. Defendants separately move for summary judgment dismissing the complaint insofar as asserted against them. Defendant YRC contends that the slight depression in the area behind the blacksmith barn constitutes a trivial defect and, therefore, is not actionable. In the alternative, YRC argues that it had neither actual nor constructive notice of the alleged defective condition. Defendant Sentrale contends that it did not manage, control, maintain or perform any construction work in the area of plaintiff's alleged accident and, therefore, owed no duty to plaintiff. In the alternative, it argues that it did not create the alleged dangerous condition, had neither actual nor constructive notice of the alleged dangerous condition and, lastly, that the alleged defect was trivial.

It is undisputed that defendant YRC is the owner of the property on which the accident is alleged to have occurred. As the landowner, defendant YRC is charged with the duty of maintaining its property "in a reasonably safe condition in view of all circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Rodriguez v.* Abbasi, 85 A.D.3d 753, 924 N.y.S.2d 801, 801, quoting *Basso v. Miller*, 40 N.Y.2d 233, 241, 386 N.Y.S.2d 564, 352 N.E.2d 868 [internal quotations omitted]; *Cassone v. State*, 85 A.D.3d 837, 925 N.Y.S.2d 197, 198).

The gravamen of YRC's claim is that the "divot" which allegedly caused plaintiff to fall and injure his ankle does not constitute a dangerous or defective condition. As a general rule, "[w]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the circumstances of each case and is generally a question of fact for the jury" (*Perez v. 655 Montauk*, 81 A.D.3d 619, 619, 916

N.Y.S.2d 137, citing *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 665 N.Y.S.2d 615, 688 N.E.2d 489; see also *Fontana v. Benmarl Winery*, 84 A.D.3d 863, 864, 923 N.y.S.2d 594; *Sabino v. 745 64th Realty Assoc.*, 77 A.D.3d 722, 722, 909 N.Y.S.2d 482; *Fairchild v. J. Crew Group*, 21 A.D.3d 523, 524, 800 N.Y.S.2d 735). "However, a property owner may not be held liable for trivial defects, not constituting a trap or a nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip" (*Id.* at 524). In determining whether a defect is trivial as a matter of law, a court must examine all the evidence presented, "including the width, depth, elevation, irregularity, and appearance of the defect, along with the time, place, and circumstances of the injury" (*Perez v. 655 Montauk*, 81 A.D.3d at 619-620; *Sabino v. 745 64th Realty Assoc.*, 77 A.D.3d at 723).[1]

Here, considering all of the facts and circumstances, YRC has made a prima facie showing of its entitlement to judgment as a matter of law on the ground that the alleged defect upon which plaintiff tripped, which had no characteristics of a trap or snare, was trivial and, therefore, not actionable (see *Trumboli v. Fifth Ave. Paving*, 59 A.D.3d 706, 873 N.Y.S.2d 742; *Fontana v. Benmarl Winery*, 84 A.D.3d 863). In opposition, plaintiff failed to raise a triable issue of fact (see *Zuckerman v. City of New York*, 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595, 404 N.E.2d 718; *Richardson v. JAL Diversified Mgt.*, 73 A.D.3d 1012, 901 N.Y.S.2d 676).

Turning now to defendant Sentrale's motion, the crux of its argument is that it owes no duty to plaintiff. Since a finding of negligence must be based on the breach of

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[1] "[T]here is no minimal dimension test or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (*Vani v. County of Nassau*, 77 A.D.3d 819, 819, 909 N.Y.S.2d 742, quoting *Trincere v. County of Suffolk*, 90 N.Y.2d at 978 [internal quotations omitted]).

a duty, "a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (*Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 138, 746 N.Y.S.2d 120, 773 N.E.2d 485; *DePascale v. E & A Constr. Corp.*, 74 A.D>3d 1128, 904 N.Y.S.2d 109). As a general rule, "liability for a dangerous condition on property is generally predicated upon ownership, occupancy, control or special use of the property" (*Quick v. G.G.'s Pizza & Pasta*, 53 A.D.3d 535, 536, 861 N.Y.S.2d 762, quoting *Nappi v. Incorporated Vil. of Lynbrook*, 19 A.D.3d 565, 566, 796 N.Y.S.2d 537 [internal quotations omitted]). "Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property" (*Ruffino v. New York City Trans. Auth.*, 55 A.D.3d 817, 818, 865 N.Y.S.2d 667).

Defendant Sentrale, a contractor performing work on the premises of defendant YRC, has established that it neither owned, occupied, controlled, or made a special use of the property where the plaintiff was injured, and thus owed no duty to him (*Id.*; see also *DePascale v. E & A Constr. Corp.*, 74 A.D.3d 1128). In opposition thereto, plaintiff failed to raise a triable issue of fact (see *Id.*).

Accordingly, it is hereby

ORDERED, that defendant YRC's motion for summary judgment is GRANTED; and it is further

ORDERED, that defendant Sentrale's motion for summary judgment is GRANTED.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
August 16, 2011

HON. LESTER B. ADLER
SUPREME COURT JUSTICE

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