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Appellate Division, Second Department Docket No. 2013-06817

Court of Appeals

STATE OF NEW YORK

MATVEY ZELICHENKO,

Plaintiff-Appellant,

against

301 ORIENTAL BOULEVARD, LLC,

Defendant-Respondent.

BRIEF ON BEHALF OF THE DEFENSE ASSOCIATION OF NEW YORK, INC. AS *AMICUS CURIAE*

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CORPORATE DISCLOSURE STATEMENT

The Defense Association of New York, Inc. is a not-for-profit corporation which has no parent companies, subsidiaries or affiliates.

PRELIMINARY STATEMENT

This brief is respectfully submitted on behalf of the Defense Association of New York, Inc. (hereinafter "DANY") as amicus curiae in relation to the appeal which is before this Court in the above-referenced action.

DANY is a bar association, whose purpose is to bring together by association, communication and organization attorneys and qualified non-attorneys in the State of New York who devote a substantial amount of their professional time to the handling of litigated civil cases and whose representation in such cases is primarily for the defense; to continue to improve the services of the legal profession to the public; to provide for the exchange among the members of this association of such information, ideas, techniques, procedures and court rulings relating to the handling of litigation as are calculated to enhance the knowledge and improve the skills of defense lawyers; to elevate the standards of trial practice and develop, establish and secure court adoption or approval of a high standard of trial conduct in court matters; to support and work for the improvement of the adversary system of jurisprudence in our courts and facilitate and expedite the trial of lawsuits; to initiate a program of education and information in law schools in emphasizing trial practice for defense attorneys; to inform its members and their clients of developments in the courts and

legislatures affecting their practice and by proper and legitimate means to aid in such developments when they are in the public interest; to establish an educational program to disseminate knowledge by means of seminars and other pedagogical methods on trial techniques for the defense; to promote improvements in the administration of justice; to encourage prompt and adequate payment of every just claim and to present effective resistance to every non-meritorious or inflated claim; and to take part in programs of public education that promote safety and help reduce losses and costs resulting from accidents of all kinds.

DANY respectfully submits this brief to address plaintiff's suggestion that the trivial defect doctrine does not apply to private landowners and interior spaces.

This brief will show that prior decisions of this Court reveal that the trivial defect doctrine is not so limited.

In addition, this brief will demonstrate that plaintiff's reliance on out-of-state authority is misplaced.

Finally, the limitation that plaintiff proposes is completely unworkable and would lead to extensive litigation.

Plaintiff posits that the doctrine should not apply to indoor walking surfaces. So, under plaintiff's theory, the de minimus rule would not apply to a domed stadium, but it would

apply to a stadium without a dome. The anomalies and problems are obvious.

DANY submits that a condition is either actionable or it is not. If, under this Court's prior holdings, the circumstances reveal that the condition is trivial, then no liability should attach, irrespective of the identity of the defendant or the location of the accident.

STATEMENT OF FACTS

This action is one for damages for personal injuries allegedly sustained at 301 Oriental Boulevard, located in the Manhattan Beach section of Brooklyn, New York. The lobby at the premises is bi-level. After entering the building, a person must ascend a small staircase, comprised of five steps, which leads up to the second level of the lobby area (R 75 - 76, 157, 170). (References are to the Record on Appeal.) The staircase has handrails on both sides (R 83, 157, 170). The stairs are fifty-three (53) inches wide (from side to side) and twelve (12) inches deep (from front to back) (R 210). The second step from the bottom has small chip located eighteen inches from the center of the stair, on the right side of center as one is descending (R 210). The chip is three and one quarter (3 1/4) inches in width and one half (1/2) inch deep (R 210).

Luis Alvarez has been the superintendent at 301 Oriental Boulevard for more than 24 years (R 164). He also resides in the building on the first floor, in an apartment reached by ascending the lobby staircase (R 167). As such, he climbs the stairs daily (R 177). For the entire period of his employment, Mr. Alvarez's duties have included sweeping and mopping the floors (R 173). He has never noticed the small chip, nor has any tenant ever complained to him about it (R 176 - 177).

In the early evening of Sunday, May 2, 2010, plaintiff, his wife, and another couple were out in Brooklyn (R 75 - 76). Plaintiff was considering moving to Manhattan Beach and the building located at 301 Oriental Boulevard appeared to him to be a place he might be interested in living (R 75 - 76). As the door to the building was open, he entered the premises, looking for the telephone number of the management company (R 77, 82). Plaintiff ascended the staircase in the lobby of 301 Oriental Boulevard without incident (R 83). While walking up the stairs, he did not observe any defective condition on the staircase (R 84).

After arriving on the landing, plaintiff located the management company's telephone number, wrote it down, and proceeded back to the staircase (R 77, 82). He then began to descend the stairs, again holding the handrail to his right (R 84 - 85). Plaintiff did not look down at the stairs while he was walking (R 90). He instead was talking with one of his friends, who was descending the staircase behind him (R 72). When he reached the second riser from the bottom, he tripped (R 80). While unable to state exactly what part of his foot came in contact with the small chip, plaintiff testified that he stepped on the small chip on that riser with his right foot, causing his leg to twist (R 83). He further stated that his hand released the handrail and his body fell (R 87, 89). He did

not see the small chip in the riser before he fell; rather, he first observed the chip when he looked back after he had fallen (R 85, 86).

The defendant moved for summary judgment arguing, among other things, that the defect was trivial and thus not actionable (R 8 – 13). In opposition, plaintiff argued, inter alia, that the trivial defect defense evolved to protect municipalities, and it should have no application to an interior stairway in an apartment house (R 232). Plaintiff continues to press this contention in this Court.

The trial court denied the motion (R 5), but the Appellate Division reversed and dismissed the complaint (R 281 – 282). The Appellate Division reasoned that "the alleged defect was trivial, did not possess the characteristics of a trap or nuisance, and therefore, was not actionable." (R 282)(citations omitted).

Thereafter, this Court granted plaintiff's motion for permission to appeal (R 278).

POINT I

PLAINTIFF'S ATTEMPT TO LIMIT THE TRIVIAL DEFECT DOCTRINE TO OPEN-AIR AREAS OWNED BY MUNICIPALITIES SHOULD BE REJECTED

On appeal, plaintiff contends that the notion of "trivial defect . . . has been over-extended by the lower courts of this State and by the Appellate Divisions." Appellant's Brief, p. 20. Plaintiff contends that the application of trivial defect analysis in cases with private defendants and to interior spaces strays too far from the concerns that underlay the rule's creation.

However, plaintiff's contention ignores the fact that this Court's prior decisions have not limited the trivial defect defense in the manner plaintiff suggests.

For instance, in Trincere v. County of Suffolk, 90 N.Y.2d 976, 977 (1997), this Court cited, with approval, the Second Department's decision in Guerrieri v. Summa, 193 A.D.2d 647 (2nd Dep't 1993). In Guerrieri, the plaintiff was playing a game of darts in a bar when he tripped and fell over a slightly elevated metal strip which served as a foul line for the game. The Appellate Division dismissed the case, concluding that the metal strip was trivial, possessed none of the characteristics of a trap or snare, and thus, did not constitute an actionable defect. In so doing, this Court did not distinguish between a municipal landowner (the defendant in Trincere) and a non-

municipal landowner (the defendant in Guerrieri). Accordingly, this Court's decision in Trincere negates plaintiff's contention.

Similarly, this Court applied the doctrine to a non-municipal landowner, in Heeney v. Topping, 13 N.Y.2d 1049 (1963). In Heeney, this Court upheld the dismissal of a complaint where the plaintiff, a spectator in a baseball stadium, tripped on protruding asphalt-like material which had been used to repair a crack in a stadium step.

That being the case, plaintiff's contention runs afoul of the doctrine of stare decisis. As recently stated by Judge Ahdus-Salaam in her concurrence in Doerr v. Goldsmith, ____ N.Y.3d ____, 2015 N.Y. Slip Op 04752,

> A state's highest court is, first and foremost, charged with creating a coherent body of settled law by which members of society may order their affairs. This mission inevitably reflects the policy choices of predecessor judges that decide an issue and thereby create a precedent, and is inevitably undermined if successor judges succumb to the very human impulse to cast aside or chip away at those rulings with which they simply disagree.

Id. at p. 19.

This Court created a "coherent body of settled law" more than fifty years ago in Heeney and landowners, municipal and otherwise, have "order[ed] their affairs" accordingly.

Plaintiff's efforts to unsettle that case law should not be heeded.

