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SHORT FORM ORDER

INDEX No. 15-5188
CAL. No. 17-02278OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 4-19-18
ADJ. DATE 9-13-18
Mot. Seq. # 001 - MD

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TAMMY PALAZZOLO,

Plaintiff,

- against -

WOLFFER ESTATE HOLDING II, LLC, and WOLFFER ESTATE VINEYARD, INC.,

Defendants.

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Attorney for Plaintiff:
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Upon the following papers numbered 1 to 35 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-25 : Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 26-32 ; Replying Affidavits and supporting papers 33-35 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Wolffer Estate Holding II, LLC, and Wolffer Estate Vineyard, Inc., for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint, is denied

Plaintiff commenced this action to recover damages for injuries she allegedly sustained on September 21, 2013, as a result of a fall on an exterior terrace patio that occurred while she was working at the Wolffer Estate Vineyard in Sagaponack, New York. The complaint alleges that defendants were negligent in failing to provide plaintiff with a safe place to work, and in creating a hazard by negligently causing or allowing the ground to be uneven.

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Defendants Wolffer Estate Holding II, LLC, and Wolffer Estate Vineyard, Inc., now move for summary judgment dismissing the complaint, arguing that plaintiff is unable to identify the cause of her fall without engaging in speculation. Defendants also assert that, assuming the cause of plaintiff's fall was sufficiently identified, the complained of "hazard" was trivial in nature and they did not create or have prior notice of such hazard. In support of the motion, defendants submit copies of the pleadings, the bill of particulars, transcripts of the parties' deposition testimony, photographs of the patio terrace, plaintiff's medical records and accident report, and an affidavit of Grahme Fischer, P.E.

Plaintiff opposes the motion, arguing that defendants failed to show the absence of triable issues of fact, and that defendants' expert affidavit should not be considered. Plaintiff's submissions in opposition include photographs of the patio terrace and a shoe that plaintiff allegedly wore at the time of the accident, and her own affidavit.

In reply, defendants argue that they have, in fact, met their burden on the motion, and that plaintiff's dispute about the qualifications of defendants' expert lacks merit. Defendants further argue that their expert was previously disclosed, and that plaintiff did not object to him, nor move to disqualify him.

At her examination before trial, plaintiff testified that on the accident date she was employed by Fresh Flavors catering and that she was working at the Wolffer Estate Vineyard, setting up chairs on the building's back patio. Plaintiff testified that she has worked at the venue approximately 50 times, and that the patio was made out of stones placed in mortar. She testified that she was carrying a chair when she stepped on an uneven surface and "rolled her ankle." Plaintiff testified that she did not see the exact spot where her ankle rolled, but that she looked back from where she landed on the ground and saw one edge of a stone, "like a kind of a lip," and that she believed such condition caused her ankle to "roll." She testified that she was not very good at estimating measurements, but that based on her observation, the stone lip was raised up "approximately one inch higher" than the other stones on the patio. Plaintiff testified that although she previously complained to Wolffer's manager about the patio area generally being uneven, she did not recall when she did so. She testified that she could only identify an area in which she fell, and not any particular stone.

At her examination before trial, Sue Calden testified that she is the event director for Wolffer Estate Vineyard, and that on the incident date she supervised where the caterers placed the tables and chairs on the covered patio. She testified that the patio was comprised of stones set in cement that were not as smooth as concrete, but were as smooth as a stone surface could be. She also testified that before each event, she inspected the premises to see if anything, including the patio surface, was in need of repair, and that if so, she would arrange for its repair. Calden testified that she has never had a problem with the stone patio, and that when she placed tables on it, the tables remained even. She testified that no one complained to her about problems with the stone patio, nor was she aware of any such complaints.

At his examination before trial, Max Rohn testified that he is the general manager at Wolffer Estate Vineyard, and that the outdoor patio terrace at the vineyard was constructed in 1996 on a flat surface in the back of the building. He testified that the patio is comprised of stones made of slightly different sizes,

shapes, and colors held together with mortar. Rohn testified that the stones are approximately the same height, and that he estimated the biggest height difference between them to be "like a centimeter at the most." He also testified that there was no formal process for inspecting the patio, but that as people are working, if they see something in need of repair, they must notify a manager and repairs would then be arranged. Rohn testified that he was not aware of any complaints or injuries on the stone patio. He also testified that he first learned of the location where plaintiff was injured through the attorneys during the lawsuit, and that upon learning about it, he inspected the patio but he did not observe anything unusual about the stones' height.

In his affidavit, Grahme Fischer, P.E., avers that he is a licensed professional engineer in the state of New York, and that he reviewed plaintiffs EBT transcript, the bill of particulars, photographs of the terrace, and Google ariel views of the accident location. He also inspected the accident location. Fischer averred that he inspected the stones that made up the terrace patio and measured the most extreme differences in height between the stones in the region of the accident. Fischer averred that there were no "near vertical edges" within the alleged accident zone, and that the highest height difference in the region was less than half an inch. As a result of his inspection, Fischer concluded that all of the "angular measurements within the vicinity of plaintiff's incident, as described by plaintiff," were inconsequential and would not cause an average person to "roll an ankle." After reviewing plaintiff's EBT testimony and plaintiff's worker's compensation "claimant questionnaire," Fischer further concluded that plaintiff's fall on the subject patio was caused solely by plaintiff's own error.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "[A] party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merits of its claim or defense" (***George Larkin Trucking Co. v Lisbon Tire Mart***, 185 AD2d 614, 615, 585 NYS2d 894 [4th Dept 1992]). If the moving party meets this burden, the burden then shifts to the opposing party, who must demonstrate evidence of the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure of the moving party to make this prima facie showing requires denial of the motion (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Since the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

To establish liability in a trip-and-fall action, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*see* ***Bradish v Tank Tech Corp.***, 216 AD2d 505, 628 NYS2d 807 [2d Dept 1995]; ***Gaeta v City of New York***, 213 AD2d 509, 624 NYS2d 47 [2d Dept 1995]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it (*see* ***Bolloli v Waldbaum, Inc.***, 71 AD3d 618, 896 NYS2d 400 [2d

Dept 2010]; ***Deveau v CF Galleria at White Plains, LP***, 18 AD3d 695, 796 NYS2d 119 [2d Dept 2005]). A condition is open and obvious if it is readily observable to those employing the reasonable use of their senses (*see* ***Davidoff v First Development Corp.***, 148 AD3d 773, 48 NYS3d 755 [2d Dept 2017]; ***Weiss v Half Hollow Hills Cent. School Dist.***, 70 AD3d 932, 893 NYS2d 877 [2d Dept 2010]). However, the question of whether a condition is open and obvious is fact-specific and usually a question for the jury (*see* ***Davidoff v First Development Corp.***, *supra;* ***Sloppelli v Yacenda***, 78 AD3d 815, 816, 911 NYS2d 119 [2d Dept 2010]).

Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the facts and circumstances of the case (*see* ***Trincere v County of Suffolk***, 90 NY2d 976, 665 NYS2d 615 [1997]; ***Dery v K Mart Corp.***, 84 AD3d 1303, 924 NYS2d 154 [2d Dept 2011]). It is well settled that a property owner may not be held liable in damages for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip (*see* ***Outlaw v Citibank, N.A.***, 35 AD3d 564, 826 NYS2d 642 [2d Dept 2006]; ***Hargrove v Baltic Estates***, 278 AD2d 278, 717 NYS2d 320 [2d Dept 2000]). In determining whether a defect is trivial, a court must examine all of the facts presented, including the "width, depth, elevation, irregularity and appearance of the defect along with time, place and circumstance of the injury" (***Trincere v County of Suffolk***, *supra* at 978; *see* ***Zalkin v City of New York***, 36 AD3d 801, 828 NYS2d 485 [2d Dept 2007]). Generally, the issue of 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 (*see* ***Trincere v County of Suffolk***, *supra;* ***Taussig v Luxury Cars of Smithtown, Inc.***, 31 AD3d 533 818 NYS2d 593 [2d Dept 2006]).

Defendants' submissions are insufficient to make a prima facie showing of entitlement to judgment in their favor on the ground that the alleged patio defect was trivial as a matter of law (*see* ***Grundstrom v Papadopoulos***, 117 AD3d 788, 986 NYS2d 167 [2d Dept 2014]; ***Deviva v Bourbon St. Fine Foods & Spirit***, 116 AD3d 654, 983 NYS2d 295 [2d Dept 2014]; ***Portanova v Kantlis***, 39 AD3d 731, 833 NYS2d 652 [2d Dept 2007]). Plaintiff's testimony revealed that she observed what appeared to be a one inch height differential where it is alleged she fell, while Rohn's testimony reflected that he believed there was not more than a centimeter difference in any of the stones' heights.

While photographs which fairly and accurately represent the accident site may be used to show a defect is trivial (***Schenpanski v Promise Deli, Inc.***, 88 AD3d 982, 984, 931 NYS2d 650 [2d Dept 2011]; *see* ***Das v Sun Wah Rest.***, 99 AD3d 752, 952 NYS2d 232 [2d Dept 2012]; ***Sawicki v Conklin Realty Co., LLC***, 94 AD3d 1083, 943 NYS2d 208 [2d Dept 2012]), the photographs offered by defendants do not clearly show where the height difference is "no greater than half an inch" on the patio where plaintiff allegedly tripped, as referred to in the engineer's report (*see* ***Louima v Jims Realty, Inc.***, 125 AD3d 943, 5 NYS3d 144 [2d Dept 2015]; ***Grundstrom v Papadopoulos***, 117 AD3d 788, 986 NYS2d 167; ***Deviva v Bourbon St. Fine Foods & Spirit***, 116 AD3d 654, 983 NYS2d 295; ***Sahni v Kitridge Realty Co., Inc.***, 114 AD3d 837, 980 NYS2d 787 [2d Dept 2014]; *cf.* ***Losito v J.P. Morgan Chase & Co.***, 72 AD3d 1033, 899 NYS2d 375 [2d Dept 2010]; ***Shiles v Carillon Nursing & Rehabilitation Ctr., LLC***, 54 AD3d 746, 864 NYS2d 439 [2d Dept 2008]; ***Hawkins v Carter Community Hous. Dev. Fund Corp.***, 40 AD3d 812, 635 NYS2d 731 [2d Dept 2007]). The Court is unable to ascertain the height differential at the location in which plaintiff

allegedly tripped from the photograph. Whether a dangerous or defective condition exists on property depends upon the particular circumstances of each case and generally is a question of fact for the jury, unless the defect is trivial as a matter of law (*see* ***Trincere v County of Suffolk***, 90 NY2d 976, 978, 665 NYS2d 615 [1997]).

Accordingly, defendants' motion for summary judgment dismissing the complaint is denied.

Dated: May 22, 2019
Riverhead, New York

WILLIAM G. FORD, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION