Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Blanca Cardona-Torres,

Plaintiff,

- against -

The City of New York, Jamaica Seven LLC and Jamaica Seven Properties LLC,

Defendants.

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Index Number: 22571/09

Motion Date: 11/29/11

Motion Cal. Number: 6

Motion Seq. No.: 1

The following papers numbered 1 to 13 read on this motion by defendants, Jamaica Seven LLC and Jamaica Seven Properties LLC, for summary judgment; and "cross-motion" by defendant, The City of New York, for summary judgment.

| | Papers Numbered |
|---|---|
| Notice of Motion-Affirmation-Exhibits..... | 1-4 |
| Notice of Cross-Motion-Affirmation-Exhibits..... | 5-8 |
| Affirmation in Opposition-Exhibits..... | 9-11 |
| Reply..... | 12-13 |

Upon the foregoing papers it is ordered that the motion and "cross-motion" are decided as follows:

Motion by Jamaica Seven for summary judgment dismissing the complaint and all cross-claims against them is granted. The notice of "cross-motion" by the City for summary judgment is deemed a notice of motion, since plaintiff is not a moving party (see CPLR 2215), and is denied.

Plaintiff allegedly sustained injuries as a result of tripping and falling at the border where a brick walkway belonging to and leading from the entrance to the apartment building in which she was a tenant located at 89-11 153rd Street in Queens County meets the public sidewalk. Said premises are owned by the Jamaica Seven defendants. Jamaica Seven move for summary judgment upon the ground that the condition at issue is a trivial defect that is not actionable as a matter of law.

A property owner may not be held liable in damages for trivial defects not constituting a trap or nuisance, and the Court may determine by examining the photographic and other evidence that the alleged defect is trivial and grant summary judgment to the defendant(see Hymanson v. A.L.L. Assocs., 300 AD 2d 358, 358 [2nd Dept 2002]). The determination of whether a condition is trivial does not rest exclusively upon the dimension or depth of the defect in inches, but must be made upon an examination of 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" (Trincere v. County of Suffolk, 90 NY 2d 976, 976 [1997]).

Upon close scrutiny of the photographs and consideration of all other facts and circumstances surrounding the accident as presented on this record, it is the opinion of this Court that the alleged sidewalk defect was too trivial to be actionable.

Annexed to the moving papers are photographs of the area where plaintiff alleges that she tripped, marked as defendant's Exhibits A, B, C and D at her deposition. Exhibits A, B and C depict a brick walkway leading to and meeting a public sidewalk that runs perpendicular to it. Plaintiff marked the spot where she alleges she tripped on Exhibit B. That spot shows a very slight elevation differential between the sidewalk and walkway at the joint where they meet. Exhibits D and E are extreme close-ups of the area with a tape measure in the photographs. The tape measure in Exhibit D shows that the edge of the sidewalk is raised from the abutting walkway by approximately 7/8", while Exhibit E shows an elevation differential of approximately ½".

It has been held that a sidewalk flag raised one inch above the adjacent flag at its highest point and where it did not have any of the characteristics of a trap or nuisance was trivial and not actionable as a matter of law (see Riser v New York City Housing Authority, 260 AD 2d 564 [2nd Dept 1999]; see also Zalkin v City of New York, 36 AD 3d 801 [2nd Dept 2007] [3/4" elevation]).

In our case, the sidewalk where it joins the walkway was raised less than one inch – between ½ and 7/8 of an inch. Moreover, the area was not concealed and did not have any characteristics of a trap or nuisance.

Plaintiff's counsel, in his affirmation in opposition, states that "the brick walkway was constructed so that the bricks were laid in a manner as to form a decorative pattern" and speculates, "[T]he brick walkway was constructed in a manner as to create a pattern with the bricks being laid in different directions. This

too caused the ledge to be more difficult to recognize and thereby increased the significance and danger presented by this hazard." Counsel's contention is without merit. In the first instance, the pattern of the bricks on the walkway clearly has no relevance to the visibility of the alleged defect, since this defect, to wit, the raised "ledge" as counsel characterizes it in extreme hyperbolic fashion, was not on the brick walkway. Indeed, the red brick pattered walkway contrasts dramatically with the light-colored cement sidewalk and highlights, rather than obscures, the border between them, thereby making the border, and the elevated edge of the sidewalk, more visible and apparent than a similar condition would be if it were entirely on the sidewalk or the walkway.

Plaintiff's counsel also argues that "the depression within movant's brick walkway caused water to pool in the area which left mud, sand, earth and sludge behind when water receded or dried. This material would camouflage and disguise the ledge formed by the height differential between the concrete public sidewalk and the brick walkway thereby making the defect more difficult to detect." He also opines, "These factors were further heightened by the fact that the accident happened during dusk on a dreary and overcast February afternoon which further contributed to plaintiff's difficulty in seeing the defect."

In support of his speculative assertions, counsel annexes to his opposition an affidavit of plaintiff in which she purportedly avers, inter alia, "Many times during the prior years when I observed that the water would pool in this depressed area. [sic] When the area was dry, there was a water stain and/or a residue of mud, sand and residue left behind by the receding water. This was the condition of the area at the time of the accident. The residue which was deposited obscured the fact that there was a ledge which had been formed where the two surfaces met. The brick walkway was further laid out so as to form a decorative pattern.... This pattern also served to camouflage and obscure the presence of the ledge that was formed between the walkway and the sidewalk....The ledge was clearly sufficient to be a trap or hazard as it was sufficient to catch my foot and cause me to fall.... In addition, the pattern formed by the bricks together with the collection of mud, sand and debris, combined to camouflage and disguise the defect making it difficult to note the presence of the hazardous and trap-like ledge. This was further exacerbated by the poor visibility which existed between 3:00 and 4:00 P.M. on a cloudy and dreary February dusk."

The speculative assertions by counsel and the purported affidavit of plaintiff fail to raise an issue as to whether the

condition constituted a trap or nuisance. There was no testimony by plaintiff that there was mud, sand and residue left from a pooling of water at the time of her accident that camouflaged and obscured the complained-of condition, or that visibility was poor and the condition was thereby obscured, or that the pattern of bricks in some fashion camouflaged the "ledge". Indeed, plaintiff testified that there was no water or debris in the area. The above-quoted arguments set forth in the affirmation in opposition are, and the affidavit is, patently, of counsel's authorship, are entirely speculative, are unsupported by any evidence on this record, and thus are not probative and fail to raise an issue of fact. The affidavit contradicts plaintiff's prior deposition testimony and was, thus, clearly crafted by counsel to create a feigned issue of fact concerning trap or nuisance to defeat summary judgment and must be disregarded (see Schleifer v Schlass, 303 AD 2d 204 [1st Dept 2003]).

Moreover, the Court notes that plaintiff cannot communicate in the English language, as is evidenced by the fact that an official Spanish interpreter was required at her deposition to translate the questions to her from English to Spanish and her answers from Spanish to English. Indeed, when she was asked, through the interpreter, what she told the building superintendent after she told him she fell, she responded, through the interpreter, "The truth is I didn't understand much since I don't speak English and I don't know if he understood me." Therefore, plaintiff's affidavit annexed to her attorney's affirmation in opposition, written in English and articulating her counsel's legal arguments in his precise writing style and vocabulary, and notarized by counsel himself, cannot be genuine. Also, there is no indication or statement that it is a translation, and indeed counsel cannot make such a representation, since he did not notarize the signature of a translator but the signature of plaintiff who signed the English language affidavit, which she could not have prepared and could not have sworn to the averments set forth therein.

Rule 2101(b) of the CPLR provides: "Each paper served or filed shall be in the English language... Where an affidavit or exhibit annexed to a paper served or filed is in a foreign language, it shall be accompanied by an English translation and an affidavit by the translator stating his qualifications and that the translation is accurate." Therefore, even if, arguendo, the purported averments in the affidavit were plaintiff's but translated into English, the affidavit must be disregarded since there is no original affidavit of plaintiff annexed to it along with a translator's affidavit.

Therefore, based upon the totality of the evidence presented on this motion, and after examination of all the facts presented,

including the appearance, dimensions and irregularity of the condition, and the time, place and circumstances of the accident, this Court is of the opinion that the less than one-inch, or one-inch at best, elevation differential between the walkway and sidewalk was too trivial to be actionable, as a matter of law, and the complaint and all cross-claims are dismissed as against the Jamaica Seven defendants.

Motion by the City for summary judgment is denied. The motion, served on November 4, 2011, more than 120 days after the note of issue was filed on May 18, 2011, is untimely.

Pursuant to CPLR 3212(a), motions for summary judgment must be made no later than 120 days after the note of issue is filed, unless a different date is ordered by the Court, except with leave of court "on good cause shown." Unless good cause is shown for the delay, an untimely motion for summary judgment must be denied outright (see Brill v. City of New York (2 NY 3d 648 [2004]; Castro v. Homsun Corp., 34 AD 3d 616 [2nd Dept 2006]).

The City's explanation that it miscalculated the time to file a timely motion does not constitute a reasonable excuse. Moreover, the City's contention that the Court should entertain its motion because it is meritorious and because it was made well in advance of trial are also not cognizable bases to allow a late summary judgment motion. The merits of a motion and the absence of prejudice do not constitute good cause (see Brill, supra).

Finally, the City argues that its otherwise untimely cross-motion may be considered since it seeks relief on the same issues as raised in the timely motion by Jamaica Seven. However, the City's application is not properly a cross-motion. As heretofore stated, the City's notice of "cross-motion" is deemed a notice of motion, since plaintiff was not a moving party at the time the "cross-motion" was made (see CPLR 2215). A cross-motion is merely a motion by any party against the party who made the original motion, made returnable at the same time as the original motion" (Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2215:1).

The rationale for allowing an untimely cross-motion for summary judgment notwithstanding the absence of good cause where it seeks the identical relief sought by a timely motion is that the court, in deciding a timely motion, may search the record and grant summary judgment to any party even in the absence of a cross-motion (see Filannino v. Triborough Bridge and Tunnel Authority, 34 AD 3d 280 [1st Dept 2006]). However, the court's search of the record is limited to those issues that are the subject of the timely motion

in chief (id.). Here, plaintiff made no summary judgment motion. The only timely motion for summary judgment was made by the Jamaica Seven defendants. Therefore, the exception set forth in the cases cited by counsel wherein a late cross-motion may be considered if it addresses the same issues raised in a timely motion is not applicable here, and the City may not "piggyback" its untimely cross-motion onto Jamaica Seven's timely motion (see Gaines v. Shell-Mar Foods, Inc., 21 AD 3d 986 [2nd Dept 2005]).

Therefore, the City's untimely motion may not be considered and is denied.

Dated: December 9, 2011

KEVIN J. KERRIGAN, J.S.C.