SCAN

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

----------x	**TRIAL PART: 16**
JOHN SCHENPANSKI and NICOLE SCHENPANSKI	**NASSAU COUNTY**
Plaintiff,	**INDEX NO: 6508/07**
-against-	**MOTION SEQ: 5**
PROMISE DELI, INC, and CLIFF REALTY, CORP **Defendant.**	**SUBMIT: 1/8/10**
----------x	

The following papers having been read on this motion:

Notice of Motion.....1
Affirmation in Support.....2
Affirmation in Opposition.....3
Reply Affirmation.....4
Reply Affirmation in Support.....5

This motion by defendant Cliff Realty Corp., for an order pursuant to CPLR § 3212 granting it summary judgment and dismissing the complaint against it is granted.

In this action, the plaintiffs, John and Nicole Schenpanski, seek to recover damages for personal injuries that John Schenpanski sustained on April 4, 2007, when he slipped and fell allegedly due to a raised manhole cover in the defendants' parking lot. There are two defendants in this action, Promise Deli, Inc., and Cliff Realty, Corp. Cliff Realty owns the property involved in this action and Promise Deli leases the property from Cliff Realty and operates a deli on the property. This action was commenced against the defendants by the plaintiff filing a Summons and Complaint with the court on April 20, 2007, and issue was joined by defendant Cliff Realty by service of its Answer on June 21, 2007, and by defendant Promise Deli by service of its Answer on March 26, 2008. In addition to asserting various defenses against the plaintiff both defendants have cross-claimed against each other seeking contribution should either party be found liable for plaintiff's alleged injuries. Along with their Answers, the two defendants also served Demands for Bills of Particulars and various other discovery demands upon the plaintiffs.

"On a motion for summary judgment pursuant to CPLR § 3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Sheppard-Mobley v. King*, 10 A.D.3d 70, 74 [2d Dep't 2004], aff'd as mod., 4 N.Y.3d 627 [2005], citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]; *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]. "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Sheppard-Mobley*, 10 A.D.3d at 74; *Alvarez*, 68 N.Y.2d at 324. That is, the party moving for summary judgments carries the initial burden of demonstrating the absence of a material issue of fact; however, once this burden has been met the burden shifts to the party opposing summary judgment to demonstrate that there is a triable issue of fact. *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557 [1980]. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. *See Demishick v. Community Housing Management Corp.*, 34 A.D.3d 518 [2d Dep't 2006], citing *Secof v. Greens Condominium*, 158 A.D. 2d 591 [2d Dep't 1990]. The function of a court in determining a summary judgment motion is to decide whether an issue exists and not to decide the issue itself. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404. Summary judgment is considered a drastic remedy, and as such it should not be granted when a triable issue of fact exists. *Marine Midland Bank, N.A. v. Dino & Artie's Auto. Trans. Co.*, 168 A.D.2d 610 [2d Dep't 1990].

The pertinent facts are as follows:

On April 4, 2007, at approximately 12:30 P.M., the plaintiff, John Schenpanski, parked his car on the premises of the Promise Deli to buy lunch. The Plaintiff stated that before the date of the incident he had gone to the Promise Deli approximately twice a week. On the day of the incident the Plaintiff parked his car and exited it in order to walk into the deli. On his way to the door of the deli the Plaintiff allegedly tripped and fell causing him serious personal injuries to his left arm, wrist, and hand. Plaintiff later realized that he tripped and fell on a manhole cover (also referred to as a raised grate) which was uneven with the rest of the pavement in the parking lot. At issue in this case is where on the manhole cover the plaintiff tripped. The cover is located in front of the door of the Deli, and using a clock as a reference, 12 o'clock would be the top of the cover directly facing the door. At his Examination Before Trial, which occurred on July 22, 2008, plaintiff circled virtually the entire cover when the defendant's counsel asked plaintiff to indicate where on the manhole cover he had tripped. However, upon being asked to clarify the area of the cover by defense counsel

plaintiff indicated that he tripped on the right side of the cover. Later, in an affidavit dated November 12, 2009, the plaintiff stated that he tripped on the cover at the position of three o'clock, using a clock as a reference point. According to the defendants' expert witness, Professional Engineer Vincent A. Ettari, the manhole cover was 1/4 of an inch above the surrounding pavement at the time of the accident and did not pose a hazard to pedestrians. Mr. Ettari's measurement was taken approximately near the bottom of the manhole cover, or at approximately four or five o'clock using a clock as a reference. According to the plaintiffs' expert witness, Professional Engineer Stanley H. Fein, the manhole cover was 1 inch above the surrounding pavement at the time of the accident and did pose a hazard to pedestrians. Mr. Fein's measurement was taken on the right hand side of the manhole cover, or at approximately three o'clock using a clock as a reference.

Whether a dangerous or defective condition exists so as to give rise to a claim of negligence depends on the particular facts and circumstances of each case. *Trincere v. County of Suffolk*, 90 N.Y.2d 976 [1997]. In *Trincere*, the Court of Appeals held 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." *Id.* at 977. As a general rule, the existence of a dangerous condition is a question of fact for the trier of fact to determine. *Neumann v. Senior Citizens Center, Inc.*, 273 A.D.2d 452 [2d Dep't 2000]. However, sometimes the issue of the existence of a dangerous condition should not be submitted to a jury because a property owner may not be held liable for "trivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes, or trip over a raised projection." *Marinaccio v. LeChambord Restaurant*, 246 A.D.2d 514 [2d Dep't 1998]. Thus, in order to prevail on a motion for summary judgment dismissing the complaint, a property owner is required to demonstrate that the defect complained of is a trivial defect that does not constitute a trap or nuisance.

The defendants' motion for summary judgment dismissing the complaint against them is granted. Here, the defendants have carried their burden of proving that they are entitled to judgment as a matter of law. According to evidence submitted by the defendants, in the form of an expert's affidavit, the defective manhole cover complained of protruded a 1/4 of an inch above the surrounding pavement. By contrast, according to evidence submitted by the plaintiffs, in the form of an expert's affidavit, the defective manhole cover complained of protruded an inch above the surrounding pavement. Obviously, there is a discrepancy between these two measurements. The reason for this discrepancy is that the parties' experts have obtained their measurements from

different areas of the manhole cover. The defendants' expert stated that the manhole cover protruded a 1/4 of an inch above the pavement from his place of measurement, which was toward the bottom of the manhole cover. By contrast, the plaintiffs' expert stated that the manhole cover protruded an inch above the pavement from his place of measurement, which was directly on the right side of the manhole cover.

Although there is an issue as to exactly which defect caused the plaintiff's injuries, that issue is moot because accepting the plaintiff's expert testimony and other evidence as true, as this Court must (*see Demishick v. Community Housing Management Corp.*, 34 A.D.3d 518 [2d Dep't 2006]), this Court finds that the defect complained of by the plaintiffs is too trivial in nature to be actionable. *See, Cicero v. Selden*, 295 A.D.2d 391 [2d Dep't 2002]. Moreover, the defect did not have any of the characteristics of a trap or snare. The case of *Morris v. Greenburgh Central School District No. 7*, 5 A.D.3d 567 [2d Dep't 2004], is virtually indistinguishable from this case. In *Morris*, the plaintiff was injured when he tripped and fell on a concrete slap which was elevated an inch above the surrounding pavement. The Second Department affirmed the trial court's decision to grant the defendants summary judgment because the evidence submitted to the trial court was sufficient to demonstrate that the protrusion of an inch was a trivial defect in nature and did not have the characteristics of a trap or snare. Here, like in *Morris*, sufficient evidence has been submitted to this Court to allow it to decide that the defendants are entitled to a judgment as a matter of law. "A court determining whether or not a defect is trivial must examine 'the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect along with the 'time, place and circumstance' of the injury.'" *Berry v. Rocking Horse Ranch Co.*, 56 A.D.3d 711 [2d Dep't 2008] quoting *Trincere v County of Suffolk,* 90 N.Y.2d at 978. The Court has considered all these factors in examining the evidence defendants have submitted to the Court. Moreover, the plaintiffs themselves have submitted evidence consisting of expert testimony and the plaintiff's testimony which establishes that the defect complained of was a protrusion of only one inch that was not hidden, covered, or otherwise obstructed from view. Therefore, taking what the plaintiffs have claimed to be true, this Court finds that like the one inch raised concrete slab in *Morris*, the one inch raised manhole cover in this case is too trivial to be actionable and does not have any of the characteristics of a trap or snare. Also, the photographs submitted by defendant are indicative of the trivial nature of plaintiff's claim. *Fisher v. JRMR Realty Corp.*, 63 A.D.2d 677 (2d Dept. 2009).

Accordingly, the motion by defendant Cliff Realty Corp., for an order pursuant to

CPLR §3212 granting it summary judgment and dismissing the complaint against it is granted.

Submit Judgment.

This constitutes the decision and order of this Court.

ENTER

DATED: March 5, 2010

HON. ARTHUR M. DIAMOND
J. S.C.

To:

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