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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES **PART 59**
Justice

JOHN FAYOLLE,

Plaintiffs,

- v -

EAST WEST MANHATTAN PORTFOLIO L.P., GALLERY HOUSE CONDOMINIUM and JOHN J. GROGAN & ASSOCIATES, INC.,

Defendants.

Index No.: 115715/08

Motion Date: 04/20/12

Motion Seq. No.: 003

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No(s).	1
Answering Affidavits - Exhibits	No(s).	2
Replying Affidavits - Exhibits	No(s).	3

Cross-Motion: ☐ Yes ☒ No

In this action seeking damages for personal injuries suffered by plaintiff John Fayolle, in a trip and fall accident, (1) plaintiff moves for summary judgment on the complaint against all defendants (mot. seq. no. 003); (2) defendants Gallery House Condominium (Gallery House) and John J. Grogan & Associates, Inc.'s (Grogan) (together Gallery House defendants) move for summary judgment dismissing the complaint as to them (mot. seq. no. 005); and (3) defendant East West Manhattan Portfolio L.P.

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

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

(East West) moves for summary judgment dismissing the complaint as to it (mot. seq. no. 006).[1] The motions are consolidated for disposition.

Gallery House is the owner of a mixed-use condominium building located at 77 West 55th Street, New York, N.Y. East West is the owner of the ground floor commercial unit, which consists of the entire first floor of the building, except for the entrance to the residential portion of the condominium. Grogan is Gallery House's managing agent.

On March 25, 2008, plaintiff met a business acquaintance, Jenny Lee (Lee), for drinks and appetizers at a restaurant called Amalia, located on East 55th Street. Plaintiff claims that, after having spent five hours, and drinking two glasses of wine at the restaurant, he walked Lee to her home at the condominium building. While bidding her goodbye, he tripped and fell on his face on what he claims to be a dangerous condition on the sidewalk abutting the front of the building, injuring himself. Plaintiff claims that, although he did not see what caused him to fall at the time of the accident, a visit to the site two days later revealed that there was an expansion joint in the concrete sidewalk which plaintiff alleges was dangerously wide, as well as

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[1]This action has been consolidated for discovery with the action *Fayolle v Richard Rothbard Inc.*, Index No. 111844/09, currently pending before this court. Dispositive motions made in that action are addressed in a separate decision of this court.

unusually deep. Plaintiff explains that he fell when his sneaker momentarily became caught in the expansion joint as he turned away from his dining companion. Plaintiff's wife took photographs of the area in front of 77 East 55th Street, at the spot at which plaintiff claims he fell, including the alleged offending expansion joint.

Plaintiff relies on Administrative Code of the City of New York (Administrative Code) § 7-210, which places the responsibility on the owners of property abutting sidewalks to maintain the sidewalk in a safe condition, free of dangerous defects. Plaintiff argues that both Gallery House, as owner of the overall condominium, and East West, as the commercial first-floor unit owner, are responsible under this statute for his injuries.

Plaintiff maintains that the expansion joint posed a serious potential for harm, in that it was, allegedly, overly wide and deep. Plaintiff, at his deposition, asserted that the expansion joint was 1 inch to 1 ½ inches wide, and 1 inch deep, lacking any caulking, and that these dimensions demonstrate a per se defective condition under the Administrative Code. He submits the report of his expert, Michael Kravitz, P.E. (Kravitz), who inspected the expansion joint approximately two years post-accident, and determined that the expansion joint in question was 3/4 inch wide and 1 inch deep. He also noted a change in level

between the abutting sidewalk flags at that location of 1/4 inch.

Kravitz found that the width of the expansion joint (3/4 inch) was 200% greater than the standard 1/4 inch width allegedly called for in the Administrative Code, and so, posed a dangerous condition for pedestrians.

Gallery House and East West dispute ownership responsibility for the sidewalk abutting 77 East 55th Street. East West argues that the sidewalk was a common area which was the responsibility of Gallery House under the condominium's Declaration and By-Laws. Gallery House proposes that the same documents, and the law, place responsibility on the unit owner whose property abuts the sidewalk.

Both defendants claim lack of notice of a dangerous condition. Defendants also contend that, regardless of responsibility for the sidewalk, or the question of notice, the defect was trivial in nature, and so, nonactionable as a matter of law. The Gallery House defendants provide the report of their expert, John Natoli, P.E. (Natoli), who inspected the accident site more than two years after the accident, and who opines that the expansion joint was not a dangerous condition, in that, as caulking shrinks over time, a 1 inch deep expansion joint (as observed by Kravitz) would necessarily have been less deep in 2008 than it was in 2010. Natoli also offers his "expert" opinion that plaintiff's accident could not have happened as

described, based on the shoes that he was wearing, and that the accident was caused by plaintiff's own negligence.

Both defendants also contend that plaintiff's accident could not have happened in the manner in which he claimed, and that he was intoxicated, and so wholly responsible for his own actions. Defendants contend that plaintiff's assertion that the condition caused his injury is sheer speculation.

The Administrative Code of the City of New York (Administrative Code) § 7-210 (a) states that "[i]t shall be the duty of the owner of real property abutting any sidewalk ... to maintain such sidewalk in a reasonably safe condition." See Amador v City of New York, 96 AD3d 475, (1st Dept 2012) (Administrative Code imposes duty on property owners to maintain abutting sidewalks in safe condition). The owner of the abutting sidewalk "shall be liable for any injury to property or personal injury ... proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition." Administrative Code § 7-201 (b); see Khaimova v City of New York, 95 AD3d 1280 (2d Dept 2012)(Administrative Code shifted liability for injuries on sidewalks from the City of New York to individual landowners of abutting sidewalk).

It has been held that, in a condominium building, the individual unit owners are not generally liable for injuries that occur on the condominium's common areas. See Rothstein v 400

East 54th Street Co., 51 AD3d 431 (1st Dept 2008). This is especially so if the condominium's declaration places responsibility for the upkeep of the common areas upon the condominium. Id.

In some instances, condominium governing documents specifically identify the sidewalks in front of the entire premises as common areas. See Araujo v Mercer Square Owners Corp., 95 AD3d 624, 624 (1st Dept 2012)(condominium declaration recognized sidewalks "appurtenant" to building as common areas, thus relieving commercial unit owner from liability for personal injuries suffered thereon). Though there is no such provision here, other terms of the Declaration make clear that East West, as the commercial unit owner, was not responsible for the upkeep of the sidewalk in front of 77 East 55th Street, and bears no liability for plaintiff's accident.

Paragraph 8 (6) (c) of Gallery House's Declaration defines East West's commercial unit as, essentially, all of the area within the structure's interior walls, floor and ceiling in the designated ground floor, and the building's outer walls. The Declaration goes on the describe the "Common Elements" as "the entire Property, including all parts of the building *other than the units* ... [emphasis supplied]." Among a list of common elements, section (8) (1) of the Declaration concludes "[a]ll other parts of the Property ... for common use or necessary or

convenient to the existence, maintenance or safety of the Property." While all "entrances and exits from the Building" are recognized as common elements (section 8 [d]), the Declarations indicate that "the Commercial Unit shall have easements for the exclusive use of the entrances to and exits from the Commercial Unit."

Further, the Gallery House Bylaws provide that "[a]ll maintenance, repairs, and replacements to common elements ... whether located inside or outside the units ... shall be made by the Board of Managers and be charged to all the unit owners as a common expense."

This court finds that East West was only a unit owner in the building, and not responsible for maintenance of the sidewalk in front of its premises, which was a common area under the condominium's own rules. Furthermore, the evidence submitted on this motion shows that the Gallery House defendants did maintain the sidewalk, by daily cleaning, and by contracting with nonparty Etna Maintenance Corp. (Etna) to repair the sidewalk in 2003. East West had no role with any repairs made to the sidewalk at that, or any, time. Therefore, East West's motion to dismiss the complaint as to it shall be granted, and the court finds that the Gallery House defendants are responsible for any actionable defect in the sidewalk.

It has been held that "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 v County of Suffolk, 90 NY2d 976, 977 (1997); see also Turuseta v Wyassup-Laurel Glen Corp., 91 AD3d 632 (2d Dept 2012). There is no per se depth or width of a defect that renders it trivial (Trincere v County of Suffolk, supra), and "whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury [internal quotation marks and citation omitted]." 90 NY2d at 977; see also Ynoa v New York City Transit Authority, 93 AD3d 406, 406 (1st Dept 2012)("[w]hether something constitutes a dangerous condition is almost always a question of fact that turns upon the particular circumstances of each case").

Despite this general rule, defects may be deemed trivial, and hence, non-actionable, if the "trivial nature of the defect [looms] larger than another element. Not every injury allegedly caused by an elevated brick or slab need be submitted to a jury." Trincere v County of Suffolk, 90 NY2d at 977; see also Dery v K Mart Corp., 84 AD3d 1303, 1304 (2d Dept 2011)("a property owner may not be held liable in damages for trivial defects, not constituting a trap or nuisance, over which a pedestrian might stumble, or stub his or her toes, or trip").

The presentation of an expert's report stating that a defect

existed may be key in raising a question of fact as to the triable nature of the question of a defect. See D'Amico v Archdiocese of New York, 95 AD3d 601 (1st Dept 2012); Narvaez v 2914 Third Avenue Bronx, LLC, 88 AD3d 500 (1st Dept 2011). Plaintiff at bar has provided an expert opinion that the width of the expansion joint, and its depth, constituted such a deviation from the norm as to constitute a dangerous condition. The report, however, is insufficient to create a factual question as to the substantial nature of the alleged defect.

Plaintiff's expert, Kravitz refers the court to several sections of the Administrative Code, indicating that the construction of a sidewalk must comply with the specifications set forth by the New York City Department of Transportation (DOT). [Administrative Code § 19-152 (8)]. He indicates that DOT Standard Specifications, Section 4.13, requires that "[p]reformed expansion joint filler shall comply with the requirements of Section 2.15, and shall be one-quarter (1/4") inch or one-half (1/2")inch thick, at the Contractor's option. Joint sealer for sealing joints over preformed joint filler shall comply with the requirements of Section 2.22-Cold application sealer." Id., § 513.3 (D). Then, he discounts this rule as being inapplicable to the width of expansion joints. Instead, he states that "[t]he width of the expansion joint shall be 1/4" as described in the Standard Details of Construction drawings; H-1011; H-1036 and H-

1044". Kravitz determined that the allegedly defective expansion joint constituted a substantial deviation from the norm, since it was 3/4 inch rather than the alleged 1/4 inch width requirement under the Construction drawings.

This court finds no question of fact as to the trivial nature of the alleged defect, and determines that the width of the expansion joints, even assuming Kravitz's opinion that they were 3/4 inch instead of 1/4 inch, and therefore, wider than the width of the filler at the time of plaintiff's accident, was de minimus. Plaintiff's expert does not direct this court to any convincing standard that calls for an undeviating 1/4 inch width in expansion joints. Further, the 1/4 inch rise allegedly existing between the sidewalk flags in the area of plaintiff's fall is, as a matter of law, too trivial to be actionable. See e.g. Schwartz v Bleu Evolution Bar & Restaurant Corp., 90 AD3d 488 (1st Dept 2011).

Accordingly, it is

ORDERED that the motion brought by plaintiff John Fayolle for summary judgment on the complaint is denied (mot. seq. 003); and it is further

ORDERED that the motion brought by defendants Gallery House Condominium and John J. Grogan & Associates, Inc. for summary judgment dismissing the complaint as against it (mot. seq. no. 005) is granted, and the complaint is dismissed as to these

defendants; and it is further

ORDERED that the motion brought by defendant East West Manhattan Portfolio L.P. for summary judgment dismissing the complaint as against it (mot. seq. no. 006) is granted, and the complaint is dismissed as to this defendant; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This is the decision and order of the court.

Dated: August 3, 2012 ENTER:

J.S.C.
DEBRA A. JAMES