STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

JO-ANN POWELL and RICHARD W. POWELL, individually, and as husband and wife,

Plaintiffs,

-against-

HANNAFORD BROS. CO. and MARTIN'S FOOD OF SOUTH BURLINGTON, INC.,

Defendants.

**DECISION and ORDER**
**INDEX NO. 06-0922**
**RJI NO. 19-08-3950**

Supreme Court Greene County All Purpose Term, March 2, 2008
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**
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**TERESI, J.:**

On December 13, 2005, Ms. Powell was walking within defendants' grocery store when her foot caught on a drain cover, and she fell. Ms. Powell, and her husband derivatively, commenced this action against defendants seeking damages. Discovery is now complete, and defendants bring this motion for summary judgment. Because defendants have demonstrated their entitlement to judgment as a matter of law, and no issues of fact exist, their motion for

summary judgment is granted.

This Court is mindful that "summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]).

In this action against a landowner "to establish entitlement to summary judgment, defendant[s are] required to demonstrate as a matter of law that [they] maintained the subject property in a reasonably safe condition and neither created the allegedly dangerous condition existing thereon nor had actual or constructive notice thereof." (Mazerbo v. Murphy, 52 AD3d 1064, 1065 [3d Dept. 2008]). However, it is also "well settled that the owner of a public passageway may not be cast in damages for negligent maintenance by reason of trivial 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". (Smith v. Wilerdam Property, Inc., 50 AD3d 1349 [3d Dept. 2008][quoting Guerrieri v. Summa, 193 AD2d 647 [2d Dept. 1993][internal quotations omitted]).

If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]). In opposing a motion for summary judgment, one must produce "evidentiary proof in admissible form. . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (Id. at 562). Where, such as here, "defendant moves for summary judgment alleging that [a minor]... height differential is too trivial to be actionable the plaintiff can defeat the motion by coming forward with evidence to establish that the alleged defect has the characteristics of a trap,

snare or nuisance". (Alig v. Parkway Parking of New York, Inc., 36 AD3d 980 [3d Dept 2007]; Trionfero v. Vanderhorn, 6 AD3d 903 [3d Dept. 2004]).

Here, it is undisputed that Ms. Powell's fall occurred when her foot caught on a drain cover, recessed approximately 1/4 of an inch from the surrounding floor, located in a walkway within defendants' grocery store. By Ms. Powell's admission, the lighting in the area was "good", the floor surrounding the drain cover was "dry" and there were no "foreign substances" or "foreign materials" on the floor where she fell. From all of the proof, it is uncontested that Ms. Powell's fall was caused solely by the 1/4 of an inch recessed drain cover.

Defendants demonstrated their entitlement to judgment as a matter of law on the creation of the allegedly dangerous condition issue. Defendants' employees demonstrated that the building where Ms. Powell fell was purchased by defendants in 2001, and had previously been used for the same grocery store purpose. The drain cover existed in the same location at the time defendants purchased the building, and defendants have no records demonstrating any repairs or alterations to the drain cover. Thus, the defendants set forth sufficient proof to demonstrate that they did not create the allegedly dangerous condition.

Defendants also demonstrated their entitlement to judgment as a matter of law on the actual notice issue. The affidavit and deposition testimony of defendants' employees show that no complaints or prior incidents had occurred in the drain cover area. The defendants employees demonstrated that the defendants keep records of all incidents occurring within their stores and, upon a search of their records, none existed. As such, the defendants demonstrated that they had no actual notice of a dangerous condition.

Lastly, defendants also demonstrated their entitlement to judgment, as a matter of law, on

the constructive notice issue by showing that they were not "aware of an ongoing and recurring unsafe condition which regularly went unaddressed". (Mazerbo, supra 1066). The walkway where Ms. Powell fell was regularly used by patrons and store employees. As set forth above, defendants' documentation demonstrates that no complaints had been lodged, nor issues reported, about the drain cover area. On this record, defendants demonstrated, that there was no "recurring unsafe condition which regularly went unaddressed" (Id.)

As the defendants demonstrated their entitlement to judgment as a matter of law, the burden shifted to plaintiffs to "raise a triable issue of fact whether the alleged defect has the characteristics of a trap, snare or nuisance". (Trionfero, supra at 904 [quoting Leverton v. Peters Groceries, Inc., 267 AD2d 1014 [4th Dept. 1999] quoting Gigliotti v. St. Stanislaus Kostka Roman Catholic Church, 261 AD2d 951 [4th Dept. 1999][internal quotations omitted]]). On this record, plaintiffs failed to demonstrate that the drain cover, recessed only 1/4 of an inch in a well lit area, constituted a trap. (Smith, supra [1/4 inch height differential was not a trap] citing and stating: "Murray v. City of New York, 15 AD3d 636 [2005][height differential of one-half inch not actionable]; Trionfero [supra]...[height differential between five eighths and seven eighths of an inch not actionable]; Neumann v. Senior Citizens Center, Inc., 273 AD2d 452 [2000][height differential of seven eighths of an inch not actionable]").

Nor did plaintiffs' professional engineer expert raise an issue of fact requiring a trial. Plaintiffs' expert wholly failed to demonstrate, or even address, how the drain cover constituted a trap. He opined that numerous building codes "infer" that a 1/4 inch recession requires a beveled slope of 1:2, which was not present with this drain cover. However, plaintiffs' expert makes no allegation that a building code was actually violated; and, defendants' expert demonstrated that

the codes relied upon did not apply to the defendants' building. Moreover, plaintiffs' expert's opinion that defendants violated their own internal standards constituted no more than mere speculation. Similarly, plaintiffs' expert's statement that the drain cover did not meet "industry standards" was unsupported by any evidentiary demonstration of what the applicable industry standard is. As such, no issue of fact has been raised by plaintiffs.

Accordingly, defendants' motion for summary judgment is granted.

All papers, including this Decision and Order, are being returned to the attorney for the defendants. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: March 10, 2009
Albany, New York

JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion, dated December 29, 2008, Affidavit of David Cost, dated December 29, 2008, with attached Exhibits "A" - "G", Affidavit of Chet J. Zaremba, dated November 20, 2008, with attached Exhibits "A" - "B", Affidavit of Erin McNally, dated December 3, 2008, and Affidavit of Timothy Ellsworth, dated December 22, 2008.
2. Affirmation in Opposition of Jeanne Gonsalves Lloyd, dated February 13, 2009, , with attached Exhibit "A", Affidavit of Thomas L. Hesnor, dated February 13, 2009, with attached Exhibits "A" - "B".
3. Reply Affidavit of David Cost, dated February 27, 2009, and Reply Affidavit of Chet J. Zaremba, dated February 25, 2009.