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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 103450/2010
INFANTE, FRANCISCO
vs.
RENAISSANCE ASSOCIATES
SEQUENCE NUMBER : 001
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). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

COUNTY CLERK'S OFFICE
NEW YORK
AUG 13 2013
FILED

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

Dated: 8/9/13

_____, J.S.C.
HON. EILEEN A. RAKOWER

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 — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER PART 15
Justice

FRANCISCO INFANTE,

Plaintiff,

- v -

RENAISSANCE ASSOCIATES, REDCO MANAGEMENT CORP., AND T.U.C. MANAGEMENT COMPANY, INC.

Defendants.

INDEX NO. 103450/2010

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answer — Affidavits — Exhibits	2
Replying Affidavits	3

Francisco Infante, ("Plaintiff") brings this action for personal injuries allegedly sustained when he slipped and fell while descending the staircase in the rear of the building ("the staircase") located at 49-55 Wadsworth Terrace in the County and State of New York ("the Premises"). Plaintiff alleges that Renaissance Associates, Redco Management Corp. ("Redco"), and T.U.C. Management Corp. (collectively, "Defendants") were negligent in allowing the staircase to become dirty with garbage and debris. Plaintiff alleges that the staircase was defective in that it lacked "appropriate" handrails, and that there was a chip in the nosing of the step. Defendants now move for summary judgment pursuant to CPLR §3212. Plaintiff opposes.

Defendant has resided at the Premises in apartment 2H since 2002. The Premises are owned by Defendant Renaissance Associates. Defendant T.U.C. Management Company, Inc. is the managing agent for the building. Defendant Redco is the former managing agent for the building, having turned management

of the building over to T.U.C. Management Company in April 2007.

Plaintiff alleges that on February 17, 2008 at approximately 12:30 p.m., while descending a flight of stairs leading from the second floor to the first floor of the Premises, he slipped and fell, sustaining serious injuries. Plaintiff testifies in his deposition that the cause of the accident was that "the stairs were dirty. There was cans, that was things like fast food. Cigarette butts, a lot of cigarette butts." Plaintiff alleges that his foot got stuck in a chip in the nosing of the staircase, and that he was unable to grab onto a handrail, as there was not one on his left side. Plaintiff asserts that Defendants had both actual and constructive notice of the dangerous conditions above.

Defendants, in support of their motion for summary judgment, submit: the Verified Bill of Particulars; the Summons and Complaint; Defendant's Answer along with Defendant's demand for the Verified Bill of Particulars and a combined demand for discovery and inspection; the deposition transcript of Plaintiff; photographs of the staircase; the deposition transcript of Luis Barbecho ("Mr. Barbecho"), the Superintendent of the premises; and the Affidavit of Louis Evangelista, Jr., a General Partner in Renaissance Associates.

Plaintiff, in opposition, provides: the Affidavit of Plaintiff; the Verified Bill of Particulars; and photographs of the staircase.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Liability for any dangerous conditions on property "must be predicated upon a defendant's "ownership, occupancy, control or special use of the subject

property." (*See, Valmon v. 4 M&M Corporation*, 291 A.D.2d 343, 738 N.Y.S.2d 340 [1st Dept 2002]). As to claims against Redco, the Affidavit of Luis Evangelista, Jr., a General Partner at Renaissance Associates, the owners of the Premises, states, "T.U.C. Management Company, Inc. took over the management of the building from defendant Redco Management Corp. in April of 2007" and "[a]t the time of Plaintiff's accident, no entity other than T.U.C. Management Company, Inc. was responsible for the management of the premises." Redco did not own, lease, occupy, control, supervise, operate, manager or derive any special use out of the subject property at the time of Plaintiff's accident. Plaintiff has not provided any evidence to raise an issue of fact as to Redco's ownership, occupancy, control, supervision, operation, or management of the Premises. Accordingly, Plaintiff's complaint and all cross-claims are dismissed as against Redco.

With regard to claims against Renaissance Associates, the owner of the premises, and T.U.C. Management Company, Inc., the managing agent, Defendants have the initial burden of showing that they neither created the allegedly hazardous condition nor had actual or constructive notice of its existence. (*O'Connor-Miele v. Barhite & Holzinger,* 234 AD2d 106, 650 NYS2d 717 [1996]). "Constructive notice requires a showing that the condition was visible and apparent and existed for a sufficient period of time prior to the accident to permit a defendant to discover it and take corrective action." (*Boyko v. Limowski*, 223 A.D.2d 962, 636 N.Y.S.2d 901 [1996]). Proof of regular inspections and maintenance of the area in question including an inspection and any remedial action just prior to the incident is ordinarily sufficient to satisfy a defendant's burden of showing no notice of a dangerous condition. (*See, Tucci v. Stewart's Ice Cream Co.*, 296 A.D.2d 650, 746 N.Y.S.2d 60 [2002]).

Plaintiff states in his deposition that he descended the staircase at approximately 12:30 p.m. on February 17, 2008. He attests that he tripped on "soda cans", "chinese food", "cigarette butts", a "plastic thing" that is used for serving food, and between five and ten "plastic bags". He describes that when he first put his left foot down onto the first step "there was bags, a can. When [he] stepped on the can that's what made [him] slip."

Plaintiff had not used the staircase at any time earlier that day and had last used the staircase on the afternoon prior to the day of the accident. Plaintiff

testified that it was "impossible to tell you how much time [the garbage and debris] was there." He did note that before his accident, he observed footprints containing Chinese food and cans that had been stepped on, indicating that the garbage would have been there long enough for other people to step on.

Mr. Barbecho, the Superintendent of the Premises at the time of the accident, described in his deposition the premises, the staircase, and his routine for maintaining the premises. He testified that "whenever I see there is dirt or a wet spot, I have to clean it right away regardless whether it's in the afternoon or at night." In addition, Mr. Barbecho states that "every day at 7:00 in the morning, I check if everything is clean, I take the garbage to the street . . . In the afternoon. That's when I check to see if there is no big trash or anything, then I go to my apartment. I do have cameras, I constantly look at them because sometimes they leave bottles in the elevator. When I see that, then I go and tell them not to do that. Then collect the garbage and have to take it to downstairs."

Mr. Barbecho testified that he had not received any complaints about garbage and debris on the staircase in February 2008. He testified that when Plaintiff complained about garbage and debris on the staircase, ". . . then, whenever, I went, there is just one bottle. I did not know whether it was his or what."

Defendants assert that they have shown proof of regular inspections and maintenance of the area in which the accident occurred, including earlier in the day on the date of the accident.

In opposition, Plaintiff states in his Affidavit, "[t]here were many other occasions prior to the accident where I observed bags, paper, Chinese food, grease, takeout containers, cans, and cigarettes on the stairs where my accident occurred proceeding from the second to first floor." He attests, "I called and complained to the superintendent , Luis Barbecho, about garbage, bags, liquids, foods, grease, takeout containers, cans, cigarette butts, and bottles accumulating at the rear stairwell where I live, from the second to the first floor at least once every other week beginning February 2007 until the accident on February 17, 2008." He alleges that Luis replied on each of these occasions "that he was busy and he had no help." Plaintiff asserts, "nothing was ever done to remedy my complaints; Mr. Barbecho only cleaned once a week and didn't clean on the other days."

Here, Plaintiff's testimony about the recurring condition on the stairs, "when compared to defendants' witnesses' testimony regarding defendants' alleged cleaning schedule, raise issues of fact as to whether there was actually a dangerous and frequently unremedied recurring condition on the stairs that caused plaintiff's claimed injury." (*Carmen Irizarry v. 15 Mosholu Four, LLC*, 24 A.D.3d 373, 806 N.Y.S.2d 534 [Sup. Ct. NY County 2005]).

Additionally, Plaintiff asserts that "the front part of his foot" entered the "chip" or "piece missing from the nosing of the step" as he was falling. Defendants contend that the chip in the nose of the staircase is trivial and not actionable because it is located on the nosing of the step and is "no more than a few inches wide."

Property owners may not be held liable for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip." (*Milewski v. Washington Mut., Inc.*, 88 AD3d 853, 931 NYS2d 336 [2011]). "Generally, whether a dangerous or defective condition exists depends on the particular facts of each case, and is properly a question of fact for the jury unless the defect is trivial as a matter of law. (*Milewski v. Washington Mut., Inc.*, 88 AD3d at 855). Defects do not have to be a certain minimum height or depth to be actionable. (*See, Trincere v. County of Suffolk*, 90 NY2d at 978). For a court to determine whether a defect is trivial as a matter of law, it must examine all of the facts presented including the width, depth, elevation, irregularity, and appearance of the defect along with the time, place, and circumstances of the injury. (*Trincere v. County of Suffolk*, 90 NY2d at 978). Photographs of a defect which fairly and accurately reflect how it appeared on the date of the accident may be used to demonstrate whether it is trivial. (*See, Shenpanski v. Promise Deli, Inc.*, 88 AD3d at 984).

The photographs, taken by Plaintiff on the evening of the accident, depict images of a chip in the nosing of the staircase. No other information is provided regarding the measurements of the defect. Accordingly, whether the defect was trivial is an issue of fact for the jury to decide.

Wherefore, it is hereby,

ORDERED that Defendants' motion for summary judgment is granted to the

extent that the action against Defendants Redco Management Corp. is dismissed, and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED that the causes of action remain as to Renaissance Associates and T.U.C. Management Company, Inc.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: August 9, 2013

J.S.C.
HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE