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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CAROL EDMEAD J.S.C. PART 39
Justice

Index Number : 116995/2005
HALAMPALAKIS, ELEFTHERIA
VS.
ROOSEVELT FIELD MALL
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 3/4/08
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

The instant motion and cross motion are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the application for an order granting summary judgment of defendants Simon Property Group, Inc., Simon Property Group, L.P., Roosevelt Field Mall, Simon Property Group, Simon's Roosevelt Field Mall, Simon Malls and Roosevelt Field a Simon Mall, **is granted** and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that the application of defendant Retail Property Trust for summary judgment dismissing the complaint, **is denied**; and it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiffs.

FILED
MAR 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/17/08

CAROL EDMEAD J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

if appropriate ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

ELEFTHERIA HALAMPALAKIS and GEORGE HALAMPALAKIS,

Plaintiffs

-against-

ROOSEVELT FIELD MALL, SIMON PROPERTY GROUP, SIMON PROPERTY GROUP, INC., SIMON'S ROOSEVELT FIELD MALL, SIMON MALLS, SIMON PROPERTY GROUP, L.P., ROOSEVELT FIELD A Simon MALL and THE RETAIL PROPERTY TRUST, FEDERATED DEPARTMENT STORES, INC., MACY'S EAST, LLC, and MACY'S EAST, INC.,[1]

Defendants.

Index No. 116995/05

DECISION/ORDER

ADDMD, J.S.C.

MEMORANDUM DECISION

Defendants Simon Property Group, L.P. i/s/h/a Roosevelt Field Mall, Simon Property Group, Simon Property Group, Inc., Simon's Roosevelt Field Mall, Simon Malls, Simon Property Group, L.P., Roosevelt Field a Simon Mall and the Retail Property Trust (the "Moving Defendants") move for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint of plaintiffs Eleftheria Halampalakis ("plaintiff") and George Halampalakis (collectively "plaintiffs") as against the moving defendants, in its entirety; or, in the alternative, granting summary judgment dismissing the complaint as against defendants Simon Property Group, L.P. i/s/h/a Roosevelt Field Mall, Simon Property Group, Simon Property Group, Inc., Simon's Roosevelt Field Mall, Simon Malls, Simon Property Group, L.P., Roosevelt Field a

[1] Plaintiffs have discontinued all claims against the defendants Federated Department Stores, Inc., Macy's East, LLC and Macy's East, Inc., with prejudice.

Simon Mall on the grounds that plaintiffs have not asserted any direct claims of negligence against these entities, some of which do not even exist.[2]

This action arises from an accident that occurred on October 8, 2003. Plaintiff, an employee of defendant Macy's claims that she was caused to trip and fall on a small depression on the sidewalk at the southeast corner of Macy's at the Roosevelt Field Mall.

Plaintiff's Deposition

On the date of plaintiff's accident, she was employed by Macy's at the Roosevelt Field Mall (p. 12). Employees used one entrance to enter and exit the store (14). Plaintiff used this entrance five days a week (p. 18). The accident occurred near that entrance. Plaintiff parked her car on the main level of the garage (p. 15). This was not where she regularly parked; she usually parked in the outside garage (19). Plaintiff left the store to put something in her car; the accident occurred on her way back to the store (p. 23). Plaintiff used the same walkway and crosswalk when the first entered Macy's, left to put something in her car, and was returning to Macy's when her accident occurred (pp. 25-27). The accident occurred when she stepped up onto the curb, her foot was on the sidewalk, she was walking and the heel of her shoe got caught in the big hole that is in the sidewalk (pp. 27-28). Although she regularly used the employee entrance, this was not the normal path she took to get to the entrance (p. 35). Plaintiff noticed the hole in the past (p. 36).

The hole was big enough to put a medium-sized water bottle into the hole (p. 48). The

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[2] Plaintiffs have discontinued all claims against defendants Simon Property Group, L.P., i/s/h/a Roosevelt Field Mall, Simon Property Group, Simon Property Group, Inc., Simon's Roosevelt Field Mall, Simon Malls, Simon Property Group, L.P., and Roosevelt Field a Simon Mall, with prejudice. Plaintiffs' pending cross motion to compel the depositions of Simon Property Group, Inc. and Simon Property Group, Inc., has been withdrawn as moot. Likewise, the portion of the Moving Defendants' instant motion of the Retail Property Trust, seeking an order changing venue to Supreme Court, Nassau County has also been withdrawn.

hole was approximately six inches wide and four inches long (p. 76).

