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SHORT FORM ORDER

INDEX No. 10-28553
CAL. No. 12-02010OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 11-15-12
ADJ. DATE 3-27-13
Mot. Seq. # 002 - MD

VIRGINIA O'CONNOR and MICHAEL O'CONNOR, Plaintiffs,	SIBEN & SIBEN, LLP Attorney for Plaintiffs 90 East Main Street Bayshore, New York 11706
- against -	SOBEL LAW GROUP, LLC Attorney for Defendants 464 New York Avenue, Suite 100 Huntington, New York 11743
ROBERT CZERNIECKI and SUSAN CZERNIECKI, Defendants.	

Upon the following papers numbered 1 to 17 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 11 - 15; Replying Affidavits and supporting papers 16 - 17; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendants for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is denied.

This action arises out of a personal injury claim by the plaintiff Virginia O'Connor (plaintiff) for injuries she allegedly sustained on April 9, 2010 as a result of a trip and fall accident that occurred on a stone pathway located at 869 Chicken Valley Road, Locust Valley, New York (the premises). In her complaint, the plaintiff alleges, among other things, that the defendants failed to maintain the pathway, allowed the stones to be unevenly spaced, raised and defective, and failed to illuminate the pathway, causing a dangerous and defective condition to exist, resulting in her injuries.

The defendants now move for summary judgment dismissing the complaint on the ground that the alleged dangerous condition was a trivial defect that is non actionable as a matter of law, that the

plaintiff cannot identify the cause of her fall, and that the plaintiff is unable to show that the defendants created the alleged condition, or had actual or constructive notice of its existence. In support of their motion, the defendants submit copies of the pleadings, the deposition transcripts of the parties, and a photograph of the pathway. However, the depositions of the defendants are certified but unsigned, and the defendants have failed to submit proof that the transcripts were forwarded to the witnesses for their review (*see* CPLR 3116 [a]). Nonetheless, the unsigned transcripts of the defendants' deposition testimony may be considered herein as they have been adopted by the party deponents (***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Ashif v Won Ok Lee***, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]; ***Wojtas v Fifth Ave. Coach Corp.***, 23 AD2d 685, 257 NYS2d 404 [2d Dept 1965]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

At her deposition, the plaintiff testified that she arrived at the premises between 8:30 and 9:00 p.m. on April 9, 2010, that it was dark outside, and that she had traveled there to drop off her grandchildren at the home of their other grandmother. She indicated that she parked her vehicle, took the "slate block path" to the house, and that she remained in the house for approximately ten minutes. At approximately 9:00 p.m., as she walked back to her car on the pathway, her left big toe made contact with a slate block, causing her to fall. She described the pathway as consisting of slate blocks, irregularly spaced. She stated that the block she fell on was "eighteen by eighteen square and maybe an inch and a half thick," elevated from the ground level. The plaintiff further testified that she had traversed approximately seven or eight slate blocks when she fell, that there was no lighting on the path where she fell except for moonlight, and that she was wearing open toe sandals at the time of her fall. She stated that she did not know if the block that she fell on was any different from any other block in the pathway, that she was looking ahead when she fell, and that she knew of no complaints regarding the pathway. She identified four photographs as fairly and accurately depicting the pathway where she fell, and she indicated that the photographs had been taken within one week of her accident.

The defendant Robert Czerniecki (Czerniecki) was deposed on September 1, 2011. He testified that he and his wife own the premises, that the premises consists of two houses, one of which they rent and the other is their residence. He indicated that there is a flagstone pathway to the rented house. He stated that after he became the owner of the premises, he had replaced any broken "stones," and that he "put bigger stones in" to replace any smaller stones, and that "I put them down, I just don't haphazardly put them down, but some look like they are a little bit spaced differently." Czerniecki further testified that there are four lights on the rented house, which include two motion detectors, and that there are no

lights along the length of the pathway. He stated that he has not received any complaints about the pathway, and that he was told by the tenant a couple of days after the incident that someone had fallen.

At her deposition, Susan Czerniecki testified that she thinks that she helped replace some of the stones at the premises, that she received a call from her tenant the morning after the plaintiff's accident indicating that the plaintiff had fallen, and that she had not received any complaints about the pathway prior to this incident. She indicated that the plaintiff's four photographs fairly and accurately depict the pathway at the time of this incident, and that some of the lighting for the pathway is controlled by an on/off switch in their home.

