SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

MARIA RIJO

INDEX NO. 161982/15

MOT. DATE

- v -

MOT. SEQ. NO. 002

CRP SHERMAN AVENUE LLC

The following papers were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). 28-40
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). 42-50
Replying Affidavits	NYSCEF DOC No(s). 52-54

This personal injury action arises from a slip and fall. Defendant now moes for summary judgment on the grounds that the defect which caused plaintiff's accident was "trivial" and that defendant did not have notice of said condition (CPLR § 3212[a]). Plaintiff opposes the motion. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

The facts are largely undisputed. On November 19, 2015, plaintiff slipped and fell on the worn edge and/or broken step of an exterior staircase located at 128 Sherman Avenue, New York, New York (the "premises"). Prior to her accident, plaintiff had lived at the premises for approximately nineteen years. At her deposition, plaintiff testified through the use of an interpreter that the accident occurred as follows: "I went down, I pulled the door and when I placed my right foot on the first step then I slipped all the way down."

Plaintiff further testified:

Q. How did you fall?

A. I was in the lobby waiting for my ride, when the ride arrived, I pulled the door with my right hand. When I put out my right foot then I went.

Q. When you opened the door to 128 Sherman Avenue, is there a small step that you would immediately step onto before stepping down to the four steps leading to the sidewalk?

A. Yes.

Dated: 12/20/17

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Q. Did you trip on the first step?

A. Yes, I placed my foot on the first step. It's broken, because it has not been fixed yet.

Q. When you say that it was broken, what do you mean by that?

A. It's broken like this, the borders are not delineated. You know that here in this area they place metal, it did not have.

...

Q. In the best way that you can describe it to me without using your hands, can you tell me what was broken about the stairs other than the missing piece of metal that you just told me about?

A. That cement was smashed like this (indicating).

Q. This was on the first step?

A. Yes.

...

Q. The middle of that first step was smashed and the entire step had no metal along the nosing?

A. No, it did not have metal.

Q. But the middle area was smashed?

A. Yes.

...

Q. When did you first notice this condition?

A. I saw it broken and there were a lot of people and since no one complained, neither did I.

Q. When did you first notice this condition?

A. It has been like that for many years.

According to her bill of particulars, plaintiff alleges that her accident was caused by sloped nosing, the absence of handrails, inadequate lighting and a failure to warn.

At the time of her accident, defendant was the owner of the premises and Liberty Place Property Management LLC ("Liberty") was the property manager. Plaintiff admitted that she did not report her accident to Liberty or defendant until the instant action was commenced.

Defendant produced for deposition Robert Cuevas, who was the superintendent for the premises. He identified photographs of plaintiff's accident location, and stated that the stairs had been repainted and cemented every summer. Cuevas could not, however, say that the stairs depicted in the photograph looked like they did on the date of plaintiff's accident.

Defendant argues that the defective condition which caused plaintiff's accident was trivial as a matter of law. Defendant maintains that plaintiff's accident occurred when she "mis-stepped" rather than

because of its alleged negligence. Defendant has also provided the affidavit of Timothy Joganich, a Certified Human Factors Professional, who claims to have conducted an investigation of plaintiff's accident. Joganich conducted an inspection of the subject stairway on January 20, 2017. Joganich opines that plaintiff's version of the accident is "inconsistent with the laws of physics and fundamental principles of biomechanics, as well as [plaintiff's] own testimony."

Joganich further claims that: If Ms. Rijo slipped as she testified, then she would have remained at the top step. [redacted] In addition, there is no reason to think Ms. Rijo would have slipped if in fact she stepped onto the worn nosing. The worn nosing had exposed the stone aggregate, which would logically increase the slip resistance between the sole of the shoe and the surface as compared to a smooth concrete surface. Thus, in this case, the worn nosing that exposed the stone aggregate increased the slip resistance.

Finally, Joganich conducted a "human factors surrogate analysis" and attempted to recreate plaintiff's accident with a surrogate of approximately the same height and weight as plaintiff. Joganich claims, based upon this test, that "a misstep accounts for [plaintiff's] fall incident, as opposed to a slip event."

Plaintiff claims that the defendant has not met its burden, and that otherwise, triable issues of fact exist which are sufficient to defeat the motion. Plaintiff has provided the affidavit of Nicholas Bellizzi, who inspected the subject stairs and states that plaintiff's testimony is consistent with his observations of "[t]he subject nosing area [being] chipped, cracked and ha[ving] a missing segment of concrete..."

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Here, the court finds that defendant's motion must be denied. Assuming *arguendo* that defendant established that the defect was trivial, plaintiff's own testimony as well as the photographs submitted into evidence and her expert's opinion are sufficient to raise a triable issue of fact on this point. "[W]hether a dangerous or defective condition exists on the property of another so as to create liability ... is generally a question of fact for the jury." (*Hutchinson v. Sheridan Hill House Corp.*, 26 NY3d 66 [2015]). An owner is entitled to summary judgment dismissing a premises liability claim arising from the negligent maintenance by reason of a trivial defects which does not constituting a trap or nuisance. Here, the facts are such that plaintiff's claim survives summary judgment, since her theory of the case, and the evidence she's presented, is that the stairs were in such a condition that when she put her foot on the top step, she slipped and fell because a portion of the step was missing. On these facts, defendant has failed to show that the defect was physically insignificant as a matter of law. The fact that plaintiff may have traversed the steps many times over the course of the years she claims it existed does not mandate dismissal of her claims, but rather, goes to her credibility as to the happening of the accident and/or whether the defect was indeed trivial.

As to defendant's argument that the accident was not proximately caused by the condition of the top step, but rather, plaintiff's own negligence, this is also a question of fact for the jury to determine, since it involves questions of credibility.

Finally, the court finds that the defendant failed to establish the absence of notice, based upon plaintiff's testimony about how long the condition existed and photographs of the steps which suggest that the condition existed for a sufficient period of time in which defendant could and/or should have repaired same.

Accordingly, defendant's motion is denied in its entirety.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that defendant's motion for summary judgment is denied in its entirety.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 12/20/17
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.