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

PRESENT: HON. PAUL WOOTEN Justice PART 7

FRANCISCA MADRID,

Plaintiff,

- against-

THE CITY OF NEW YORK and ASN WESTMONT LLC c/o ARCHSTONE-SMITH OPERATING TRUST,

Defendants.

INDEX NO. 101304/2009

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to 3, were read on this motion by defendant ASN Westmont LLC c/o Archstone-Smith Operating Trust for summary judgment, pursuant to CPLR 3212.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	3

FILED
JAN 11 2011
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ■ No

This is a negligence "trip-and-fall" action by plaintiff Francisca Madrid ("plaintiff") to recover damages for injuries she allegedly sustained when she tripped and fell on a sidewalk near the corner of 96th Street and Columbus Avenue, purportedly due to a height differential in the sidewalk. Defendants are the City of New York ("the City") and ASN Westmont LLC c/o Archstone-Smith Operating Trust ("ASN") (collectively "defendants"). ASN is the owner of the real property located at the accident site. The parties have completed discovery and the Note of Issue was filed on February 5, 2010. ASN now moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint as against it on the grounds that: (1) any alleged defect in the sidewalk was trivial and thus not actionable; and (2) ASN did not create the alleged defect nor have actual or constructive notice of it. Plaintiff has responded in opposition to the motion, and ASN has filed a reply.

BACKGROUND

In support of its summary judgment motion, ASN submits, *inter alia*, portions of plaintiff's deposition and 50-h hearing transcript; depositions of ASN representatives David Lewis and Rudolf Sec; and photographs of the accident location. In opposition, plaintiff submits only an affidavit of investigator Miguel Cantos with an accompanying photograph. Cantos was not previously disclosed as a witness during discovery. The following facts are undisputed.

On November 13, 2007, at approximately 1:30 p.m., plaintiff tripped and fell on an alleged defect in the sidewalk near the front of 730 Columbus Avenue, New York, New York ("730 Columbus"). She alleges that she sustained serious permanent injuries as a result. ASN purchased 730 Columbus on July 13, 2006, and owned the property on the date of the incident.

On February 5, 2008, plaintiff served a Notice of Claim upon the City, and a 50-h hearing was held on March 18, 2008. Thereafter, on January 30, 2009, plaintiff commenced the present action against the City and ASN, alleging that they negligently maintained and controlled the sidewalk by allowing a dangerous and defective condition to exist which caused her alleged injuries. Specifically, plaintiff claims that her injuries were caused by a "height differential of one inch between two sidewalk flags" (*see* Plaintiff's Aff. in Opp. at ¶ 3). All claims as against the City have been dismissed.[1]

At her deposition and 50-h hearing, plaintiff testified that the weather was nice and the ground was dry on the day of the incident. She was walking a little rapidly looking ahead, and there was nothing obstructing or blocking her passage or view of the sidewalk. When she turned onto Columbus Avenue, she tripped and fell to the ground. She did not notice any defect in the sidewalk prior to her trip-and-fall.

After she was on the ground, plaintiff noticed that the cement was not straight and that

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[1]The Court granted summary judgment dismissing all claims against the City on May 3, 2010 (Smith, *J.S.C.*).

she tripped over the part that was higher. She described the sidewalk as "uneven" and the cement as "indented." She gave varying descriptions of the measurements of the alleged height differential, testifying at the 50-h hearing that the length was about "two centimeters" or about half the length of her index finder (Not. of Mot., Ex. D, at 21). At her deposition, she stated that the difference was "maybe a 2-inch difference, something like that" (*id.*, Ex. E, at 29).

Plaintiff had passed by the accident location on many prior occasions because she worked in the area and walked there two or three times a week. She never noticed a defect in the sidewalk and was not aware if anyone had complained about the condition at any prior time.

During her deposition, plaintiff was shown a number of photographs depicting the accident site and she marked the location where she allegedly tripped. She did not identify any detectable defect in the sidewalk. Plaintiff did not provide an expert report regarding the measurements of the sidewalk during discovery.

Two ASN representatives were also deposed in connection with plaintiff's lawsuit. Lewis, the Vice-President of Regional Services, was responsible for overseeing repairs and renovation work to the sidewalk surrounding 730 Columbus. Lewis was not aware of any complaints regarding the accident location between the time that ASN purchased the property until the accident date, and ASN did not authorize or pay for any repairs or renovation work on the sidewalk during that time. After Lewis learned of the incident, he personally walked around the property to try to determine where the accident could have occurred. He was unable to figure out where it happened.

Sec, the Service Manager for ASN's property, was responsible for day-to-day maintenance and repairs. According to Sec, the exterior of the property was inspected and cleaned on a daily basis, and if an unsafe condition was noticed in the sidewalk it would have been reported and repaired or the area blocked off. Sec personally conducted daily walks

around the building, and he was not aware of any complaints or accidents occurring on the sidewalk on the date of the accident or at any time before or after.

In opposition to ASN's motion, plaintiff submits an affidavit of Cantos, an investigator and administrative assistant employed by her counsel. It is undisputed that Cantos was disclosed as a witness for the first time in plaintiff's opposition to the summary judgment motion. According to Cantos' affidavit, Cantos visited the accident site and took photographs of the location on November 22, 2010, after interviewing plaintiff regarding the circumstances of the incident. He placed his telephone in its carrying case in the differential gap between the two sidewalk flags that allegedly caused plaintiff to trip-and-fall. He then photographed the case. The width of the differential between the sidewalk flags was nearly identical to the width of the telephone in its case. Cantos then measured the telephone in its case with a ruler and determined that the width was just over one inch, which he claims confirmed his visual impression at the scene that the differential between the sidewalk flags was approximately one inch.

DISCUSSION

ASN moves for summary judgment dismissing the complaint as against it, as a matter of law, on two grounds. First, ASN argues that the alleged defect in the sidewalk is trivial, and thus, is not actionable. Second, ASN asserts that it cannot be held liable for plaintiff's injuries because it did not create the alleged defect in the sidewalk or have actual or constructive notice of it. Plaintiff responds that the motion should be denied because ASN has not met its burden of proving that there are no genuine issues of fact for trial.

A. Summary Judgment Standards

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a

matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

A. Trivial Defect

Generally, the issue of whether a dangerous or defective condition exists depends on the particular facts of each case, and is properly a question of fact for the jury (*see Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). "However, a property owner may not be held liable for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip" (*Copley v Town of Riverhead*, 70 AD3d 623, 624 [2d Dept 2010]; *see also Trincere*, 90 NY2d at 977; *Cruz v City of New York*, 39 AD3d 398, 398 [1st Dept 2007]; *Tineo v Parkchester South Condominium*, 304 AD2d 383, 383 [1st Dept 2003]).

Here, plaintiff seeks to hold ASN liable based on an allegation that she tripped and fell due to a height differential of one inch between two sidewalk flags. It is well-settled 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" (*Trincere*, 90 NY2d at 977; *see also Tineo*, 304 AD2d at 383). "[A] mechanistic disposition of a case based exclusively on the dimension of the sidewalk defect is unacceptable" (*Trincere*, 90 NY2d at 977-78). Rather, in determining whether a defect is trivial as a matter of law, the 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" (*id.* at 978, quoting *Caldwell v Village of Is. Park*, 304 NY 268, 274 [1952]; *see also Tese-Milner v 30 East 85th St. Co.*, 60 AD3d 458, 458 [1st Dept 2009]).

Upon considering the relevant factors, the Court finds that ASN has made a prima facie showing, through plaintiff's testimony and the photographs she confirmed as accurately representing the accident location, that the alleged defect in the sidewalk was trivial and, therefore, not actionable as a matter of law (*see Cruz*, 39 AD3d at 398; *James v Newport Gardens, Inc.*, 70 AD3d 1002, 1004 [2d Dept 2010]). Plaintiff testified that she traversed the accident location on a regular basis and never noticed the uneven condition of the sidewalk before she fell. The incident occurred during daylight hours on a clear day and the ground was dry. Nothing obstructed plaintiff's view or passage. Plaintiff was looking straight ahead prior to the trip-and-fall, and only noticed the alleged uneven condition after she fell. Plaintiff gave inconsistent testimony regarding the alleged height differential, and she did not identify any detectible defect in the photographs identified by her as accurately depicting the accident location (*see Losito v JP Morgan Chase & Co.*, 72 AD3d 1033, 1034 [2d Dept 2010] ["Although the plaintiff, in her deposition testimony, described the width of the crack as 1½ inches wide, photographs of the crack, which she confirmed fairly and accurately represented the accident site, indicate that the width was slight and that there was no elevation differential"]). There is also no indication that the alleged defect possessed the characteristics of a trap or nuisance. The burden of proof therefore shifts to plaintiff (*see id.*; *Copley*, 70 AD3d at 624; *Fisher v JRMR*

Realty Corp., 63 AD3d 677, 678 [2d Dept 2009]; *Trumboli v Fifth Ave Paving*, 59 AD3d 706, 707 [2d Dept 2009]).

