To commence the statutory time 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

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ALBA GALEANO,

Plaintiff,

-against-

NETHERLAND GARDEN OWNERS, INC.

Defendant.

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Index No. 51466/2015

DECISION/ORDER

Motion date: 7/6/16
Motion Seq. 1

ECKER, J.

The following papers numbered 1 through 9 were read on the motion of Netherlands Garden Owners, Inc. ("defendant"), made pursuant to CPLR 3212, seeking dismissal of the complaint, as against Alba Galeano ("plaintiff"):

PAPERS	**NUMBERED**
Notice of Motion, Affirmation, Exhibits A-E	1 - 7
Affirmation in Opposition	8
Reply Affirmation	9

Upon the foregoing papers, the court determines as follows:

Plaintiff alleges she sustained physical injuries when she tripped and fell as a result of a crack along the walkway leading to the apartment she occupies at the defendant cooperative. The occurrence took place on October 4, 2014, at around 9:00 a.m., as she was walking toward the building where she resides. The weather conditions were clear and

dry. The crack in issue traverses some distance along the walkway.[1] Plaintiff, during her deposition, circled on photographs she was shown [Deft.'s Ex. E], the area where she fell when her high heeled shoe got caught in a portion of the crack. The area where she fell, asdepicted by the photographs, which the court determines to be a sufficient depiction, measured one eighth (1/8") inch in depth and one (1") inch in width [Deft.'s Ex. E]. Her deposition testimony reveals she has resided in the apartment for nineteen years, has been aware of the cracked walkway for two to three years, and has reported the condition to the management company and the superintendent. Her theory of liability is predicated upon the premise that the condition complained of had the "characteristics of a trap" in that the heel of her right shoe became stuck in the crack [Aff. In Opp., page 4]. It is upon these facts that she alleges there is an issue of fact that must be resolved by the jury.

Defendant counters that the extent of the crack in walkway, her awareness of the crack for so long and that she reported the condition is not relevant to the issue of whether the crack constitutes a "trivial defect" [Reply Aff.].

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. Issue finding, rather than issue determination, is the key to the procedure. *Matter of Suffolk Co. Dept. of Social Services v James M.,* 83 NY2d 178 [1994]; *Sillman v Twentieth Century-Fox Film Corp,* 3 NY2d 395, 404 [1957]. In making this determination, the court must view the evidence in the light most favorable to the party opposing the motion, and must give that party the benefit of every inference which can be drawn from the evidence. *Negri v Stop and Shop, Inc.,* 65 NY2d 625 [1985]; *Nash v Port Washington Union Free School District,* 83 AD3d 136, 146 [2d Dept 2011]; *Pearson v Dix McBride, LLC,* 63 AD3d 895 [2d Dept 2009]. The moving party is entitled to summary judgment only if it tenders evidence sufficient to eliminate all material issues of fact from the case. *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]. If a party makes a *prima facie* showing of its entitlement to summary judgment, the opposing party bears the burden of establishing the existence of a triable issue of fact. *Id.*; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986].

In accordance with the standard enunciated, supra, the court finds that there is no issue of fact for the trier of fact (the jury) relative to whether defendant can be found negligent. The Court of Appeals in *Hutchinson v Sheridan*, 26 NY3d 66 [2015], has enunciated in their analysis of three distinct cases, when it is appropriate to grant a defendant summary judgment. In the *Hutchinson* case itself, the Court affirmed the order

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[1] The Aff. in Opp. describes the crack as "a "T" shaped crack that runs both vertical and horizontal on the walkway. The vertical portion is appx. 66" long and the horizontal portion is appx. 43" wide; spanning the entire width of the walkway." [Aff. In Opp., page 3]. As defendant correctly notes, there is no proof in the record by anyone with personal knowledge that this is so [Reply Aff.,¶ 12]

of the Appellate Division reversing the trial court, that had denied the motion. There, the facts were plaintiff slipped and fell on what the record revealed to be a cylindrical metal protrusion extending from the sidewalk one quarter inch above the sidewalk and approximately five eighths of an inch in diameter. The court stated, after its discussion of *Trincere v County of Suffolk*, 90 NY2d 976 [1976], that "(T)aking into account all the facts and circumstances presented, including but not limited to the dimensions of the metal object, we conclude that the defect was trivial as a matter of law." *Hutchinson, supra*, at p. 80. [2]

In *Kam Lin Chee v DiPaolo*, 138 AD3d 780, 783 [2d Dept 2016], the Court modified Supreme Court's order which, upon reargument, had denied defendant's motion for summary judgment. There plaintiff tripped and fell "on a nonlevel, raised portion of a sidewalk flag while walking on a sidewalk abutting commercial premises..." The defect at issue was "at most, a rise of slightly more than one inch." Citing *Trincere, supra*, the Appellate Division found that "neither the alleged defect nor the surrounding circumstances increased the risk to her (citing *Hutchinson, supra,* at 79)." [3] Plaintiff testified at her deposition that "she had traversed the sidewalk on numerous previous occasions without incident before the incident, that it was a sunny day and there were no crowds, construction, or other obstructions to block her view of the sidewalk as she traversed it.

The facts herein are sufficiently equivalent to the facts in *Kam Lin Chee v DiPaolo, supra,* such that it can be said that plaintiff has failed to establish, as a matter of law, that this case requires further consideration by the jury. The court finds that defendant has demonstrated that it is entitled to the granting of its application for summary judgment. *Alvarez v Prospect Hosp., supra.* Accordingly, it is hereby

ORDERED that the motion by defendant Netherlands Garden Owners, Inc.,made pursuant to CPLR 3212, for summary judgment and dismissal of the complaint, as against plaintiff Alba Galeano, is granted, and the complaint is dismissed.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
September 28, 2016

ENTER,

HON. LAWRENCE H. ECKER, J.S.C.

[2] Having made this determination, the Court found it unnecessary to address the issue of lack of actual or constructive notice.

[3] *"Hutchinson, supra* at 79" corresponds to the analysis in the *Hutchinson* case where no liability was found as to the sidewalk defect.

Appearances

Rosenberg, Minc, Falkoff & Wolff, LLP
Attorneys for Plaintiff
Via NYSCEF

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