ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

----------x

ERNEST PERKINS,

Plaintiff,

-against-

HILLSPRING LLC. and ADF PIZZA II, LLC.

Defendants.

----------x

Index No.: 11980/14
Mot. Date: 6/20/17
Mot. Cal. No. 134
Mot. Seq. 4

The following papers read on this motion by defendant Hillspring, LLC for an order pursuant to CPLR 3212 and 3211 dismissing the plaintiff's complaint ONLY as against Hillspring, LL or, in the alternative, for an order pursuant to CPLR 3212 granting Hillspring, LLC summary judgment on its cross-claim for contractual indemnification, including attorneys' fees and costs against co-defendant ADF Pizza II, LLC.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits	1-4
Affirmation in Opposition.....	5-6

Upon the foregoing papers, it is ordered that the motion is denied.

In this action seeking damages for personal injuries allegedly sustained by the plaintiff when he slipped and fell, at 219-33 Hillside Avenue, Queens Village, New York. The landlord, Hillspring LLC (Hillspring), had a triple-net lease with co-defendant ADF Pizza II, LLC (ADF) that it claims required ADF to maintain the demised premises. Movant claims that it did not owe a duty to the plaintiff to maintain the sidewalk, and that, if it did, the plaintiff failed to establish notice, or identify the cause of the accident. It further argues that the defect, if any, was trivial. The Court rejects all of the foregoing claims as meritless.

"Generally, an out-of-possession owner or lessor is not liable for injuries that occur on ***its*** premises unless it has retained control over the premises or is contractually obligated to repair unsafe conditions" [*emphasis supplied.*] (*Scott v Bergstol*, 11 AD3d 525 [2d Dept. 2004]).

Pursuant to Administrative Code § 7-210, property owners are "under a statutory nondelegable duty to maintain the sidewalk" (*see Cook v. Consolidated Edison Co. of NY, Inc.*, 51 AD3d 447, 448 [1st Dept 2008]; *Collado v. Cruz*, 81 AD3d 542, [1st Dept 2011]; *Reyderman v Meyer Berfond Trust #1*, 90 AD3d 633, 634 [2d Dept 2011] [*landlord failed to establish, prima facie, that it fulfilled its nondelegable duty to maintain the sidewalk in a reasonably safe condition and, thus failed to show that it was entitled to summary judgment dismissing the complaint.*]; *Stephen v Brooklyn Pub. Lib*, 120 AD3d 1221 [2d Dept 2014] [*pursuant to Administrative Code of the City of New York § 7-210, the owner, had a statutory duty to maintain the sidewalk abutting its premises at the alleged accident location*]). Plaintiff has alleged, *inter alia*, violations of the "Sidewalk Law."

The duty flowing from the Sidewalk Law is nondelegable (*see Spector v Cushman & Wakefield, Inc.*, 87 AD3d 422, 423 [1st Dept 2011]). However, this regulation does not impose strict liability on the owner. (*See Martinez v Khaimov*, 74 AD3d 1031,1032 [2d Dept. 2010]). Where the owner negligently fails to remove snow and ice from the sidewalk abutting its property, it can be found liable to a plaintiff who is thereby injured (*see Kabir v Budhu*, 143 AD3d 772, 773 [2d Dept 2016]). At trial, the plaintiff must establish that the owner owed him a duty which it breached, and thereby, caused injury to the plaintiff. To succeed on a summary judgment motion in such a case, the owner is generally required to show that it neither created a dangerous condition on the sidewalk adjoining its property nor had actual or constructive notice of any such condition within a sufficient period of time to discover and remedy it (*see Rejaee v Costco Price Club*, 140 AD3d 641 [1st Dept 2016]). Such a burden cannot be met by simply noting gaps in the plaintiff's case (*Martinezv Khaimov supra* at 1033). Hillspring describes the allegedly defective area in its motion papers as "sidewalk/driveway abutment." Other than counsel's claim that ADF's area manager admitted that it was responsible for the repair of the area where the plaintiff fell, movant has not established that the subject area

was a part of the demised premises as opposed to the sidewalk adjacent thereto. The existence of this issue fails to demonstrate a lack of duty to the plaintiff as a matter of law.

Contrary to defendants' apparent misapprehension, on a summary judgment motion it is the moving party's burden to submit evidence in admissible form sufficient to demonstrate the absence of any issues of fact and affirmatively establish the movant's right to judgment as a matter of law. (*See Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Katz v Beil*, 142 AD3d 957, 964 [2d Dept 2016]; *Ortega v Liberty Holdings, LLC*, 111 AD3d 904 [2d Dept 2013].) Defendant has not met this burden.

In seeking to demonstrate a lack of notice, the owner must present proof by one with actual knowledge as to the sidewalk's condition before the accident or as to when the owner or its employees last inspected the sidewalk (*see Rong Wen Wu v Arniotes*, 149 AD3d 786 [2d Dept 2017]; *Vargas v Cadwalader, Wickersham & Taft, LLP*, 147 AD3d [1st Dept 2017]; *Maloney v Farris*, 117 AD3d 916, 916-917 [2d Dept 2014] [*defendants failed to establish, prima facie, that they did not have constructive notice of the alleged hazardous condition.*] In support of the motion, the defendant submitted no evidence as to when the allegedly defective area, to wit, the abutting sidewalk or parking lot, or driveway was last inspected prior to the accident.

The defendant's burden on the issue of whether it had actual or constructive notice is not met simply by evidence of its usual practices (*see Johnson-Glover v Fu Jun Hao Inc.*, 138 AD3d 499, 500 [1st Dept 2016]). Further, a defendant who has actual knowledge of a recurring condition can be deemed to have constructive knowledge of every recurrence of that condition (*see Osorio v Wendell Terrace Owners Corp.*, 276 AD2d 540 [2d Dept 2000]). Thus, when a plaintiff alleges that the dangerous condition was a recurring one, of which the owners had actual notice, the owners failed to meet their burden of demonstrating their entitlement to summary judgment when they simply asserted that they neither created nor had constructive or actual notice of the claimed dangerous condition; instead, they were required to establish that the condition was not frequent, ongoing, or customary, and that they lacked actual notice of the claimed recurring condition (*see also Colt v Great Atl. & Pac. Tea Co.*, 209 AD2d 294 [1st Dept 1994]; *see also Romero v 2024 Second Ave., LLC*, 2017 N.Y. Misc. LEXIS 1529 *, 2017

NY Slip Op 30818(U) [Sup Ct. NY Co. 2017]). The photos of the area where the plaintiff fell depict an extremely cracked and broken area, with depressions, which in and of themselves belie the testimony of the representative of defendant ADF that they would repair the area if they noticed a condition in need of attention.

As to the defendant's polemic regarding the open and obvious nature of the condition, "even if a hazard qualifies as 'open and obvious' as a matter of law, that characteristic merely eliminates the property owner's duty to warn of the hazard, but does not eliminate the broader duty to maintain the premises in a reasonably safe condition" *(Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 70 [1st Dept 2004]). However, "a court is not 'precluded from granting summary judgment to a landowner on the ground that the condition complained of by the plaintiff was both open and obvious and, as a matter of law, was not inherently dangerous' " (*Burke v Canyon Rd. Rest.*, 60 AD3d 558, 559 [1st Dept 2009], *quoting Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]).

Viewing the evidence in the light most favorable to the plaintiff, the Court finds that a triable issue of fact exists as to whether the allegedly defective walking surface was an open and obvious condition that was not inherently dangerous.

The Court finds that the issue of trivial defect is one properly reserved here for the trier of fact. Generally, whether a dangerous or defective condition exists depends on the particular facts of each case, and is properly a question of fact for the jury unless the defect is demonstrated to be trivial as a matter of law *(see Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). In determining whether a defect is trivial as a matter of law, the court must examine all of the facts presented, including the width, depth, elevation, irregularity and appearance of the defect, along with the time, place and circumstances of the accident. "Circumstances" has been interpreted to include, but not be limited to, the sufficiency of the lighting, the existence of rain, snow, leaves or debris (*see Trincere, supra* at 978). There is no "minimum dimension test" or "per se rule" that the condition must be of a certain height or depth in order to be actionable. (*Trincere, supra* at 977).

The Court of Appeals has further clarified its intent with regard to the "trivial defect doctrine" in the recently decided *Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, [2015], stating "Trincere stands for the proposition that a defendant cannot use the trivial defect doctrine to prevail on a summary judgment motion solely on the

basis of the dimensions of an alleged defect, and the reviewing court is obliged to consider all the facts and circumstances presented when it decides the motion . . . in deciding whether a defendant has met its burden of showing prima facie triviality, a court must — except in unusual circumstances not present here — avoid interjecting the question of whether the plaintiff might have avoided the accident simply by placing his feet elsewhere." (*Hutchinson, supra* at 84,). Defendant has not made a *prima facie* showing that, as a matter of law, the allegedly defective condition displayed in the photographs was merely a non-actionable trivial defect (*see e.g., DePascale v E & A Constr. Corp.*, 74 AD3d 1128, 1131 [2d Dept 2010] [*one-quarter inch is trivial]*). A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a *prima facie* showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not somehow increase the risk it poses. Only then does the burden shift to the plaintiff to establish an issue of fact (*see Hutchinson, supra* at, 79 ; *Scuteri v 7318 13th Ave. Corp.*, 52 Misc 3d 391, 393-395 [Sup Ct, Kings County 2016].). While defendant supplies an affidavit from an expert stating that the height-differential was less than a half inch, the Court, in deference to the above authority, finds that the height of the depressed area is not dispositive. The photographs depict a cracked, pitted, broken area of walkway that a jury could find creates an unsafe condition if not a trap for someone exiting the co-defendant ADF's business.

Defendant's request for contractual indemnification from co-defendant ADF is denied. The affidavit of Alexander Spivakon behalf of Hillspring (*see* Exhibit K in movant's papers), states that the lease, that was in effect on September 13, 2013, is annexed to his affidavit. He claims that it incorporates repair and indemnity obligations. The triple-net lease entered into in 2008 does not contain any indemnity provisions. The previous lease annexed to the defendant's papers references The Southland Corporation as landlord. There is no lease in the defendant's moving papers that provides for indemnity or insurance running from co-defendant ADF to the moving defendant, or any evidence of an assignment of the prior lease by The Southland Corporation to the moving defendant. The defendant's prolix motion papers fail to demonstrate that the allegedly defective area

was within the demised premises or otherwise within the tenant's responsibility to Hillspring.

Accordingly, for all of the foregoing reasons, it is hereby,

ORDERED, that motion by the defendant Hillspring, LLC. is denied in all respects.

ORDERED, that all other applications not specifically addressed herein are denied in all respects.

Dated: October 11, 2017

TIMOTHY J. DUFFICY, J.S.C.

FILED
OCT 16 2017
COUNTY CLERK
QUEENS COUNTY

OCT 16 2017
COUNTY CLERK
QUEENS COUNTY