SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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SUSAN LEMIN,

Plaintiff,

-against-

JAMES H. KIRKWOOD,

Defendant.

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF008823-2018
Motion Date: August 28, 2019

The following papers numbered 1 to 6 were read on Defendant's motion for summary judgment:

Notice of Motion - Affirmation / Exhibits - Affidavit / Exhibits - Memorandum 1-4

Affirmation in Opposition - Expert Affidavit 4-5

Reply Affirmation / Exhibits 6

Factual Background

This is an action to recover for personal injuries sustained by plaintiff Susan Lemin in a trip-and-fall accident that occurred on April 21, 2018 at approximately 9:30 p.m. at the home of defendant James Kirkwood. Plaintiff's Complaint asserts a cause of action for common law negligence. Defendant moves for summary judgment on the purported ground that the alleged defective condition was trivial and non-actionable as a matter of law.

Plaintiff, aged 70, and Defendant, aged 67, were in a relationship, and Plaintiff stayed at Defendant's home a couple nights a week. On April 21st, they were returning together with other family members from Defendant's birthday celebration. Plaintiff had to use the bathroom, so after Defendant pulled into the driveway, he got out of his van, opened the garage and switched an interior light on so Plaintiff could go in. Plaintiff tripped and fell at the junction between the asphalt driveway and the concrete slab of the garage.

Photographs depicting the condition show that the concrete slab was cracked; that for much of the width of the garage its leading edge was cracked, irregular and uneven; and that the edge was raised approximately an inch and one-half (1 ½") above the level of the asphalt driveway. Plaintiff's forensic engineering expert opined that this condition resulted in a dangerous tripping hazard. Plaintiff had never noticed the condition of the concrete slab before. She had entered the garage about 25 times previously, but only once before at night, and preferred to use the front door because Defendant kept so much equipment in the garage. It was pitch dark at the time of the accident. There was no illumination outside the garage, and the light within was dim and did not shine out to the front.

Legal Analysis

Pertinent law concerning "trivial" non-actionable defects was recently summarized by the Second Department in *Craig v. Meadowbrook Pointe Homeowner's Ass'n, Inc.*, 158 AD3d 601 (2d Dept. 2018):

> A property owner has a duty to keep the property in a "reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Basso v. Miller*, 40 NY2d 233, 241...). Generally, the issue of whether a dangerous or defective condition exists depends on the facts of each case and is a question of fact for the jury (*see Trincere v. County of Suffolk*,

> 90 N.Y.2d 976, 977...) . However, property owners may not be held liable for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip (*see id.* at 977...). There is no "minimal dimension test or per se rule" that the condition must be of a certain height or depth to be actionable (*id...)*. 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 circumstance' of the injury" (*id.* at 978...).

Id., at 602. *See, Hutchinson v. Sheridan Hill House Corp.*, 26 NY3d 66, 77-78 (2015).

In *Hutchinson, supra,* the Court of Appeals revisited "trivial defect" jurisprudence under *Trincere v. County of Suffolk, supra,* and its progeny. The Court noted that "*Trincere* and the line of cases in which it stands establish the principle that 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, so that it 'unreasonably imperil[s] the safety of' a pedestrian [cit.om.]." *Id.*, 26 NY3d at 78. The Court warned that "there are no shortcuts to summary judgment in a slip-and-fall case" (*id.*, at 84), and observed that there are various pathways to establishing that a physically small defect constitutes an actionable hazard:

> Liability does not "turn[] upon whether the hole or depression, causing the pedestrian to fall,...constitutes 'a trap'" [cit.om.]. The case law provides numerous examples of factors that may render a physically small defect actionable, including a jagged edge [cit.om.]; a rough, irregular surface [cit.om.]; the presence of other defects in the vicinity [cit.om.]; poor lighting [cit.om.]; or a location – such as a parking lot, premises entrance/exit, or heavily traveled walkway – where pedestrians are naturally distracted from looking down at their feet [cit.om.].

Id., at 78.

Finally, the *Hutchinson* Court stressed that "the trivial defect doctrine is best understood with our well-established summary judgment standards in mind." *Id.*, at 79. The Court held that a defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must

make a *prima facie* showing on two counts: (1) that "the defect is, under the circumstances, physically insignificant", and (2) that "the characteristics of the defect or the surrounding circumstances do not increase the risks it poses." *Id.* (emphasis added). "Only then does the burden shift to the plaintiff to establish an issue of fact." *Id. See, Craig v. Meadowbrook Pointe Homeowner's Ass'n, Inc., supra*, 158 AD3d at 602-603; *Flanagan v. Town of Huntington*, 155 AD3d 1000 (2d Dept. 2017) (same).

On neither count has Defendant here demonstrated *prima facie* entitlement to judgment as a matter of law.

First, given the nature, size and location of the defect in the garage concrete slab, Defendant has not demonstrated *prima facie* that "the defect [was], under the circumstances, physically insignificant." As noted above, the concrete slab was cracked; for much of the width of the garage its leading edge was cracked, irregular and uneven; and the edge – in a place where pedestrians would foreseeably pass on a regular basis – was raised approximately an inch and one-half (1 ½") above the level of the asphalt driveway. *Cf., Brumm v. St. Paul's Evangelical Lutheran Church,* 143 AD3d 1224, 1225-26 (3d Dept. 2016) (raised irregular edge one inch high and eighteen inches long in deteriorated, uneven sidewalk flag was not trivial defect as a matter of law).[1]

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[1]Defendant on his motion for summary judgment proffered no expert support for his position that the defect was trivial. Plaintiff, in opposition, submitted the sworn affidavit of her forensic engineering expert, who opined that the condition of the garage concrete slab resulted in a dangerous tripping hazard. The engineering report proffered by Defendant in reply is unsworn and hence not in admissible form. It is thus without probative value and may not be considered in support of Defendant's motion. *See, Accardo v. Metro-North Railroad,* 103 AD3d 589 (1st Dept. 2013); *Matter of Delgatto,* 82 AD3d 1230, 1231 (2d Dept. 2011); *Troche v. NYCTA,* 16 AD3d 407 (2d Dept. 2005); *Pagano v. Kingsbury,* 182 AD2d 268, 270-271 (2d Dept. 1992).

Second, Defendant has not demonstrated *prima facie* that "the characteristics of the defect or the surrounding circumstances do not increase the risks it poses." As the Court of Appeals observed in *Hutchinson,* among the factors that could render a physically small defect actionable are several that are potentially applicable in this case: a jagged edge; a rough, irregular surface; poor lighting; and a location, such as a premises entrance/exit, where pedestrians are naturally distracted from looking down at their feet. *See, Hutchinson v. Sheridan Hill House Corp., supra,* 26 NY3d at 78. *Cf., Kam Lin Chee v. DiPaolo,* 138 AD3d 780, 782-783 (2d Dept. 2016) (rise of slightly more than one inch in a portion of the sidewalk was not actionable where the situs was well illuminated, plaintiff's view was unobstructed and she had traversed the sidewalk on numerous prior occasions without incident).

Defendant having failed to establish *prima facie* that the defect was under the circumstances physically insignificant, or that the characteristics of the defect or the surrounding circumstances did not increase the risks it posed, he failed to meet his initial burden in moving for summary judgment. Consequently, the burden did not shift to Plaintiff to establish an issue of fact, and Defendant's motion must be denied regardless of the sufficiency of the opposing papers. *See, Hutchinson v. Sheridan Hill House Corp., supra*; *Craig v. Meadowbrook Pointe Homeowner's Ass'n, Inc., supra*; *Flanagan v. Town of Huntington, supra.*

It is therefore

ORDERED, that Defendant's motion for summary judgment is denied.

The foregoing constitutes the decision and order of the Court.

Dated: September 19, 2019
Goshen, New York

ENTER

HON. CATHERINE M. BARTLETT, A.J.S.C.
HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE

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