SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 32
NASSAU COUNTY

FRANCESCA R. GIANFERRARA and PAUL GIANFERRARA,

Plaintiffs,

- against -

Index No.: 607254/16
Motion Seq. No.: 01
Motion Date: 06/29/18

FIVE BELOW, INC. and EQUITY ONE (WESTBURY PLAZA) LLC now known as EQUITY ONE (NORTHEAST PORTFOLIO) LLC,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	**1**
Affidavits in Opposition, Affirmation in Opposition and Exhibits	**2**
Reply Affirmation and Exhibits	**3**

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants move, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiffs' Complaint. Plaintiffs oppose the motion.

In this action, plaintiffs seek to recover for injuries plaintiff Francesca R. Gianferrara allegedly sustained on December 22, 2015, at approximately 1:15 p.m., when she tripped and fell, on the curb on the sidewalk on the south side of the premises occupied by defendant Five

Below, Inc. ("Five Below, Inc."), in the shopping center owned by defendant Equity One (Westbury Plaza) LLC now known as Equity One (Northeast Portfolio) LLC ("Equity One"), located in Westbury, County of Nassau, State of New York. *See* Defendants' Affirmation in Support Exhibit E.

Plaintiffs commenced the instant action with the filing of a Summons and Complaint on or about September 19, 2016. *See* Defendants' Affirmation in Support Exhibit A. Issue was joined by defendant Equity One on or about October 17, 2016. *See* Defendants' Affirmation in Support Exhibit B. Issue was joined by defendant Five Below on or about January 12, 2017. *See* Defendants' Affirmation in Support Exhibit C.

Counsel for defendants submits, in pertinent part, that, "[t]he plaintiff, Francesca Gianferrara, alleges in the Complaint that the incident occurred on the premises located at Old Country Road, Westbury, New York. The plaintiff further alleges that she was caused to fall by reason of the negligence of the defendants and their agents, servants and employees, in failing to properly maintain, manage, control, supervise and repair the sidewalks and curbs around the premises, resulting in a dangerous and deceptive condition.... Plaintiff's (*sic*) Verified Bill states, "Plaintiff, Francesca R. Gianferrara, was caused to fall on a deceptively marked and appearing curb on the sidewalk'.... Plaintiffs further claim that the defendants were negligent in constructing and maintaining a curb that was not plainly visible to pedestrians, such as plaintiff, that did not appear to be a curb but only a marking, that did not differentiate the color of the ground on either side of the curb, that was not expected to be present by a lay-person, and that was not properly indicated to the present (*sic*).... Lastly, plaintiffs' claim they do not know whether any laws, rules, regulations or ordinances are claimed to be applicable or violated."

See Defendants' Affirmation in Support Exhibits A and E.

In support of their motion, defendants submit the transcript from plaintiff Francesca R. Gianferrara's Examination Before Trial ("EBT"). *See* Defendants' Affirmation in Support Exhibit F. Counsel for defendants contends that, "[i]t is clear based upon the deposition testimony of plaintiff, Francesca Gianferrara, that she was walking parallel to the yellow line that she so described as seeing prior to her fall. This is not a case where plaintiff was walking perpendicular to the yellow line and claims some type of an optical illusion was created causing her not to see the height differential. Plaintiff was in the best position to see what was open and obvious at the time of her fall, and based upon her testimony, saw the yellow line prior to falling." *See id.*

Also in support of the motion, defendants submit the transcript of the EBT testimony of Charlene Jones-Villedrouin, plaintiff's friend who was present for the subject incident. *See* Defendants' Affirmation in Support Exhibit G. Counsel for defendants asserts that "Ms. Jones-Villedrouin further testified that the ground was wet as well as the sidewalk from the mist or rain at the time of the plaintiff's accident." *See id.*

Counsel for defendants contents that, "[p]rior to plaintiff's alleged incident, defendants had no notice of anyone ever becoming injured on the premises where plaintiff is alleged to have fallen. Further, plaintiff has not come forward with any evidence of any complaints to establish any type of notice whatsoever."

Defendants also submit the transcripts of the EBT testimony of Samantha Loyer, who testified on behalf of defendant Five Below, and Lizabeth Miskelly, a regional property manager with Regency Centers, a real estate investment trust. *See* Defendants' Affirmation in Support

Exhibits I and J.

