| **Trencher v Jewish Ctr., First Choice PI, Inc.** |
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| 2018 NY Slip Op 31468(U) |
| July 3, 2018 |
| Supreme Court, New York County |
| Docket Number: 153302/2016 |
| Judge: Arlene P. Bluth |
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**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK: PART 32**

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**MICHAEL TRENCHER,**

**Plaintiff,**

**-against-**

**THE JEWISH CENTER, FIRST CHOICE PL, INC., and TOP DOG PLUMBING AND HEATING CORP.,**

**Defendants.**

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**Index No. 153302/2016**
**Motion Seq: 003 & 004**

**DECISION & ORDER**

**HON. ARLENE P. BLUTH**

Motion sequence numbers 003 and 004 are consolidated for disposition. The motion (Mot Seq 003) by defendant First Choice Pl., Inc. ("First Choice") for summary judgment dismissing the complaint and all cross-claims against it is granted. The motion (Mot Seq 004) by defendant The Jewish Center and the cross-motion by plaintiff for summary judgment are denied.

**Background**

This action arises out of a scooter accident that took place on December 4, 2015 on the sidewalk in front of the Jewish Center. Plaintiff was riding a scooter with his son when the scooter purportedly got caught between two sidewalk flags (this area is called the expansion joint), which caused plaintiff and his son to fall. Both plaintiff and his son were riding on the same scooter; plaintiff stood behind his son on the scooter and kept his hands in front of his son as they were falling to keep his son from hitting the sidewalk.

Defendant First Choice was hired in July 2015 by the Jewish Center to do plumbing work under the sidewalk. First Choice opened up two or three sections of the sidewalk in order to

replace a water shut-off valve near the curb. First Choice maintains that the work it did had nothing to do with the expansion joint that allegedly caused plaintiff to fall.

**Discussion**

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

**Use of A Scooter- (Mot Seq 004)**

The initial question for this Court is whether plaintiff's use of a scooter precludes him from recovering under these circumstances. The scooter used here was a kick scooter (one operated exclusively by the user and does not have a motor). The parties did not submit and the Court could not find any applicable regulation or law that bars the use of kick scooters on New York City sidewalks. Therefore, the Court must consider whether the Jewish Center had an obligation to maintain the sidewalk in a reasonably safe condition for plaintiff to use his scooter.

"If the [defendant] was negligent in failing to keep the sidewalk in suitable condition for people to walk upon, and plaintiff, while roller skating, on the sidewalk was injured because of such neglect, he could recover" (*Errante v City of New York*, 74 AD2d 122, 124, 427 NYS2d 18 [1st Dept 1980]). Because using a kick scooter, just like roller skating, is permitted on sidewalks in Manhattan, the Jewish Center had an obligation to keep the sidewalks free of defects. The question, then, is whether the sidewalk contained a defect that caused plaintiff to fall.

**Condition of the Sidewalk**

"It is a well-established principle of law that a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500, 856 NYS2d 573 [1st Dept 2008]). Circumstances "include the likelihood of injury to a third party, the potential that such an injury would be of a serious nature, and the burden of avoiding the risk" (*id.*).

"[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977, 665 NYS2d 615

[1997] [internal quotations and citation omitted]). "Of course, in some instances, the trivial nature of the defect may loom larger than another element. Not every injury allegedly caused by an elevated brick or slab need be submitted to a jury" (*id.*). A court must examine "the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect along with the time, place and circumstance of the injury" (*id.* at 978).

"A small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 78, 19 NYS3d 802 [2015]). "The relevant questions are whether the defect was difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances" (*id.* at 80).

The Jewish Center claims that plaintiff's scooter could not have been trapped in the expansion joint because the space between the flags was not large enough. The Jewish Center submits the affidavit of its expert (Joseph Sage), who claims that he inspected the area where the accident occurred as identified by plaintiff as his deposition (NYSCEF Doc. No. 108, ¶ 6). Sage claims that the largest elevation difference between the two adjacent sidewalk flags was 3/4 inch (Sage took measurements at two locations between the flags) and the largest width of the expansion joint was 1/2 inch (*id.*¶¶ 11-13). Sage notes that the typical width of a scooter wheel is 3/4 inch and, therefore, the alleged defect was trivial for plaintiff's scooter (*id.* ¶ 15). Sage concludes that it would be "physically impossible for such a wheel to enter and become 'stuck' in this narrow joint as Plaintiff claimed at his deposition" (*id.*).

