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

PRESENT: Hon Joan A. Madden PART 11

Justice

Index Number : 117186/2006

MONAHAN, JACQUELINE

VS.

T.I.R.N. REALTY CORP.

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 3/3/11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision and order.

FILED

JUL 18 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: July 15, 2011

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

JACQUELINE MONAHAN,	:	
Plaintiff,	:	
- against -	:	Index No.: 117186/06
T.I.R.N. REALTY CORP., GEORGE A. BOWMAN, INC., JCB MADISON, INC., and ALMA GROUP.,	:	
Defendants.	:	
T.I.R.N. REALTY CORP. and GEORGE A. BOWMAN, INC.,	:	
Third- Party Plaintiffs,	:	Third-Party Index No.: 590559/07
- against -	:	
JCB MADISON, INC.,	:	
Third- Party Defendant.	:	
JCB MADISON, INC.,	:	
Second Third-Party Plaintiff	:	Second Third-Party Index No.: 591134/07
- against -	:	
ALMA GROUP, INC.,	:	
Second Third-Party Defendant.	:	

JOAN A. MADDEN, J.:

In this personal injury action, defendant/third-party-defendant/second third-party plaintiff JCB Madison, Inc., ("JCB") moves for summary judgment pursuant to CPLR 3212 dismissing the complaint filed against it by plaintiff Jacqueline Monahan ("Monahan")(motion seq. no. 003). Defendants/third-party plaintiffs T.I.R.N. Realty

Corp. and George A. Bowman, Inc. ("TIRN" and "Bowman") move for the same relief (motion seq. no. 004).[1] Monahan opposes both motions, which are denied for the reasons below.

Background

Monahan alleges that she sustained personal injuries on September 29, 2005, while attempting to leave her fifth-floor apartment at 768 Madison Avenue, New York, New York, 10021, ("the building"), when she tripped and fell down an interior staircase. Specifically, Monahan alleges that, as she reached the staircase leading from the second floor down to the first floor, she tripped and fell on a raised and loose gold metal trim installed to hold down the edge of the carpet on the second floor landing.

The owner of the building, defendant TIRN, employs defendant Bowman as the building's managing agent. TIRN leased a space on the second floor to JCB which operates a beauty salon. JCB hired defendant/second third-party defendant Alma Group, Inc., ("Alma"), to install carpet in the second floor hallway. Alma installed the carpet in May 2005.

Monahan testified that on the date of the accident, she was leaving her apartment to take her dog for a walk around 8:00 p.m. Monahan dep., at 8. Monahan contends that, just prior to reaching the staircase on the second floor, her left foot got caught on a gold colored metal strip that holds down the edge of the carpet and separates it from the marble stairs. Id., at 32. She testified that after her foot got caught on the strip, she went up in the air and slammed down on the stairs, landing on her back. Id. Monahan testified that one of the nails that was used to keep the metal strip down seemed loose. Id., at 91.

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[1]Motion seq. nos. 003 and 004 are consolidated for disposition.

Monahan also testified that the metal strip "always had give to it" but she was unaware of how long the nail had been loose prior to her accident. Id., at 92.

At her deposition, Monahan's roommate, Anne Robertson, ("Robertson"), testified that a portion of the subject metal strip was raised approximately "two millimeters" when she saw it.[2] Robertson dep., at 78. Robertson also testified that at least two months before the accident, she had mentioned this fact to Zuvdija Medunjanin, ("Zuki"), the superintendant, ("super"), at the building, and that he said that he would take care of the problem. Id., at 77. She testified that she had not made any complaints to JCB about the subject metal strip prior to the date of Monahan's accident. Id., at 49.

Frederic D. Sasse, Jr., ("Sasse"), president of Bowman, stated that in May 2005, he permitted JCB, the beauty salon that occupied the second floor, to install carpeting in the second floor hallway and stairwell landing. Sasse dep., at 23. Sasse testified that in late May, after the carpeting on the landing had been installed, he personally inspected the carpeting and found no issues or problems with it. Id., at 26. Further, he testified that that Zuki had made a statement to him that "there [were] no defects in the carpet or problems with the carpet." Id., at 26, 27. Sasse also testified that he did not recall receiving any complaints in connection with the carpeting from any of the tenants, including regarding the gold metal strip. Id., at 27, 28. Sasse also testified that in 2005, Zuki had specifically communicated to him that he had not personally received any complaints from tenants regarding the gold strip. Id., at 29. Sasse further testified that

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[2] Subsequently, in her sworn affidavit, Robertson changed her approximation and said that, when the gold metal trim was stepped on, it would raise "at least a quarter of an inch." Robertson Aff., at ¶ 7. However, since this statement directly contradicts her deposition testimony, the court will not consider it. See, Zylinski v. Garito Contracting, 268 A.D.2d 427 (2d Dept. 2000).

he did not believe that the carpet had been installed improperly or that the carpet created a dangerous condition. Id., at 32.

During his deposition, Zuki testified that he and Sasse had personally inspected the carpet and the gold metal trim the week after it was installed and found that none of the nails were loose nor was the metal strip raised at all. Zuki dep., at 52. Additionally, after Zuki was made aware of Monahan's accident, approximately one or two months after the fact (Id., at 55.), he testified that he conducted another inspection of the carpeting and gold metal trim and again found no defects. Id., at 59. During this inspection, Zuki stepped on the metal strip and it did not move at all nor was any portion of the metal strip raised. Id. Zuki also testified that none of the tenants, including Monahan and Robertson, had ever complained to him about the metal strip. Id., at 53, 54.

Monahan commenced this action against TIRN and Bowman. Thereafter, TIRN and Bowman commenced a third-party action against JCB. After interposing its answer, JCB commenced a second third-party action against Alma, which did not answer and is in default. Monahan then commenced a separate action against JCB and Alma and that action has been consolidated with the instant action.

TIRN and Bowman now move for summary judgment, arguing that they have established a prima facie defense by submitting evidence that shows that the area where Monahan allegedly tripped and fell was a *de minimus* or trivial defect. Additionally, TIRN and Bowman argue that they did not cause or create the alleged defect nor did they have actual or constructive notice of it and therefore cannot be held liable.

JCB separately moves for summary judgment on the grounds that the defect which allegedly caused Monahan to trip and fall was "open and obvious." JCB alternatively argues that the defect at issue was *de minimus* and too trivial to be actionable and did not have any of the characteristics of the trap or snare. JCB also argues that assuming *arguendo* that the defect was actionable, it is not liable since JCB did not lease the area in question and therefore did not owe a duty to Monahan.

Monahan counters that triable questions of fact exist as to whether the defect was trivial as evidenced by the defendants' assertions that the defect was both trivial and open and obvious. Monahan also argues a triable issue of fact exists as to whether TIRN and Bowman were on actual or constructive notice of the defect and that, in any event, as the owner and managing agent of the building, respectively, they have a non-delegable duty to maintain a safe means of ingress and egress. Monahan also asserts that since it is necessary to walk by the alleged defect on the second floor landing in order to enter JCB's hair salon, JCB had notice of the defect.

In support of her contention that the defect was not trivial or *de minimus*, Monahan relies on the affidavit of Dr. William Marletta, ("Dr. Marletta"), a certified safety professional, who performed an onsite inspection of the subject stairway on September 18, 2007. Although the carpet and metal trim had already been removed and discarded at the time of his inspection, he reviewed several color photographs of the subject defective metal trim as well as Monahan's deposition. He concluded that the metal edge trim molding was raised more than 1/4 inch off the floor creating an abrupt vertical transition capable of interrupting the human gait. Marletta Aff. at 7. He further states that the subject change in levels is at least 1/4 inch and is without appropriately

sloped edges in violation of the American Society of Testing and Materials, ("ATSM"), F13 Committee on Safety and Traction, "Standard Practice for Safe Walking Surfaces" (ASTM F1637) indicating changes in level between 1/4 to ½ inch should be beveled with a slope no greater than 1:2 (rise: run); as incorporated in Federal Register (49 CFR 31523); ANSI Standard A117.1 1980; and The New York City Building Code (27-127, 27-128 and 27-104). Id., at 10-11.

In reply, JCB argues that the affidavit of Dr. Marletta should not be considered as Monahan did not disclose her intention of presenting an expert witness at any time prior to the service of her opposition papers. JCB further argues that Monahan knowingly made misrepresentations about her intention and she should therefore be sanctioned by this court.

Discussion

On a motion for summary judgment, the proponent "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 face..." Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist and require a trial. Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986).

Pursuant to CPLR 3212(b), a summary judgment motion should be denied if any party shall show facts sufficient to require trial of any issues of fact. In order to reach this threshold and defeat a defendant's motion for summary judgment, the Monahan need only present evidentiary materials sufficient to create a material question of fact.

Zuckerman v. City of New York, 49 N.Y. 2d 557 (1980). In the instant case, even assuming *arguendo* that defendants made a *prima facie* showing entitling them to summary judgment, Monahan has countered this showing.

First, contrary to the defendants' position, it cannot be determined as a matter of law that the defect at issue is *de minimus* or trivial. "Whether a dangerous or defective condition...creates liability 'depends on the peculiar facts and circumstances of each case and is generally a question for the jury." Trincere v. County of Suffolk, 90 NY2d 976, 977 (1997), citing Guerrieri v. Summa, 193 AD2d 647 (2d Dept. 1993). However, "trivial [or *de minimus*] defects on a walkway not constituting a trap or nuisance, as a consequence of which a pedestrian might...trip," are not actionable. Morales v. Riverbay Corp., 226 AD2d 271 (1st Dept. 1996). In determining whether an alleged defect is trivial as a matter of law, the court must examine all the facts presented, including the width, depth, elevation, irregularity and appearance of the alleged defect, along with the time, place and circumstances of the injury, and whether it constitutes a trap or snare. Trincere, 90 NY2d at 977, citing Caldwell v. Vill. of Isl. Park, 304 NY 268 (1952).

Here, even assuming *arguendo* that the defendants made a *prima facie* showing that the defect was too trivial to be actionable, Monahan has produced evidence sufficient to counter this showing including Monahan's testimony that her left foot got "caught on the metal strip" suggesting that the defect was a trap or snare. See, Dominguez v. OCG IV, LLC, 82 A.D.3d 434 (1st Dept. 2011)(holding that a triable issue of fact existed as to whether a defect was trivial when there was evidence that Monahan's foot became caught on the edge of a step).

Moreover, the opinion of Monahan's expert that the metal strip created a tripping hazard in violation of various safety standards and provisions also raises factual issues. Contrary to JCB's position, the court may consider the expert's affidavit despite Monahan's failure to previously identify him as an expert since there is no indication that such failure was intentional or willful or prejudicial to defendants.[3] Hernandex-Vega v. Zwanger-Psiri Radiology Group, 39 AD3d 710, 711 (2d Dept 2007); see also Busse v. Clark Equipment Co., 182 AD2d 525 (1st Dept 1992). In addition, the court finds that the expert affidavit is sufficiently detailed and based on facts in the record to support Monahan's position that the gold metal strip was defective. Accordingly, a jury must decide the issue of whether the defect in the metal strip was trivial.

Likewise, factual issues exist as to whether the metal strip was an "open and obvious condition" and therefore not actionable. The issue of "whether a condition is open and obvious is generally a jury question and the court should only determine that a risk was open and obvious as a matter of law when the facts compel such conclusion." Westbrook v. WR Activities-Cabrera Mkts., 5 AD3d 69, 72 (1st Dept 2004). Here, although Monahan testified that the gold metal strip "always had some give," and that "a nail might have been loose," she also testified that she did not see the defect in the metal strip immediately before or during her fall. In addition, there is testimony that two separate inspections of the metal trim did not reveal any defects. Accordingly, whether the subject defect was "open and obvious" is a material question of fact for a jury. See,

[3] With respect to the prejudice issue, Dr. Marletta's onsite inspection was performed after the carpeting and trim had been removed and discarded. The majority of his findings were based on the color photographs taken soon after the accident and the deposition testimony of Monahan. As this evidence is readily available to defendants, Dr. Marletta's affidavit does not prejudice defendants and may be considered by the court.

Thornhill v. Toys "R" Us NYTEX, Inc., 183 AD2d 1071 (3d Dept 1992)(finding that based on the surrounding circumstances it could not be determined as a matter of law that the raised platform over which Monahan fell was an open and obvious condition).

The next issue is whether there is a basis for finding that defendants owed Monahan a duty such that they can be held liable for the injuries suffered as a result of the allegedly defective condition. "It is well established that a landowner (or possessor of property) is under a duty to maintain its property in a reasonably safe condition under the extant circumstances, including the likelihood of injuries to others, the potential for any such injuries to be of a serious nature and the burden of avoiding the risk [citations omitted]." O'Connor-Miele v. Barhite & Holzinger, Inc., 234 AD2d 106 (1st Dept 1996). In order for an owner to be held liable for injuries caused to a person as a result of a defective condition on the premises, it must be shown that "the owner or possessor either created the condition, or had actual or constructive notice of it and a reasonable time within which to remedy it." Freidah v. Hamlet Golf and Country Club, 272 AD2d 572, 573 (2nd Dept 2000).

In the instant case, there is no dispute that TIRN and Bowman did not create the condition that led to Monahan's accident. Although these entities were not responsible for creating the allegedly hazardous condition, they may be liable for the resulting injuries if it can be shown that they had actual or constructive notice of the condition for a reasonable amount of time. Trujillo v. Riverbay Corp., 153 A.D.2d 793, 794 (1st Dep't 1989).

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 defendant's employees to discover and remedy it. Gordon v. American Museum of Natural History,

67 N.Y.2d 836, 837 (1986). A general awareness that litter or some other dangerous condition may be present on the premises is insufficient to maintain liability. Id. at 838.

Here, the record raises material issues of fact as to whether TIRN and Bowman had notice of the alleged defect. Specifically, Robertson testified that two months prior to Monahan's accident, (in reference to the second floor landing area), she told the building's super that the metal strip that holds down the carpet was loose. Although this fact is disputed by TIRN and Bowman, credibility cannot be determined on summary judgment (Moustaffa v. City of New York , 252 AD2d 472 [1st Dept 1998]), and such a communication would certainly be enough to establish "notice."

As for JCB, although its lease excluded the hallway and staircase, as JCB was responsible for the installation of the carpeting, it is potentially liable on the theory that it created the condition on which Monahan fell. Moreover, since the defect at issue was just outside of the entrance to the hair salon, and there is testimony that the defect existed for period of time before the incident, there are triable issue of fact as to whether JCB had actual or constructive notice of the defect.

Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment by defendant TIRN and Bowman is denied; and it is further

ORDERED that the motion for summary judgment by defendant JCB is denied; and it is further

ORDERED that a pre-trial conference shall be held in Part 11 room 351, 60 Centre Street, New York, NY, on July 28, 2011, at 3:00pm.

DATED: ~~June~~ July 11, 2011

FILED

J.S.C.

JUL 18 2011

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