SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KELLY O'NEILL LEVY **PART** 19
Justice

----------X

RITA PUNCH,

Plaintiff,

- v -

NEDERLANDER THEATRICAL CORPORATION, NEDERLANDER PRODUCING COMPANY OF AMERICA, INC., LUNT NEDERLANDER CORPORATION, LUNT THEATRE COMPANY, NEDERLANDER ORGANIZATION, INC.

Defendants.

----------X

INDEX NO. 156712/2014

MOTION DATE

MOTION SEQ. NO. 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132

were read on this application to/for summary judgment

In this negligence action to recover damages for personal injuries, Defendants Nederlander Theatrical Corporation, Nederlander Producing Company of America, Inc., Lunt Nederlander Corporation, Lunt Theatre Company, and Nederlander Organization, Inc. (collectively, "Lunt Theatre") move, pursuant to CPLR 3212, for an order granting them summary judgment dismissing the complaint of plaintiff Rita Punch. Plaintiff opposes.

BACKGROUND

On February 15, 2014, Plaintiff and her boyfriend, William Sacco, attended a performance at defendants' Lunt-Fontanne Theatre located at 205 West 46 Street in Manhattan where Plaintiff allegedly tripped and fell as her right heel became caught in a gap approximately

one and one-half inches in width between a doorway saddle and a floor mat. Plaintiff was walking through the second set of double doors on the mezzanine level of the theatre when the accident occurred.

Plaintiff's Deposition Testimony

Plaintiff testified that on the day of the accident she was wearing boots with an approximately two (2) inch heel. As she entered a double doorway leading into the mezzanine level of the Lunt-Fontanne Theatre, the heel of her right foot became caught and stuck in a gap at the doorway between the door saddle and a floor mat, thereby causing her to trip and fall to the ground. She testified that the gap was approximately one and one-half (1 ½) inches in width.

Deposition Testimony of Tracey Malinowski

Tracey Malinowski testified that at the time of the accident, she was employed as theatre manager for the Lunt-Fontanne Theatre where she has worked for 15 years. As the theatre manager, Ms. Malinowski's duties involved the day-to-day operations at the theater including ensuring patron safety and overseeing building operations and maintenance.

Ms. Malinowski testified that she did not witness Plaintiff's accident but became aware of Plaintiff's fall through theatre employee Joell Soto. She approached Plaintiff, introduced herself, and offered her assistance. According to Ms. Malinowski, Plaintiff appeared to be happy and remained at the Lunt-Fontanne Theatre for the entire performance.

Ms. Malinowski testified that she was familiar with the area of the accident as it was "right outside" her office (tr. at 36). According to Ms. Malinowski, floor mats are placed in the theatre during the winter months by the porters, and it is their duty to make certain the mat at issue is placed flush with the door saddle so that there is no gap. She further testified that the mat is always laid flush against the set of double doors and is secured by the rubber on the bottom so

it adheres to the floor, and she never received any complaints about the door saddle being uneven with the floor.

Ms. Malinowski testified that prior to every show, she does a walk-through of the mezzanine areas and that she walks through the subject double door frequently and the mat is always in its proper place. Indeed, she testified that prior to the accident, she had inspected the area during her walk-through twice that day because there are two shows on Saturday.

Ms. Malinowski testified that immediately after the accident, she took four (4) photographs of the area, inspected the area, and found no evidence of any defects with the mat or saddle, or of any gap. She identified Plaintiff's exhibits 2 through 5 as the photographs she took of the accident area.

Deposition Testimony of Joell Soto

Joell Soto testified that he was employed as a "director" for the Lunt-Fontanne Theatre on the day of the accident (tr. at 6). He worked for the theatre for approximately 20 years and has overseen the ushers in the mezzanine level for over 15 years. He testified that he witnessed Plaintiff fall, asked if she needed medical or managerial assistance, both of which she declined, and immediately informed Ms. Malinowski of the accident. He was not aware of what caused Plaintiff to fall, but according to Mr. Soto, the mat was not moved as a result of her fall.

He testified that the mats are placed by the theatre's porters, and he has never seen the mat in his area not flush with the door saddle. Mr. Soto further testified that he has never had to tell an employee to reposition the mat, seen the mat moved by foot traffic, seen the corner of the mat raised or seen anyone trip on the saddle or mat prior to Plaintiff's accident.

Deposition Testimony of William Sacco

William Sacco testified that on the day of the accident, he was accompanying Plaintiff to the theatre when Plaintiff's heel became caught in a gap between a door saddle and floor mat causing her to fall. He testified that the gap in the area where Plaintiff tripped was approximately two to three inches wide.

According to Mr. Sacco, the photographs the theatre relies upon do not show the area as it existed at the time of the accident and the floor mat as depicted in the photographs had been moved forward. He testified that the floor mat was not flush with the door saddle at the time of the accident. Mr. Sacco disputes the veracity of Ms. Malinowski's and of Mr. Soto's testimony regarding the accuracy of the photos and the placement of the floor mat at the time of the accident.

Affidavit of Expert Engineer Daniel S. Burdett, P.E.

Expert engineer Daniel S. Burdett, P.E. inspected the site of the accident on June 16, 2015 and opined that the height differential between the door saddle and entranceway of one inch combined with the gap space constituted a foot-trap and a dangerous tripping hazard. He further opined that Lunt Theatre created the defect by improper placement of the mat in the area and a failure to level the door saddle.

ARGUMENTS

Lunt Theatre argues that in the first instance there was no gap between the door saddle and the floor mat which allegedly caused Plaintiff to trip and fall. Lunt Theatre further argues that even if there was a gap, the alleged defect is nevertheless trivial and not actionable. Finally, Lunt Theatre argues that, assuming *arguendo* that Plaintiff tripped and fell as a result of an

actionable gap defect between the door saddle and floor mat, there is no evidence that Lunt Theatre caused, created or had notice of said gap.

Plaintiff contends that the gap over which she fell was not trivial but constituted a dangerous and defective condition which Lunt Theatre created through negligent placement and maintenance of a floor mat that was not flush with the adjacent doorway saddle.

STANDARD

On a motion for summary judgment, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that there exist material factual issues. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or findings of fact. *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503, 505 (2012).

The First Department has consistently held that whether a dangerous or defective condition exists is generally a question of fact for the jury. *See, e.g., Nin v. Bernard*, 257 A.D.2d 417, 417 (1st Dep't 1999). It is well settled that there is no per se rule that a defect be a certain number of inches in order to create liability but rather liability depends on the particular facts and circumstances of each case. *See Trincere v. Cty. of Suffolk*, 90 N.Y.2d 976, 977 (1997). Included in a motion court's analysis is "the width, depth, elevation, irregularity and appearance of the

defect along with the time, place and circumstance of the injury." *Id.* at 978 (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, 515 (2d Dep't 1998) (internal quotation marks omitted). In some cases, "the trivial nature of the defect may loom larger than another element," and "not every injury . . . need be submitted to a jury. *Trincere*, 90 N.Y.2d at 977. For instance, the First Department has found a defect trivial in nature in cases which have involved a slope, a gradual depression, or a minimal hole. *See Marcus v. Namdor, Inc.*, 46 A.D.3d 373, 374 (1st Dep't 2007) (finding "uneven pavement" and the "incline of the slope" as conditions too trivial to be actionable); *Figueroa v. Haven Plaza Hous. Dev. Fund Co.*, 247 A.D.2d 210, 210 (1st Dep't 1998) ("evidence including photographs depicting shallow, gradual character of depression was sufficient to support determination that alleged defect in walkway was trivial and possessed none of the characteristics of trap or snare"); *Gaud v. Markham*, 307 A.D.2d 845, 845-46 (1st Dep't 2003) (finding that "[t]he defect to which plaintiff now attributes the accident—the height differential of less than an inch between the defective area and the rest of the landing—was trivial, and plaintiff has not presented any evidence to show that such defect presented a significant hazard, notwithstanding its minimal dimension, by reason of location, adverse weather or lighting conditions, or other circumstances giving it the characteristics of a trap or snare").

ANALYSIS

As a preliminary matter, pursuant to this court's Status Conference Order dated May 10, 2017, Lunt Theatre's motion is found to be timely.

Here, although Plaintiff has met her burden of showing a question of fact as to whether she tripped and fell as a result of a gap between the door saddle and floor mat, Lunt Theatre's summary judgment motion is granted because, even assuming Plaintiff's fall was due to such a gap, the defect is trivial as a matter of law, as discussed further below.