Defendants additionally submit the Affidavit of Dr. William Marletta in support of the argument that the "premises were (*sic*) safe and constructed in compliance with all building codes and safety regulations." *See* Defendants' Affirmation in Support Exhibit K. Counsel for defendants asserts that, "[t]his Court will note that in brief, Dr. Marletta found: 1) no violation of any building code, rule or regulation; 2) a 3½ inch wide yellow stripe demarcating the curbage; 3) the rise of height of seven inches is not excessive and does not depart from good and accepted safe practice or any code; 4) a ramp slope of 3.5 degrees is safe, reasonable and acceptable and which is in compliance with The New York State Building Code and ANSI A117.1 Standards for Handicapped Access; and 5) a high contrast between the concrete of the sidewalk and that of the yellow paint. Further, there is no requirement to place a guardrail or a handrail on the subject premises. If called to testify at trial, it would be Dr. Marletta's professional opinion within a reasonable degree of certainty as a certified safety professional, that the defendants provided a reasonable safe and continuous exist for customers and that furthermore there was no deviation from any New York State Uniform Fire Prevention and Building Code or good and accepted safer practice." *See id.*

Counsel for defendants argues that, "[p]laintiff allegedly fell in an area heavily transverse (*sic*). An area right outside the entrance to the building. Reason would have it that if the area so constructed was a trap or a hazardous condition, plaintiff would have put forth evidence to show other injuries or complaints with the area. The record is silent based on the sworn testimony of the defendants of any injuries ever occurring in this area prior to plaintiff. The sworn testimony of the parties clearly illustrate that defendants had no notice, actual or constructive of any hazardous condition on the premises. The evidence, along with the photo of

the accident location and the affidavit of the safety consultant, based upon his inspection of the premises clearly indicate the premises to be safe."

In opposition to the motion, plaintiff Francesca R. Gianferrara submits her own Affidavit in which she asserts, in pertinent part, that, "[o]n December 22, 2015 at approximately 1:15 p.m. I fell on the sidewalk on the south side of the Five Below store. Prior to the fall my friend Charlene Jones-Villedrouin and I had been shopping at Walmart, which was located in the same shopping center complex as Five Below. After shopping at Walmart we drove to the Five Below store. We parked in the parking lot south of the store. Because the sidewalk was crowded (it was December 22, 2015 - the last shopping weekend before Christmas), we walked in the parking lot to the front of the store. We did not walk on the sidewalk on the south side of the store until leaving the store. After shopping we left the front entrance of the Five Below store, made a left on the sidewalk in front of the store and then turned left and walked diagonally towards the parking lot on the south side of the store. While walking on the sidewalk on the south side of the store to the parking lot I fell as I stepped over a yellow line in the middle of the sidewalk. When I stepped over the yellow line I fell, bounced and ended up on my back.... I did not perceive any difference in elevation or the existence of a step/curb in the middle of the sidewalk near where the yellow line was marked. The sidewalk on both sides of the yellow line is the exact same whitish color. The is a huge difference in appearance between the whitish sidewalk and the blacktop of the parking lot. The whitish sidewalk is also different in color than the sidewalk to the east and west of the yellow line. There was simply no way for me to perceive a seven inch difference in elevation.... Before my accident I had never seen or heard of a curb in the middle of a sidewalk. It was absolutely unexpected. Clearly the optical illusion created by the same color of the sidewalk on both sides of the yellow line as compared to the blacktop in the parking lot and

the lack of any warning sign or handrail led to my fall. When I fell and ended up at a spot two or three feet south of the yellow stripe. I first realized there was a curb after I had fallen, since the step down was invisible to me. Since I did not perceive any difference in elevation before the accident I had no reason to believe that the area was dangerous before the accident; as opposed to what I knew after falling." *See* Plaintiffs' Francesca R. Gianferrara Affidavit in Opposition.

In further opposition to the motion, plaintiffs submit an Affidavit from Charlene Jones-Villedrouin. *See* Plaintiffs' Jones-Villedrouin Affidavit in Opposition.

Plaintiffs also submit an Affidavit from Caroline Metze who asserts that, "[o]n December 23, 2016 I fell on the southside (*sic*) of the Five Below store located in the Westbury Plaza Shopping Center. I was caused to fall to the ground because of a dangerous condition caused by a step in the middle of the sidewalk on the south side of the Five Below store.... There was no sign or handrail to indicate the existence of a step in the middle of the sidewalk." *See* Plaintiffs' Metze Affidavit.

Also in support of their opposition, plaintiffs submit the Affidavit of Scott M. Silberman, P.E. *See* Plaintiffs' Silberman Affidavit. Counsel for plaintiffs asserts that, "[p]hysical engineer Scott M. Silberman, P.E. testifies in his annexed affidavit concerning his inspection and photography at the accident site, opining that a curb in the middle of a sidewalk is inherently dangerous, and in Francesca Gianferrara's case not likely to be appreciated by someone walking in the direction in which plaintiff was walking at the time of the incident due to the identical color of the sidewalk on both sides of the yellow line and that the color of that sidewalk was different than the color of the sidewalk to the east and west of the yellow line and dramatically different than the color of the blacktop parking lot and the lack of a warning sign or handrail/guardrail. Mr. Silberman's opinion is that the step down in the middle of the sidewalk

was 'inherently dangerous,' and not 'open and obvious' to someone walking in the direction in which plaintiff was walking prior to the accident, and constituted failure to keep the premises - the sidewalk, in a reasonably safe condition, and that same violated the New York State Building Code." *See id.*

Counsel for plaintiffs further argues that, "there are genuine material issues of fact to be resolved by a jury that preclude granting defendants summary judgment. Specifically, if the subject seven-inch step in the middle of the sidewalk was not as a matter of law 'inherently dangerous' then there is for sure a question of fact for the jury to resolve as to whether it was 'inherently dangerous.' Furthermore, the subject step was not 'open and obvious' due to the hazardous 'optical confusion' created as proven by the annexed photographs and the deposition testimony and affidavits.... Defendants have not offered competent proof of lack of actual or constructive notice. If they are deemed to have done so, still plaintiffs have countered with proof of both actual and constructive notice."

Counsel for plaintiffs also asserts that, "[c]ase law acknowledges that 'optical confusion' may create liability where absent 'optical confusion' there may not be liability."

Counsel for plaintiffs adds that, "[t]he Power [counsel for defendants] Aff. ... claims no prior notice of the condition by reason of no prior accidents being reported. However, there may well have been accidents reported without reports finding their way into the defendants' records [a convenient way for a Risk Manager to try to avoid proof of 'notice'], as Ms. Loyer [witness for defendant Five Below] stated was not done in this case notwithstanding the very severe injuries sustained by plaintiff and the plaintiff having been taken away in an ambulance. There could have been many, many trip and falls that were not reported either because the injury was not serious enough, because no injury occurred, or because the injured party immediately sought

medical attention without reporting the accident.... Defendants' motion does not address 'actual or constructive notice as an element of the claim.' Defendants' motion is based on the defendants' 'claim' that there was no notice of any other person having been injured or fallen as proof the step was not inherently dangerous and open and obvious."

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp., supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable

issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Issue finding, rather than issue determination, is the key to summary judgment. *See In re Cuttitto Family Trust*, 10 A.D.3d 656, 781 N.Y.S.2d 696 (2d Dept. 2004); *Greco v. Posillico*, 290 A.D.2d 532, 736 N.Y.S.2d 418 (2d Dept. 2002); *Gniewek v. Consolidated Edison Co.*, 271 A.D.2d 643, 707 N.Y.S.2d 871 (2d Dept. 2000); *Judice v. DeAngelo*, 272 A.D.2d 583, 709 N.Y.S.2d 427 (2d Dept. 2000). The court should refrain from making credibility determinations (*see S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 357 N.Y.S.2d 478 (1974); *Surdo v. Albany Collision Supply, Inc.*, 8 A.D.3d 655, 779 N.Y.S.2d 544 (2d Dept. 2004); *Greco v. Posillico, supra*; *Petri v. Half Off Cards, Inc.*, 284 A.D.2d 444, 727 N.Y.S.2d 455 (2d Dept. 2001)), and the papers should be scrutinized carefully in the light most favorable to the party opposing the motion. *See Glover v. City of New York*, 298 A.D.2d 428, 748 N.Y.S.2d 393 (2d Dept. 2002); *Perez v. Exel Logistics, Inc.*, 278 A.D.2d 213, 717 N.Y.S.2d 278 (2d Dept. 2000).

Summary judgment is a drastic remedy which should not be granted when there is any doubt about the existence of a triable issue of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, *supra*. It is nevertheless an appropriate tool to weed out meritless claims. *See Lewis v. Desmond*, 187 A.D.2d 797, 589 N.Y.S.2d 678 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N.A.*, 82 A.D.2d 168, 442 N.Y.S.2d 610 (3d Dept. 1981).

In order for plaintiffs to make a *prima facie* case of negligence, they must establish the existence of a dangerous or defective condition in the first instance. *See Pillato v. Diamond*, 209 A.D.2d 393, 618 N.Y.S.2d 446 (2d Dept. 1994). Plaintiffs must also demonstrate that the defendants' negligence was a substantial cause of the incident. *See Howard v. Poseidon Pools, Inc.*, 72 N.Y.2d 972, 534 N.Y.S.2d 360 (1988).

