[* 1]

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

PRESENT: JAFFE PART 5

Index Number : 116666/2007
CHERNOW, BARBARA
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

his motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
JUL 16 2010
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

RECEIVED
JUL 16 2010
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: 7/12/10

BARBARA JAFFE J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

----------x

BARBARA CHERNOW,

Plaintiff,

-against-

THE CITY OF NEW YORK, RONALD WINSTON, and CORINA LAMOTTE,

Defendants.

----------x

Index No. 116666/07

Motion Dates: 5/25/10, 6/15/10
Motion Seq. Nos.: 003, 005
Motion Cal. Nos.: 31, 21
Motion Argued: 5/25/10

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Vito A. Cannavo, Esq.
Sullivan Papain Block McGrath and Cannavo, P.C.
120 Broadway, 18th Fl.
New York, NY 10271
212-732-9000

For defendant City:
Jessica Wisniewski, ACC
Michael A. Cardozo
Corporation Counsel
100 Church St., 4th Fl.
New York, NY 10007-2601
212-788-0609

For defendant LaMotte:
Leonard Toker, Esq.
Hoey, King, Toker & Epstein
55 Water St., 29th Fl.
New York, NY 10041-2899
212-612-4200

By amended notice of motion dated March 23, 2010, defendant City of New York (City) moves pursuant to CPLR 3211 and 3212 for an order dismissing the complaint and all cross-claims against it. Plaintiff opposes the motion. By notice of motion dated May 11, 2010, defendant Corina LaMotte (LaMotte) moves pursuant to CPLR 3212 for an order dismissing the complaint and all cross-claims against her. The motion is unopposed.

I. BACKGROUND

On August 20, 2007, plaintiff was allegedly injured while walking on the sidewalk adjacent to the area between the premises at 164 East 74th Street and 166 East 74th Street in Manhattan after she tripped on an uneven, improperly maintained, and hazardous area on the sidewalk. (Affirmation of Jessica Wisniewski, ACC, dated Mar. 23, 2010 [Wisniewski Aff.], Exh. A). It is undisputed that LaMotte owned the premises at 166 East 74th Street and that

defendant Ronald Winston owned the premises at 164 East 74th Street.

On or about October 16, 2007, plaintiff served her notice of claim on City (*Id.*, Exh. A). At a 50-h hearing held on November 27, 2007, plaintiff testified that on August 20, 2007, which was a pleasant, dry day, she tripped on a gap between the pavement on the sidewalk, and that one side of the gap was approximately an inch and a half higher than the other. (*Id.*, Exh. D).

On or about December 13, 2007, plaintiff served her summons and complaint on defendants (*id.*, Exh. B), and on or about February 8, 2008, City served its answer (*id.*, Exh. C).

By decision and order dated May 12, 2010, the complaint against Winston was dismissed.

II. CITY'S MOTION

A. Contentions

City relies on plaintiff's 50-h hearing testimony and photographs produced during discovery to argue that the defect on the sidewalk, which allegedly caused plaintiff to fall, was trivial and thus not actionable. The photographs show a gap at the intersection between four pavement stones on the sidewalk, which is part of a long, irregular line running parallel to the edge of one pavement stone. One of the pictures reflects that the gap had a height differential of approximately one inch. (Wisniewski Aff., Exh. E).

Plaintiff observes that City does not deny having had prior notice of the defect, and she denies that the defect was trivial. (Affirmation of Vito Cannavo, Esq., dated Apr. 5, 2010 [Cannavo Aff.]). She relies on her testimony that the height differential of the gap was approximately one and 1/2 inches, and photographs showing that the width of the gap was approximately one inch. (*Id.*, Exhs. D, E, F, G). Plaintiff thus argues that as the gap resulted in an abrupt elevation change in the middle of the sidewalk, the defect was substantial. She also

observes that City, pursuant to New York City Administrative Code § 19-152(a)(4) and 34 RCNY § 2-09(xx)(D)(5)(iv), defines a substantial defect as including a trip hazard with a height differential greater than or equal to a half-inch.

B. Analysis

Summary judgment may be granted upon a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence sufficient to eliminate material issues of fact. (CPLR 3212[b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Failure to make a *prima facie* showing requires denial of the motion, regardless of the sufficiency of the opposing papers. (*Winegrad*, 64 NY2d at 853).

When the party seeking summary judgment demonstrates entitlement to judgment, the burden shifts to the opponent to "rebut that prima facie showing" (*Bethlehem Steel Corp. v Solow,* 51 NY2d 870, 872 [1980]), by producing "evidentiary proof in admissible form sufficient to require a trial of material questions of fact." (*GTF Mktg. v Colonial Aluminum Sales,* 66 NY2d 965, 968 [1985]; *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]). In opposing such a motion, the party must "lay bare" its evidentiary proof. (*Silberstein, Awad & Miklos, P.C. v Carson*, 304 AD2d 817, 818 [2d Dept 2003]).

As City argues only that the gap was trivial, it has conceded that it had prior notice of the defect and that it is liable for any defective condition on the sidewalk.

It is well-settled that "[t]he 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 toes, or trip

over a raised projection." (*Morales v Riverbay Corp.*, 226 AD2d 271 [1st Dept 1996]). Whether a defect in a sidewalk is trivial does not depend solely on its dimensions. Rather, "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." (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]; *quoting Guerrieri v Summa*, 193 AD2d 647 [2d Dept 1993]). "[E]ven a trivial defect may constitute a snare or trap." (*Argenio v Metro. Transp. Auth.*, 277 AD2d 165, 166 [1st Dept 2000]; *see Abreu v NYCHA*, 61 AD3d 420, 421 [1st Dept 2009] [lengthy irregularity in cement might have been capable of catching plaintiff's sandal]).

Thus, sidewalk defects measuring one inch have been found to be not trivial. (*Cuebas v Buffalo Motor Lodge/Best Value Inn*, 55 AD3d 1361 [4th Dept 2008] [sidewalk slabs with height differential of one inch insufficient to satisfy defendant's burden of showing defect was trivial]; *Boxer v Metro. Transp. Auth.*, 52 AD3d 447 [2d Dept 2008] [where plaintiff alleged defect was one inch and defendant alleged it was one-half inch, triable issues of fact existed]; *Mishaan v Tobias*, 32 AD3d 1000 [2d Dept 2006] [photographs showed broken and cracked sidewalk, and portion of sidewalk was raised at least one inch, raising triable issue]).

Here, as the gap which allegedly caused plaintiff to fall had a height differential of approximately one inch, it was not trivial as a matter of law. (*See Nin v Bernard*, 257 AD2d 417 [1st Dept 1999] [precise dimensions of defect are not dispositive as to whether defect was trivial]). Moreover, the photographs show an irregular and sudden height differential of approximately one inch in an otherwise smooth sidewalk, and a gap of approximately one inch in width. (*See DeLaRosa v City of New York*, 61 AD3d 813 [2d Dept 2009] [defendant failed to

establish that defect consisting of height differential between two concrete slabs on sidewalk was trivial]; *Cuebas*, 55 AD3d at 1361 [same]; *Herrera v City of New York*, 262 AD2d 120 [1st Dept 1999] [elevation differential of between 3/8th to one inch between sidewalk sections, sloping downward in direction plaintiff had been walking, with gap of up to one and 1/2 inches in width was not trivial]). City has thus failed to establish, *prima facie*, that the defect was trivial and thus not actionable.

III. LAMOTTE'S MOTION

As LaMotte has established that her building is an owner-occupied two-family dwelling that is used exclusively for residential purposes (Affirmation of Leonard Toker, Esq., dated May 11, 2010, Exh. E), and absent any evidence to the contrary or that she caused or created the defect or made "special use" of the sidewalk, she is exempt from liability pursuant to Administrative Code § 7-210(b). Moreover, City does not dispute that it is liable for any defect on the sidewalk where plaintiff fell. Thus, LaMotte's motion for summary judgment is granted.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant City of New York's motion for summary judgment is denied; it is further

ORDERED, that defendant Corina LaMotte's motion for summary judgment is granted, and the complaint and all cross-claims are dismissed against defendant LaMotte with costs and disbursements to defendant as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly; and it is further

ORDERED, that the remainder of the action shall continue and the remaining parties shall appear for a compliance conference on August 3, 2010 at 2 pm in room 103 as originally scheduled.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: July 12, 2010
New York, New York