While Ms. Malinowski testified that the floor mat was flush with the door saddle and that she did not observe any gap, Plaintiff and Mr. Sacco, who was standing behind Plaintiff at the time of the accident, testified that Plaintiff's heel became stuck in a gap between the door saddle and floor mat causing her to trip and fall. Mr. Sacco also testified that the photographs taken by Ms. Malinowski and offered as evidence did not accurately portray the position of the floor mat at the time of accident and that the mat had been moved forward in the photograph. Despite no evidence that Lunt Theatre's employees moved the floor mat before taking the photographs, the court cannot make a credibility determination at the summary judgment stage. *See Costello v. Pizzeria Uno of Albany, Inc.*, 139 A.D.3d 1336, 1337 (3d Dep't 2016) (finding triable issues of fact as to whether there was a defect in the floor where nonparty witnesses had accompanied plaintiff to the restaurant on the day of her fall and testified that the floor in the area where plaintiff fell was "uneven"); *see also Diaz v. 1100 Wyatt LLC*, 99 A.D.3d 532 (1st Dep't 2012); *Clark v. Jay Realty Corp.*, 94 A.D.3d 635 (1st Dep't 2012).

However, upon consideration of the facts and circumstances, this court concludes that the described gap defect is trivial as a matter of law. Whether the gap is one and one-half inches wide or three inches wide is not dispositive. *See Nin v. Bernard*, 257 A.D.2d 417, 417 (1st Dep't 1999) ("The precise dimensions of the defect, be they in feet or inches, are not dispositive"). Ms. Malinowski, who has worked at the theatre for 15 years, testified that she never received any violations or complaints regarding the area of the incident. Similarly, Mr. Soto, who has worked

as a director in the mezzanine level of the theatre for over 15 years, testified that he never saw anyone trip in the area prior to Plaintiff's accident. The instant case is distinguishable from those cases cited by Plaintiff as there was no evidence that the gap had or created sharp edges, that it was an irregular zig-zag, or that the gap itself violated any standards, regulations or codes, and the area was not a heavily traveled walkway such as Grand Central Terminal which would render the defect difficult to detect. As to Plaintiff's expert, Mr. Burdett only offers conclusory opinions regarding the defect insufficient to raise a triable issue of fact. *See Pena v. Women's Outreach Network, Inc.*, 35 A.D.3d 104, 111 (1st Dep't 2006) (citing *Murphy v. Conner,* 84 N.Y.2d 969 [1994]) ("An expert's conclusory and speculative opinion is insufficient to defeat summary judgment").

Despite Plaintiff's arguments in her opposition papers that, in addition to the gap or in conjunction with the gap, the "raised" door saddle was a defective condition that proximately caused Plaintiff's injuries, Plaintiff testified that the cause of her fall was the heel of her right foot becoming caught and stuck in a gap between the door saddle and floor mat. As a result, Plaintiff's arguments concerning the dangerous or defective condition of the door saddle are unavailing.

Thus, a mere one and one-half to possibly three-inch wide gap, without more, cannot be found to be an actionable defect. *See, e.g., Morales v. Riverbay Corp.*, 226 A.D.2d 271, 271 (1st Dep't 1996) ("differences in elevation of about one inch, without more, have been held to be non-actionable"); *see also Martin v. Lafayette Morrison Hous. Corp.*, 31 A.D.3d 300 (1st Dep't 2006) (Minor height differential of approximately one-half inch was insufficient, standing alone, to establish the existence of a dangerous or defective condition for which the property owner could be held liable).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion of defendants Nederlander Theatrical Corporation, Nederlander Producing Company of America, Inc., Lunt Nederlander Corporation, Lunt Theatre Company, and Nederlander Organization, Inc. made, pursuant to CPLR 3212, for summary judgment dismissing the complaint of plaintiff Rita Punch is granted.

The clerk of the court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

12/22/17
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.
HON. KELLY O'NEILL LEVY
J.S.C.

CHECK ONE:	[X]	CASE DISPOSED			[ ]	NON-FINAL DISPOSITION	
	[X]	GRANTED	[ ]	DENIED	[ ]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	DO NOT POST			[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE