[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. JUDITH J. GISCHE PART 10
*Justice*

Arleen Rossy
Plaintiff (s),

-v-

Miracle Pentacostal Church
Defendant (s).

INDEX NO. 114277/09
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for 3212

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, the court's decision on this (these) motion (s) is as follows:

Motion (s) decided in accordance with the accompanying memorandum decision

case ready for trial

FILED

JAN 31 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: JAN 30 2012

Hon. Judith J. Gische, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMIT ORDER

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

Supreme Court of the State of New York
County of New York: IAS Part 10

----------x

ARLEEN ROSSY,

Plaintiff,

-against-

MIRACLE PENTECOSTAL CHURCH,

Defendant,

----------x

**Decision and Order**
Index No.: 114277/09
Seq No.: 001

Present:
Hon. Judith J. Gische
J.S.C.



| **Papers** | **Numbered** |
|---|---|
| Def's mtn to dismss w/ MP affirm, exh | 1 |
| Pltff's opp w/ MS affirm, exhs | 2 |

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

**Gische J.;**

This negligence action is brought by Arleen Rossy ("Rossy") against Miracle Pentecostal Church ("Defendant"), the owner of the building located at 1802 3rd Ave ("building"). Issue has been joined and the note of issue was filed after this motion was brought. Defendant now moves for summary judgment pursuant to CPLR § 3212. Plaintiff opposes the motion on the basis that there are issues of fact for trial. Since the motion is timely, it will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

**Background**

At Rossy's deposition she testified that on April 11, 2009, she left her apartment with her daughter-in-law. As Rossy walked over the cellar door on East 100th Street, her left

foot got caught in a hole on the door causing her right foot to slip out from under her and she fell. Rossy, as part of her testimony, acknowledged that the cellar door was wet due to rainfall that day and it was drizzling when she fell.

During Rossy's deposition Defendant asked her questions about the photographs she provided of the area where she fell. Defendant maintains that Rossy's description of the "hole" and the photographs she testified about depict nothing more than a trivial defect, which Defendant claims is non-actionable, as a matter of law.

In support of these arguments Defendant provides the sworn affidavit of its safety consulting engineer, Anthony Mellusi ("Mellusi"), who inspected the site of the accident. Mellusi observed a "U" shaped raised section on the cellar measuring 2 ½ inches x 3 inches in diameter. The top surface of the raised area is described by Mellusi as being polished and worn, showing no evidence of any abrupt variations in height or tripping hazards. Mellusi opines that the condition is "insignificant in size shape and dimension," and that "the minimal height differential of this particular condition is negligible and diminutive."

Mellusi also opines that stepping on this condition with the heel of the foot , as Rossy testified she did, could not have caused her to fall. Additionally, Mellusi opines that the cellar door being wet is what caused Rossy to fall.

Rossy's expert, Professional Engineer Richard Berkenfeld ("Berkenfeld") has provided a sworn affidavit in opposition to Defendant's motion. Berkenfeld opines that the vertical difference of elevation of 9/16 of an inch in the cellar doors violates the New York City Administrative Code, which considers a vertical difference of ½ of an inch or greater to be a substantial defect and a tripping hazard. NYCAC §19-152. Berkenfeld concludes, that

based upon his site inspection and measurements, a dangerous and hazardous tripping condition existed at the site of Rossy's fall. Furthermore, Berkenfeld opines that the depression, with its abrupt vertical difference in elevation in the cellar doors is considered hazardous and unsafe by both published Industry safety standards and the New York City Administrative Code. Rossy's injuries include, but are not limited to, a severe trimalleolar fracture and a dislocation of left ankle. Rossy claims that these injuries are permanent and has undergone eight corrective surgeries on her ankle.

**Arguments presented**

Rossy asserts that her injuries occurred as a result of the Defendant's negligence, or the negligence of their agents, servants, employees or licensees in the ownership, operation, management, maintenance and control of 1802. Rossy asserts that no negligence on her part contributed to the alleged incident.

Defendant asserts that it cannot be held liable for Rossy's injuries because the alleged condition is trivial and therefore not actionable as a matter of law. Additionally, Defendant asserts that rainfall earlier that day made the cellar door wet and caused Rossy to lose her footing when she stepped on the door.

Defendant asserts that even if the indentation of the door was the proximate cause of Rossy's accident, Defendant is still not liable because the condition was open and obvious. Defendant also asserts that any injuries Rossy suffered were solely a result of her own negligence.

**Applicable law**

The movant on a summary judgment motion has the initial burden of proving

entitlement to summary judgment, by tender of evidentiary proof in admissible form sufficient to eliminate any material issues of fact from the case. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1st Dept. 1980); Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1st Dept. 1985). It is only when the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment does the burden then shifts to the party opposing the motion who must then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action. Zuckerman, *supra* at 562. Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact or where the factual issue is arguable or debatable. International Customs Assoc., Inc. v. Bristol-Meyers Squibb Co., 233 A.D.2d 161, 162 (1st Dept. 1996). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993). Moreover, the court cannot resolve issues of credibility; it is for the jury to weigh the evidence and draw legitimate inferences therefrom. S.J. Capelin Assocs. v Globe Mfg. Corp., 34 N.Y.2d 338 (1st Dept. 1974).

