At a Special Term of the Supreme Court of the State of New York held in and for the County of Oswego on May 10, 2023.

PRESENT: **HON. SCOTT J. DELCONTE**
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
OSWEGO COUNTY

ABBY RESTANI and **THOMAS RESTANI,**

Plaintiffs,

v.

UNIVERSAL PROPERTIES OF NEW YORK, LLC; ST. MARY'S RECTORY; and **ST. ANNE MOTHER OF MARY FOOD PANTRY,**

Defendants.

Index No. EFC-2020-1010

DECISION and ORDER
(Motion No. 2)

APPEARANCES:

MacKenzie Hughes LLP, *by Stephen S. Davie, Esq., for Defendants*

Finkelstein & Partners, LLP, *by George A. Kohl, II, Esq., for Plaintiffs*

This is a personal injury action arising out of an accident at the entrance of a food pantry operated by Defendants St. Mary's Rectory and St. Anne Mother of Mary Food Pantry and owned by Defendant Universal Properties of New York, LLC. Plaintiffs Abby and Thomas Restani allege that Ms. Restani fell and injured her ankle when she stepped into a three-to-four inch depression concealed from view underneath a mat laid on the gravel driveway near the pantry's public entrance. Defendants now move for summary judgment and dismissal of the complaint (Motion No. 2), arguing that they did not create the concealed depression and did not have actual or constructive notice of it. Plaintiffs oppose the motion, arguing that there are triable questions of fact. For the reasons set forth below, Defendants' motion for summary judgment is **DENIED.**

I.

On September 2, 2020, Plaintiff Abby Restani and her spouse, Thomas Restani, commenced this personal injury action after Ms. Restani fell while exiting the food pantry in Mexico, New York on July 29, 2019 (NYSCEF Doc. 1). The food pantry, which was affiliated with the Catholic Church in Mexico, had recently relocated to the property owned by Defendant Universal Properties, and opened four months earlier in April of 2019 under a temporary certificate of occupancy (NYSCEF Docs. 67, 70). Plaintiffs allege that, as Ms. Restani walked down from a wooden platform onto the driveway leaving the pantry, she stepped into a depression in the driveway just outside the public entryway that was concealed underneath a memory foam mat, which caused her to fall and seriously injure her ankle (*Id.*).

At that time of the accident, the pantry's driveway was constructed of rolled, compacted stone aggregate (NYSCEF Doc 67). It had been installed by a series of contractors and volunteers working for Defendant Universal Properties, and consisted of both purchased and donated stone (NYSCEF Docs. 69, 70 [several months later a poured driveway was installed]). At the time of the incident, a temporary four-inch-high wooden platform was positioned as a transition from the gravel driveway to the front door (*Id.*). Two memory foam entrance mats were placed in front of the entryway – one on the raised wooden platform and one on the gravel driveway – to catch dirt and alert people to the step (NYSCEF Docs. 69; 80).

At her deposition, Ms. Restani testified that she walked into the food pantry that day without any "trouble" and did not notice anything that she personally "considered dangerous or defective" (NYSCEF Doc. 67, p. 88). When she left the pantry, however, Ms. Restani stepped off of the platform and onto the mat that was on the driveway, and then fell. Ms. Restani testified: "I stepped onto the mat. There was a divot under the – under the mat, that caused my ankle to bulge to the right, and that's when I fell" (NYSCEF Doc. 67, p. 103]). Waiting for the ambulance to arrive, her son Thomas Restani moved the mat and observed a depression, which he described a three-to-four-inch-deep hole, about the size of a foot (NYSCEF Doc. 68, p. 68).

Discovery is complete, and Defendants now move for summary judgment dismissing the complaint, arguing that the gravel driveway and entrance were reasonably safe, there is no evidence that they created the alleged depression, and there is no evidence that they had constructive notice of the alleged defect. Ms. Restani opposes the motion, arguing that there are questions of fact as to the whether the depression was a dangerous condition, whether Defendants or their agents created that dangerous condition, and whether Defendants should have known about it.

II.