Plaintiff cross-moves for summary judgment and submits its own expert report from Irvin Loewenstein. Loewenstein claims that the expansion joint at issue here is missing materials that would have eliminated part of the defect and stresses that the flags are not level (NYSCEF Doc. No. 121, ¶ 12). He claims that the gap in the expansion joint between the sidewalk flags was over 1 inch deep and 1 inch wide (*id.* ¶ 8).

Both the Jewish Center's motion and plaintiff's cross-motion for summary judgment are denied because of the differing accounts of the parties' experts and the way in which plaintiff claimed the accident occurred. If the jury credits Loewenstein's findings that the expansion joint had a width and depth of an inch, then the jury could find that the Jewish Center was negligent by failing to remedy the defect (*see e.g.*, 34 RCNY § 2-09[4][f][v] [requiring that all expansion joints should be recessed 1/2 inch below the finished sidewalk]).

At his deposition, plaintiff claimed that "The wheel of the scooter got caught in a control joint for the squares of the sidewalk. The control joint was very wide; it was very deep. And the wheel was caught between the two squares" (Plaintiff's tr at 28). The control joint that trapped the scooter ran parallel to plaintiff's path (*id.* at 30).

Plaintiff further testified that "We were scooting, heading west, as I said earlier, approaching 131 West 86th Street. We probably got to the midway point of the building, and we were transitioning between the squares of the sidewalk, and we probably were slightly at an angle, and the wheel got caught in the joint. And it just didn't get out" (*id.* at 34). Plaintiff insisted that he and his son fell slightly to the right and he kept his arms in front of his son so that his son would not hit the sidewalk (*id.* at 35).

This description of the accident also creates an issue of fact sufficient to defeat the Jewish Center's motion. If the jury credits plaintiff's measurements and testimony, then it could find that the scooter got caught in the 1 inch expansion joint. The Jewish Center's argument that it would be impossible for the scooter's wheel to get caught because the wheel is too big is a rational argument, but the evidence adduced in the instant motion does not support granting the Jewish Center summary judgment on that ground. The fact is that the Jewish Center does not offer a measurement for the width of the scooter used by plaintiff. Although the Jewish Center's expert claims a *typical* scooter wheel is 3/4 inch and the Jewish Center directs the Court to look at a picture of the scooter (which has what appears to be a ruler next to it), that is not enough to grant the Jewish Center summary judgment. The Court cannot tell from the picture the exact width of the wheel (*see* NYSCEF Doc. No. 104). Besides, there are two versions of the measurement of the expansion joint.

The Court also observes that plaintiff testified that the scooter entered the expansion joint at an angle– this means that the height differential between the flags might be a proximate cause of the scooter's wheel getting stuck in the expansion joint. Under these circumstances, the Court is unable to conclude as a matter of law that the alleged defect was trivial. Clearly, there was a height differential between the two sidewalk flags and the experts disagree over whether the relevant expansion joint was too deep.

The Court also denies plaintiff's cross-motion for summary judgment. The Jewish Center's expert and the picture of the scooter might convince a jury that there is no way the wheel could ever be caught in the expansion joint. The jury might also find that plaintiff simply lost his balance (possibly due to having his young son on a scooter meant for one person), fell on

his own accord and that the sidewalk had nothing to do with it.

**Notice**

After "the passage of § 7-210 of the Administrative Code of the City of New York, the duty to maintain and repair public sidewalks, within the City of the New York, and any liability for the failure to do so, was shifted, with certain exceptions, to owners whose property abuts the sidewalk" (*Early v Hilton Hotels Corp.*, 73 AD3d 559, 560, 904 NYS2d 367 [1st Dept 2010]). "It is well settled that in order to hold an owner liable for a dangerous condition within a premises, it must be established that the owner created the dangerous condition alleged or failed to remedy the condition despite having prior actual or constructive notice of it" (*id.* at 560-61 [citations omitted]). "A defendant owner is charged with having constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the occurrence of an accident to permit the defendant to discover and remedy the condition" (*id.* at 561).

Here, the depth of the expansion joint is visible and apparent (*see* NYSCEF Doc. No. 118 [photos of the alleged defect]). And while the parties disagree over how long the defect existed, the Court is unable to find, on the record presented here, that the defect existed for such a short length of time prior to the accident that the Jewish Center had no opportunity to discover and remedy the condition.[1] The Court finds that there is an issue of fact with respect to whether the Jewish Center had constructive notice of the alleged defect (*Flanders v Sedgwick Ave. Assocs.*,

[1]The Court stresses that its finding of an issue of fact with respect to notice has nothing to do with the presence of a "violation" on the Big Apple Map from 1991. The Court cannot discern from that decades-old map whether the Jewish Center had notice of a defect regarding this specific expansion joint.

156 AD3d 504, 65 NYS3d 443(Mem) [1st Dept 2017] [finding that a jury could infer from photographs of a sidewalk defect that the condition existed for a sufficient length of time to put defendants on constructive notice]).

**First Choice- (Mot Seq 003)**

First Choice claims that it is entitled to summary judgment because it did not do work near the defect which caused plaintiff to fall. First Choice contends that the work it did had no impact on the condition of the sidewalk nor did it have any effect on the expansion joint where plaintiff allegedly tripped.

In opposition, plaintiff argues that First Choice did not meet its prima facie burden for summary judgment. Plaintiff claims that the affidavit of First Choice's owner, Ron Maimon Azulai, is insufficient because Azulai does not possess personal knowledge of the work. Plaintiff points out that First Choice failed to submit Azulai's deposition transcript in which he acknowledged that he was not present on the second (and final) work day– the day when the sidewalks were closed up. The Jewish Center also submits opposition and reiterates plaintiff's point that Azulai did not possess personal knowledge.

In reply, First Choices stresses that Azulai does have knowledge of the what happened at the jobsite because he was there on the first day of work and, as the supervisor, he knows exactly what work took place.

Auzlai's affidavit notes that he was "present at the Jewish Center the first day when the sidewalk was opened and the valve replaced" and that he was "not present on the second day when the sidewalk openings were backfilled and the sidewalk restored" (NYSCEF Doc. No. 69,

¶ 4). To complete his work, Azulai claims that First Choice used a saw to cut the perimeter of each sidewalk flag and possibly a jackhammer to remove the rest of the concrete (*id.* ¶ 6). Azulai stresses that the work has no impact on adjoining sidewalk flags (*id.* ¶ 7).

When considering Azulai's claim that they only did work on the "lighter-colored sidewalk flags" (*see* NYSCEF Doc. No. 71) and the pictures submitted by plaintiff (NYSCEF Doc. No. 118), the Court finds that First Choice is entitled to summary judgment. First Choice did not do any work with on the sidewalk flags surrounding the subject expansion joint. Plaintiff's (and The Jewish Center's) claim that somehow, doing work on a nearby sidewalk flags affected the subject expansion joint is unsupported; neither the Jewish Center nor plaintiff offer any theory about how replacing nearby sidewalk flags could have created the alleged defect. Instead, plaintiff and the Jewish Center only speculate that First Choice's work had some effect on the relevant defect. That is not enough to raise an issue of fact here, where Azulai claims that he has done similar work like this for over 20 years and it has never had any effect on adjacent flags (NYSCEF Doc. No. 69, ¶ 7).

While the Court recognizes that Azulai was not physically present on the second day of work, that does not mean he cannot opine about how this type of job is normally done and about what he saw on the first day. And the fact is that the alleged defect was *not* located in an expansion joint of a sidewalk flag that First Choice worked on; the alleged defect was located between two neighboring flags that First Choice did not touch. There is no way that a jury could conclude that working on nearby sidewalk flags created a defect based on the record before this Court. To hold otherwise would mean that an issue of fact exists anytime a contractor does work anywhere near an alleged sidewalk defect regardless of whether they actually did any work on the

flag containing the defect. This Court cannot embrace such a holding.

Accordingly, it is hereby

ORDERED that the motion by First Choice Pl, Inc. (Mot Seq 003) for summary judgment is granted, all claims and cross-claims against this defendant are hereby severed and dismissed and the clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion (Mot Seq 004) by the Jewish Center and the cross-motion by plaintiff for summary judgment are denied.

This is the Decision and Order of the Court.

**Dated: July 3, 2018**
**New York, New York**

**ARLENE P. BLUTH, JSC**

**ARLENE P. BLUTH**
**J.S.C.**