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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

EILEEN MAXSON,

Plaintiff,

- against-

ASN FOUNDRY, LLC and THE CONSOLIDATED EDISON COMPANY OF NEW YORK,

Defendants.

INDEX NO. 110167/2008
MOTION DATE
MOTION SEQ. NO. 003
MOTION CAL. NO.

The following papers, numbered 1 to 5, were read on this motion by defendant ASN Foundry, LLC for summary judgment, pursuant to CPLR 3212.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1, 2
Answering Affidavits — Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4, 5

Cross-Motion: ☐ Yes ■ No

Plaintiff Eileen Maxson ("plaintiff") brings this personal injury action against defendants ASN Foundry, LLC ("ASN") and The Consolidated Edison Company of New York ("Con Ed") to recover damages for injuries she allegedly sustained when she tripped and fell over a raised metal grate in the sidewalk near 505 West 54th Street, purportedly due to a height differential between the metal grate and the vault portion of the sidewalk. ASN is the owner of the real property located adjacent to the accident site. Con Ed, a utility company, is the entity that installed, owned and maintained the subject metal grate and vault. The parties have completed discovery and the Note of Issue was filed on March 31, 2010. ASN now moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint and all cross-claims against it on the grounds that: (1) plaintiff cannot establish the existence of a "dangerous" or "defective" condition for which ASN may be held liable; and (2) ASN owed no duty to plaintiff because it did

not install, own or maintain the metal grate upon which plaintiff tripped and fell. Plaintiff has responded in opposition to the motion, and ASN has filed a reply. Con Ed takes no position regarding the motion.

BACKGROUND

In support of its summary judgment motion, ASN submits, *inter alia*, depositions of plaintiff and Con Ed representative Robert O'Brien ("O'Brien"); photographs of the accident location; and Con Ed's replies to plaintiff and ASN's notices to admit. Plaintiff submits in opposition, *inter alia*, her own affidavit and a deposition of building employee Omar Skeete ("Skeete"). The following facts are undisputed.

On February 6, 2008, at around 7:15 p.m., plaintiff was walking on the sidewalk in front of 505 West 54th Street, New York, New York, which was a building owned by ASN. She tripped and fell to the ground when her foot made contact with a metal grate in the sidewalk, allegedly resulting in physical injuries. The metal grate was located within a vault identified by Con Ed as Vault Number 6480. Con Ed admits in its responses to plaintiff and ASN's notices to admit that it installed, owned and was responsible for maintenance of the subject metal grate and vault.

Plaintiff was shown photographs at her deposition depicting the vicinity where the accident occurred and she identified the metal grate that she tripped on. She testified that the metal grate was "elevated from the ground," but at the time of the accident she did not measure the distance between the surface of the sidewalk and the top of the grate (*see* Not. of Mot., Ex. F at p. 48, 63). At some point after the accident, she purportedly determined that there was a height differential by "just looking at it," but she never actually measured it (*id.* at p. 65-66). In her affidavit opposing summary judgment, however, she estimates that there was a height differential of about two inches, stating: "I have thought about it and revisited the location where I fell and I believe that at the time of my accident, the height differential between the

sidewalk and the top of the utility grating was about two inches" (Affirmation in Opposition, Ex. C at ¶ 5).

Skeete, an employee of the building owned by ASN, was working at the building at the time of plaintiff's accident. Skeete testified at his deposition that during the six month period prior to the accident, he was aware that the metal grate was "risen a little bit" and that it posed a risk of injury if it was not repaired (*id.*, Ex. A at p. 21). He discussed it with other building employees in general conversation, but he did not measure the distance that it was raised.

DISCUSSION

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]).

As a threshold matter, plaintiff argues that ASN has failed to submit any evidence in admissible form establishing its entitlement to summary judgment because the depositions of plaintiff and O'Brien are unsigned, and thus, inadmissible. ASN responds that its evidentiary proof is admissible since the deposition transcripts are certified as accurate by the court reporter, and, moreover, plaintiff relies upon Skeete's unsworn deposition in support of her opposition to summary judgment. There is authority in the First Department that "[a]n unsigned but certified deposition transcript of a party can be used by the opposing party as an admission in support of a summary judgment motion" (*Morchik v Trinity School*, 257 AD2d 534, 536 [1st Dept 1999]; *see also Garris v City of New York*, 65 AD3d 953, 953 [1st Dept 2009]; *White Knight Ltd. v Shea*, 10 AD3d 567, 567 [1st Dept 2004]; *Zabari v City of New York*, 242 AD2d 15, 17 [1st Dept 1998]). Since the transcript of plaintiff's deposition is certified, the Court finds this evidence admissible for purposes of the present motion.

Turning to the merits, ASN first argues that it has established its entitlement to judgment as a matter of law dismissing all claims against it because plaintiff cannot establish the existence of a "dangerous" or "defective" condition for which ASN may be held liable. ASN argues that plaintiff gave speculative testimony at her deposition regarding the alleged height differential since she testified that she never measured the height differential and did not know what the difference in height was. ASN also argues that plaintiff's reliance upon a "supplemental" affidavit to establish that the height differential was about two inches fails to raise an issue of fact since it contradicts her prior testimony. ASN further argues that even if a height differential existed, it was trivial and de minimus, and thus insufficient to support her claim.

Plaintiff argues that there are questions of fact regarding whether the height differential was de minimus since Skeete testified that the metal grate was raised for six months and that he had and discussed it with fellow employees. Plaintiff also asserts that ASN has not established what the actual height differential was, and she submits her own affidavit indicating that the height differential was about two inches.

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, it is well established that "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 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]). 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). 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 failed to make a prima facie showing that the condition upon which plaintiff allegedly tripped and fell was trivial, and thus, not actionable as a matter of law (*see Vani v County of Nassau*, 77 AD3d 819, 819-20 [2d Dept 2010]; *Fasano v Green-Wood Cemetery*, 21 AD3d 446, 446 [2d Dept 2005]). The evidence submitted in support of ASN's motion, which includes plaintiff's deposition testimony and photographs of the metal grate, is insufficient to sustain its initial burden of proof. Notably, this evidence fails to establish any measurements of the alleged height differential, and ASN

presents no other evidence, such as testimony from an expert witness, establishing the trivial nature of the condition (*see Rivas v Crotona Estates Hous. Dev. Fund Co.*, 74 AD3d 541, 542 [1st Dept 2010]; *Delarosa v City of New York*, 61 AD3d 813, 814 [2d Dept 2009]; *cf. Vazquez v JRG Realty Corp.*, 81 AD3d 555 [1st Dept 2011] [defendant's witnesses stated that area was nearly flat and their expert measured the defect and found it to be the height of a nickel]). In light of this finding, the Court need not review the sufficiency of plaintiff's opposition papers regarding this issue (*see Vani*, 77 AD3d at 820).

With respect to the second issue, however, ASN has established its entitlement to judgment as a matter of law. ASN contends that it owed no duty to plaintiff since ASN did not install, own or maintain the metal grate identified by plaintiff as the cause of her accident. Rather, Con Ed has admitted to the installation, ownership and maintenance of the subject grate. Plaintiff argues that there are questions of fact regarding whether ASN owed a duty to plaintiff because, pursuant to the Administrative Code of the City of New York § 7-210, a landowner of a commercial building is responsible for the maintenance of the sidewalk abutting its property. According to plaintiff, section 7-210 does not carve out an exception for "metal grates" that were installed by Con Ed.

The First Department's decision in *Hurley v Related Management Co.*, 74 AD3d 648 [1st Dept 2010], is dispositive of this issue. In that case, a pedestrian brought an action against property owners and Con Ed for injuries sustained in an alleged slip and fall on a sidewalk metal grate. At issue on appeal was "whether sidewalk metal grating is part of the 'sidewalk' for purposes of [section 7-210], which requires owners of real property to maintain abutting sidewalks in a reasonably safe condition" (*id.* at 648-49). Similar to here, the plaintiff's testimony established that she fell as a result of an alleged slippery condition of a sidewalk grate and it was undisputed that Con Ed owned the grate and vault it covered. After examining the relevant rules governing the maintenance and repair of sidewalk grates (*see* New York City

Department of Transportation Highway Rule 34 [RCNY § 2-07] [placing maintenance and repair responsibilities on the owners of covers or gratings]), the First Department concluded:

> "[W]e find that § 7-210 of the Administrative Code of the City of New York *does not impose liability upon a property owner for failure to maintain a sidewalk grate in a reasonably safe condition.* [The defendant property owners] have 'established their prima facie entitlement to judgment as a matter of law by demonstrating that they did not have exclusive access to, or the ability to exercise control over, the grate on which . . . plaintiff allegedly [slipped] and fell' (*Breland v Bayridge Air Rights, Inc.*, 65 AD3d 559, 560, 884 NYS2d 143 [2009])" (*Hurley*, 74 AD3d at 649 [emphasis supplied]).

Under this clear authority, therefore, ASN has established its entitlement to judgment as a matter of law dismissing the claims against it.

Accordingly, ASN's motion for summary judgment dismissing the complaint and all cross-claims against it is granted.

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

ORDERED that ASN's motion for summary judgment is granted; and it is further,

ORDERED that the Clerk is directed to enter judgment in favor of ASN dismissing the complaint and all cross-claims against ASN; and it is further,

ORDERED that the remainder of this action shall continue; and it is further,

ORDERED that ASN shall serve a copy of this Order, with notice of entry, upon all parties.

This constitutes the Decision and Order of the Court.

Dated: March 28, 2011

Paul Wooten J.S.C.

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

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