SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 14

X

PATRICIA CREGAN,

Plaintiff,

-against-

Index No. 019933/10
Motion Sequence...01
Motion Date...03/21/12

BOARD OF MANAGERS OF HORIZON SHORES CONDOMINIUM and HORIZON SHORES CONDOMINIUM,

Defendants.

X

Papers Submitted:
Notice of Motion x
Affirmation in Opposition.....x
Affirmation in Reply x

Upon the foregoing papers, the motion by the Defendants, BOARD OF MANAGERS OF HORIZON SHORES CONDOMINIUM and HORIZON SHORES CONDOMINIUM ("Horizon Shores"), seeking an order pursuant to CPLR § 3212 granting them summary judgment dismissing the Plaintiff's complaint, is decided as hereinafter provided.

This action arises from injuries allegedly sustained by the Plaintiff when she was caused to trip and fall on the sidewalk abutting the premises known as 666 Shore Road,

Long Beach, New York. The Plaintiff claims that she was caused to trip and fall due to the Defendants' negligence in allowing the sidewalk to be in an irregular and uneven condition. The Plaintiff commenced this action by filing a summons and complaint on October 22, 2010. Issue was joined by service of the Defendants' answer, dated December 2, 2010.

The Plaintiff testified at an Examination Before Trial on August 2, 2011, stating that on July 15, 2010 at about 9:00 p.m., while walking on the sidewalk adjacent to 666 Shore Road, she was caused to trip and fall on an uneven brick. (*See* Cregan Transcript, pages 8-13, attached to the Defendants' Notice of Motion as Exhibit "D") The Plaintiff testified that at the time of the accident, it was dark and the weather conditions were clear and dry. (*Id.* at page 12) The Plaintiff was wearing sneakers at the time of the accident. (*Id.*) At the time the Plaintiff fell on the sidewalk, she was walking back from her daughter's residence located at 465 Shore Road. (*Id.* at page 9) The Plaintiff had walked on the sidewalk located in front of 666 Shore Road many times before the date of the accident. Prior to the date of the accident, the Plaintiff had neither noticed the uneven brick which caused her to fall, nor made any complaints regarding same. (*Id.* at page 13)

In support of the motion, the Defendants submit the deposition testimony of Eileen Holland, a member of the Board of Managers at Horizon Shores and a resident at 666 Shore Road. Ms. Holland's specific duties include maintaining the insurance policies, reviewing them every year for renewal and voting on miscellaneous issues at board meetings. (*See* Holland Transcript, pages 6-7, attached to the Defendants' Notice of Motion as Exhibit

"E") With respect to the day-to-day maintenance of the premises, there is a full time, live-in superintendent and a part-time porter responsible for the maintenance. Ms. Holland testified that she has no personal knowledge of the incident that gave rise to the Plaintiff's claims. (*Id.* at page 10) According to the deposition testimony, other than keeping the sidewalk clean, Ms. Holland does not know the specific duties assigned to the superintendent or anyone else with respect to the maintenance of the sidewalk where the incident occurred. (*Id.* at page 11) Although there are records maintained of repairs with respect to the sidewalk, Ms. Holland has never seen those records. (*Id.* at page 13) According to Ms. Holland, after discussions with some members of the board, no one has ever complained of the uneven sidewalk prior to the date of the accident. (*Id.* at pages 13-14)

The Defendants now move to dismiss the Plaintiff's complaint claiming that no duty was owed to the Plaintiff since the alleged defective condition was de minimis and trivial and, therefore, not actionable. The Defendants further claim that they are not liable for the Plaintiff's injuries as they did not have actual or constructive notice of the defective condition, nor did the Defendants create the alleged defective condition.

A Court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to summary judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter, its task is to determine whether or not there exists

a genuine issue for trial. *Miller v. Journal-News*, 211 A.D.2d 626 (2d Dept. 1995).

The moving party's burden seeking summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of a material issue of fact. *Ayotte v. Gervasio*, 81 N.Y.2d 1062 (1993). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of the opposing papers. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra*; *Miceli v. Purex*, 84 A.D.2d 562 (2d Dept. 1981).

In support of their contention that the alleged defect is de minimis, the Defendants rely on a photograph of the sidewalk where the accident occurred. (*See* Photograph identified at the Plaintiff's deposition as "Defendants Exhibit B", attached to the Defendant's Notice of Motion as Exhibit "F") After a review of the photograph, the Court is unable to discern what the appearance or condition of the sidewalk was at the time the photograph was taken. The photograph itself is unclear and blurry. Accordingly, the photograph alone is insufficient to support a judgment as a matter of law in favor of the Defendants.

The Defendants further argue that the Plaintiff's failure to testify at her deposition regarding the measurements of the defect also supports the contention that the alleged defective condition is trivial in nature. The Defendants reasoning is misplaced. At the summary judgment phase of the litigation, the burden is on the Defendants to eliminate all material issues of fact. Indeed, although not dispositive, the Defendants failed to proffer

any evidence regarding the height, width or length of the defect. Rather, the Defendants primarily rely on an blurred photograph which does not reveal anything useful. Accordingly, the Defendants have failed to meet their burden with respect to the branch of the motion for summary judgment seeking dismissal based upon a trivial or de mininis defect.

The Court will now address the Defendants claim that they neither had actual nor constructive notice of the defect in order to have sufficient time to cure same.

A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie case that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it. *See Sloane v. Costco Wholesale Corp.*, 49 A.D.3d 522 (2d Dept. 2008).

It is well settled that 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 permit defendant's employees to discover and remedy it. *See Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 (1986). It is also well settled that a property owner who has actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of that condition. *See Petri v. Half Off Cards,* 284 A.D.2d 444 (2d Dept. 2001); *Osorio v. Wendell Terrace Owners Corp.,* 276 AD2d 540 (2d Dept. 2000; *Benn v. Municipal Hous. Auth. for City of Yonkers,* 275 A.D.2d 755 (2d Dept. 2000).

Contrary to the Defendants' contention, the evidence submitted in support of

their motion for summary judgment, including the deposition testimony of Ms. Holland, as well as the photograph of the incident, failed to establish, as a matter of law, that they lacked actual and/or constructive notice of the alleged defect. Ms. Holland was not responsible for inspecting or maintaining the area where the accident occurred. Rather, she was responsible for maintaining and reviewing the insurance policies as well as voting on miscellaneous issues. (*See* Holland Transcript, pages 6-7, attached to the Defendants' Notice of Motion as Exhibit "E") Notably, she had no personal knowledge of the incident itself. Most importantly, Ms. Holland testified that, although records exist regarding any maintenance or repairs that may have been performed on the subject sidewalk, she did not review those records nor did she possess actual knowledge as to where those records were maintained. Moreover, Ms. Holland's testimony that there were no prior complaints of the sidewalk based on her discussions with "some members of the board", is also insufficient to meet their burden. (*Id.* at pages 13-14)

In light of the foregoing, the Defendants failed to make a prima facie showing of entitlement to judgment as a matter of law. Since the Defendants failed to meet their initial burden, the motion is denied without regard to the sufficiency of the opposing papers *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra*.

Accordingly, it is hereby

ORDERED, that the motion by the Defendants, seeking an order pursuant to CPLR § 3212 granting them summary judgment dismissing the Plaintiff's complaint, is

DENIED.

This decision constitutes the order of the Court.

DATED: Mineola, New York
June 5, 2012

Hon. Randy Sue Marber, J.S.C.