In opposition, plaintiff has failed to raise a triable issue of fact (*see Stylianou v Ansonia Condominium*, 49 AD3d 399, 399 [1st Dept 2008]). Plaintiff's reliance upon Cantos' affidavit -- which is the only evidence she submits in opposition to the motion -- is improper. This witness was disclosed for the first time in plaintiff's opposition to summary judgment, and, moreover, his affidavit appears tailored to avoid the consequences of plaintiff's prior inconsistent testimony regarding the measurements of the alleged defect (*see Garcia v Good Home Realty, Inc.*, 67 AD3d 424, 425 [1st Dept 2009]; *Rodriguez v New York City Hous. Auth.*, 304 AD2d 468, 469 [1st Dept 2003]).

In any event, were the Court to consider Cantos' affidavit as proper proof, the Court would nonetheless find that plaintiff has failed to sustain her burden of proof *(see Copley*, 70 AD3d at 624*; James*, 70 AD3d at 1004*; Fisher*, 63 AD3d at 678). Cantos' affidavit indicates that he did not visit the accident location until three years after the incident (*see Burko v Friedland*, 62 AD3d 462, 462 [1st Dept 2009] ["the opinion of plaintiff's expert, based on the condition of the cited defect more than three years after the accident, would be insufficient to raise a triable issue of fact"]). In addition, Cantos' affidavit lacks sufficient detail to raise an issue of fact since, by his own admission, his measurements were taken of the telephone in its case and not the sidewalk itself (see *Stylianou*, 59 AD3d at 399 [plaintiff's expert report was "so lacking in detail as to the slope of the sidewalk flag, where along the alleged slope any measurements were taken and how the alleged slope was the proximate cause of plaintiff's fall, that it [was] insufficient to raise an issue of fact in opposition to defendant's prima facie showing of entitlement to summary judgment"]).

ASN, therefore, has established its entitlement to judgment as a matter of law on the basis that the alleged defect in the sidewalk is trivial (*see Cruz*, 39 AD3d at 398).

B. Creation or Notice of Defect

A defendant who moves for summary judgment in a trip-and-fall action "has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]). In order to constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to allow the defendant to discover and remedy it (*see Perez v Bronx Park South Assoc.*, 285 AD2d 402, 403 [1st Dept 2001). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (*Smith*, 50 AD3d at 500). It is well established, however, that "rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact" (*Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 [1st Dept 2010]).

Defendant has met its initial burden of establishing, prima facie, that it neither created the purportedly dangerous condition that caused plaintiff to trip-and-fall, nor had actual or constructive notice of its existence (*see Burko*, 62 AD3d at 462). The two ASN representatives testified that the sidewalk in front of 730 Columbus was inspected and cleaned daily and that during the relevant time periods they had no knowledge of any prior complaints about the sidewalk, never saw a defective condition on the sidewalk, and there were no repairs to the sidewalk (*see id.; Raghu v New York City Hous. Auth.*, 72 AD3d 480, 481-82 [1st Dept 2010]). Plaintiff's reliance upon Cantos' affidavit in opposition is insufficient to raise a triable issue of fact, for the same reasons as found above. Thus, ASN has established its entitlement to

judgment as a matter of law on this ground as well (*see Burko*, 62 AD3d at 462).

Accordingly, the Court grants ASN's motion for summary judgment dismissing the complaint as against it.

For these reasons and upon the foregoing papers, it is,

ORDERED that ASN's motion for summary judgment dismissing the complaint as against it is granted, and all claims against ASN are dismissed; and it is further,

ORDERED that ASN shall serve a copy of this Order with Notice of Entry, upon plaintiff.

This constitutes the Decision and Order of the Court.

Dated: December 27, 2010

Paul Wooten J.S.C.

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check If appropriate: ☐ **DO NOT POST**