Generally, owners have a duty to maintain their property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk (*see* ***Peralta v Henriquez***, 100 NY2d 139, 144, 760 NYS2d 741 [2003]; ***Demshick v Community Hous. Mgt. Corp***., 34 AD3d 518, 519, 824 NYS2d 166 [2d Dept 2006]). They may be held liable for injuries arising from a dangerous condition on their property if they created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it (*see* ***Sowa v SJNH Realty Corp.***, 21 AD3d 893, 800 NYS2d 749 [2d Dept 2005]; ***Curiale v Sharrotts Woods, Inc.***, 9 AD3d 473, 781 NYS2d 47 [2d Dept 2004]; ***Lee v Bethel First Pentecostal Church of Am.***304 AD2d 798,762 NYS2d 80 [2d Dept 2003]; ***Patrick v Bally's Total Fitness***, 292 AD2d 433, 739 NYS2d 186 [2d Dept 2002]). In order 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 discover and remedy it (*see* ***Chianese v Meier,*** 98 NY2d 270, 746 NYS2d 657 [2002], *citing* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986], *citing* ***Negri v Stop & Shop***, 65 NY2d 625, 491 NYS2d 151 [1985]). The issue of whether a dangerous or defective condition exists on the property of another is generally dependent upon the peculiar circumstances of each case (*see* ***Portanova v Kantlis***, 39 AD3d 731, 732, 833 NYS2d 652 [2d Dept 2007], *citing* ***Trincere v County of Suffolk***, 90 NY2d 976, 665 NYS2d 615 [1997]).

Whether a particular height difference between walkway slabs constitutes a trivial defect is generally a question of fact and depends on the circumstances of each case, including the depth, width, elevation, irregularity and appearance of the defect, as well as the time, place and circumstances of the injury (*see* ***Trincere v County of Suffolk***, *id.*; ***Zalkin v City of New York***, 36 AD3d 801, 828 NYS2d 485 [2d Dept 2007]; ***Taussig v Luxury Cars of Smithtown Inc***., 31 AD3d 533, 818 NYS2d 593 [2d Dept 2006]). While a gradual shallow depression is generally regarded as trivial, the presence of an edge which poses a tripping hazard may render an otherwise minor elevation a non-trivial defect (*see* ***Ain v Three School St.***, 8 AD3d 413, 778 NYS2d 308 [2d Dept 2008]; ***McKenzie v Crossroads Arena,*** 291 AD3d 860, 738 NYS2d 779 [4th Dept 2002]; ***Argeno v Metropolitan Transp. Auth***., 277 AD2d 165, 716 NYS2d 657 [1st Dept 2000]; ***Niv v Bernard***, 257 AD2d 417, 638 NYS2d 237 [1st Dept 1995]). Moreover, the issue of whether a height differential between two surfaces of a sidewalk constitutes a dangerous condition is usually a question of fact for the jury unless defendant's proof establishes, as a matter or law, that the defect is too trivial to be actionable and possesses none of the characteristics of a trap or snare (*see* ***Trincere v County of Suffolk***, *supra*; ***Zalkin v City of New York***, *supra*; ***Joseph v Villages at Huntington Home Owner's Assn., Inc***., 39 AD3d 481, 835 NYS2d 231 [2d Dept 2007]).

Here, the defendants failed to establish that the difference in the elevations of the pathway stones constituted a trivial defect and was not actionable as a matter of law (*see* ***Ain v Three School St.***, *supra*; ***Herring v Lefrak Org.***, 32 AD3d 900, 821 NYS2d 624 [2d Dept 2006]; ***Argeno v Metropolitan Transp. Auth.***, *supra*; ***McKenzie v Crossroads Arena***, *supra*). The plaintiff testified that the stones were raised by approximately one and a half inches above ground level. "[T]here 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 at 977; *see* ***Vani v County of Nassau***, 77 AD3d 819, 909 NYS2d 742 [2d Dept 2010]). In addition, a condition that is generally apparent "to a person making reasonable use of their senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" (***Mazzarelli v 54 Plus Realty Corp.***, 54 AD3d 1008, 1009, 864 NYS2d 554 [2d Dept 2008]; *see* ***Clark v AMF Bowling Centers, Inc.***, 83 AD3d 761, 921 NYS2d 273 [2d Dept 2011]). The plaintiff's testimony raises an issue of fact as to whether the defect posed a tripping hazard or constituted a trap or snare (*see* ***Gerber v W. Hempstead Convenience, Inc.***, 303 AD2d 212, 756 NYS2d 553 [1st Dept 2003]; ***Argeno v Metropolitan Transp. Auth.***, *supra*; ***McKenzie v Crossroads Arena***, *supra*; ***Niv v Bernard***, *supra*).

