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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

CHARLOTTE SINCLAIR,

Plaintiff(s),

INDEX No. 1427/06

-against-

MOTION DATE: 9/5/07

GREAT LINCOLN, LLC, AURORA CONTRACTORS, INC., and DIVERSIFIED CONSTRUCTION CORP.,

Defendant(s).

MOTION SEQ. No. 1-MD

The following papers read on this motion:
Notice of Motion/Affirmation/Memorandum of Law/Exhibits
Plaintiff's Affirmation in Opposition/Exhibits
Reply
Defendants Affirmation in Opposition/Exhibits
Reply

In this action plaintiff CHARLOTTE SINCLAIR seeks damages for injuries sustained as a result of tripping and falling on the sidewalk adjacent to the CVS store, in the Great Lincoln Shopping Center, in Oceanside, New York.

GREAT LINCOLN seeks an Order granting it summary judgment contending that the crack of which Ms. SINCLAIR complains is only de minimus, and therefore not actionable. In the alternative, it argues that it had no duty to repair the crack as it was created by an independent contractor or the natural growth of tree roots. It is apparently undisputed that the crack is a crevice in the sidewalk located in the delineation between slabs, was several feet long.

Counsel for the moving defendants argues that summary judgment dismissing the action is appropriate as plaintiff cannot demonstrate what duty of the property owners was breached causing her injury. Counsel

notes that the plaintiff testified her left toe became caught in the crevice and caused her to trip. Counsel for GREAT LINCOLN argues that the crack in the sidewalk was both open and obvious and also, due to its lack or depth and width, it was de minimus.

GREAT LINCOLN produced the shopping center supervisor for deposition. He testified that the sidewalk was replaced in 2004, and that defendant AURORA subcontracted with DIVERSIFIED to do the job. He testified he had no role in the replacement and first noticed that a slab was raised about ½ of an inch after the incident. He testified that when he saw this, after plaintiff's fall, he placed cones in the area and contacted DIVERSIFIED to come and make repairs.

Defendant GREAT LINCOLN contends that based on the proof presented, it is entitled to summary judgment because there was no notice of any defect. It argues that there were no prior similar incidents and that there had been no prior complaints about the location. It argues that despite discovery having been completed, plaintiff has failed to establish any liability on its part. It argues that the plaintiff must establish a duty owed by the defendant and must demonstrate defendant failed in that duty. With no notice of a defective condition, the defendant argues that plaintiff has not established a duty which was breached. It also argues that it is entitled to summary judgment on its claim for indemnification from the co-defendants pursuant to their construction agreement.

The co-defendant AURORA CONTRACTORS and DIVERSIFIED CONSTRUCTION oppose the application arguing that the defect was not trivial as a matter of law. These defendants argue that it has not been established that GREAT LINCOLN owns the property, and owes plaintiff a greater duty than an abutting property owner. They argue that the tax maps on file for the location demonstrate that the sidewalk is actually part of GREAT LINCOLN's property. They also argue that there is a question of fact whether the sidewalk, constructed by DIVERSIFIED was defective due to its construction, or whether it became defective due to tree root expansion.

Counsel argues that these questions prohibit summary judgment for GREAT LINCOLN. These defendants offer no evidence to support their claim that the defect may have been caused by tree roots. Nor do these defendants argue that the indemnification clause in their contract is not enforceable.

In opposing the application plaintiff provides an affidavit from an engineer who states that the crack is not trivial. The plaintiff provides an affidavit from an engineer who states that the difference in elevation in between concrete slabs in violation of the Nassau County Department of Public Works standard specification of 3/8th of an inch. He also opines that upon inspection, tree roots were not the cause of the defect. (Opposition, Exh. A).

That portion of the defendant's motion seeking dismissal of the Complaint, is Denied.

The mere fact that plaintiff fell, even over a crack in pavement, does not impose liability or blame on the owner of the premises. There must be some demonstration that the defendants were at fault, either creating or having constructive notice of the defective condition. *Gordon, supra*; *Eddy v. Tops Friendly Markets*, 91 A.D.2d 1203 (4th Dept. 1983). The mere conclusions and unsubstantiated allegations of plaintiff are insufficient. *Zuckerman v. City of New York,* 49 N.Y.2d 557 (1980).

Counsel for the plaintiffs contends that the defendant property owners negligently created the crack in the sidewalk, or in the least, were negligent in letting the defect remain for an unreasonable period of time. There is some evidence presented supporting the contention that GREAT LINCOLN knew or should have known of the problem and should have corrected it.

This evidence is sufficient to demonstrate that there is a triable issue of fact which prevents summary judgment.

In order to succeed on a premises liability action, a plaintiff must establish that a defendant either created a condition, or had actual or constructive notice it existed, and failed to correct it in a reasonable time. To be considered constructive notice, a defect must be visible and apparent and must exist for a sufficient length of time prior to an accident to permit the defendant to discover and remedy it. *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 (1986). Plaintiff offers evidence that the defendants created the defect. The photos presented show the gap in between concrete slabs. Plaintiff's expert states these gaps are too wide and too deep pursuant to the applicable County regulations.

The Court finds that in this instance, there is a question of fact for the jury whether a dangerous or defective condition exists. *Marinaccio v. Le Chamburd Restaurant*, 246 AD2d 514 (2nd Dept. 1990), and that the plaintiff has demonstrated that there is a question of whether the alleged defect is not of a trivial nature

in order to provide an issue of fact for a jury. A trier of fact could determine that the alleged defect in sidewalks and walkways, possesses the characteristics of a trap or snare. *Trincere v. County of Suffolk*, 90 NY2d 976 (1997); *Guerrieri v. Suma*, 193 AD2d 647 (2nd Dept. 1993);*Marinaccio v. LeChambord Restaurant*, 246 AD2d 514 (2nd Dept. 1998); *Morris v. Greenburgh Cent. Sch. Dist.*, 2004 NY App. Div. Lexis 2714 (2nd Dept., March 15, 2004).

The Court cannot find as a matter of law that as depicted in the photographs, the alleged defect is too trivial to be actionable. *Tallis v. Fleet Bank,* 306 AD2d 400 (2nd Dept. 2003)*; Pennella v. 277 Bronx River Road Owners, Inc.*, 309 AD2d 793 (2nd Dept 2003)*; Riser v. New York City Housing Authority*, 260 AD2d 564 (2nd Dept. 1999); *Burstein v. City of New York*, 259 AD2d 579 (2nd Dept. 1999); *Santiago v. United Artists Communications, Inc.*, 263 AD2d 407 (1st Dept. 1999).

Based on the proof presented, the Court finds that there is a triable issue of fact with respect to defendants' liability, thus the defendants' application for summary judgment with respect to the plaintiff's Complaint is Denied.

Based on the proof presented, that portion of GREAT LINCOLN's motion seeking total indemnification from DIVERSIFIED and AURORA, is also Denied. There is no evidence presented rebutting the sworn statement of plaintiff's engineer who states that the defect was caused due to improper installation. Further, there are allegations that GREAT LINCOLN had actual and constructive knowledge of the complaint or condition, and failed to repair it within a reasonable time prior to the plaintiff's fall. Under these circumstances, GREAT LINCOLN cannot be indemnified for its own negligence.

It is, SO ORDERED.

Dated: Dec 10, 2007

HON. GEOFFREY J. O'CONNELL, J.S.C.