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

PRESENT: BARBARA JAFFE J.S.C. PART 5

Index Number : 105377/2006

STONE, TERRI

VS

CITY OF NEW YORK

Sequence Number : 003

DISM ACTION/ INCONVENIENT FORUM

CAL #121

INDEX NO. _____

MOTION DATE 2/1/11

MOTION SEQ. NO. 003

MOTION CAL. NO. 121

The following papers, numbered 1 to 4 were read on this motion to/for _____

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

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

see decision under sequence # 004

FILED

APR 01 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/30/11

MAR 30 2011

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 — NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. PART 5

Index Number : 105377/2006

STONE, TERRI

vs

CITY OF NEW YORK

Sequence Number : 004

SUMMARY JUDGMENT

CAL # 128

INDEX NO.

MOTION DATE 2/1/11

MOTION SEQ. NO. 004

MOTION CAL. NO. 128

The following papers, numbered 1 to 3 were read on this motion to/for

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

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

APR 01 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/30/11

MAR 30 2011

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

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TERRI STONE,

Plaintiff,

-against-

Index No. 105377/06

Motion Date: 2/1/11
Motion Seq. Nos.: , 004
Calendar Nos.: , 128

DECISION & ORDER

THE CITY OF NEW YORK, MARY HITCHCOCK CHILDS, THOMS PARSON III, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF CONSTANCE C. CHILDS, DECEASED, ROBERT CRIMMONS, WILLIAM EWING JR., HENRY S. PATTERSON II, AS TRUSTEES UNDER AN AGREEMENT DATED DECEMBER 22, 1969, AND SHEILA DALEY, ALL OF WHICH ARE DOING BUSINESS UNDER THE NAME OF 625 MANAGEMENT COMMITTEE,

Defendants.

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Corporation Counsel
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By notice of motion dated September 28, 2010, City moves pursuant to CPLR 3211(a)(7) for an order dismissing the complaint, or pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff and co-defendants (collectively, 625 Management) oppose. By notice of motion dated November 2, 2010, 625 Management moves pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes. For the reasons that follow,

both motions are denied.

I. FACTS

Plaintiff alleges that on July 25, 2005, she fell on the east side of Madison Avenue between 58th and 59th Streets, adjacent to the building at 625 Madison Avenue, after her right foot struck a height differential between the sidewalk and the curb. After stumbling, plaintiff's left foot became lodged in a split in the curb. (Affirmation of Gary E. Lesch, Esq., dated Nov. 30, 2010 [Lesch Aff.]). She alleges a ⅝-inch differential between the sidewalk flag and the curb that caused her to stumble, and a ⅜-inch space differential in the curb that caused her to fall. (*Id.*).

Abraham Lopez, a record searcher for the New York City Department of Transportation, testified at deposition held on August 30, 2007, as to the results of a search for records pertaining to Madison Avenue between 58th and 59th Streets, for a period of two years prior to and including the date of the accident. (Affirmation of Peter C. Lucas, ACC, dated Sept. 28, 2010 [Lucas Aff.], Exh. H). The search yielded no complaints, repair orders, or violations. (*Id.*). A permit was found for the sidewalk in front of 625 Madison Avenue, issued on June 23, 2005 to a third party to store equipment or materials on the sidewalk. (*Id.*). The permit does not reflect that work was being done on the premises. (*Id.*).

II. GOVERNING LAW

It is well-settled that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated*

Fur Mfrs, Inc., 46 NY2d 1065, 1067 [1979]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d 851, 853). Accordingly, it is City's burden here, as movant, to demonstrate its entitlement to judgment, and negate, *prima facie*, an essential element of the plaintiff's cause of action. (*Rosabella v Metro. Trans. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]). If shown, the burden shifts to plaintiff to establish a triable issue of fact.

III. CITY'S MOTION

A. Contentions

City contends that, pursuant to New York City Administrative Code § 7-210, it is not liable for the ⅝-inch differential between the sidewalk and the curb, that it cannot be held liable for a defect in the curb absent written notice, and that there is no evidence that it caused or created a defect. (Lucas Aff.). In support, it annexes Lopez's deposition transcript, plaintiff's deposition and verified bill of particulars, photographs taken of the accident location, and the results of Lopez's record search. (Lucas Aff., Exhs. A through I).

In opposition, plaintiff agrees that City is not liable for the ⅝-inch height differential between the sidewalk and the curb and that City had no written notice of a defect, but maintains that City's ownership of the curb raises an issue of fact that it constructed it, that City does not argue that some other entity was responsible for its installation, and that there exist triable issues of fact as to whether City caused or created the defect. (Lesch Aff.). Plaintiff also annexes in support the affidavit of Robert Liss, a structural designer and engineer who investigated the sidewalk four months after the accident and found a ⅜-inch separation in the curb, characterizing it as a trap and hazard. (*Id.*, Exh. F). Liss opines that this defect must have existed at the time the

curb was installed or constructed, and that it did not develop over time. (*Id.*).

In opposition, 625 Management maintains that City has not satisfied its *prima facie* burden as it does not establish that it did not affirmatively create either defect or that it did not make a special use of the sidewalk, and that a permit issued for the block on Madison Avenue raises triable issues of fact as to whether City caused or created the condition. (Affirmation of Richard C. Prezioso, Esq., dated Nov. 2, 2010).

In reply, City argues that there is no evidence that it caused or created the defective condition, and that a permit constitutes insufficient evidence of written notice of a defective condition. (Reply Affirmation of Peter C. Lucas, dated Jan. 24, 2011). In support, it annexes an affidavit from Thomas Foley, an assistant commissioner for the Department of Design and Construction, who conducted a search and found that no work was performed on the sidewalk or curb on Madison Avenue between 58th and 59th Streets. (*Id.*, Exh. A).

B. Analysis

Pursuant to Administrative Code § 7-201 "no civil action shall be maintained against the city" arising from a dangerous condition on a sidewalk unless the plaintiff demonstrates that City received written notice of the dangerous condition. If City establishes that it received no written notice, the burden shifts to the plaintiff to establish a recognized exception to the rule, in this case, that City affirmatively created the defect. (*Yarborough v City of New York*, 10 NY3d 726, 728) [2008]). This exception is "limited to work by the City that immediately results in the existence of a dangerous condition." (*Bielecki v City of New York*, 14 AD3d 301 [1st Dept 2005]).

As plaintiff seeks to hold City liable only for the curb and not the abutting sidewalk, Administrative Code § 7-210 is inapplicable. (*See Ascensio v New York City Hous. Auth.*, 77

AD3d 592 [1st Dept 2010] [abutting property owner not liable for curb under section 7-210]). However, as both plaintiff and 625 Management concede that City did not receive written notice of the defect in the curb, the burden shifts to plaintiff to establish the existence of an issue of fact as to whether City created the space differential that caused her fall.

As plaintiff's engineer opines, without dispute from City, that the gap in the curb originated at its installation or creation (*see Oboler v City of New York*, 8 NY3d 888, 890 [2007] [plaintiff presented no evidence as to who repaved roadway]), City is presumed to have created the curb and thus, there exists an issue of fact as to whether it created the defect here (*Good v County of Sullivan*, 198 AD2d 706, 708 [3d Dept 1993]; *Cruz v City of New York*, 218 AD2d 546 [1st Dept 1995]).

IV. 625 Management's motion

A. Contentions

625 Management contends that it cannot be held liable for the gap in the curb that caused plaintiff's fall, and that the height differential that caused her initial stumble is trivial as a matter of law and thus not actionable. (Affirmation of Richard C. Prezioso, Esq., dated Nov. 2, 2010 [Prezioso Aff.]). In support, it annexes the pleadings, plaintiff's 50-h hearing testimony and deposition transcript, the deposition transcripts of co-defendant's City's record searcher and 625 Management's property manager, and photographs of the accident location. (*Id.*, Exhs. A-H).

In opposition, plaintiff does not contest that 625 Management is not liable for the gap in the curb, but denies that the ⅝-inch differential between the sidewalk flag, for which 625 Management may be held liable, and the curb, is not trivial. (Lesch Aff.). In addition to her testimony and pleadings, plaintiff annexes the affidavit of Robert Liss, a structural designer and

engineer who investigated the sidewalk four months after the accident and measured a 5/8-inch height differential, characterizing it as an "abrupt variation in elevation." (*Id.*, Exh. F).

In reply, 625 Management challenges the sufficiency and admissibility of plaintiff's expert affidavit. (Affirmation in Reply of Richard C. Prezioso, Esq., dated Jan. 3, 2011).

B. Analysis

Pursuant to Administrative Code § 7-210, the owner of commercial property is liable for the sidewalk abutting the building, and thus 625 Management may be held liable to extent that the sidewalk caused plaintiff's injury.

It is well-settled that the party responsible for "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]). Moreover, there is no per se rule as to what measurement renders a defect trivial. Rather, "a mechanic disposition of a case based exclusively on the dimension of the . . . defect is unacceptable" (*Trincere v County of Suffolk*, 90 NY2d 976, 977-978 [1997]) *Dominguez v OCG IV, LLC*, ___ NYS2d ___, 2011 NY Slip Op 01588 [1st Dept 2011]; *Delarosa v City of New York*, 61 AD3d 813, 814 [2d Dept 2009]), and "even 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 may 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]; *Boxer v Metro. Transp. Auth.*, 52 AD3d 447 [2d Dept 2008]; *Mishaan v Tobias*, 32 AD3d 1000 [2d

Dept 2006]).

And, "[w]hile a gradual, shallow depression is generally regarded as trivial . . . the presence of an edge which poses a tripping hazard renders the defect nontrivial." (*Argenio*, 277 AD2d at 166). Thus, "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]). It is the movant's burden to establish that a defect is trivial as a matter of law. (*Boxer*, 52 AD3d 447, 448]).

Absent any per se measurement rule, I decline to hold that the defect in issue here is not actionable merely because the height differential measures less than one inch, as plaintiff alleges, without evidence to the contrary, that she stumbled when she struck the raised area between the sidewalk and the curb, and defendant provides no testimony of anyone with knowledge of the condition at the time of the accident to dispute that the defect constituted a snare that did not occur gradually. (*Menendez v Dobra*, 301 AD2d 453 [1st Dept 2003] [defect not actionable absent evidence that, although apparently trivial, posed significant hazard by reason of its location or adverse weather or lighting conditions]; *compare Dominguez*, ___ NYS2d ___, 2011 NY Slip Op 01588 [appellant did not provide someone with knowledge of condition], *with Krinsky*, 918 NYS2d 40, 2011 NY Slip Op 01524 [1st Dept 2011] [defendants established through expert affidavit that crack in sidewalk trivial]). Therefore, 625 Management has not satisfied its *prima facie* burden and it is unnecessary to address plaintiff's opposition papers or her expert's affidavit. (*Delarosa*, 61 AD3d at 814).

V. CONCLUSION

Accordingly, it is hereby

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

ORDERED, that defendant 625 Management's motion for summary judgment is denied.

This constitutes the decision and order of the court.

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: March 30, 2011
New York, New York

MAR 30 2011