

Wolfthal v NY Dealer Sta., LLC
2014 NY Slip Op 32897(U)
April 23, 2014
Supreme Court, Westchester County
Docket Number: 54839/2011
Judge: James W. Hubert
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X

Marvin Wolfthal, as Executor of the Estate of Philip Wolfthal,

Plaintiff,

DECISION & ORDER

-against-

Index No. 54839/2011

NY Dealer Stations, LLC and South Broadway Snack Mart, Inc.

Motion Seq. 002

Defendants.

-----X

Hubert, A.J.S.C.

The following papers were read on this motion for summary judgment:

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Upon the foregoing papers, it is Ordered that this motion by defendant for summary judgment is disposed of as follows:

This is an action to recover for personal injuries allegedly sustained by Philip Wolfthal on December 18, 2010, when he fell on a step as he was leaving a store on the premises of a Shell gas station located at 372 South Broadway in Tarrytown, New York. At the time of the accident, the convenience store was operated by defendant South Broadway Snack Mart, Inc. The property was owned by defendant NY Dealer Stations, LLC. Plaintiff's bill of particulars states that Mr. Wolfthal, who was 77 years old at the time, died as a result of his injuries, which included a cranial hemorrhage, a fractured wrist, fractured ribs, and other injuries. Decedent's wife testified at a deposition that they had stopped at the gas station to buy coffee, and were both leaving the store when decedent fell and hit his head on the pavement as he was stepping down from a concrete platform that runs along the front of the building where the door is located.

Plaintiff Marvin Wolfthal, executor of the estate, alleges in the bill of particulars that Defendants were negligent in the design, placement, renovation, construction, repair and maintenance of the step/landing on the premises. Specifically, Plaintiff alleges that decedent tripped as a result of a "broken, cracked, raised/depressed, uneven step/landing outside the premises." In an affidavit submitted to the court, Plaintiff states that he did not measure the area of missing pieces of concrete where decedent fell, but would estimate that the missing pieces of concrete measured about 1 to ½ inches and caused a depression at the edge of the walkway/sidewalk. Plaintiff's wife has also submitted an affidavit stating that "[a]s my husband was stepping off of this walkway/sidewalk, I observed his foot make contact with one of the areas that was chipped and broken. I then observed my husband fall as a result of his foot tripping over the area with the missing concrete." Plaintiff has also submitted photographs taken a few days after the accident depicting where decedent fell.

Defendants move for summary judgment dismissing the complaint on the ground that, as a matter of law, any defect in the step or landing is a non-actionable trivial defect. Whether a dangerous or defective condition exists so as to create liability in negligence “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 N.Y.2d 976, 665 N.Y.S.2d 615 (1997)(internal quotation marks omitted). However, a property owner may not be held liable in damages for “trivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes, or trip over a raised projection.” *Marinaccio v. LeChambord Rest.*, 246 A.D.2d 514, 667 N.Y.S.2d 395, 396 (2d Dep’t 1998)(internal citations omitted).

There is no “minimal dimension test” or per se rule that a defect must be of a certain height or depth in order to be actionable. *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 977. In considering whether a defect is too trivial to be negligent, the court should consider all of the facts presented, “including the width, depth, elevation, irregularity and appearance of the defect along with the ‘time, place and circumstance’ of the injury. *Trincere*, 90 N.Y.2d at 978, quoting *Caldwell v. Village of Is. Park*, 304 N.Y. 268, 274 (1952).

In order to prevail on a motion for summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986)(citations omitted). Once this showing has been made, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact” on which the party rests his or her claim, or must demonstrate an “acceptable excuse” for having failed to do so. *Zuckerman v. City of New*

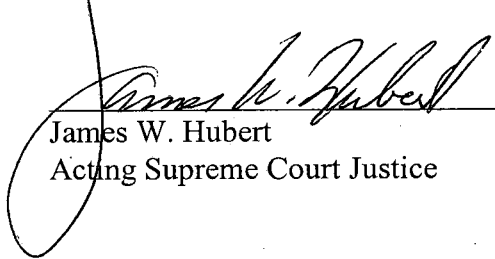
York, 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595 (1981); *see also Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324.

Here, Defendants have met their prima facie burden of establishing their entitlement to judgment as a matter of law. The accident occurred at approximately 11:30 a.m. According to deposition testimony, it was a clear day and there were no adverse weather conditions. There is no evidence that there was anything obstructing decedent's view or the step where he fell. Although it appears that the concrete step was chipped or uneven, it does not appear from the photographs that the walkway or step constituted a tripping hazard. There was nothing protruding from the pavement, nor is any gap in the pavement depicted in the photographs.

In opposition, Plaintiff has failed to raise a triable issue of fact. No expert affidavits have been submitted to the Court establishing that the alleged defect which caused decedent to fall exhibited any characteristics that would render it a trap or snare, as contemplated by the case law. Other than the chip in the concrete, Plaintiff offers no other details regarding the concrete step or walkway. The Court therefore finds that the condition of the concrete step, as described by the parties and reviewed by the Court in the photographs, does not constitute a dangerous or defective condition for which the property owner can be held liable. *Maciaszek v. Sloninski*, 105 A.D.3d 1012, 963 N.Y.S.2d 382 (2d Dep't 2013)(hole in a step in stericase deemed trivial defect); *Grosskopf v. 8320 Parkway Towers Corp.*, 88 A.D.3d 765, 930 N.Y.S.2d 661 (2d Dep't 2011)(chip in marble staircase was a trivial defect); *Zalkin v. City of New York*, 36 AD3d 801, 828 N.Y.S.2d 485 (2d Dep't 2007)(3/4 inch difference in height elevation between edge of concrete slab which caused plaintiff to fall and adjacent concrete slab too trivial to be actionable).

Defendants' motion for summary judgment is therefore granted. The action is dismissed.

Dated: White Plains, New York
April 23, 2014



James W. Hubert
Acting Supreme Court Justice