

SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3**

**Present: HON. UTE WOLFF LALLY
Justice**

**CONCETTA PANARIELLO and EUGENE
PANARIELLO,**

Plaintiffs,

-against-

YONKERS RACING CORP.,

Defendant.

**Motion Sequence #1
Submitted September 13, 2011
XXX**

INDEX NO: 508/10

The following papers were read on this motion for summary judgment:

**Notice of Motion and Affs.....1-3
Affs in Opposition.....4&5
Affs in Reply.....6&7**

Upon the foregoing papers it is ordered that this motion by the defendant, for an order pursuant to CPLR 3212 granting summary judgment in its favor and dismissing the plaintiffs' complaint, is granted.

This is an action to recover money damages for personal injuries allegedly sustained by the plaintiff, Concetta Panariello, on July 15, 2007. Plaintiff Eugene Panariello, her husband, has asserted a derivative cause of action. Plaintiff, Concetta Panariello, alleges that she was caused to trip and fall on a ramp on the first floor of defendant's casino premises as a result of the negligence of the defendant in the

installation, operation, ownership and control of the ramp area. It is claimed that the defendant failed to properly differentiate the change of elevation due to the color of the carpeting in that area.

Defendant seeks summary judgment and dismissal of the plaintiffs' claims asserted against it on the grounds that the ramp and carpeting covering same where the plaintiff allegedly tripped was not inherently dangerous and was open and readily observable by the reasonable use of one's senses.

Upon the record presented, the defendant has established entitlement to summary judgment. Summary judgment should only be granted where there are no material and triable issues of fact. (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395; *Paulin v Needham*, 28 AD3d 531; *Stretch v Tedesco*, 263 AD2d 538; *Krupp v Aetna Life & Cas. Co.*, 103 AD2d 252).

In order to establish the existence of a *prima facie* case of negligence, a plaintiff must demonstrate that there was a duty owed by the defendant to the plaintiff and that the breach of that duty was the proximate cause of the injury to the plaintiff. (*Comack v VBK Realty Associates, Ltd.*, 48 AD3d 611; *Nappi v Inc. Vil. of Lynbrook*, 19 AD3d 565). The courts have long recognized that there is no duty on the part of the landowner to warn about an open and obvious change in elevation as it is a condition that is "readily observable by those employing the reasonable use of their senses." (*Bastone v 1144 Yonkers Ave., Inc.*, 266 AD2d 327; see also, *Paulo v Great Atl. & Pac. Tea Co.*, 233 AD2d 380; *Ackermann v Town of Fishkill*, 201 AD2d 441; *Tarricone v State of New York*, 175 AD2d 308). Therefore, the plaintiffs' contention that the defendant failed to warn about the

condition is inconsequential.

The plaintiffs have also failed to come forward with competent evidence demonstrating that the ramp and carpeting itself was defective and dangerous. Absent the affidavit of an expert, there is no proof that the condition was inherently dangerous and therefore, the plaintiffs have not raised an issue of fact sufficient to defeat this motion (*Zuckerman v City of New York*, 49 NY2d 557, 561). This is especially so, in light of plaintiff Concetta Panariello's inconclusive testimony at her examination before trial, as to exactly what condition caused her to fall.

Therefore, defendant's motion for an order pursuant to CPLR 3212 granting summary judgment, and dismissing plaintiffs' complaint, is granted.

Dated: NOV 14 2011



UTE WOLFF LALLY, J.S.C.

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