Plaintiff never reported the condition when she noticed it in the past, before her accident. And, she is not aware of any complaints made by anyone about the condition to anyone (p. 79).

Deposition of Glenn Ward

Glenn Ward ("Ward") is an Assistant Mall Manager for Retail Property Trust for the Roosevelt Field Mall (p. 5). The job of the mall manager and the assistant mall manager included inspecting the property, overall cleanliness, security, and reportiing any unsafe condition (p. 14). Ward is familiar with the sidewalk in question and he is not aware of any repairs that have been made to it (p. 21).

Moving Defendants' Contentions

It is undisputed that the Roosevelt Field Mall was and is owned and operated by defendant the Retail Property Trust. It has exclusively owned the Roosevelt Field Mall since September 23, 1998.

Neither defendant Simon Property Group, Inc., nor Simon Property Group, L.P. owned or operated the Roosevelt Field Mall at the time of plaintiff's accident. The remaining entitles identified in the caption, Roosevelt Field Mall, Simon Property Group, Simon's Roosevelt Field Mall, Simon Malls and Roosevelt Field a Simon Mall, do not exist. Regardless, it is undisputed that these entities do not have any interest in the Roosevelt Field Mall.

Scrutiny of the photographs identified by plaintiff as accurately reflecting the condition of the sidewalk at the time of her fall, and specifically at the precise spot depicted therein over which plaintiff testified she tripped, supports the conclusion that, as a matter of law, the alleged defect, which has no characteristics of a trap or nuisance, is too trivial to be actionable.

Further, plaintiff walked through this area five days per week for months prior to the date of her accident and was fully aware of the existence of the claimed defect. And, even plaintiff did not believe the condition was dangerous as she never reported it to anyone before her accident. Since there is no proof that the alleged defect was anything more than trivial or that the alleged defect constituted a trap or nuisance, plaintiff cannot establish a *prima facie* case of negligence.

On October 16, 2007, Ward, the assistant mall manager at the Roosevelt Field Mall, personally measured the dimensions of the depression and found that it was no deeper than one quarter of an inch, no more than two inches long, measuring from the expansion joint compound at the curb, and is at most five inches wide between the sidewalk flagstones. The expansion joint between the sidewalk flagstones is three eighths of an inch wide. The expansion joint between the curb and the sidewalk flagstones is one and one quarter inches wide and filled with compound.

Plaintiffs' Opposition

Alvin Ubell ("Ubell"), an expert in construction, repair and maintenance of sidewalks, performed an inspection and analysis of the location of the occurrence. During his inspection of the location of the occurrence, Ubell was accompanied by the plaintiff, who advised him of the location and nature of the occurrence. Furthermore, Ubell personally took photographs of the location of the occurrence. Ubell's measurements of the hole into which the plaintiff's shoe became lodged establish that the hole was approximately 2 ½ inches wide, 4 ½ inches long and more than 11/16ths of an inch deep. Ubell states that good and accepted standards for the safe maintenance of street walks, pathways and walkways with pedestrian traffic require that they

should not have an elevation differential or depth greater than ½ inch. The defect in the particular area of the sidewalk in which plaintiff tripped and fell is almost 50% greater than the good and accepted sidewalk maintenance standards as indicated and as set for by: ADA Hand Book, Section 4.5.8, Changes in level; NYC Dept. of Transportation, Rules and Regulations, Section 2-09 Sidewalks, Curbs & Roadway Work, Paragraph (f). Moreover, it is apparent that the defect existed for a considerable amount of time based on the fact that the hole was not of a uniform shape, but was of an irregular shape. The shape of the defect indicates that the corners of the sidewalk flags resulted from breakage of the concrete comprising the sidewalk flags over an extended period of time, and that the size of the hole became enlarged as more and more portions of the sidewalk flags became broken.

