

**Kirshberg v 1590-1592 First Ave., LLC**

2014 NY Slip Op 30125(U)

January 16, 2014

Supreme Court, New York County

Docket Number: 116738/2010

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Kirshberg, Brenda
- v -
1590 - 1592 First Avenue

INDEX NO. 116738/2010
MOTION DATE 11.08.2013
MOTION SEQ. NO. 003

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

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendants pursuant to CPLR 3212 granting summary judgment dismissing the Plaintiff's complaint is granted and the complaint is severed and dismissed. However, the third-party action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

This constitutes the decision and order of the Court.

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

Dated: 01.16.2014

[Signature], J.S.C.

HON. CAROL EDMEAD

- 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: PART 35

-----X  
BRENDA SOLOMON KIRSHBERG,

Plaintiff,

-against-

1590-1592 FIRST AVENUE, LLC and ORSID REALTY  
CORP.,

Defendants.

-----X  
1590-1592 FIRST AVENUE, LLC and ORSID REALTY  
CORP.,

Third-Party Plaintiffs,

-against-

EDUARD DAVYDOV,

Third-Party Defendant.

-----X  
CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this personal injury action, defendants/third-party plaintiff, 1590-1592 First Avenue, LLC ("1590") and Orsid Realty Corp ("Orsid") (collectively "defendants") move pursuant to CPLR 3212 for summary judgment dismissing the complaint of the plaintiff Brenda Solomon Kirshberg ("plaintiff").

*Factual Background*

Plaintiff alleges that she was injured on September 15, 2010, at approximately 9:45 a.m., when her left foot struck a raised corner of a sidewalk cellar door located in front of 400 East 83rd Street, New York, New York. The incident took place shortly after plaintiff exited Evelyn and San Shoe Store, located on the first floor of 400 East 83rd Street.

According to the plaintiff, plaintiff had just dropped off a pair of shoes for repair.

Plaintiff alleges that she turned right as she exited the store and took approximately six steps from the store before her foot struck the sidewalk cellar door (EBT, pp. 12). The height of the “raised area” of the cellar door was “Approximately” an “inch or so,” although she did not measure the condition (*id.*, pp. 15, 66-67). At the time of the accident, plaintiff was walking slowly, looking straight ahead (*id.*, p. 13). The weather was a very “nice” and “dry” day (*id.*, p. 11). There was one other person on the sidewalk walking by plaintiff in the opposite direction (*id.*, p. 13). Although plaintiff had visited the store on prior occasions, her visits were infrequent and plaintiff did not have a regular route to and from the store. As a result of her foot striking the sidewalk cellar doors, plaintiff lost her balance and fell forward (*id.*, pp. 15-18). Plaintiff never noticed the raised condition before the day of her accident, heard of any prior accidents in that area, or heard of any complaints about the sidewalk or the cellar doors (*id.*, p. 40).

Plaintiff brought suit against the building owner, 1590, and the property manager, Orsid, who in turn, commenced a third party action against the store owner, third-party defendant Eduard Davydov (“Davydov”). Defendants now move for summary judgment dismissing the plaintiff’s complaint.

In support of their motion for summary judgment, defendants assert that the alleged defect of the sidewalk cellar doors is trivial in nature, and thus, not actionable. Defendants note that plaintiff’s accident took place in the daytime, at approximately 9:45 a.m., during nice, dry weather. There was only one other person on the sidewalk and there was nothing between plaintiff and the cellar doors at the time of the accident. Additionally, there is a distinct color difference between the cellar doors and the surrounding sidewalk, as depicted in the photograph plaintiff identified at her deposition. The photographs demonstrate that the elevation of the

alleged defect is trivial, at best. Further, the building superintendent, Manny Farrugia ("Farrugia"), has never received any complaints relating to the cellar doors, nor called his office relating to any problems with the cellar doors. Nor has he ever observed anything wrong with the cellar doors within the three years leading up to his deposition. Farrugia has never tripped on the cellar doors nor has he ever seen anyone else trip on the cellar doors.

In further support of their motion, defendants submitted an affidavit from professional engineer Stanley Fein ("Fein"), attesting that he performed an inspection of the subject cellar doors on October 17, 2012. Based on his inspection, Fein determined that the raise identified by the plaintiff as the defect that caused her accident measured "less than one half inch in height," and was in compliance with the New York City Administrative Code 7-210 and 19-152(a) requirements to maintain the sidewalk in a reasonably safe condition and repair defects or appurtenances not flush within  $\frac{1}{2}$ " of the sidewalk surface, respectively.

Accordingly, based upon on the facts and circumstances of the alleged incident, including the time of day, weather, foot traffic, photographs, measurements, lack of any prior accidents or complaints about the cellar doors, plaintiff's familiarity and the defendants' compliance with the Administrative Code, defendants have established that plaintiff's complaint should be dismissed.

In opposition, plaintiff asserts that defendants are not entitled to summary judgment because defendants caused and created the dangerous hazardous trap-like tripping condition that at issue by negligently maintaining the cellar doors. Defendants failed to (1) ensure the height of the cellar doors from its frame was less than  $\frac{1}{4}$  inch all around; (2) grind down the edges of the

cellar doors to form a slope of 7/8 inch wide and 5/8 inch wide;<sup>1</sup> and (3) remove debris from between the doors and its adjacent frame which created the difference in height between the doors and frame. Further, plaintiff's expert, Cornelius Dennis ("Dennis") stated that if the debris between the cellar doors and the frame were removed, the cellar doors would settle into the frame or drop to a 1/4 inch height or less and the grinding/sloping would not be necessary. In the alternative, an issue of fact exists as to whether defendants' omissions created the dangerous condition, thereby precluding summary judgment.

Plaintiff further argues that defendants had actual notice of the dangerous condition that caused plaintiff's accident, thereby precluding summary judgment, or alternatively, that the question of notice is an issue of fact that must be left to the trier of fact to determine. Building superintendent Farrugia testified that he visited the subject premise at least once a week and at times three times per week. His inspections lasted approximately 15 to 20 minutes each and included a visual examination of the cellar doors in question. The condition of the cellar doors as depicted in the photographs shown to Farrugia at his deposition was the same as it was two years prior to Farrugia's deposition. Thus, defendants were or should have been aware of the raised, warped, uneven condition of the corner of the sidewalk cellar doors where plaintiff tripped and the debris between the cellar doors and the adjacent frame, given that those conditions were readily observable to Dennis, upon his inspection of the subject cellar doors.

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<sup>1</sup> Specifically, plaintiff argues that the corner of the cellar doors over which plaintiff tripped was 7/16 inch higher than the adjacent frame, while other areas measured at 5/16 inch. And, the difference between the cellar doors and the frame where plaintiff tripped was between 1/4 and 1/2 inch, thereby requiring defendants to ground down the outer edges of the doors to form a slope 7/8 inch wide pursuant to ICC A117.1 §§303.2 and 303.3 and the New York City Building Code 1101/2.

Plaintiff further asserts that defendants had constructive notice of the subject condition, and that in any event, an issue of fact exists as to this issue. Plaintiff argues that Farrugia could have and should have observed the warped portion of the cellar doors and the gap that existed between the cellar doors and the adjacent frame in his visual inspection of the doors, given that the gap measured more than a 1/4 inch at all points. Also, the condition existed for more than a reasonable period of time. Thus, defendants knew or should have known of the condition, thereby allowing defendants time to ameliorate the condition prior to plaintiff's accident.

Lastly, plaintiff argues that, in light of the close proximity of the cellar doors to the entrance of the shoe shop, and pedestrian traffic on the sidewalk and in and out the shop, the question of whether the defect in the cellar doors (which were not readily observable) was a trap and/or snare or *de minimis* is an issue of fact for a jury to determine. And, the defect was a latent condition not readily observable. Thus, defendants are not entitled to summary judgment and their motion should be denied.

In reply, defendants point out that plaintiff expert, Dennis, concedes that the subject cellar door was in compliance with New York City Administrative Code 19-152(a), which is the sole statute cited in plaintiff's Bill of Particulars. Dennis' assertion that the cellar doors violated New York City Building Code Section 1101.2, which adopts Section 303.3 of the International Code Council A117.1 9 ("Section 303.3"), lacks merit, as this conclusion is based on an alleged debris condition existing at the time of his inspection on September 5, 2013, of which there is no evidence as having existed at the time of plaintiff's accident. Plaintiff did not cite debris as the cause of her accident. Rather, plaintiff's affidavit in opposition cites the alleged warped condition of the cellar doors as the cause of her accident. Further, the photographs, which

plaintiff testified are a fair and accurate representation of the subject cellar doors at the time of her accident, show the *de minimis* space between the door and the frame to be free from any debris. Thus, since there was no debris between the cellar doors and its frame at the time of plaintiff's accident, the cellar doors did in fact sit at a height of  $\frac{1}{4}$  of an inch and in full compliance with both New York City Administrative Code 19-152(a) and Section 303.3.

Further, plaintiff's description of the cellar doors as having been "visibly warped" is a mischaracterization and unsupported by the evidence. There is no warping or other visible defect in the subject doors detectable in the photographs depicting the condition of the subject cellar doors at the time of her accident. And, the issue of notice, though shown as lacking, is irrelevant due to the absence of any actionable defect.

Therefore, the alleged defect of the sidewalk cellar doors is trivial in nature, and thus, not actionable and the complaint should be dismissed.

#### *Discussion*

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the party opposing the motion to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]). The court's function on a motion for summary judgment is only to determine whether any triable issues of fact exist, not to determine the merits of any such issues (*Sheehan v Gong*, 2 AD3d 166, 168 [1st Dept 2003]).

The question of "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" (*Trincere v Cnty. of Suffolk*, 90 NY2d 976, 977, 688 NE2d 489 [1997] citing *Guerrieri v Summa*, 193 AD2d 647 [2d Dept 1993]). "Not every injury allegedly caused by an elevated brick or slab need be submitted to a jury" (*Trincere v Cnty. of Suffolk*, *supra* at 977; see e.g., *Boynton v Haru Sake Bar*, 107 AD3d 445, 968 NYS2d 430 [1<sup>st</sup> Dept 2013] ("an alleged hazardous one-half-inch differential between the level of the sidewalk and the frame to the cellar hatch doors fails. Photographic evidence shows that the height differential is trivial, and an insufficient basis for finding liability on the part of defendant"); *Fayolle v East West Manhattan Portfolio L.P.*, 108 AD3d 476, 970 NYS2d 186 [1<sup>st</sup> Dept 2013] (the "alleged defect—a three-quarter-inch expansion joint, which was not filled to grade level, coupled with a one-fourth-inch height differential between slabs—was 'trivial' and therefore nonactionable); *Riley v City of New York*, 50 AD3d 344, 854 NYS2d 400 [1<sup>st</sup> Dept 2008] (finding the alleged defect trivial and non-actionable where plaintiff "tripped over the top edge of a cellar door that was slightly elevated above the sidewalk, and his own deposition testimony established that the accident occurred in daylight in an area that he traveled on a daily basis"))).

It is well settled that "[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" (*Id.*) In determining whether a defect is trivial in nature, the court must examine the facts of each case "including the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury" (*Id.*).

Here, defendants established that the alleged defect was trivial in nature. The accident

allegedly occurred during a “nice” day, and Fein established that the subject raise measured “less than one half inch in height.” The subject cellar door clearly depicted in the photographs attached to his affidavit closely resembles the condition of the subject cellar door depicted in the photographs identified by plaintiff at her deposition. All of the photographs submitted in support of defendants’ motion collectively support Fein’s conclusion that the height differential between the cellar door and frame surrounding it to be less than one half inch. That plaintiff testified that the raise was “approximately” an inch or so does not contradict Fein’s findings, especially in light of marking on the photographs of the raised area which caused her to trip. Nor does the alleged “warped” condition of the cellar door raise an issue as to the triviality of the raise, since plaintiff’s testimony establishes that her foot got caught on the gap; there is no indication that any warped condition of the other areas of the cellar door caused plaintiff to trip (or slip, or lose her balance). In other words, plaintiff alleges simply that her foot got caught due the raise or gap located at the corner of the cellar door.

In opposition, plaintiff failed to raise an issue of fact as to the trivial nature of the alleged defect. The affidavit of plaintiff’s expert, Dennis, is insufficient to overcome defendants’ showing. Dennis “observed a lot of debris located between the metal doors and the cellar door frame imbedded in the sidewalk concrete” (Affidavit, ¶14). Dennis does not provide photographs of his examination of the cellar doors; instead, he relies on the photographs identified by plaintiff at her deposition. Dennis’ conclusion rests upon his belief that “if the debris between the doors and the frame were removed the doors would settle onto the frame and project less than 1/4 inch and grinding [down] the doors would not be required.” There is no testimony of any debris existing on or about the cellar doors at the time of Dennis’ inspection in

September 2013 existed at the time of plaintiff's accident in 2012. Further, Dennis measured the "vertical height of the cellar doors as compared to the cellar door frame imbedded in the sidewalk at the corner of the western most cellar door, which was the portion of the cellar doors that Plaintiff tripped over" and observed that "there was more than 1/4 inch of gap." (Id. ¶¶15-17). However, Dennis' finding that there was more than 1/4 inch gap is entirely consistent with Fein's finding that the gap was less than 1/2 inch. As such, and in light of the daylight hours during which plaintiff's accident occurred, the Court finds that the alleged defect was trivial, and thus, non-actionable as a matter of law (*Schwartz v Bleu Evolution Bar & Restaurant Corp.*, 90 AD3d 488, 935 NYS2d 10 [1<sup>st</sup> Dept 2011] (reversing denial of summary judgment where a gap between two sidewalk flags which was approximately one-half-inch-wide, and the height differential between the flags was also approximately one-half-inch. Defendants are entitled to summary judgment based on plaintiff's theory of how the accident occurred. The gap between the flags and the height differential was trivial and plaintiff has not come forward with evidence to show that the defect presented a significant hazard despite being de minimis )).

Further, although it has been held that even a trivial defect may constitute a snare or trap (*Argenio v Metro. Transp. Auth.*, 277 AD2d 165, 166, 716 NYS2d 657, 659 [1<sup>st</sup> Dept 2000]), this is no indication that there "were many people around" plaintiff or that the location of the cellar doors "in a heavily traveled pedestrian walkway" rendered "observation of the defect less likely" (*cf. Argenio v Metro. Transp. Auth.*, *supra*; citing *Slate v Fredonia Cent. School Dist.*, 256 AD2d 1210, 1210-1211 [defect "not readily observable under normal conditions"]; *Tesak v Marine Midland Bank*, 254 AD2d 717, 718 ["attention would be drawn to the door, not to the sidewalk"]). Plaintiff testified that there was only one person walking in the area, after having

left the store, and there is no indication that her attention was drawn to any "door."

Accordingly, defendants' motion for summary judgment dismissing the plaintiff's complaint is granted.

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that the motion by defendants pursuant to CPLR 3212 granting summary judgment dismissing the Plaintiff's complaint is granted and the complaint is severed and dismissed. However, the third-party action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: January 16, 2014



Hon. Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**