**Discussion**

It is black letter law that a landowner or possessor has a duty to maintain its property in a reasonably safe condition under existing circumstances , which includes the likelihood of injury to a third party. Perez v. Bronx Park South, 285 AD2d 402 [1st Dept 2001]. The prima facie elements of a premises liability negligence case are that the defendants either created a dangerous condition or had actual or constructive notice of the

condition and that such defects are visible and apparent. Segretti v. Shorenstein Company East, LP, 256 AD2d 234 (1st Dept. 1998).

This motion is predicated primarily on the claim that any defect in the sidewalk where plaintiff fell is too trivial to be actionable as a matter of law and therefore, there is no issue of fact for the jury to decide. Marcus v. Namdor, Inc., 46 A.D.3d 373 (1st Dept. 2007); Corrado v. City of New York, 6 AD3d 380 (2nd dept. 2004).

As the moving party, Defendant has the initial burden of producing evidentiary facts in support of its position. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]. By their very nature, negligence cases do not lend themselves to summary judgment because the issue of the whether the defendant (or plaintiff) acted reasonably under the circumstances is rarely an issue that can be decided as a matter of law. Urgarriza v. Schmieder, 46 N.Y. 2d 471 [1979]. As more fully set forth below, not only has Defendant failed to meet its burden of proof on this motion, there are, in any event, triable issues of fact requiring the denial of Defendant's motion. Winegard v. New York Univ. Med. Ctr., 64 N.Y. 2d 851, 853 [1985]; Rotuba Extrudes v Ceppos, 46 NY 2d 223 [1978]. The determination whether defendant was negligent is for the trier of fact to decide. Ugarriza v. Schmieder, *supra*.

*Trivial defect*

While differences in elevation on a sidewalk of approximately one inch have been held by the First Department to be non-actionable (Morales v. Riverbay Corp., 226 AD2d 271 [1st Dept 1996]), there is no minimal dimension test or "per se rule" that would render a hole or defect of a certain size either actionable or inactionable as a matter of law

(Trincere v. County of Suffolk, 90 N.Y.2d 976 [1997]). When deciding whether a sidewalk defect is actionable, the courts have considered the particular facts and circumstances of each case, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury that is alleged. Trincere v. County of Suffolk, 90 N.Y.2d at 977 and 978; Marcus v. Namdor, Inc., 46 A.D.3d at 374. Though photographs of the alleged defect may be sufficient to demonstrate that as a matter of law the defect is too trivial to be actionable, they may also be examined by the court to see if there are factual disputes to be tried. Corrado v. City of New York, 6 AD3d 380 (2nd dept. 2004).

Although Defendant relies on Rossy's photographs to support its claim, the photographs actually show a horseshoe shaped indentation in the door with irregular and jagged edges perpendicular to the direction plaintiff was walking when the accident occurred. The area depicted looks like a hole, not a mere shift in elevation. Therefore, it cannot be said that this defect is trivial, as a matter of law, as a reasonable juror could find that the gnarled edges of the indentation snared Rossy's foot causing her to fall.

Since the Defendant has not met its burden of proving that the condition alleged by Rossy was, as a matter of law, trivial Defendants motion must be denied.

*Additional arguments raised*

Alternatively, Defendant argues that defects specific to "cellar doors" are inactionable and, therefore, dismissible unless the defect constitutes a trap, nuisance or was otherwise a "dangerous" condition. Having failed to prove that the condition of the cellar doors was "trivial" there is likewise no basis to find that they did not pose a

dangerous condition.

The case that Defendant relies on, Tavaras v. The City of New York, 59 A.D. 3d 178 (1st Dept. 2008), is distinguishable. The plaintiff in Tavaras was allegedly injured after tripping over a construction fence and stumbled onto a raised padlock affixed to cellar doors. The court dismissed the case because there was no evidence that the padlock caused her to fall or that the padlock was dangerous. Here, there are facts that the surface of the cellar doors created a tripping hazard and that this is the condition actually caused her to fall.

Defendant also argues that whether or not the condition alleged is a trivial defect, the proximate cause of Rossy's injury was not the condition of the cellar door at all, but the wet condition of the doors. Though it is undisputed that it was raining lightly the day of the accident, Rossy did not testify that she slipped on a wet condition, but that she fell when her foot got caught in the depression of the metal grate. Consequently, neither the opinion of Defendant's expert, nor the climatological expert's report that Defendant relies upon, establish that Rossy's accident was caused by the rain to the exclusion of all other possible causes. Even if such facts satisfied Defendant's burden of proof on this motion, Rossy's testimony creates an issue of fact.

Finally, issues regarding whether a condition is open and obvious go to comparable negligence and are not a basis to dismiss the case where the claim is that an owner did not maintain the premises in a reasonably safe condition. Fraces v. 107-145 West 135th Street Assoc. Ltd., 70 AD3d 599 (1st Dept 2010).

**Conclusion**

Defendant has failed to prove its defenses and is, therefore, not entitled to summary judgment. Rossy has, in any event, raised issues of fact for the jury to decide. Defendant's motion for summary judgment dismissing the complaint is denied in its entirety.

In accordance with the foregoing, it is hereby

**ORDERED** that defendant Miracle Pentecostal Church of the Lord of Jesus' motion for summary judgment is denied; and it is further

**ORDERED** that plaintiff Arleen Rossy shall serve a copy of this decision/order on the office of trial support so this case can be scheduled for trial; and it is further

**ORDERED** that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

**ORDERED** that this constitutes the decision and order of the court



Dated: January 30, 2012
New York, New York

**So Ordered:**

HON. JUDITH J. GISCHE, J.S.C