Ubell opined that as can be seen from the photographs he took during his inspection, the sidewalk at the site of the accident was a sidewalk that had been replaced and the concrete repoured in the immediate area of the accident, and it replaced a section of older sidewalk. When the new sidewalk was poured and created, the original curb was left in its original condition and not replaced at the immediate location of the occurrence, although the old curb was removed and replaced beginning only approximately one and one half feet away from the hole where plaintiff was caused to fall. Unfortunately, the large space of one and one quarter inches left between the new sidewalk and the old curb (at the immediate site of this occurrence and where the hole is found) caused, over time, damage and destruction of the sidewalk and created and caused the hole which resulted in plaintiff's falling down.

The Moving Defendants' Reply

Plaintiffs' failure to provide expert disclosure for Ubell, despite a demand for same,

warrants his preclusion as an expert. Further Ubell's opinions are based upon materials that are neither generally accepted in the relevant scientific community nor otherwise reliable to establish defective conditions on commercial premises in Nassau County. The affidavit relies on the ADA Handbook Section 4.5.8, Changes in Level and NYC Department of Transportation, Rules and Regulations, both of which are irrelevant herein, to establish that the "good and accepted standards for the safe maintenance of street walks, pathways and walkways with pedestrian traffic require that they should not have an elevation of differential or depth greater than ½ inch." This is not an ADA claim, nor do the rules and regulation of New York City apply to Nassau County. Ubell's reference to "numerous books and articles..." is insufficient to establish a standard for sidewalks and curbs. Moreover the New York State Department of Transportation Standard Specifications for street and road way construction and design and materials is inapplicable in that the site of plaintiff's accident is not a public street, a public road or an adjacent sidewalk.

Ubell's inspection of the accident scene, years after the accident occurred, is not probative of the accident scene's state on the date of the loss.

Analysis

Both the Moving Defendants and the plaintiffs rely on inspections of the accident site performed years after the accident in support of and opposition to the instant motion. Therefore, there is no prejudice to either side in considering both.

Moreover, with respect to the consideration afforded the Ubell affidavit, it is well settled that the jury may reject the opinion of an expert if the jury finds that the facts are different from those which formed the basis of the expert opinion. The jury may also reject the opinion if, after

careful consideration of all of the evidence in the case, expert and other, the jury disagrees with the opinion. In other words, the jury is not required to accept an expert's opinion to the exclusion of the facts and circumstances disclosed by other testimony. Such an opinion is subject to the same rules concerning reliability as the testimony of any other witness. It is entitled to such weight as the jury finds the expert's qualifications in the field warrant and must be considered by the jury, but is not controlling upon their judgment (PJI 1:90).

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). A party can prove a *prima*

facie entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

In determining whether a plaintiff claiming injuries caused by a defective sidewalk should be permitted to present her claims before a jury, the court may only reach a conclusion "[a]fter examination 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." *Trincere v City of Suffolk,* 90 NY2d 976, 665 NYS2d 615 (1997).

The Court of Appeals addressed the issue of "trivial defect" in *Trincere v County of Suffolk,* 90 N.Y.2d 976 (1997). In *Trincere,* the Court found that there is no "minimal dimension test" or per se rule that a defect must be of a certain minimum height or depth in order to be actionable. The Court found, however, that dismissal of plaintiff's claim was proper after the lower court's examination of all the facts and circumstances presented, including the dimension of the defect at issue. The Court continued in *Trincere* and stated that there is no rule that liability, in a case involving minor defects in the pavement, "turns upon whether the hole or depression, causing the pedestrian to fall, is four inches-or any other number of inches-in depth" (*Loughran v City of New York,* 298 N.Y. 320, 321-322; *Wilson v Jaybro Realty & Dev. Co.,* 289 N.Y. 410, 412). Instead, whether a dangerous or defective condition exists on the property of another so as to create liability " 'depends on the peculiar facts and circumstances of each case' and is generally a question of fact for the jury" (*Guerrieri v Summa,* 193 A.D.2d 647 [citations omitted]). 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 (*see, e.g., Hecht v City of New York,* 60 N.Y.2d 57, 61 [claim involving trivial gap between two flagstones of the sidewalk was properly dismissed]). However, a mechanistic disposition of a case based exclusively on the dimension of the sidewalk defect is unacceptable. After examination 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 (*Caldwell v Village of Is. Park,* 304 N.Y. 268, 274), the Court found that the lower court correctly concluded that no issue of fact was presented.

The First Department addressed the issue of height differential in *Martin v Lafayette Morrison Housing Corp.*, 819 N.Y.S.2d 249, 250 (1st Dept 2006). In *Martin,* the First Department found that defendant established that the claimed defect which allegedly caused plaintiff to trip and fall was merely a slight height differential of approximately one-half inch between the rubber surface of the playground and the adjoining cement walkway, which did not constitute a trap or snare. Neither surface was broken, cracked or otherwise defective, and they were of contrasting colors. This minor height differential alone is insufficient to establish the existence of a dangerous or defective condition for which the property owner could be held liable (*see Morales v Riverbay Corp.*, 226 A.D.2d 271, 641 N.Y.S.2d 276 [1996]). The First Department further found that plaintiff's submissions failed to establish the existence of issues of fact regarding defendant's possible liability for plaintiff's fall.

More recently, the First Department revisited this issue in the case of *Jacobson v Krumholz,* 41 AD3d 128 (1st Dept.2007). In *Jaacobson,* plaintiff sought damages for personal injuries allegedly resulting from a trip and fall on the border of a parking lot surface and the adjoining sidewalk. The First Department here found that there were triable issues of fact as to whether the defect was trivial and as to whether defendant had constructive notice. The photographs depicted a lengthy irregular depression with a jagged edge (see *Argenio v Metropolitan Transp. Auth.*, 277 A.D.2d 165, 166 [2000]), and, although there were no adverse weather or lighting conditions at the time of plaintiff's accident, and the area was not crowded, plaintiff testified at her deposition that she was concerned with vehicles entering and exiting the lot and therefore could not have been expected to be looking downward (*see George v New York City Tr. Auth.*, 306 A.D.2d 160 [2003]). The court further found that the store manager's

testimony regarding his lack of actual notice notwithstanding, plaintiff's testimony that the defect was of long duration, as well as the photographs, support an inference that the complained-of condition was not suddenly created and raise a triable issue as to whether defendant could have obtained timely knowledge of it by the exercise of ordinary care (see *Denyssenko v Plaza Realty Servs., Inc.*, 8 AD3d 207 [2004]).

The instant case is analogous to *Tineo v Parkchester,* 304 A.D.2d 383 (1st Dept.2003) where plaintiff described the defect as broken and uneven asphalt pavement in bad condition. Plaintiff's expert, who inspected the area of the fall, described the condition as a "3/4 inch deep depression, nominally two feet long by two feet wide in the asphalt pavement, where an abrupt elevation difference remains around the perimeter of the depression as a tripping hazard." The expert concluded that the "patch-repaired walkway surface was destabilizing underfoot because it was wide-cracked, depressed, sunken, and uneven."

In the instant case, similar specificity is contained in the Ubell affidavit which provides details of the dimensions of the defect, the age of the defect, the uneven, depressed and cracked condition of the defect. And, the photographs presented herein evidence a "trap" as in the case of *Herrera v City of New York,* 262 A.D.2d 118 (1st Dept.1990) to permit the case to go to the jury.

In short, plaintiff has sufficiently overcome the Moving Defendants' claim that the defect was "trivial," to allow the issue to go before the jury.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the application for an order granting summary judgment of defendants Simon Property Group, Inc., Simon Property Group, L.P., Roosevelt Field Mall, Simon Property

Group, Simon's Roosevelt Field Mall, Simon Malls and Roosevelt Field a Simon Mall, **is granted** and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that the application of defendant Retail Property Trust for summary judgment dismissing the complaint, **is denied**; and it is further

ORDERED that counsel for defendant Retail Property Trust shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiffs.

This constitutes the decision and order of this court.

Dated: March 17, 2008

Carol Robinson ADDMD, J.S.C.