IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

CHRISTY CALE and BRUCE CALE,	:	
	:	
Plaintiffs,	:	C.A. No. SK09C-04-050 WLW
	:	
v.	:	
	:	
GROTTO PIZZA, INC.,	:	
	:	
Defendant/Third-Party Defendant,	:	
	:	
v.	:	
	:	
DAISY CONSTRUCTION CO., INC.,	:	
	:	
Third-Party Defendant, Fourth-Party Plaintiff,	:	
	:	
v.	:	
	:	
SAM'S CONSTRUCTION, LLC.,	:	
	:	
Fourth-Party Defendant.	:	

Heard: August 12, 2011
Decided: September 1, 2011

ORDER

Upon Daisy Construction Company, Inc.'s
Motion for Summary Judgment.
Granted.

Douglas B. Catts, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware; attorneys for Plaintiffs Christy and Bruce Cale.

Robin M. Grogan, Esquire of Bifferato Gentilotti, LLC, Wilmington, Delaware; attorneys for Defendant Grotto Pizza, Inc.

Armand J. Della Porta, Jr., Esquire of Marshall Dennehey Warner Coleman & Goggin, Wilmington, Delaware; attorneys for Third-Party Defendant Daisy Construction Company, Inc.

Colin Shalk, Esquire of casarino Christman Shalk Ransom & Doss, P.A., Wilmington, Delaware; attorneys for Fourth-Party Defendant Sam's Construction LLC.

Witham, R.J.

Third-Party Defendant has filed a motion for summary judgment. For the reasons set forth in this order, the motion is granted.

FACTS

On May 6, 2007, Christy Cale ("Cale" or "Plaintiff") fell as she exited a restaurant operated by Grotto Pizza, Inc. ("Grotto" or "Defendant") in Rehoboth Beach. She asserts that she tripped because the toe of her shoe caught in an uneven space where the restaurant adjoins the fronting sidewalk. She also claims that the fall was caused by the fact that the sidewalk was not perfectly even with the floor of Grotto Pizza's restaurant. Plaintiff has filed a tort action against Defendant. Plaintiff's husband, Bruce Cale, has filed an accompanying loss of consortium action.

The sidewalk adjoining the Grotto Pizza restaurant was installed during the Rehoboth Avenue Streetscape Project, which was carried out about one year before Plaintiff's fall. Daisy Construction, Inc. was the general contractor for the project. It hired a subcontractor, Sam's Construction, LLC, to install the sidewalk.

Plaintiff has submitted pictures of the sidewalk that were taken several weeks after the accident. The pictures show a small "hole" in the sidewalk. There is no other physical evidence concerning the sidewalk because Grotto performed a subsequent remedial measure two months after the accident by grinding the sidewalk down.[1]

[1] Neither is there any eye-witness testimony concerning the cause of the fall. Plaintiff testified that she felt her toe catch on something. It was not until several weeks after the accident, when Plaintiff's husband revisited the scene to take photographs, that Plaintiff decided that her toe probably caught in the small "hole" in the sidewalk.

PROCEDURAL HISTORY

Plaintiff filed a negligence action, alleging that Defendant failed to provide safe ingress and egress to the restaurant. Defendant filed a third party claim against Daisy, alleging that any defects in the sidewalk were due to negligent construction. Daisy then filed a fourth party complaint against Sam's, claiming that the subcontractor was ultimately responsible for the alleged defects. Daisy has filed a motion for summary judgment, which is now before the Court.

Standard of Review

Summary Judgment should be granted if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[2] The facts must be viewed in the light most favorable to the non-moving party.[3] Summary Judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.[4] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.

DISCUSSION

The third and fourth party defendants argue that there is no reason to believe

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[2] Super. Ct. Civ. R. 56(c).

[3] *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. Ct. 1995).

[4] *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

that they built the sidewalk in a defective manner (*i.e.* that they did not breach the duty of reasonable care). Grotto has failed to support its third party claim with evidence tending to show that the allegedly defective condition of the sidewalk (the "hole" or the alleged unevenness) was the result of negligent construction. The only physical evidence of the condition of the sidewalk comes from photographs taken several weeks after the accident. There are no earlier photos nor is there any testimony tending to show that the sidewalk was defective at the time when construction was completed approximately one year before Plaintiff's accident.

Grotto assumes that any defect in the sidewalk must be due to construction since its employees would have noticed if the sidewalk had deteriorated since that time. The argument attempts to transform the absence of evidence into positive evidence of breach. The non-moving party is entitled to all of the inferences on a motion for summary judgment. However, Grotto's argument is not based on evidence, but on an unwarranted assumption that its employees would have–but did not–notice any changes in the sidewalk. Grotto has failed to show any evidence of breach. Therefore, it cannot establish a prima facie case of negligence against Daisy. Summary judgment against the third party claim is proper. Moreover, this determination renders the fourth party complaint moot because it was predicated on Daisy's liability to Grotto.

CONCLUSION

For the foregoing reasons, third party defendant's motion for summary judgment is ***granted***.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh
oc: Prothonotary
xc: All Counsel