SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

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SONDRA MARKS,

Plaintiff,

- v -

79TH STREET TENANTS CORP. and
56-79 I.G. ASSOCIATES, L.P.,

Defendant.

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INDEX NO. 153486/2015

MOTION DATE 01/16/2019

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 165, 169, 170, 171, 172, 173, 174, 180, 181, 182, 183, 184

were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury action, the plaintiff alleges that on August 6, 2014, she tripped and fell on an uneven sidewalk surface abutting the defendants' respective properties at 425 and 435 East 79th Street in Manhattan. Defendant 79th Street Tenants' Corp., owner of 415-425 East 79th Street, now moves for summary judgment dismissing the complaint pursuant to CPLR 3212. The plaintiff opposes the motion. The instant motion is granted. Defendant 56-79 I.G. Associates, L.P. moves separately for the same relief, and that motion is also granted, in a separate order (MOT SEQ 006).

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824, 833 (2014); Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez, supra, at 324; Zuckerman, supra, at 562.

A landowner and its managing agent have a duty to maintain premises in a reasonably safe condition. See Gronski v County of Monroe, 18 NY3d 374 (2011); Basso v Miller, 40 NY2d 233 (1976); Westbrook v WR Activities Cabrera-Markets, 5 AD3d 69 (1st Dept. 2004). Landowners and their agents may be held liable for failing to maintain premises if they either created a dangerous condition thereon or had actual or constructive notice thereof within a sufficient time prior to the accident to be able to remedy the condition. See Parietti v Wal-Mart Stores, Inc., 29 NY3d 1136 (2017). However, as to cases of mis-leveled sidewalk cases, the Court of Appeals has held that "not every injury allegedly caused by an elevated brick or slab need be submitted to a jury." Trincere v County of Suffolk, 90 NY2d 976, 977 (1997).

In Trincere, the Court explained that the determination of whether a dangerous condition or defect exists depends upon the facts and circumstances of each case and in "in some instances, the trivial nature of the defect may loom larger than another element." Id. Thus, it has been held that summary judgment should have been granted in favor of a defendant landowner where the plaintiff fell after her foot got caught on a one-half inch wide gap and a one-half inch height differential between two sidewalk flags. See Schwartz v Bleu Evolution Bar & Rest. Corp., 90 AD3d 488 (1st Dept. 2011). There, the court similarly found the "gap between the flags and the height differential was trivial and the plaintiff has not come forward with evidence to show that the defect presented a significant hazard despite being de minimus." Thereafter, in Mangar v Parkash 180 LLC, 99 AD3d 607 (1st Dept. 2012), the First Department held that the defendants "established that the half-inch height differential at the top of a two-step exterior stairway was trivial and non-actionable" and that the plaintiff, who had traversed the area for years, raised no triable issue of fact. An even great height differential, one of ¾", between two concrete slabs was found to be trivial and non-actionable in Zalkin v City of New York, 36 AD3d 801 (2nd Dept. 2007). In Castro v City of New York, 101 AD3d 573 (1st Dept. 2012), the Court affirmed the dismissal of a complaint where photographs established that the claimed sidewalk defect was "trivial in nature, and did not amount to a hazard." See also Hutchinson v Sheridan Hill House Corp., 110 AD3d 552 (1st Dept. 2013) [metal screw protruding from sidewalk which was 5/8 " in diameter and protruded about 3/16 " above surface was "minor height differential" which "alone is insufficient to establish the existence of a dangerous condition"]. Thus, in cases where the alleged defect is trivial, summary judgment should be denied only where, in opposition to the defendant's motion, the plaintiff raises a triable issue as to whether the trivial defect nonetheless posed a hazard. See e.g Boynton v Haru Sake Bar, 107 AD3d 445 (1st Dept. 2013) [plaintiff raised triable issue with evidence that raised hinges on

cellar door also were movable]; Gomez v Congregation K'Hal Adath Jeshurun, Inc., 104 AD3d 456 (1st Dept. 2013) [triable issue raised as to whether ½" differential between sidewalk flags was "substantial defect" under local laws and whether defendant had sufficient notice].

Here, the defendant has established its *prima facie* entitlement to summary judgment by demonstrating that the alleged defect was trivial. The defendant submits the plaintiff's testimony in which she states that the accident occurred at 10:30 a.m. on a clear day as she was walking to an appointment with her hairdresser. She was wearing sneakers and felt as if she "stubbed her toe" or "caught her foot". She did not see the alleged defect in the sidewalk until after she fell. In her complaint, Bill of Particulars, and deposition testimony, the plaintiff described the sidewalk where she fell as "uneven". Each of the two subject slabs was in front of one defendant's property, such that the height differential was between the property lines.

Jose Rafael Mendez, the resident superintendent at the defendants' building, 425 East 79th Street, for the past 23 years, testified at his deposition that he inspects the area for tripping hazards every day and never noticed any problem with or received any complaint about that area of the sidewalk, never had any repairs done to that area and heard of no prior accidents involving this sidewalk. Mendez submitted an affidavit saying the same.

In his affidavit, licensed professional engineer Andrew Yarmus, the expert hired by defendant 79th Street Tenants' Corp., states that upon inspecting the sidewalk, he measured the height differential between the two slabs to be 7/16" and, being less than ½", is not a "substantial defect" or "trip hazard" under the New York City Administrative Code 19-152(a-1) and the Rules of the City of New York, Title 34 chapter 2 (34 RCNY 2-09[5][iv]). It was his professional opinion, to a reasonable degree of engineering certainty, that the area was no a tripping hazard, that the sidewalk was maintained in generally excellent condition and there was no condition on the defendant's property that could have proximately caused the plaintiff's accident. The two photographs submitted by the defendant with the Yarmus affidavit show no discernible height differential between the subject slabs.

In opposition, the plaintiff failed to establish any basis to find that the trivial defect posed a hazard to pedestrians. The plaintiff submitted an affidavit of a licensed professional engineer, Scott Silbermann, who visited the location on January 22, 2015, and June 27, 2018. In 2015, he measured the expansion joint or gap between slabs as about 1 ¼" wide, and 1" deep, although

the height differential was the plaintiff's theory of liability. Silbermann described the space between the concrete slabs as "an expansion joint [that] creates too large of a gap and too deep of a trench for a public sidewalk or nay surface persons are expected to walk." In the affidavit, Silbermann also estimated the height differential to be "greater than a half-inch" in violation of various local laws. He pointed out that, while the height differential remained the same between 2015 and 2018, the gap had been filled with sealant at a sometime between Yarmus' inspection in early 2018 and his own later that year. With that affidavit, the plaintiff submits several photographs of the area, some taken from very close range and with a ruler in the frame for reference. However, his affidavit and photos do not establish that Silbermann was actually measuring the exact location where the plaintiff says she fell. Even if his measurements are accurate, this, alone would be insufficient to show that the area was a dangerous or hazard.

As observed by the defendant in reply, the plaintiff's theory of liability as per her complaint, Bill of Particulars and deposition was that the subject slabs were mis-leveled, not that there was any excessive gap between them, which is the focus of Silbermann's opinion. The defendant also provides the plaintiff's expert disclosure notice for Silbermann which refers only to a height differential, and not to any gap between the slabs. Thus, the Silberman affidavit alone is insufficient to warrant denial of the defendant's motion for summary judgment. Nothing more is submitted by the plaintiff to meet her burden on the motion.

Accordingly, and upon the foregoing papers, it is

ORDERED that the motion of defendant 79th Street Tenants' Corp. for summary judgment dismissing the complaint is granted, and it is further

ORDERED that the Clerk shall enter judgment dismissing the complaint as against that defendant.

This constitutes the Decision and Order of the court.

12/18/2019
DATE

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

CHECK ONE:
[X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
[X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER

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