ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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DONTAE HALYARD,

Plaintiff,

-against-

MAGELLAN AEROSPACE NEW YORK, INC. and ELANEF MANUFACTURING CORP.,

Defendants.

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Index No.: 706959/17
Mot. Cal Date: 5/7/19
Mot. Seq. 4

FILED
MAY 22 2019
COUNTY CLERK
QUEENS COUNTY

The following papers were read on this motion by plaintiff for an order, pursuant to CPLR 3212, granting summary judgment on the issue of liability as against defendants; and on the cross-motion by defendants for an order, pursuant to CPLR 3211(a)(7), dismissing plaintiff's Complaint for failure to state a cause of action upon which relief may be granted and for an order awarding defendants summary judgment, pursuant to CPLR 3212, on the issue of liability as against plaintiff.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	EF 52-74
Notice of Cross-Motion-Affidavits-Exhibits.....	EF 103-111
Affidavits in Opp to Cross-Motion and Reply to Motion.....	EF 133-134

Upon the foregoing papers, it is ordered that the motion and cross-motion are denied.

In this action, plaintiff Dontae Halyard seeks damages for personal injuries, allegedly sustained, on September 29, 2016, when he tripped and fell on a crack in the sidewalk adjacent to the premises, located at 50-05 98th Street, Queens, New York.

Plaintiff maintains that he sustained serious personal injuries due to the negligence of defendants. Defendants claim that the plaintiff failed to establish notice, that any defect was a trivial condition, and that any defective condition was open and obvious.

It is undisputed that said premises were owned by the defendants. Plaintiff has alleged, *inter alia*, violations of the "Sidewalk Law." Pursuant to Administrative Code

§ 7-210, property owners are "under a statutory nondelegable duty to maintain the sidewalk" (*see Stephen v Brooklyn Pub. Lib*, 120 AD3d 1221 [2d Dept 2014] [pursuant to Administrative Code of the City of New York § 7-210, the owner had a statutory duty to maintain the sidewalk abutting its premises at the alleged accident location]; *Reyderman v Meyer Berfond Trust #1*, 90 AD3d 633, 634 [2d Dept 2011] [landlord failed to establish, prima facie, that it fulfilled its nondelegable duty to maintain the sidewalk in a reasonably safe condition and, thus failed to show that it was entitled to summary judgment dismissing the complaint]; *Collado v Cruz*, 81 AD3d 542, [1st Dept 2011]; *Cook v Consolidated Edison Co. of NY, Inc.*, 51 AD3d 447, 448 [1st Dept 2008].) The duty flowing from the Sidewalk Law is nondelegable (*see Spector v Cushman & Wakefield, Inc.*, 87 AD3d 422, 423 [1st Dept 2011]). However, this regulation does not impose strict liability on the owner (*See Martinez v Khaimov*, 74 AD3d 1031 [2d Dept. 2010]).

To succeed on a summary judgment motion in such a case, the owner is generally required to show that it neither created a dangerous condition on the sidewalk adjoining its property nor had actual or constructive notice of any such condition within a sufficient period of time to discover and remedy it (*see Rejaee v Costco Price Club*, 140 AD3d 641 [1st Dept 2016]). Such a burden cannot be met by simply noting gaps in the plaintiff's case (*Martinez v Khaimov, supra* at 1033). In seeking to demonstrate a lack of notice, the owner must present proof by one with actual knowledge as to the sidewalk's condition before the accident or as to when the owner or its employees last inspected the sidewalk (*see Rong Wen Wu v Arniotes*, 149 AD3d 786 [2d Dept 2017]; *Vargas v Cadwalader, Wickersham & Taft, LLP*, 147 AD3d [1st Dept 2017]; *Maloney v Farris*, 117 AD3d 916, 916-917 [2d Dept 2014] [defendants failed to establish, prima facie, that they did not have constructive notice of the alleged hazardous condition].)

The defendant's burden on the issue of whether it had actual or constructive notice is not met simply by evidence of its usual practices (*see Johnson-Glover v Fu Jun Hao Inc.*, 138 AD3d 499, 500 [1st Dept 2016]). Further, a defendant who has actual knowledge of a recurring condition can be deemed to have constructive knowledge of every recurrence of that condition (*see Osorio v Wendell Terrace Owners Corp.*, 276 AD2d 540 [2d Dept 2000].) Thus, when a plaintiff alleges that the dangerous condition was a recurring one, of which the owners had actual notice, the owners failed to meet their burden of demonstrating their entitlement to summary judgment when they simply asserted that they neither created nor had constructive or actual notice of the

claimed dangerous condition; instead, they were required to establish that the condition was not frequent, ongoing, or customary, and that they lacked actual notice of the claimed recurring condition (*see also Colt v Great Atl. & Pac. Tea Co.*, 209 AD2d 294 [1st Dept 1994]; *see also Romero v 2024 Second Ave., LLC*, 2017 N.Y. Misc. LEXIS 1529 *, 2017 NY Slip Op 30818(U) [Sup Ct. NY Co. 2017]).

Plaintiff established a *prima face* case that there are no triable issues of fact via submission of, *inter alia*: the examination before trial transcript testimony of plaintiff, photographs of the allegedly defective condition, and an expert affidavit of Sidewalk Consultant, Irvin S. Lowenstein, wherein he averred *inter alia* that: the condition created a vertical grade differential greater than ½ inch in violation of NYC Administrative Code §19-152; "the condition existed in excess of six months and was required to be fixed prior to the date of plaintiff's accident"; and "[t]his type of condition would take many months, if not years, to develop and had defendant conducted reasonable inspections, they would have noticed the condition."

Defendants established a triable issue of fact in opposition and via their cross-motion. Defendants established a lack of notice of a defective condition via submission of, *inter alia*, the examination before trial transcript testimony of defendants' employee, Susana Nunes, Environmental Health & Safety Coordinator of Magellan Aerospace New York, Inc., who testified, *inter alia,* that: defendants were not aware that they were responsible for the sidewalk, as the City had fixed one of defendants' sidewalks years before, and defendants' had no knowledge of the alleged defect until the plaintiff filed suit.

As to the defendants' argument regarding the open and obvious nature of the condition, "even if a hazard qualifies as 'open and obvious' as a matter of law, that characteristic merely eliminates the property owner's duty to warn of the hazard, but does not eliminate the broader duty to maintain the premises in a reasonably safe condition" (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 70 [1st Dept 2004]). However, "a court is not 'precluded from granting summary judgment to a landowner on the ground that the condition complained of by the plaintiff was both open and obvious and, as a matter of law, was not inherently dangerous' " (*Burke v Canyon Rd. Rest.*, 60 AD3d 558, 559 [1st Dept 2009], *quoting Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]).

The Court finds that a triable issue of fact exists as to whether the allegedly defective walking surface was an open and obvious condition that was not inherently

dangerous, particularly in light of the fact that the plaintiff testified at his deposition that he was not aware of his surroundings prior to the trip and fall.

Additionally, the Court finds that the issue of trivial defect is one properly reserved here for the trier of fact. Generally, 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 unless the defect is demonstrated to be trivial as a matter of law (*see Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). In determining whether a defect is trivial as a matter of law, the court must examine all of the facts presented, including the width, depth, elevation, irregularity and appearance of the defect, along with the time, place and circumstances of the accident. "Circumstances" has been interpreted to include, but not be limited to, the sufficiency of the lighting, the existence of rain, snow, leaves or debris (*see Trincere, supra* at 978). There is no "minimum dimension test" or "per se rule" that the condition must be of a certain height or depth in order to be actionable (*Trincere, supra* at 977). The Court of Appeals has further clarified its intent with regard to the "trivial defect doctrine" in *Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 84 [2015], stating "Trincere stands for the proposition that a defendant cannot use the trivial defect doctrine to prevail on a summary judgment motion solely on the basis of the dimensions of an alleged defect, and the reviewing court is obliged to consider all the facts and circumstances presented when it decides the motion . . . in deciding whether a defendant has met its burden of showing prima facie triviality, a court must — except in unusual circumstances not present here — avoid interjecting the question of whether the plaintiff might have avoided the accident simply by placing his feet elsewhere." (*Hutchinson, supra* at 84). Defendants have not made a *prima facie* showing that, as a matter of law, the allegedly defective condition displayed in the photographs was merely a non-actionable trivial defect (*see e.g., DePascale v E & A Constr. Corp.*, 74 AD3d 1128, 1131 [2d Dept 2010] [*one-quarter inch is trivial*]). A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a *prima facie* showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not somehow increase the risk it poses. Only then does the burden shift to the plaintiff to establish an issue of fact (*see Hutchinson, supra* at 79; *Scuteri v 7318 13th Ave. Corp.*, 52 Misc 3d 391, 393-395 [Sup Ct, Kings County 2016]).

It is well-established law that photographs accurately depicting the area in which a plaintiff fell generally create an issue of fact as to whether a premises owner had constructive notice of a defect which caused a trip and fall which is best submitted to the jury (*Zavarro v Westbury Property Inv. Co.*, 244 AD2d 547 [2d Dept 1997].) Additionally, the issue of whether a dangerous or defective condition exists on the property of another "depends on the particular facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976 [1997]).

Accordingly, there are triable issues of fact in connection with, *inter alia*, whether a defective condition existed, whether defendants had either actual or constructive notice of a defective condition, whether defendants created a defective condition, whether defendants acted reasonably under the circumstances, and whether the condition was open and obvious, and therefore, whether plaintiff was comparatively negligent (*See Cup v Karfunkel*, 1 AD3d 48 [2d Dept 2003]). On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, plaintiff's motion for summary judgment and defendants' cross-motion for summary judgment are denied.

Accordingly, for all of the foregoing reasons, it is hereby,

ORDERED, that motion is denied; and it is further

ORDERED, that the cross-motion is denied; and it is further

ORDERED that any applications not specifically addressed herein are denied.

This constitutes the decision and order of the Court.

Dated: May 17, 2019

TIMOTHY J. DUFFICY, J.S.C.