

**Miller v HSBC USA, Inc.**

2008 NY Slip Op 33065(U)

November 5, 2008

Supreme Court, Queens County

Docket Number: 5045/06

Judge: Patricia P. Satterfield

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Short Form Order

**NEW YORK STATE SUPREME COURT - QUEENS COUNTY**

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

Justice

-----X

EVELYN MILLER,

Plaintiff,

-against-

HSBC USA, INC.,

Defendant.

-----X

HSBC USA, INC.,

Third-Party Plaintiff

- against -

JONES LANG LASALLE AMERICAS, INC.,

Third-Party Defendant.

-----X

The following papers numbered 1 to 14 read on this motion by defendant/third-party plaintiff HSBC and third-party defendant Jones Lang LaSalle Americas, Inc., for an order granting summary judgment pursuant to CPLR § 3212; and on this cross-motion by plaintiff for an order denying the motion for summary judgment, and precluding defendant/third-party plaintiff HSBC and third-party defendant Jones Lang LaSalle Americas, Inc. from offering further evidence and witnesses on the issues of notice and the condition of the stairway in question, and setting this matter on the trial calendar for the issue of damages only.<sup>1</sup>

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 5
Notice of Cross Motion-Affidavits-Exhibits.....	6 - 9
Affirmation in Opposition to Cross Motion-Exhibits.....	10 - 12
Reply Affirmation.....	13 - 14

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<sup>1</sup> Although plaintiff cross-motion references a “stairway,” this matter does not involve a stairway. Thus, this Court will consider this a typographical error.

Upon the foregoing papers, it is hereby ordered that the motion and cross-motion are resolved as follows:

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Evelyn Miller (“plaintiff”) as a result of a slip and fall that occurred on September 3, 2004, on the sidewalk abutting the premises of defendant/third-party plaintiff HSBC (“HSBC”), at its branch located at 44-04 Kissena Boulevard, Queens, New York. On July 18, 2006, HSBC served a third-party complaint against third-party defendant Jones Lang LaSalle Americas, Inc. (“Jones Lang”), the managing agent for the premises, for it to defend and indemnify HSBC. Jones Lang assumed the defense of HSBC on April 9, 2007, after the September 19, 2006 preliminary conference and just prior to the April 18, 2007 compliance conference, each of which resulted in an order directing that the Note of Issue be filed on or before August 17, 2007. By order of this Court dated February 5, 2008, the motion by HSBC and Jones Lang (collectively “defendants”) for an order extending their time to file a summary judgment motion was granted and the time for dispositive motions was extended to April 29, 2008. Defendants now timely moves for an order granting summary judgment pursuant to CPLR § 3212, and plaintiff cross-moves for an order denying HSBC’s motion, precluding it from offering further evidence and witnesses on the issues of notice and the condition of the defect in question, and setting this matter on the trial calendar for the issue of damages.

It is well established that 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 (2d 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.)

“To demonstrate its entitlement to summary judgment in a slip-and-fall case, a defendant must establish, prima facie, that it did not create the condition that allegedly caused the fall and did not have actual or constructive notice of that condition for a sufficient length of time to remedy it.” Gregg v. Key Food Supermarket, 50 A.D.3d 1093 (2<sup>nd</sup> Dept. 2008); Sloane v. Costco Wholesale Corp., 49 A.D.3d 522 (2<sup>nd</sup> Dept. 2008); Frazier v. City of New York, 47 A.D.3d 757 (2<sup>nd</sup> Dept. 2008); Ulu v. ITT Sheraton Corp., 27 A.D.3d 554 (2<sup>nd</sup> Dept. 2006); White v. L & M Corporate, Inc., 24 A.D.3d 659 (2<sup>nd</sup> Dept.2005); Beltran v. Metropolitan Life Ins. Co., 259 A.D.2d 456 (2<sup>nd</sup> Dept.1999). “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.” 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). Defendant’s burden, however, cannot be satisfied merely by pointing to gaps in the plaintiff’s case. *See*, Gregg v. Key Food Supermarket, *supra*; Stroppel v. Wal-Mart Stores, Inc., 53 A.D.3d 651 (2<sup>nd</sup> Dept. 2008); DeFalco v. BJ’s Wholesale Club, Inc., 38 A.D.3d 824, 825 (2<sup>nd</sup> Dept. 2007). “Only after the defendant has satisfied its threshold burden will the court examine the sufficiency of the plaintiff’s opposition (citations omitted).” Doherty v. Smithtown Cent. School Dist., 49 A.D.3d 801 (2<sup>nd</sup> Dept. 2008); *see, also*, Gregg v. Key Food Supermarket, *supra*; Seabury v. County of Dutchess, 38 A.D.3d 752 (2<sup>nd</sup> Dept. 2007); Yioves v. T.J. Maxx, Inc., 29 A.D.3d 572 (2<sup>nd</sup> Dept. 2006).

Here, defendants submit, in support of their motion, plaintiff’s deposition testimony in which she alleges, inter alia, that she slipped on a piece of paper or plastic from the supermarket adjacent to the bank, which caused her to hit a rise in the sidewalk flagstone that resulted in her fall. Plaintiff testified that she did not ascertain the cause of her accident immediately before or after her fall, until she returned to the accident scene several weeks later and identified a “slight incline” which she described as “less than an inch, enough for your foot to jam.” Arguing that as plaintiff could not identify or mark photographs during her deposition showing the location where she fell, defendants contend that whether it had actual or constructive notice as to any alleged defect in the sidewalk is not placed in issue. Moreover, defendant asserts that as there is no evidence of the cracks measurement, width, depth, or irregularity, the crack as described by plaintiff should “be deemed trivial since it is less than one inch in height. To conclude otherwise is speculative.” Lastly, defendants proffer the deposition transcript and affidavit of Nora Francis Burns, the Assistant Manager at HSBC, who stated, inter alia, that prior to the instant accident, no HSBC employee ever received any complaints regarding any debris, or a cracked or uneven sidewalk.

In opposition and in support of the cross-motion for an order precluding defendants from offering further evidence and witnesses on the issues of notice and the condition of the sidewalk, plaintiff contends, inter alia, that the motion should be denied as a matter of law on the ground that defendants rely upon inadmissible evidence in the form of the unsigned deposition transcripts of plaintiff and Nora Francis Burns, the Assistant Manager at HSBC. Plaintiff contends that although defendants mailed the transcript to her on January 15, 2008, they failed to serve the exhibits upon which they relied at the deposition until March 12, 2008. Consequently, plaintiff asserts that pursuant to CPLR § 3116, she had until May 12, 2008 to review and sign the transcript. She further states that since the exhibits were incorporated in her testimony and defendants were informed several times that she could not accurately review the transcript without the exhibits, which were marked for identification, such delay inhibited her and was “equally as perilous as not sending her a complete transcript to review.” Thus, she asserts that defendants motion, unsupported by credible evidence, must be denied as a matter of law.

CPLR § 3116, entitled “Signing deposition; physical preparation; copies,” states, in pertinent part, the following:

The deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination.

Moreover, it is well settled that where a party proffers an unsigned deposition transcript in support of a motion for summary judgment, it must be established by the proponent thereof that the transcript previously was forwarded to the relevant witness for his or her review, pursuant to CPLR 3116 (a), and such failure to make this showing renders the transcript inadmissible. See, *Martinez v. 123-16 Liberty Ave. Realty Corp.*, 47 A.D.3d 901, 903 (2<sup>nd</sup> Dept. 2008)[stating “the defendants failed to show that the unsigned deposition transcripts of the various witnesses, submitted in support of the defendant Lee's motion and relied upon by Liberty in its cross motion, previously were forwarded to the relevant witnesses for their review pursuant to CPLR 3116(a). The transcripts did not constitute admissible evidence.”]; *Myers v. Polytechnic Preparatory Country Day School*, 50 A.D.3d 868 [stating “the unsigned and unsworn deposition transcript attached to the plaintiffs' reply papers was not in admissible form and could not supply the basis for a showing of a meritorious cause of action.”]; *Santos v. Intown Associates*, 17 A.D.3d 564 (2<sup>nd</sup> Dept. 2005) [stating “the defendants failed to show that the unsigned deposition transcripts of various witnesses submitted in support of their motion were previously forwarded to the relevant witnesses for their review pursuant to CPLR 3116(a). Hence, contrary to the defendants' contention, the transcripts were not admissible.”]; *Scotto v. Marra*, 23 A.D.3d 543 (2<sup>nd</sup> Dept. 2005) [stating “Marra failed to establish that the unsigned deposition transcripts of the various witnesses submitted in support of the motion were forwarded to them for their review pursuant to CPLR 3116 (a). Hence, the transcripts were not admissible.”]. Moreover, where the proponent of unsworn and unsigned transcripts fail to give an explanation as to why such transcripts have not been proffered in proper form, pursuant to CPLR § 3116, the transcripts are likewise inadmissible. See, *McDonald v. Mauss*, 38 A.D.3d 727, 728 (2<sup>nd</sup> Dept. 2007)[stating “the deposition transcripts of two nonparty witnesses, submitted by the defendant without an explanation as to why they were unsigned and unsworn, were not in admissible form and should not have been considered by the court.”].

Here, although defendants mailed the transcript to plaintiff on January 15, 2008, they failed to serve the complete transcript with the exhibits upon which they relied at the deposition until March 12, 2008, a fact not denied by defendants. Notwithstanding this delay, they prematurely moved for summary judgment on April 11, 2008, relying upon plaintiff's unsigned transcript, and

thereby abridging plaintiff's time in which to review and sign the transcript which should have been extended until May 12, 2008 due to defendants' untimeliness. This was done presumably to comply with the order of this Court dated February 5, 2008, which granted defendants an extension of time to file a summary judgment motion to April 29, 2008. Nevertheless, as defendants neither address the inadmissibility of plaintiff's transcript in their response to the cross-motion, nor proffer an explanation as to why they relied upon plaintiff's unsigned transcript, this Court finds that the subject transcript is inadmissible, and thus, impermissibly relied upon by defendants. Likewise, the same result obtains with regard to the transcript of Nora Francis Burns.

This Court previously held in the matter of *Pina v. Flik International Corp.*, that the defendant failed in the first instance to properly address the issue of notice by failing to submit admissible evidence in the form of "affidavits, or proof of any kind by someone with personal knowledge that they, in fact, lacked notice of the conditions which caused plaintiff's injuries." In affirming this Court's denial of the motion for summary judgment, the Appellate Division, Second Department, stated [25 A.D.3d 772, 773 (2<sup>nd</sup> Dept. 2006)]:

The Supreme Court properly denied the defendants' motions for summary judgment since they failed to submit sufficient evidence in admissible form to establish their entitlement to judgment as a matter of law (see *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642). The defendants failed to show that the unsigned deposition transcripts of various witnesses they submitted in support of their motions had previously been forwarded to the relevant witnesses for their review pursuant to CPLR 3116(a). Hence, contrary to the defendants' contention, they were not admissible (see *Lalli v. Abe*, 234 A.D.2d 346, 650 N.Y.S.2d 313; *Palumbo v. Innovative Communications Concepts*, 175 Misc.2d 156, 668 N.Y.S.2d 433, *affd.* 251 A.D.2d 246, 675 N.Y.S.2d 37; *Connors*, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR C3116:1).

Here, in the notice of motion, defendants proffer the unsigned transcript of their witness, Nora Francis Burns ("Burns"), without any proof of compliance with CPLR § 3116, in the first instance. They attempted to correct this by belatedly proffering in their reply to plaintiff's cross-motion, entitled "Affirmation in Opposition," a letter addressed to Burns dated February 8, 2008 directing her to review, sign and return her transcript to defendants. Defendants also submit an affidavit of service which was notarized almost five months later on July 2, 2008, alleging that the transcript was served upon Burns on February 8, 2008. Notwithstanding defendants contentions to the contrary, this inappropriate proffering of documentary evidence in a document which is essential their reply papers, coupled with the fact that the July 2, 2008 affidavit of service, clearly prepared in opposition to the cross-motion, raise an issue as to whether their was actual or feigned compliance with CPLR § 3116. As these submissions cast doubt on such compliance, this Court finds that defendants have failed to establish that they previously forwarded the transcript to Burns for her review, as mandated

by statute. Thus, as defendants impermissibly rely on Burns' inadmissible transcript in support of their motion, it cannot be considered by this Court on this application. Lastly, the affidavit of Burns proffered in support of the motion is equally unavailing in support of this application for summary judgment.

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). 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*. "A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (citations omitted)." Sloane v. Costco Wholesale Corp., 49 A.D.3d 522 (2<sup>nd</sup> Dept. 2008); Frazier v. City of New York, 47 A.D.3d 757 (2<sup>nd</sup> Dept. 2008); Ulu v. ITT Sheraton Corp., 27 A.D.3d 554 (2<sup>nd</sup> Dept. 2006); White v. L & M Corporate, Inc., 24 A.D.3d 659 (2<sup>nd</sup> Dept. 2005); Beltran v. Metropolitan Life Ins. Co., 259 A.D.2d 456 (2<sup>nd</sup> Dept. 1999).

Here, Burns stated in her affidavit that prior to plaintiff's accident, defendants never received any complaints regarding any debris, or a cracked or uneven sidewalk, and they did not create any defective condition. She further stated that she observed Jones Lang clean the area in front of HSBC between 8:00a.m. and 10:30 a.m., and prior to the accident, she did not observe any debris or defects in the sidewalk. However, in light of the fact that defendants' other documentary evidence was deemed inadmissible, this self-serving affidavit, standing alone, is insufficient to satisfy defendants' burden of eliminating all triable issues of fact. Thus, the motion for summary judgment must be denied. Arguendo, even if the affidavit was sufficient, and the unsigned transcripts were deemed admissible, the motion would still be denied, in the first instance, for defendants failure to demonstrate a prima facie entitlement to summary judgment by eliminating triable issues of fact from the instant action.

The issue of whether a dangerous condition exists on the property of another which would create liability depends on the particular facts and circumstances of each case and is generally a question of fact for the jury. See, Trincere v County of Suffolk, 90 N.Y.2d 876 (1997); Taussig v Luxury Cars of Smithtown, 31 A.D.3d 533 (2<sup>nd</sup> Dept. 2006). A property owner, however, may not be held liable for trivial defects, not constituting a trap or a nuisance over which a pedestrian might merely stumble, stub his or her toes, or trip. See, Ayala v. Gutin, 49 A.D.3d 677 (2<sup>nd</sup> Dept. 2008); Ambroise v New York City Tr. Auth., 33 A.D.3d 573 (2<sup>nd</sup> Dept. 2006); Taussig v Luxury Cars of Smithtown, 31 A.D.3d 533 (2<sup>nd</sup> Dept. 2006). "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); see, Ayala v. Gutin, 49 A.D.3d 677 (2<sup>nd</sup> Dept. 2008); see, Outlaw v. Citibank, N.A., 35 A.D.3d 564 (2<sup>nd</sup> Dept. 2006); Velez v Inst. of Design & Constr., 11 A.D.3d 453 (2<sup>nd</sup> Dept. 2004). Moreover, the Appellate Division, Second Department, in Zalkin v. City of New York, 36 A.D.3d 801 (2<sup>nd</sup> Dept. 2007), and its progeny, found that the plaintiff was not able to identify any defect which caused her accident, and any differential in the sidewalk was trivial. The Court in Zalkin stated 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).

Here, defendants proffered the unsigned deposition transcript of plaintiff in which she testified that she fell on a raised portion of the sidewalk. Defendants allege 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. They further contend that plaintiff has not established any measurement of height difference in the elevation of the sidewalk which she alleges were raised and caused her to trip and fall. Thus, defendants assert that plaintiff is unable to support any argument that the sidewalk in question is not a trivial defect.

Notwithstanding, 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, defendants point 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, defendants have 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 defendants move for summary judgment on the basis that plaintiff cannot identify any defect which caused her

fall, they still have failed to proffer evidence which would eliminate triable issues of fact on this basis, as plaintiff identified the alleged defect in a photograph and indicated at her deposition that she fell as a result of the sidewalk differential. Accordingly, as there are issues of fact to be determined, the motion for summary judgment by defendant/third-party plaintiff HSBC and third-party defendant Jones Lang LaSalle Americas, Inc. is denied. The cross-motion by plaintiff Miller for an order denying the motion for summary judgment, and precluding defendant/third-party plaintiff HSBC and third-party defendant Jones Lang LaSalle Americas, Inc. from offering further evidence and witnesses on the issues of notice and the condition of the stairway in question, and setting this matter on the trial calendar for the issue of damages only, is denied without prejudice to the extent that any allegations with respect to outstanding discovery, defendants' failure to comply, and their recalcitrance, shall be addressed in a proper motion seeking discovery and supported by the relevant documentation.

Dated: November 5, 2008

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J.S.C.