Plaintiff further contends that "[c]ourts of other states have restricted the application of the trivial defect doctrine to property located out of doors and have declined to apply it to indoor, covered property of non-municipal property owners." Appellant's Brief, p. 23. In support of his contention, however, plaintiff cites only to cases from the Appellate Court of Illinois. See, Bledsoe v. Dredge, 288 Ill. App. 3d 1021, 1024, 681 N.E.2d 96, 98 (App. Ct., 3d Dist. 1997)(noting that "a covered entryway is not an outdoor sidewalk within the contemplation of the *de minimus* rule."); Gillock v. City of Springfield, 268 Ill. App. 3d 455, 457, 644 N.E.2d 831, 834 (App. Ct., 4th Dist. 1994)(imposing the de minimus rule because the "economic burden would be too great to require municipalities to repair every slight defect existing in the miles of sidewalk they maintain.").

Moreover, limiting the concept of trivial defects to some subset of property and/or landowners is inconsistent with the underlying notion of trivial defects. Therefore, plaintiff's proposal to limit trivial defects to outdoor property or outdoor property owned by municipalities should be rejected.

Although plaintiff claims "other states" do not extend the notion of trivial defects to indoor spaces, he cites only one

decision from the Appellate Court of Illinois holding that Illinois' *de minimus* rule does not apply to interior premises defects. Appellant's Brief, p. 23 (citing Bledsoe). Bledsoe, of course, is not a decision of the Illinois Supreme Court, and, in fact, Illinois law on this issue appears to be unsettled. See, St. Martin v. First Hospitality Grp., Inc., ___ Ill. App. 3d ___, 9 N.E.3d 1221, 1227 (App. Ct. 2d Dist.) appeal denied, 20 N.E.3d 1263 (Ill. 2014) (applying *de minimus* rule to partially covered entryway to hotel).

This Court should also note that Illinois law on this issue appears to derive, at least in part, from New York precedent. See, Arvidson v. City of Elmhurst, 11 Ill. 2d 601, 604-605 (1957)[citing Loughran v. City of New York, 298 N.Y. 320 (1948) and Beltz v. City of Yonkers, 148 N.Y. 67 (1895)]. DANY respectfully submits that it would be anomalous to devolve New York law on the basis of less evolved Illinois precedent.

Moreover, contrary to plaintiff's implication, the courts of at least two other states apply their trivial defect rule to all landowners and to interior as well as exterior spaces. Graves v. Roman, 113 Cal. App. 2d 584, 586-587, 248 P.2d 508, 510 (Ct. App., 2d Dist. 1952) (holding that the trivial defect rule applied to brass stripping separating lobby marble floor from linoleum tiles in front of elevator because "authorities disclose that the underlying basis of the decisions is a

practical recognition of the impossibility of maintaining heavily travelled surfaces in a perfect condition and that minor defects such as differences in elevation are bound to occur in spite of the exercise of reasonable care by the party having the duty of maintaining the area involved."); McGuire v. Sears, Roebuck & Co., 118 Ohio App. 3d 494, 498-499, 693 N.E.2d 807, 810 (Ct. App., 1st Dist. 1996)(applying trivial defect rule to interior floor tile based on policy that landowners "are not insurers and therefore not liable for injuries caused by [trivial] imperfections in the premises, which are commonly encountered."); Helms v. Am. Legion, Inc., 5 Ohio St. 2d 60, 62, 213 N.E.2d 734, 736 (1966)(trivial defect analysis applies to entrance steps of private building); see, also, Copelan v. Stanley Co. of Am., 142 Pa. Super. 603, 604, 17 A.2d 659, 659-60 (1941)(finding no liability for a trivial defect in a terrazzo step from theater lobby to sidewalk). Thus, there is no consensus among the states that the trivial defect rule applies only to exterior spaces.

Furthermore, limiting non-liability for trivial defects to certain classes of owners or spaces is inconsistent with the notion that these defects are trivial. While the theory of trivial defects appears to have originated in cases concerned with limiting municipal liability [See, Gastel v. City of New York, 194 N.Y. 15, 18 (1909)("If the full description of the

alleged defect in a municipal case shows that it was of such a trivial character that it was not naturally dangerous, and must almost inevitably occur in the many street miles of a city unless a grievously burdensome degree of care and expense is to be exacted, a recovery will not be allowed even though witnesses do testify to prior accidents.")], even the early cases recognize that the relative insignificance of a defect is the basis for immunizing landowners. As this Court observed over a century ago, where the defect is "so slight that it is not in excess of similar defects found in great numbers in every village and city," imposing a legal duty to repair such defects is not reasonable. Terry v. Village of Perry, 199 N.Y. 79, 87 (1910). In other words, landowners have a duty to maintain their premises in a reasonably safe condition, but the existence of trivial defects is not a breach of that duty. See, also, Trincere v. County of Suffolk, supra, at 977 ("Not every injury allegedly caused by an elevated brick or slab need be submitted to a jury."); Aguayo v. New York City Hous. Auth., 71 A.D.3d 926, 927 (2nd Dep't 2010)(holding that "a property owner may not be held liable in damages for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip").

Indeed, while this Court reasoned in Trincere that "a mechanistic disposition of a case based exclusively on the

dimension of the sidewalk defect is unacceptable," it sensibly noted that "in some instances, the trivial nature of the defect may loom larger than another element." 90 N.Y.2d at 977-978. Were this not so, anything other than a mirror smooth surface could lead to liability; one man's anti-slip strip could be another woman's tripping hazard. The notion that some defects are simply too trivial to give rise to liability, however, applies whether the landowner is public or private and whether the defect is on a sidewalk or on the tread of an interior stairwell. There is no logical or policy reason for holding private landowners liable for the same trivial defects for which municipal landowners are immune.

"Courts have long fixed the duty point by balancing factors, 'including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability.'" Peralta v. Henriquez, 100 N.Y.2d 139, 144 (2003)(quoting Palka v. Servicemaster Mgmt. Servs. Corp., 83 N.Y.2d 579, 586 (1994)). In the case of trivial defects, all of these factors counsel against limiting immunity from trivial defects to public entities.

The reasonable expectations of landowners and the public in general are that no legal liability will derive from trivial defects on premises since the Appellate Division has consistently held that there is no liability for trivial interior defects. See, e.g., Guerriero v. Jand, 57 A.D.3d 365, 366 (1st Dep't 2008)(the alleged defect on an interior marble step, "which was six inches long and 1/64th of an inch wide, was trivial, did not constitute a trap or nuisance, and was not actionable as a matter of law."); Sabino v. 745 64th Realty Associates, LLC, 77 A.D.3d 722, 723 (2nd Dep't 2010)(interior floor with a "slope of one degree is too trivial to be actionable."); Hardsog v. Price Chopper Operating Co., 99 A.D.3d 1130, 1131 (3rd Dep't 2012)("Defendants met their initial burden of establishing that the small depression of approximately one-quarter-inch depth was a trivial defect as a matter of law."); Werner v. Health, 96 A.D.3d 1569, 1570 (4th Dep't 2012)("the allegedly dangerous condition was no more than a 'nickel size' indentation in the linoleum-tiled corridor" was trivial).

Furthermore, the minimal increase in safety gained by forcing landowners to repair trivial defects in their premises would be entirely outweighed by the incredible cost associated with such an enterprise. Expanding liability by enlarging the duty of private landowners to ensure no trivial defects exist in interior spaces would inevitably lead to the proliferation of

claims and unlimited, insurer-like liability. Moreover, if every hairline crack in a hallway floor or chip off a linoleum tile could result in a significant jury verdict, liability insurance premiums would skyrocket.

Finally, requiring perfect walking surfaces to avoid liability would put tort law in substantial conflict with contract law. Established principles of contract law only require substantial performance by contractors. Nieman-Irving & Co. v. Lazenby, 263 N.Y. 91, 94 (1933)("Though there be defects or omissions in the complete performance of the contractor's stipulated obligation, there may be a recovery upon proof of substantial performance where the omissions and defects are trivial and innocent and can be atoned for by the allowance of the resultant change.") If trivial defects in walking surfaces can give rise to tort liability, landowners would either have grounds to refuse payment for less than perfect work, or they would be forced to repair less than perfect work without being able to recover the cost from the delinquent contractor. DANY respectfully submits that given the potential substantial dislocations that would naturally result from plaintiff's "modest proposal," this Court should affirm the application of trivial defect analysis to private landowners and defects in interior spaces.

CONCLUSION

For the foregoing reasons, this Court should reject plaintiff's suggestion to limit the trivial defect rule to open areas owned by municipalities.

Dated: Jericho, New York
July 10, 2015

Respectfully submitted,

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