

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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ASIMINA ANTONAROS,

Plaintiff,

Index No: 16174/07  
Motion Date: 4/2/08  
Motion Cal. No: 1  
Motion Seq. No: 1

-against-

CUMBERLAND FARMS, INC.,

Defendant.

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The following papers numbered 1 to 10 read on this motion for an order, pursuant to CPLR § 3212, granting summary judgment and dismissing the complaint of plaintiff as against defendant Cumberland Farms, Inc.

|   | PAPERS<br>NUMBERED |
|---|--------------------|
| Notice of Motion-Affidavits-Exhibits..... | 1 - 4              |
| Affirmation in Opposition.....            | 5 - 8              |
| Reply Affirmation-Exhibits.....           | 9 - 10             |

Upon the foregoing papers, it is hereby ordered that the motion is disposed of as follows:

This is a personal injury action commenced by plaintiff to recover damages for injuries she allegedly sustained as the result of a trip and fall accident on the sidewalk in front of the premises leased by defendant, and subleased by L & R Service Station, defendant in a companion arising from the same accident, as she traversed the area on July 3, 2004. Defendant moves for summary judgment dismissing the complaint, alleging that as plaintiff is unable to identify the cause of her fall and there is no notice of any defect, summary judgment is warranted.<sup>1</sup>

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<sup>1</sup> In the companion action *Asimina Antonaros v. L & R Service Station, Inc.*, pending in this court under Index No: 7130/06, L & R Service Station moved for summary judgment on the ground that the defect was too trivial to be actionable. By order of the Court dated February 25, 2008 [Rosengarten, J.], the motion was denied for L & R Service Station’s failure to eliminate triable issues of fact by failing to submit “any evidence of the measurement of the level difference of the sidewalk slabs where plaintiff fell.”

Summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1<sup>st</sup> Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2<sup>nd</sup> Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, *supra*.

Moreover, it is well established that to impose liability in a trip and fall context for injuries resulting from an allegedly defective condition, a plaintiff must demonstrate that defendant either created the condition that caused the accident, or had actual or constructive notice of it. “Where there is no indication in the record that the defendant created the alleged dangerous condition or had actual notice of it, the plaintiff must proceed on the theory of constructive notice.” Rabadi v. Atlantic & Pacific Tea Co., Inc., 268 A.D.2d 418, 419 (2<sup>nd</sup> Dept. 2000); *see, also*, Ramos v. Castega-20 Vesey Street, LLC, 25 A.D.3d 773 (2<sup>nd</sup> Dept. 2006); Klor v. American Airlines, 305 A.D.2d 550 (2<sup>nd</sup> Dept. 2003); O’Callaghan v. Great Atlantic & Pacific Tea Co., 294 A.D.2d 416 (2<sup>nd</sup> Dept. 2002). “To constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time prior to the accident to permit the defendant’s to discover and remedy it.” See, Frazier v. City of New York, 47 A.D.3d 757 (2<sup>nd</sup> Dept. 2008); Green v. City of New York, 34 A.D.3d 528, 529 (2<sup>nd</sup> Dept. 2006); *see*, Stone v. Long Island Jewish Medical Center, Inc., 302 A.D.2d 376 (2<sup>nd</sup> Dept. 2003); Blaszczyk v. Riccio, 266 A.D.2d 491 (2<sup>nd</sup> Dept. 1999); Russo v. Eveco Development Corp., 256 A.D.2d 566 (2<sup>nd</sup> Dept. 1998); Dima v. Breslin Realty, Inc., 240 A.D.2d 359 (2<sup>nd</sup> Dept.1997); Kraemer v. K-Mart Corp., 226 A.D.2d 590 (2<sup>nd</sup> Dept.1996). Further, where the defendant moves, *inter alia*, for summary judgment dismissing the complaint based upon lack of notice, “the defendant is required to make a *prima facie* showing affirmatively establishing the absence of notice as a matter of law.” White v. L & M Corporate, Inc., 24 A.D.3d 659 (2<sup>nd</sup> Dept.2005); *see*, Beltran v. Metropolitan Life Ins. Co., 259 A.D.2d 456 (2<sup>nd</sup> Dept.1999).

Here, defendant proffers the deposition transcript of plaintiff in the companion action in which she testified that she fell on a raised portion of the sidewalk. Defendant alleges that plaintiff does not know how she tripped, is unable to give any specifications as to the defect, never looked at the sidewalk to see how far it was raised, and failed to take measurements of the alleged differential. Defendant, relying on Zalkin v. City of New York, 36 A.D.3d 801 (2<sup>nd</sup> Dept. 2007) and Rammetta v. County of Nassau, 296 A.D.2d 485 (2<sup>nd</sup> Dept. 2002), Appellate Division, Second Department cases, and their progeny, further contends that plaintiff is not able to identify any defect which caused her accident, and any differential in the sidewalk is trivial. The Court in Zalkin stated, and defendant relies, upon the following [36 A.D.3d 801, 801-802]:

[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" (*Hargrove v Baltic Estates*, 278 AD2d 278 [2000]; see *Hagood v City of New York*, 13 AD3d 413 [2004]). [] The defendant established its entitlement to judgment as a matter of law by demonstrating that, under the circumstances, the 3/4 of an inch difference in the height elevation between the edge of the concrete slab which had caused the plaintiff to fall and the adjacent concrete slab was too trivial to be actionable (see *Morris v Greenburgh Cent. School Dist. No. 7*, 5 AD3d 567, 568 [2004]; *Riser v New York City Hous. Auth.*, *supra*).

Further, the Rammetta Court found that the raised asphalt patch upon which plaintiff tripped "did not constitute a trap or nuisance and was too trivial to be actionable as a matter of law." Id. at 486. Based upon the aforementioned, defendant states that "plaintiff has not established any measurement of height difference in the elevation of the sidewalk slabs which she alleges were raised and caused her to trip and fall. Plaintiff is unable to support any argument that the sidewalk in question is greater than 3/4 of an inch and this is not a trivial defect." Further, defendant contends that the summary judgment application which was denied in the companion action on the basis that L & R Service Station failed to demonstrate that the subject defect was trivial is not the law of the case, and therefore distinguishable in this matter as it seeks summary judgment on the basis that plaintiff cannot identify any defective condition causally related to her action. Thus, defendant asserts that it is entitled to summary judgment and dismissal of the complaint.

From the outset, this Court rejects defendant's attempt to differentiate between the summary judgment application which was denied in the companion action on the basis that L & R Service Station failed to demonstrate that the subject defect was trivial, by alleging that it seeks summary judgment in the instant case on the basis that plaintiff cannot identify any defective condition causally related to her action. "The law of the case doctrine 'is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned' [Martin v. City of Cohoes, 37 N.Y.2d 162, 165, 371 N.Y.S.2d 687, 332 N.E.2d 867(N.Y. 1975)]." Oyster Bay Associates Ltd. Partnership v. Town Bd. of Town of Oyster Bay, 21 A.D.3d 964, 966 (2<sup>nd</sup> Dept. 2005); see, Mosher-Simons v. County of Allegany, 99 N.Y.2d 214 (N.Y. 2002). Indeed, it is fundamental that one Judge may not review or overrule an order of another Judge of coordinate jurisdiction, and the decision of the Judge who first rules in a case binds all courts of coordinate jurisdiction as the law of the case, regardless of whether a formal order was entered. See, Messinger v. Messinger, 16 A.D.3d 562 (2005). Here, in the underlying action, Justice Rosengarten, in denying L & R Service Station's summary judgment motion, stated the following:

In support of this motion the movant has not submitted any evidence of the measurement of the level difference of the sidewalk slabs where plaintiff fell. Furthermore, the picture submitted by plaintiff

in opposition to the motion shows an uneven concrete level on at least two sides. Taking onto account all the factors stated above, summary judgment must be denied as issues of fact remain for trial.

Consequently, it is this Court's finding that it is the law of the case that there are issues of fact to be determined with respect to whether the defect upon which plaintiff tripped is trivial. Arguendo, even if the law of the case doctrine is inapplicable to the instant application for summary judgment, defendant has failed, in the first instance, to demonstrate a prima facie entitlement to summary judgment by eliminating triable issues of fact from the instant action.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 853 (1983); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). “[O]nly the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment.” Rotuba Extruders v. Ceppos, *supra*, 46 N.Y.2d at 231; Coughlin v. Bartnick, 293 A.D.2d 509 (2d Dept. 2002). Inherent in the court's consideration of a motion for summary judgment is the requisite determination that there are no issues of fact, thus the threshold inquiry in determining a summary judgment motion is the sufficiency of the moving papers, with consideration only given to opposing papers once defendant makes a prima facie showing of his entitlement to judgment. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. *See*, Zuckerman v. City of New York, *supra*.

“Generally, the issue of whether a dangerous or defective condition exists depends on the particular facts of each case, and is properly a question of fact for the jury (citations omitted). However, a property owner may not be held liable for trivial defects, not constituting a trap or a nuisance, over which a person might merely stumble, stub his or her toes, or trip (citation omitted).” Ayala v. Gutin, 49 A.D.3d 677 (2<sup>nd</sup> Dept. 2008). “Of course, in some instances, the trivial nature of the defect may loom larger than another element. Not every injury allegedly caused by an elevated brick or slab need be submitted to a jury (citations omitted). However, a mechanistic disposition of case based exclusively on the dimension of the sidewalk defect is unacceptable.” Trincere v. County of Suffolk, 90 N.Y.2d 976, 977-978 (1997); *see also*, Ayala v. Gutin, 49 A.D.3d 677 (2<sup>nd</sup> Dept. 2008); Outlaw v. Citibank, N.A., 35 A.D.3d 564 (2<sup>nd</sup> Dept. 2006); Taussig v. Luxury Cars of Smithtown, Inc., 31 A.D.3d 533 (2<sup>nd</sup> Dept. 2006). “In determining whether a defect is trivial, a court must examine all of the facts presented, including the ‘width, depth, elevation, irregularity and appearance of the defect along with the ‘time, place and circumstance’ of the injury’ (citations omitted).” Zalkin v. City of New York, 36 A.D.3d 801, 801-802 (2<sup>nd</sup> Dept. 2007).

In the case at bar, other than conjecture and supposition, the record is devoid of any evidence which would remotely demonstrate that the alleged defect is trivial, and therefore, not actionable. Indeed, defendant points to the fact that plaintiff failed to take measurements of the differential found on the subject sidewalk, nevertheless, in seeking to eliminate all triable issues, defendant has failed

to set forth the “width, depth, elevation, irregularity and appearance of the defect,” which the Zalkin Court considered in finding a non-actionable defect in that case. Furthermore, even if defendant moves for summary judgment on the basis that plaintiff cannot identify any defect which caused her fall, which this Court has rejected, it still has failed to proffer evidence which would eliminate triable issues of fact on this basis, as plaintiff clearly identified the alleged defect in a photograph and indicated at her deposition in the companion action that she fell as a result of the sidewalk being “raised” and not “straight.” Accordingly, as there are issues of fact to be determined, the motion for summary judgment by defendant Cumberland Farms, Inc. is denied.

Dated: June 2, 2008

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J.S.C.