The fact that an accident happened does not mean that it was the result of negligence. "[T]rivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his [or her] toes, or trip over a raised projection," do not constitute a dangerous condition (*Liebl v Metropolitan Jockey Club*, 10 AD2d 1006, 1006 [2d Dept 1960]. Put simply, a property can contain trivial defects and still be reasonably safe. There is no *per se* rule as to what separates a trivial defect from a dangerous condition, and the courts on a summary judgment motion must consider all circumstances, "including the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury" (*Trincere v County of Suffolk*, 90 NY2d 976, 978 [1997]).

Here, Ms. Restani's son, Thomas, testified that after the accident he removed the foam mat and observed "a hole that had been dug out" beneath it that was "approximately three to four inches deep, about the size of a normal size foot" (NYSCEF Doc. 68, p. 69, 68). While Defendants zealously challenge the veracity of the witness' observation, "it is well settled that, [o]n a motion for summary judgment[,] the court must not weigh the credibility of witnesses unless it clearly appears that the issues are feigned and not genuine[,] and [a]ny conflict in the testimony or evidence presented merely raise[s] an issue of fact" (*Myer v University Neurology*, 133 AD3d 1307, 1308 [4th Dept 2015] [internal quotations omitted]).

Accordingly, viewing the testimony here in the light most favorable to Plaintiffs, the Court cannot conclude as a matter of law that a three-to-four-inch depression in a parking area directly in front of the entryway and concealed from view by a mat is too trivial to constitute a dangerous condition (*Gutierrez v Riverbay Corp.*, 262 AD2d 64, 64 [1st Dept 1999] ["The pictures of the two-inch depression in the walkway on defendant's property on which plaintiff slipped do not

demonstrate that it was a 'trivial' defect as a matter of law."]; *contra Figueroa v Haven Plaza Hous. Dev. Fund Co.*, 247 AD2d 210, 210 [1st Dept 1998] ["The shallow, gradual character of the depression, measured by plaintiff to be an inch and one-half is readily discernible in plaintiff's photographs … was trivial, and possessed none of the characteristics of a trap or snare."]). As such, Defendants have failed to meet their burden on summary judgment of establishing that the property was in a reasonably safe condition.

Similarly, Defendants have failed to meet their "burden of establishing that [they] did not create the alleged dangerous condition and did not have actual or constructive notice of it" (*Seferagic v Hannaford Bros. Co,* 115 AD3d 1230 [4th Dept 2014]). The uncontradicted testimony is that the men who constructed the stone driveway – the property owner's principal and a local contractor – were responsible for rolling and leveling the aggregate (NYSCEF Docs. 69-70). Further, the property owner's principal testified that there was digging and disturbance of the driveway in the vicinity of the alleged hole during the installation of the wooden platform (NYSCEF Doc. 70, pp. 65-66). Accordingly, it would be reasonable for the finders of fact in this action to conclude that the three-to-four inch depression the witness claims to have observed immediately after the accident was created by the either landlord or his agent when laying down the crushed stone, leveling the driveway, or setting the platform (*Backiel v Citibank, N.A.*, 299 AD2d 504, 506 [2d Dept 2002] ["An owner may be held vicariously liable for the negligence of its independent contractor because the owner in possession has retained control over the premises."]).

III.

Accordingly, upon due deliberation, it is hereby,

ORDERED that Defendants' motion for summary judgment (Motion No. 2) is **DENIED**.

Dated: May 10, 2023

HON. SCOTT J. DELCONTE, J.S.C.

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PAPERS CONSIDERED:

1. Defendants' Notice of Motion, dated February 28, 2023 (NYSCEF Doc. 62);
2. Attorney Affirmation of Stephen S. Davie, Esq., sworn to February 28, 2023, with Exhibits A through L, attached (NYSCEF Docs. 63-75);
3. Attorney Affirmation of George A. Kohl, II, Esq., sworn to April 17, 2023, with Exhibits A through C, attached (NYSCEF Docs. 78; 80-82); and
4. Reply Attorney Affirmation of Stephen S. Davie, Esq., sworn to April 27, 2023 (NYSCEF Doc. 83).