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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan B. Melder **PART** 11

Justice

Index Number : 109630/2009
THOMAS, DENISE
vs.
DEVER PROPERTIES LLC.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ **, were read on this motion to/for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision + Order.

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

Dated: July 8, 2013

_____, **J.S.C.**

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**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

DENISE THOMAS,

Plaintiff,

-against-

DEVER PROPERTIES LLC., SL GREEN REALTY CORP. and 215 PARK AVENUE SOUTH ASSOCIATES, L.P.,

Defendants,

----------X

Index No: 109630/09

Joan A. Madden, J.

In this personal injury action, defendants Dever Properties LLC., SL Green Realty Corp. and 215 Park Avenue South Associates, L.P. (together "Defendants") move for summary judgment dismissing the complaint against them. Plaintiff, Denise Thomas ("Thomas") opposes the motion, which is granted for the reasons below.

Background

Thomas alleges that she sustained personal injuries on January 13, 2009, when she tripped and fell in the elevator lobby near the freight elevator at 215 Park Avenue South, New York, New York ("The Building) (Thomas Dep. At 16-17, 46). Defendants owned, operated, managed and/or controlled the building on the date of the accident. At her deposition, Thomas testified that she was walking in the lobby after exiting the freight elevator when, after moving to her right to avoid a UPS delivery man, her right foot "started to slide [and she] couldn't catch [her] balance." (Id. at 46). Her foot then got caught in a crack in the floor, after which her body moved backward and she fell to the ground. (Id. at 45-46, 49). The patch was at the beginning of an inclined, sloped area of the lobby floor. (Thomas Dep. at 61). During her deposition, Thomas circled and initialed the crack that caught her foot (See Defendants' Exhibit H). The photograph depicts a small, smooth patch of concrete covering the area where two perpendicular cracks intersect (Id; see also, Plaintiffs' Exhibit H).

Thomas testified that she was looking straight ahead of her before she slipped and that after she fell, she did not observe any debris on the floor. (Thomas Dep. at 46-47). She testified that the floor was slippery but did not know what caused it to be so. (Id. at 47). Tim Xhixhabesi, a maintenance worker at Defendants' premises who observed Thomas moments after she fell, also testified in his deposition that he did not observe any debris on the ground where she fell. (Xhixhabesi Dep. at 51, 64).

The building superintendent, Andrew Parker, testified that the lobby is cleaned every morning before 8 a.m. and swept as needed by porters throughout the day (Parker Dep. at 21). He also testified that garbage is taken down between 12 and 1:30 am from each floor of the building and stored in the freight elevator lobby between 3 and 5 am every day until it is picked up (Id. at 17). Mr. Xhixabesi testified that he was unsure whether the garbage ever contained coffee (Xhixabesi Dep. at 31). Additionally, the lobby floor and walls are painted once a year during the fall (Parker Dep. at 58).

Mr. Parker has been the building superintendent of Defendants' premises since 1987 (Id. at 35). For 25 years Mr. Parker has been in charge of employees who clean the lobby on a daily basis (Id. at 7-8) and when shown photographs of the freight elevator lobby floor containing the patch which caught Ms. Thomas' foot, he testified that the floor has been in that same condition since he started working in the building (Id. at 42-44). He further testified that he is not aware of any repair work whatsoever done in the freight elevator lobby before the date of the accident (Id. 45, 48) and there have been no complaints regarding any conditions in the lobby prior to Thomas's accident (Affidavit of Andrew Parker, par. 9).

After inspecting the patch that caught Ms. Thomas' right foot, Defendants' expert, Jeffrey J. Schwalje, P.E., described the area as "a patched region of concrete with a height

differential of less than 1/8 inch that forms a slight bowl shaped depression." (Affidavit of Jeffrey J. Schwalje, par 6). Mr. Schwalje concluded that the "non-vertical, de-minimus height differential" of the patch will "deflect the edge of a shoe rather than impede it." (Affidavit of Jeffrey Schwalje, P.E, par.7). Mr. Schwalje, after measuring the floor with a slip resistance testing device, further concluded that the floor was slip resistant, and that the lighting in the elevator lobby "clearly illuminated the floor surface" and was in conformance with the New York City Building Code. (Id. at par. 8, 9). Overall, the expert concluded that the lobby floor was "properly designed, constructed and maintained safe for pedestrian use." (Id. at par. 10).

Defendants move for summary judgment, arguing that there is no evidence to show what caused Thomas to slip, so even if the floor were slippery, there is not enough evidence to suggest that this alleged dangerous condition was attributable to the conduct of Defendants.

Defendants also argue that there is no evidence to suggest that they had constructive notice of the patch, and that in any event, the patch is a trivial defect. In support of their position, Defendants rely on the testimony of their expert, Mr. Schwalje, as mentioned above, as well as case law to support the argument that the patch is too trivial to amount to an actionable defect since, as a matter of law, a gradual, shallow depression is considered trivial.

Thomas opposes the motion, arguing that her testimony that her foot got caught in the patch and that she observed a patch over a crack near where she fell while she was on the ground constitutes sufficient evidence to raise a question of fact for the jury as to whether the defect caused her to fall. Thomas also argues that because the patch was a bowl-shaped, non-level depression, which differed in texture and appearance from the surrounding floor constitutes a non-trivial defect. Thomas further argues that Defendants' expert's findings do not conclusively demonstrate that the patch is a non-trivial defect since there are no minimal tests or rules

regarding what constitutes a trivial defect. She also asserts that Mr. Schwalje's report is not in the proper evidentiary form, although she does not state the basis for this assertion.

Additionally, Thomas argues that Defendants had constructive notice of the patch as the building superintendent (i) was in charge of employees who had been cleaning the lobby on a daily basis for 25 years and (ii) he confirmed in his deposition that the condition of the floor has remained the same since he started working in the building.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

First, Defendants have not demonstrated their entitlement to summary judgment on the ground that Thomas did not know what caused her to fall. Although Thomas did know what substance caused her to slip, she adequately identified the cause of her fall through her testimony that she fell when she caught her foot in a crack in the floor and her identification of the defect on a photograph during her deposition. See Tomaino v. 209 East 84th Street Corp., 72 A.D.3d 460, 461 (1st Dept 2010)(rejecting defendants' argument that "plaintiff was required to identify at the time of the accident exactly where she fell and the precise condition that caused her to fall"); compare Smith v. City of New York, 91 A.D.3d 456, 457 (1st Dept 2012), lv denied, __ N.Y.3d ___, 2013 WL 2476556 (2013) (defendants sustained their burden on summary judgment

motion where plaintiff testified that she had "no idea" how she tripped and fell and could not identify or mark on photographs the defective condition).

Next, it cannot be determined as a matter of law that the defect at issue is *de minimus* or trivial. "Whether a dangerous or defective condition...creates liability depends on the peculiar facts and circumstances of each case and is generally a question for the jury." Trincere v. County of Suffolk, 90 N.Y.2d 976, 977 (1997), citing, Guerrieri v. Summa, 193 A.D.2d 647 (2d Dept. 1993). In determining whether an alleged defect is trivial as a matter of law, the court must examine all facts presented, including the width, depth, elevation, irregularity and appearance of the alleged defect, along with the time, place and circumstances of the injury, and whether it constitutes a trap or snare. Trincere v. County of Suffolk, 90 N.Y.2d at 977, citing, Caldwell v. Vill. Of Isl. Park, 304 N.Y. 268 (1952). Furthermore, 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." Tineo v. Parkchester S. Condo., 304 A.D.2d 383,383 (2003), quoting, Trincere v. County of Suffolk, 90 N.Y.2d at 977.

Here, even assuming *arguendo* that, based on their expert's affidavit, the Defendants made a *prima facie* showing that the defect was too trivial to be actionable, Thomas has produced evidence sufficient to counter this showing including her testimony that her left foot got caught in a crack in the floor, (Id. at 45-46, 49), suggesting that the crack was a trap or snare. See Dominguez v. OCG, IV, LLC, 82 A.D.3d 434 (1st Dept. 2011) (holding that a triable issue of fact existed as to whether a defect was trivial when there was evidence that plaintiff's foot became caught on the edge of a step); Glickman v. City of New York, 297 A.D.2d 220 (1st Dep't 2002) (holding summary judgment was not warranted in trip and fall action as there were factual issues as to whether shallow depression on which plaintiff fell posed a tripping hazard).

The next issue is whether there is a basis for finding that Defendants owed Thomas a duty such that they can be held liable for the injuries suffered as a result of the allegedly defective condition. "It is well established that a landowner (or possessor of property) is under a duty to maintain its property in a reasonably safe condition under the extant circumstances, including the likelihood of injuries to others, the potential for any such injuries to be of a serious nature and the burden of avoiding the risk [citations omitted]. O'Connor-Miele v. Barhite & Holzinger, Inc., 234 A.D.2d 106 (1st Dep't 1996). In order for an owner to be held liable for injuries caused to a person as a result of a defective condition on the premises, it must be shown that "the owner or possessor either created the condition, or had actual or constructive notice of it and a reasonable time within which to remedy it." Freidah v. Hamlet Golf and Country Club, 272 A.D.2d 572, 573 (2nd Dep't 2000).

While there is no evidence that Defendants were not responsible for causing or creating the allegedly defective condition at issue here, as indicated below that record raises triable issues of fact as to whether Defendants had constructive notice of the condition. 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 allow defendant's employees to discover and remedy it. Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837 (1986). On a motion for summary judgment to dismiss the complaint based upon lack of notice, the defendant is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law. Dwoskin v. Burger King Corp., 249 A.D.2d 358, 358 (1998). In opposition, 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." Id. at 358-359..

Here, even assuming that Defendants met their burden of showing an absence of actual notice based on evidence that there were no prior complaints about the condition, the record raises triable issues of fact as to whether Defendants had constructive notice of the condition based on, *inter alia*, the building superintendent's testimony that the lobby floor has been in the same condition as depicted in the photographs since he started working at Defendants' premises 25 years ago, as well as the photographs revealing the visible nature of the defect. See Finan v. Atria East Associates, 230 A.D.2d 707 (2d Dept 1996)(issue of fact existed as to whether defendant had constructive notice of longstanding defective condition); see generally, Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837

Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment by Defendants is denied; and it is further

ORDERED that parties shall proceed to mediation

DATED: ~~June~~ July 8, 2013

J.S.C.

FILED

JUL 17 2013

COUNTY CLERK'S OFFICE
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