

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24  
Justice

	x	Index
PEGGY EGAR, et al.		Number <u>2849</u> 2006
- against -		Motion
CONGREGATION TALMUD TORAH, et al.		Date <u>December 2,</u> 2008
	x	Motion
		Cal. Number <u>5 &amp; 6</u>
		Motion Seq. No. <u>3 &amp; 4</u>

The following papers numbered 1 to 25 read on these separate motions by defendants Congregation Talmud Torah, Congregation Talmud Torah Kneseth Israel, Congregation Kneseth Israel, Congregation Kneseth Israel of Far Rockaway and Lawrence, and The Community Eruv Committee of Far Rockaway (hereinafter referred to collectively as Congregation) for summary judgment dismissing plaintiffs' complaint and any cross claims asserted against them, and by defendants Episcopal Health Services, Inc., St. John's Episcopal Hospital and St. John's Episcopal Hospital South Shore (hereinafter collectively referred to as Hospital) for the same relief.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	1-9
Answering Affidavits - Exhibits .....	10-19
Reply Affidavits .....	20-25

Upon the foregoing papers it is ordered that these motions are consolidated and determined as follows:

Plaintiff Peggy Egar was allegedly injured on March 31, 2003 at 12:00 P.M., when she tripped and fell down at the ramp of the Hospital's teaching center located at 327 Beach 19<sup>th</sup> Street, Far Rockaway, New York. Plaintiff attributes her accident to an "eruv" wire which had fallen across the ramp causing her to trip and fall.

An eruv, under Jewish law, is an unbroken physical delineation of an area. It is created from natural barriers or from wires

strung across poles. This device allows an observant Jewish person on the Sabbath to carry or push objects from his or her residence, i.e., private property, onto public property and vice versa, activities such as a person would be prohibited from doing otherwise by creating the fiction of a communal "private" domain. Although its use is specifically for the Sabbath, the eruv is maintained throughout the year by observant Jews.

Herein it is undisputed that the subject eruv was maintained by the Congregation and that the Hospital permitted the eruv to be placed on its property.

A plaintiff in a slip-and-fall case must demonstrate that the defendant created the condition which caused the accident, or that the defendant had actual or constructive notice of the condition (Kraemer v K-Mart Corp., 226 AD2d 590 [1996]). 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 (Gordon v American Museum of Natural History, 67 NY2d 836 [1986]). Thus, in the absence of proof as to how long the eruv wire was on the ramp, there is no evidence to permit an inference that the Congregation or Hospital defendants had constructive notice of the condition (see Kershner v Pathmark Stores, Inc., 280 AD2d 583 [2001]; McDuffie v Fleet Fin. Group, 269 AD2d 575 [2000]; Maguire v Southland Corp., 245 AD2d 347 [1997]).

In the instant case, plaintiffs contend that a question of fact exists as to whether the eruv constitutes a dangerous condition because the eruv wire fell in a different location approximately one year prior to the accident, and that single incident gave defendants constructive notice of the hazard which caused plaintiff Peggy Egar's accident. It is true that where a defendant has actual knowledge of a recurrent dangerous condition, the defendant can be charged with constructive notice of each reoccurrence of that condition (see Perlongo v Park City 3 & 4 Apartments, Inc., 31 AD3d 409 [2006]; Batista v KFC Nat. Management Co., 21 AD3d 917 [2005]; Fielding v Rachlin Management Corp., 309 AD2d 894 [2003]). The evidence relied upon by the plaintiffs of the single occurrence to raise a triable issue of fact is not sufficiently time or site-specific to support a claim of constructive notice (see Yearwood v Cushman & Wakefield, Inc., 294 AD2d 568 [2002]; see also Dember v Winthrop Univ. Hosp., 272 AD2d 431 [2000]; McDuffie v Fleet Fin. Group, supra).

Herein, the defendants established their entitlement to judgment as a matter of law by submitting proof that the length of time for which the downed eruv wire existed was unknown (see

Izrailova v Rego Realty, 309 AD2d 902 [2003]; Chemont v Pathmark Supermarkets, 279 AD2d 545 [2001]; Seneglia v FPL Foods, 273 AD2d 221 [2000]). In its thorough review of the record and parties' submissions, the court finds that defendants have made a prima facie showing of their entitlement to summary judgment dismissing the complaint. Plaintiffs, in response, have failed to rebut said showing with admissible evidence sufficient to raise a legitimate question of fact requiring a trial of this action. Here, there is no evidence in the record that the defendants or their agents created an allegedly dangerous condition or that defendants were made aware of any such condition which could have caused plaintiff to trip and fall. The single incident of the eruv falling a year before this incident certainly does not constitute evidence of a regularly recurring condition of which defendants must be aware (see Espinal v New York City Housing Authority, 215 AD2d 281 [1995]). Moreover, no notice can be inferred where, as here, plaintiffs have failed to demonstrate that any prior complaints of the fallen eruv on March 31, 2003 were made known to the defendants (see Dane v Taco Bell Corp., 297 AD2d 274 [2002]; Smith v Funnel Equities, 282 AD2d 445 [2001]). Furthermore, in the absence of an expert's affidavit, the plaintiffs' argument that defendant Congregation created a dangerous condition by the way it allegedly attached the eruv wire to the Hospital is entirely speculative (Lopez v Ins. Co. of N. Am., 289 AD2d 205 [2001]; Madtes v Town of Brookhaven, 275 AD2d 442 [2000]; Mendes v Whitney-Floral Realty Corp., 216 AD2d 540 [1995]; see also Holy Name of Jesus R.C. Church v New York City Tr. Auth., 28 AD3d 520 [2006]).

Accordingly, the summary judgment motions of defendants Congregation and Hospital are both hereby granted in their entirety.

Dated: April 16, 2009

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AUGUSTUS C. AGATE, J.S.C.