# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN PART 58
*Justice*

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STEFANE BARTLETT,

Plaintiff,

- v -

GREENWICH VILLAGE FISH CO., INC. D/B/A CITARELLA, CITARELLA EAST INC., 1313 REALTY CO., L.L.C, 75 REALTY CO., L.L.C

Defendant.

INDEX NO. 161380/2013

MOTION DATE 3/17/2017

MOTION SEQ. NO. 004

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 90

were read on this application to/for DISMISSAL.

**Upon the foregoing documents, it is**

Decided that the motion for summary judgment is denied. The undisputed facts are that plaintiff was shopping in the store known at Citarella located at 1313 3rd Avenue New York, NY. After exiting the store without purchasing anything, plaintiff tripped and fell. Plaintiff was taken to the hospital and no report was made with defendant at the time of the accident. Plaintiff commenced this action alleging that the cause of her fall was an uneven sidewalk in front of the store that constituted a hazardous and defective condition. During her deposition, plaintiff said that the reason for her fall was due to an uneven sidewalk, where one sidewalk was an inch or more elevated than the other. Plaintiff also stated that she had returned to the scene of the accident sometime soon after and the condition had remained. At a later deposition taken on December

19, 2016 after plaintiff had viewed the accident scene again on that day, plaintiff testified that the sidewalk appeared to be different and looked flatter. When asked if there presently was a difference in elevation, plaintiff said no. In support of the motion for summary judgment, defendant submitted the deposition transcript and affidavit of John Corbo, the general manager of Citarella stores. Mr. Corbo stated that no one from Citarella noticed a condition despite viewing and cleaning the area every day and that no one had ever complained about an uneven sidewalk or trip hazard. Finally, Mr. Corbo stated that since the time of the accident through plaintiff's viewing of the scene of the accident, no changes to the elevation of the sidewalk had been performed.

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Integrated Logistics Consultants v. Fidata Corp.,* 131 AD2d 338 [1st Dept 1987]; *Ratner v. Elovitz,* 198 AD2d 184 [1st Dept 1993]). On a summary judgment motion, the court must view all evidence in a light most favorable to the non-moving party (*Rodriguez v. Parkchester South Condominium Inc.,* 178 AD2d 231 [1st Dept 1991]). The moving party must show that as a matter of law it is entitled to judgment [*Alvarez v. Prospect Hosp.,* 68 NY2d 320 324 [1986]). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Only once the moving party has demonstrated its *prima facie* entitlement to summary judgment, does the party opposing the motion have to demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v. City of New York,* 49 NY2d 557 [1980]).

Although defendant makes reference to the lack of notice of any defect and the fact that plaintiff had made statements that she felt dizzy and hadn't been using her cane, defendant's reply papers make clear that the basis for this motion is that there was no defect and even if there was a defect, said defect was *de minimus*. Thus, to prevail, defendant has the burden to establish on a *prima facie* level that as a matter of law that there was no defect. Defendant has failed to do so. Defendant has not submitted any evidence that no condition existed on the day of the accident. Instead, defendant argues "that there is no evidence of any defect in the sidewalk that may have existed on the day of the accident." However, it is not plaintiff's burden on summary judgment to show said evidence at this time. Instead, it is the moving party's burden to make a *prima facie* showing of entitlement to judgment as a matter of law and then the burden shifts. Further, plaintiff clearly testified that she tripped on an uneven sidewalk, where one flag was elevated and defendant has not submitted any reports or evidence that show the flags were even. At best, defendant has stated that no one complained and that no store employees ever noticed something out of the ordinary. To the extent that defendant suggests that combining plaintiff's admission that in December 2016, there was no elevation with Mr. Corbo's statement that since the time of the accident, no changes to the elevation of the sidewalk had been performed, such argument does not establish that no defective condition existed on the day of the accident. First, plaintiff clearly stated in her further deposition that it looked like the sidewalk had been flattened. Although Mr. Corbo stated that no work on the elevation had been performed, it is also undisputed that since the time of the accident, the space between the two flags has been filled with a silicone substance to close the gap. Indeed, the pictures submitted show that said gap has been filled. Whether said silicone filler has made the sidewalks appear flat or has covered up a trip hazard remains an issue of fact for the jury to determine.

For the same reasons, to the extent that defendant argues that even if there was a slight elevation of one flag, said elevation was trivial or *de minimus*, that argument is denied. Defendant has not submitted any report or measurements to show that the elevation was slight. Plaintiff's testimony was that the elevation was an inch or more and in any event, since the gap has been filled, and the Court cannot determine from the pictures whether any elevation or gap was trivial or *de minimus*, an issue of fact remains.

For the above reasons, defendant's motion for summary judgement is denied.

This constitutes the decision and order of the Court.

9/1/2017
DATE

DAVID BENJAMIN COHEN, J.S.C.

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| CHECK ONE: | [ ] | CASE DISPOSED | | [X] | NON-FINAL DISPOSITION | | |
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| APPLICATION: | [ ] | SETTLE ORDER | | [ ] | SUBMIT ORDER | | |
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