Under New York law, a landowner must exercise reasonable care to maintain its premises in a safe condition in view of the circumstances, accounting for the possibility of injury to others, the seriousness of such injury and the burden of avoiding such risk. *See Witherspoon v. Columbia University*, 7 A.D.3d 702, 777 N.Y.S.2d 507 (2d Dept. 2004).

"To impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it." *See Leary v. Leisure Glen Home Owners Ass'n, Inc.*, 82 A.D.3d 1169, 920 N.Y.S.2d 193 (2d Dept. 2011); *Williams v. SNS Realty of Long Island, Inc.*, 70 A.D.3d 1034, 895 N.Y.S.2d 528 (2d Dept. 2010); *Dennehy-Murphy v. Nor-Topia Serv. Center, Inc.*, 61 A.D.3d 629, 876 N.Y.S.2d 512 (2d Dept. 2009). *See also Denker v. Century 21 Dept. Stores, LLC*, 55 A.D.3d 527, 866 N.Y.S.2d 681 (2d Dept. 2008); *Rubin v. Cryder House*, 39 A.D.3d 840, 834 N.Y.S.2d 316 (2d Dept. 2007). "A defendant has constructive notice of a defect when the defect is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected." *Dennehy-Murphy v. Nor-Topia Serv. Center, Inc., supra; Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 501 N.Y.S.2d 646 (1986); *Nelson v. Cunningham Associates, L.P.*, 77 A.D.3d 638, 908 N.Y.S.2d 713 (2d Dept. 2010); *Cusack v. Peter Luger, Inc.*, 77 A.D.3d 785, 909 N.Y.S.2d 532 (2d Dept. 2010).

"While a landowner has a duty to maintain its premises in a reasonably safe manner (*see Basso v. Miller*, 40 N.Y.2d 233, 386 N.Y.S.2d 564 (1976)), it has no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous [citations omitted]." *Zhuo Zheng Chen v. City of New York*, 106 A.D.3d 1081, 966 N.Y.S.2d 177 (2d Dept. 2013). Whether a dangerous or defective condition exists on the property so as to give rise to liability depends on the circumstances of each case and is generally a question of fact for the jury. *See Surujnaraine v. Valley Stream Cent. High School Dist.*, 88 A.D.3d 866, 931 N.Y.S.2d 119 (2d Dept. 2011); *Katz v. Westchester County Healthcare Corp.*, 82 A.D.3d 712, 917 N.Y.S.2d 896 (2d Dept. 2011); *Perez v. 655 Montauk, LLC*, 81 A.D.3d 619, 916 N.Y.S.2d 137 (2d Dept. 2011); *Sabino v. 745 64th Realty Associates, LLC*, 77 A.D.3d 722, 909 N.Y.S.2d 482 (2d Dept. 2010); *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 665 N.Y.S.2d 615 (1997). "'A condition that is ordinarily apparent to a person making reasonable use of [his or her] senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted.'" *Mazzarelli v. 54 Plus Realty Corp.*, 54 A.D.3d 1008, 864 N.Y.S.2d 554 (2d Dept. 2008). *See also Clark v. AMF Bowling Ctrs., Inc.*, 83 A.D.3d 761, 921 N.Y.S.2d 273 (2d Dept. 2011); *Zhuo Zheng Chen v. City of New York, supra*. The Court, however, may determine that a condition is open and obvious as a matter of law when the established facts compel such conclusion on the basis of clear and undisputed evidence. *See Tagle v. Jakob*, 97 N.Y.2d 165, 737 N.Y.S.2d 331 (2001).

Viewing the evidence in the light most favorable to plaintiffs (*see Taylor v. Rochdale Village Inc.*, 60 A.D.3d 930, 875 N.Y.S.2d 561 (2d Dept. 2009); *Judice v. DeAngelo*, 272 A.D.2d 583, 709 N.Y.S.2d 427 (2d Dept. 2000); *Robinson v. Strong Memorial Hosp.*, 98 A.D.2d 976, 470 N.Y.S.2d 2398 (4th Dept. 1983)), the Court finds that there are material triable issues of fact

with respect to defendants' liability in the subject incident.

Accordingly, defendants' motion, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiffs' Complaint, is hereby **DENIED**.

All parties shall appear for Trial, in Nassau County Supreme Court, Central Jury Part (DCM), at 100 Supreme Court Drive, Mineola, New York, on September 20, 2018, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
September 7, 2018

ENTERED
SEP 07 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE