SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN *Justice* PART 21

MARILYN YUKOWITZ,

Plaintiff,

- against -

NEW YORK CITY TRANSIT AUTHORITY and METROPOLITAN TRANSPORTATION AUTHORITY,

Defendants.

INDEX NO. 108352/11

MOTION DATE 4/11/14

MOTION SEQ. NO. 002

The following papers, numbered 1 to 4, were read on this motion for summary judgment

Notice of Motion — Affirmation in Support — Exhibits A-P	No(s). 1-2
Affirmation in Opposition — Exhibits 1-A-B	No(s). 3
Reply Affirmation — Exhibit Q	No(s). 4

Upon the foregoing papers, this motion is decided in accordance with the annexed memorandum decision and order.

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

Dated: 6/24/14
New York, New York

_____, J.S.C.

1. Check one:..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check if 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: IAS PART 21

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MARILYN YUKOWITZ,

Plaintiff,

- against -

Index No. 108352/11

NEW YORK CITY TRANSIT AUTHORITY and METROPOLITAN TRANSPORTATION AUTHORITY,

Decision and Order

Defendants.

----------X

HON. MICHAEL D. STALLMAN, J.:

In this personal injury action, defendants New York City Transit Authority (NYCTA) and the Metropolitan Transportation Authority (MTA) move for summary judgment dismissing the plaintiff's complaint as against them.

BACKGROUND

Plaintiff alleges that, on April 24, 2010 at approximately 4:00 p.m., she sustained injuries when she tripped and fell on a defective metal nosing at the top step of stairway P2A at the West 4th Street subway station entranceway at the northeast corner of Sixth Avenue and West 3rd Street in Manhattan. At plaintiff's request, a professional photographer took pictures of the subject location a few days after the accident. (*See* Shafer Affirm. ¶ 34, Ex. O.) According to plaintiff's deposition, plaintiff fell when her shoe

made contact with a raised metal lip on the first step. (Shafer Affirm. Ex. F [Yukowitz EBT], at 26.) Plaintiff testified,

"See the shoe, so the shoe just goes right in, so it's this part (indicating).

Q: You're indicating the sole of the toe of your shoe?

A: This part right here (indicating).

(Colloquy omitted) ***

Q: Is that what you're saying, the sole of the toe of your shoe got caught on the lip?

A: Right, it was lifted.

Q: Do you know how much the lip was lifted?

A: No. Enough for that to happen.

***

Q: As a result of your left foot coming into contact with that lip, what happened next to your physical person?

A: I went forward.

Q: Your body went forward?

A: Yeah.

Q: Did you fall?

A: Yes.

***

Q: Can you put an X [on the photograph] where you landed?

A: I can't be sure."

(Yukowitz EBT at 26-30.)

DISCUSSION

The standards for summary judgment are well-settled.

> "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact, and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's [f]ailure 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."

(*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal citations and quotation marks omitted].)

Defendants move for summary judgment on the grounds that the alleged defect is a trivial defect and defendants did not have actual or constructive notice of the alleged condition. In support of their motion, defendants submit the photographs taken a few days after the alleged incident by a professional photographer, and they argue that the photographs do not show "a raised lip on the top step of the second

staircase as alleged by plaintiff." (Shafer Affirm. ¶ 38.) Defendants also submit the deposition testimony of Vincent Moschello, a structure maintainer for the NYCTA. (*Id.* Ex. J [Moschello EBT].) Moschello testified about various work reports specific to the subject stairway. (*Id.*) Moschello testified that the last work report for the subject stairway before plaintiff's alleged incident was from January 21, 2010 in which the tread(s) on stairway P2A had come off, and the repair work was completed that same day. (*Id.* at 23.) Defendants also submit the accident report from the date of the alleged incident indicating that the stairway was last inspected on April 16, 2010, eight days prior to the alleged incident and the condition at the time of the inspection was "Clean, Dry, Well lit, [and] Defect free." (Shafer Affirm. Ex. G.)

In opposition, plaintiff states that summary judgment should be denied because triable questions of fact remain about the condition of the staircase and whether defendants had notice of the condition. Plaintiff submits an affidavit from plaintiff with attached photograph of her shoe worn at the time of the alleged incident with a ruler showing the height of the front of the shoe. (Hershman Opp. Affirm. Ex. 1 [Yukowitz Aff.].) In her affidavit, plaintiff states,

> "That I have reviewed the photographs which have been provided to the Court as part of this motion. Due to the angles and manner in which the photographs were taken it is impossible to see the height differential in the photographs.
>
> ***
>
> Now looking at the height of the front of my loafers worn at the time of the accident, (with the ruler showing the actual height of the shoe) and knowing that my foot was on the ground immediately before I tripped, it is now clear that the height differential between the ground and the top of the step causing me to trip was at least one (1") inch if not more." (Yukowitz Aff., ¶¶ 9-10.)

Plaintiff also submits the affidavit of Brenda Carpenter, plaintiff's friend and witness who was present at the time of the alleged incident. (Hershman Opp. Affirm. Ex. A [Carpenter Aff.].) In her affidavit, Carpenter states,

> "That shortly after the accident I took the time and looked at all the steps on the set of steps where [plaintiff] fell.
>
> That I observed that each of the steps had a definite differential in height between the top of the step and the ground immediate before it as one would be walking down the steps, with the top step being higher than the ground immediately before it. This included the top step where I believe [plaintiff] fell.
>
> ***
>
> That I have been shown the photographs which the defendant has included in its motion papers for summary judgment. That due to the manner in which they were taken these photographs do not accurately show the height differential I personally observed soon after the accident." (Carpenter Aff. ¶¶ 5-6, 8.)

Plaintiff also argues that defendants had constructive notice because there were several work reports for the subject stairway between April 24, 2008 and April 24, 2010, and therefore defendants "had ample opportunity to discover and correct the condition causing plaintiff's accident." (Hershman Opp. Affirm. ¶¶ 22-23.)

"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." (*Elliott v E. 220th St. Realty*, 1 AD3d 262, 263 [2003] [internal quotation marks omitted] [citations omitted].) "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 County of Suffolk*, 90 NY2d 976, 977 [1997] [internal quotation marks omitted] [citations omitted].) To determine whether a defect is actionable, an examination of all the facts presented in the moving papers, including "the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" is required. (*Trincere*, 90 NY2d at 978 [internal quotation marks omitted] [citations omitted].)

Here, defendants have not demonstrated entitlement to judgment as a matter of law. In the motion papers, defendants provide photographs of

the subject stairway. (Shafer Affirm. Ex. O.) Defendants rely on these photographs to show that the defect is trivial and thus non-actionable. However, this Court cannot tell, just by viewing these photographs, whether the defect is, indeed trivial. There are no up close photographs of the stairway. All of the photographs are taken at a distance, so any height differential would be difficult to discern, if at all. Thus, these photographs do not unequivocally demonstrate that the defect is trivial. Also, defendants have not provided measurements or other evidence to strengthen their argument. Moreover, plaintiff has raised a question of fact as to the photographs, arguing that the photographs do not accurately depict the alleged defect. (Yukowitz Aff. ¶ 9, Carpenter Aff. ¶ 8.)

Plaintiff has also raised a question of fact as to notice. Although defendants argue that the subject stairway was inspected eight days before the alleged incident and the condition at the time of inspection was "Clean, Dry, Well lit, [and] Defect free" (Shafer Affirm. Ex. G), the nature of the inspection is not clear; neither is it clear whether a non-transitory condition of the kind alleged would have been found during such an inspection. Thus, this is a question of fact for the jury.

Therefore the motion for summary judgment is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is denied.

Dated: June 24, 2014
New York, New York

ENTER:

J.S.C.