In addition, the defendants' contention that the plaintiff's inability to identify the specific "stone" that caused her fall is fatal to her cause of action is without merit. Mere speculation about causation is not adequate to sustain a cause of action (***Acunia v New York City Bd. of Educ.***, 68 AD3d 631, 891 NYS2d 70 [1st Dept 2009]; ***Acevedo v York Intl. Corp.***, 31 AD3d 255, 818 NYS2d 83 [1st Dept 2006]). However, the plaintiff's deposition testimony does not establish that plaintiff is merely speculating as to the cause of her fall as the circumstances surrounding plaintiff's fall could permit a jury to make a "natural and reasonable inference" that a raised pathway stone precipitated her fall (***Chase v OHM, LLC***, 75 AD3d 1031, 907 NYS2d 80 [3d Dept 2010]; ***Chimilio-Ramos v Banguera***, 62 AD3d 538, 879 NYS2d 417 [1st Dept 2009]; ***Lucio v Pisanello***, 227 AD2d 390, 642 NYS2d 325 [2d Dept 1996]). "[T]he absence of direct evidence of causation [does] not necessarily compel a grant of summary judgment in favor of the defendant[s], as proximate cause may be inferred from the facts and circumstances underlying the injury, the evidence must be sufficient to permit a finding based on logical inferences from the record and not upon speculation alone" (***Hartman v Mountain Val. Brew Pub***, 301 AD2d 570, 754 NYS2d 31, 32 [2003] *see also* ***Schneider v Kings Hwy. Hosp. Ctr.***, 67 NY2d 743, 500 NYS2d 95 [1986]; ***Bardi v City of New York***, 293 AD2d 505, 739 NYS2d 747 [2d Dept 2002], *lv denied* 98 NY2d 611, 749 NYS2d 2 [2002]).

Turning to the defendants' contention that the plaintiff has failed to establish that the defendants created the alleged condition, or had actual or constructive notice of its existence. To prove a prima facie case of negligence in a slip/trip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (***Bradish v Tank Tech Corp.***, 216 AD2d 505, 628 NYS2d 807 [2d Dept 1995]; ***Gaeta v City of New York***, 213 AD2d 509, 624 NYS2d 47 [2d Dept 1995]). 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 the defendant's employees to discover and remedy it (***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Bykofsky v Waldbaum's Supermarkets, Inc.***, 210 AD2d 280, 619 NYS2d 760 [2d Dept 1994]). Liability can be predicated only on failure of the defendant to remedy the danger after actual or constructive notice of the condition (***Piacquadio v Recine***

Realty Corp., 84 NY2d 967, 622 NYS2d 493 [2d Dept 1994]). However, the party moving for summary judgment in a slip and fall action bears the initial burden of establishing a prima facie entitlement to judgment as a matter of law (***Petersel v Good Samaritan Hosp. of Suffern, N.Y.***, 99 AD3d 880, 951 NYS2d 917 [2d Dept 2012]; ***Musachio v Smithtown Cent. School Dist.***, 68 AD3d 949, 892 NYS2d 123 [2d Dept 2009]; ***Birnbaum v New York Racing Assn.***, 57 AD3d 598, 869 NYS2d 222 [2d Dept 2008]; ***Altieri v Golub Corp.***, 292 AD2d 734, 741 NYS2d 126 [1st Dept 2002]). Thus, the burden is on the defendants to show that they did not create the condition, or have actual or constructive notice of its existence. Here, the defendants' testimony that they renovated portions of the pathway, placed replacement stones, and chose the size of said replacement stones raises questions of fact regarding whether they created the condition, and/or had actual or constructive notice of the alleged defective condition (*see* ***Bettineschi v. Healy Elec. Contr., Inc.***, 73 AD3d 1109, 902 NYS2d 597 [2d Dept 2010]).

Indeed, viewing the evidence in a light most favorable to plaintiff and resolving all reasonable inferences in her favor, the photograph of the pathway and the defendants' testimony raise an issue of fact as the existence of constructive notice of the alleged defect (*see* ***Batton v Elghanayan***, 43 NY2d 898, 403 NYS2d 717 [1978]; ***Taylor v New York City Tr. Auth.***, 48 NY2d 903, 424 NYS2d 888 [1979]; ***Calderon v Noonan Towers Co., LLC***, 33 AD3d 495, 823 NYS2d 135 [1st Dept 2006]; ***Brandes v Incorporated Vil. of Lindenhurst***, 8 AD3d 315, 777 NYS2d 720 [2d Dept 2004]; ***De Gruccio v 863 Jericho Turnpike. Corp.***, 1 AD3d 472, 767 NYS2d 274 [2d Dept 2002]). "Photographs may be used to prove constructive notice of an alleged defect if the photographs are taken reasonably close to the time of the accident, and if there is testimony that the conditions at the time of the accident were similar to the conditions shown in the photographs" (***Salvia v Hauppauge Route 111 Assoc.***, 47 AD3d 791, 791-792, 849 NYS2d 630 [2008]; *see* ***Batton v Elghanayan,*** 43 NY2d 898, 403 NYS2d 717 [1978]; ***DeGruccio v 863 Jericho Turnpike Corp.***, 1 AD3d 472, 767 NYS2d 264 [2003]; ***DeGiacomo v Westchester County Healthcare Corp.,*** 295 AD2d 395, 743 NYS2d 548 [2002]).

Failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Accordingly, the defendants' motion for summary judgment dismissing the plaintiffs' complaint is denied.

Dated: 5/23/13

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION