SHORT FORM ORDER

INDEX No. 16-617824
CAL. No. 18-00649OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 5-8-18 (#002)
MOTION DATE 9-5-18 (#003)
ADJ. DATE 9-19-18 (#002)
ADJ. DATE 11-7-18 (#003)
Mot. Seq. # 002 - MG; CASEDISP
Mot. Seq. # 003 - MD

SANDRA BERNARDI,

Plaintiff,

- against -

THE STOP & SHOP SUPERMARKET COMPANY LLC. and ARC BABYLON LLC, a Connecticut Limited Liability Company,

Defendants.

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Upon the following papers read on these motions for summary judgment and for consolidation : Notice of Motion/ Order to Show Cause and supporting papers by defendants, dated June 21, 2018 ; Notice of Motion/ Order to Show Cause and supporting paper by plaintiff, dated July 31, 2018; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by plaintiff, dated September 8, 2018 ; Answering Affidavits and supporting papers by defendants, dated October 31, 2018 ; Replying Affidavits and supporting papers by defendants, dated September 17, 2018 ; Other ___; it is,

ORDERED that the motion (002) by defendants and the motion (003) by plaintiff are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendants for summary judgment dismissing the complaint is granted; and it is further

ORDERED that the motion by plaintiff for consolidation of this action with an action pending in this Court under assigned index number 602576/2018 is denied.

Plaintiff commenced this action to recover damages for injuries she allegedly sustained on the afternoon of March 25, 2016, when she fell at a supermarket operated by defendant The Stop & Shop Supermarket Company, LLC, and located on premises owned by its subsidiary, defendant Arc Babylon LLC. The accident occurred outside, on a concrete walkway leading to the store's entrance. By her bill of particulars, plaintiff alleges that she fell "as a result of a chipped, cracked, broken, sloped and slanted walkway which constituted a dangerous and defective condition" on the premises; that defendants were negligent, among other things, in failing to maintain the entrance area in a reasonably safe condition, and in permitting the walkway to be "chipped, cracked and broken," and in failing to make repairs to the walkway; and that defendants had notice of the alleged dangerous condition.

Defendants now move for summary judgment dismissing the complaint on the ground that plaintiff cannot establish her accident was due to a defective condition on the premises. Alternatively, defendants assert that the alleged crack in the walkway constitutes a trivial defect and is not actionable. Defendants' submissions in support of the motion include copies of the pleadings and the bill of particulars, a transcript of plaintiff's deposition testimony, photographs of the exterior of the supermarket marked as exhibits during plaintiff's deposition, and an affidavit of Bruce Astrachan, Manager of General Liability of The Stop & Shop Supermarket Company.

Plaintiff opposes the motion, arguing that she sufficiently "identified the area of her fall and the subject 'crack' as the condition which caused and/or contributed to her fall." She further argues that, based on the length and location of the crack in the walkway, an issue exists as to whether defendants had constructive notice of the alleged dangerous condition.

As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (*see* ***Grover v Mastic Beach Prop. Owners Assn.***, 57 AD3d 729,869 NYS2d 593 [2d Dept 2008]; ***Dugue v 1818 Newkirk Mgt. Corp.***, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]; ***Millman v Citibank, N.A.***, 216 AD2d 278, 627 NYS2d 451 [2d Dept 1995]; *see also* ***Butler v Rafferty***, 100 NY2d 265, 762 NYS2d 567 [2003]). The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Putnam v Stout***, 46 AD2d 812, 361 NYS2d 205 [2d Dept 1974], *affd* 38 NY2d 607, 381 NYS2d 848 [1976]; ***Milewski v Washington Mut., Inc.***, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). The duty to keep premises in a reasonably safe condition is not dependent upon the plaintiff's status as an invitee, licensee or trespasser, or upon the status of the property as public or private (*see* ***Peralta v Henriquez***, 100 NY2d 139, 760 NYS2d 741 [2003]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564). And while an owner or possessor is not an insurer of the safety of people on its property (*see* ***Maheshwari v City of New York***, 2 NY3d 288, 778 NYS2d 442 [2004]; ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]), it must act as a reasonable person in maintaining the property "in a reasonably safe condition in view of all of 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, 386 NYS2d 564).

To establish liability in a trip-and-fall action, a plaintiff must establish that a dangerous or defective condition caused his or her injuries, and that the defendant owner or possessor created the

condition or had actual or constructive notice of it (*see* ***Acevedo v New York City Tr. Auth.***, 97 AD3d 515, 947 NYS2d 599 [2d Dept 2012]; ***Starling v Suffolk County Water Auth.***, 63 AD3d 822, 881 NYS2d 149 [2d Dept 2009]; ***Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc.***, 61 AD3d 629, 876 NYS2d 512 [2d Dept 2009]; *see also* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]). To constitute constructive notice, the dangerous or defective condition must be visible and apparent, and must have existed for a sufficient length of time before the accident to permit the owner to discover and remedy it (***Gordon v American Museum of Natural History***, 67 NY2d 836, 837, 501 NYS2d 646; *see* ***Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc.***, 61 AD3d 629, 876 NYS2d 512; ***Denker v Century 21 Dept. Stores, LLC.***, 55 AD3d 527, 866 NYS2d 861 [2d Dept 2008]; ***Deveau v Galleria at White Plains, LP***, 18 AD3d 695, 796 NYS2d 119 [2d Dept 2005]).

A defendant seeking to establish entitlement to summary judgment as a matter of law in a trip-and-fall case ordinarily has the initial burden of demonstrating that the plaintiff's injuries were not caused by a dangerous or defective condition, or that it did not have actual or constructive notice of the alleged dangerous or defective condition (*see* ***Leary v Leisure Glen Home Owners Assn., Inc.***, 82 AD3d 1169, 920 NYS2d 193 [2d Dept 2011]; ***Sampino v Crescent Assoc., Ltd.***, 34 AD3d 779, 825 NYS2d 135 [2d Dept 2006]). However, a defendant also can make a prima facie case of entitlement to summary judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation (***Ash v City of New York***, 109 AD3d 854, 972 NYS2d 594 [2d Dept 2013]; *see* ***Vojvodic v City of New York***, 148 AD3d 1086, 51 NYS3d 534 [2d Dept 2017]; ***Viviano v KeyCorp***, 128 AD3d 811, 9 NYS3d 154 [2d Dept 2015]).

Concomitantly, a plaintiff can demonstrate that a defective or dangerous condition was a proximate cause of his or her accident even in the absence of direct evidence of causation. To establish a prima facie case based solely on circumstantial evidence, a plaintiff must present facts and conditions from which the negligence of the defendant and the cause of the accident may reasonably be inferred (*see* ***Schneider v Kings Hwy. Hosp. Ctr.***, 67 NY2d 743, 500 NYS2d 95 [1986]; ***Bardi v City of New York***, 293 AD2d 505, 739 NYS2d 747 [2d Dept], *lv denied* 98 NY2d 611, 749 NYS2d 2 [2002]). Although not required to prove the exact nature of the defendant's negligence (*see* ***Gayle v City of New York***, 92 NY2d 936, 680 NYS2d 900 [1998]), or to exclude every other possible cause for the injury-producing event to meet this burden (*see* ***Burgos v Aqueduct Realty Corp.***, 92 NY2d 544, 684 NYS2d 139 [1998]; ***Bernstein v City of New York***, 69 NY2d 1020, 517 NYS2d 908 [1987]; ***Schneider v Kings Hwy. Hosp. Ctr.***, 67 NY2d 743, 500 NYS2d 995), a plaintiff must offer competent evidence showing that it was "more likely" or "more reasonable" that the alleged injury was caused by the defendant's negligence than by some other agency (***Gayle v City of New York***, 92 NY2d 936, 937, 680 NYS2d 900; *see* ***Grob v Kings Realty Assoc.***, 4 AD3d 394, 771 NYS2d 384 [2d Dept 2004]; ***Collins v City of New York***, 305 AD2d 529, 759 NYS2d 349 [2d Dept 2003]). The plaintiff's evidence must be sufficient for a jury to determine, based on logical inferences drawn from such evidence, that causes for the injury other than the defendant's negligence are sufficiently remote (*see* ***Gayle v City of New York***, 92 NY2d 936, 680 NYS2d 900; ***Bernstein v City of New York***, 69 NY2d 1020, 517 NYS2d 908; ***Bardi v City of New York***, 293 AD2d 505, 739 NYS2d 747).

Defendants established their entitlement to judgment as a matter of law by submitting deposition testimony showing that plaintiff is unable to identify what caused her to fall (*see* ***Viviano v KeyCorp***,

128 AD3d 811, 9 NYS3d 154; ***Ash v City of New York***, 109 AD3d 854, 972 NYS2d 594; ***Peluso v Red Rose Rest., Inc.***, 106 AD3d 972, 965 NYS2d 603 [2d Dept 2013]; ***Hunt v Meyers***, 63 AD3d 685, 879 NYS2d 725 [2d Dept], *lv denied* 13 NY3d 712, 891 NYS2d 304 [2009]; ***Hartman v Mountain Val. Brew Pub***, 301 AD2d 570, 754 NYS2d 31 [2d Dept 2003]). Plaintiff testified at her deposition that on the day of the accident she went to the supermarket to purchase tulip plants. She testified that she selected two plants from a display set up just outside the entrance, and then walked inside the store to pay for them. After paying for the two plants, she left the supermarket and returned to the outdoor display. Wanting to look at other tulip plants that were inside of the store, plaintiff left the outdoor display area, took four or five steps towards the entrance, and then fell on the cement walkway. Plaintiff testified that she did not know what caused her to fall, though she did observe various cracks in the walkway after her accident.

The burden, therefore, shifted to plaintiff to raise a triable issue as to whether defendants' alleged negligence in maintaining the walkway was a proximate cause of her accident (*see* ***Derdiarian v Felix Contr. Corp.***, 51 NY2d 308, 434 NYS2d 166 [1980]; ***Hartman v Mountain Val. Brew Pub***, 301 AD2d 570, 754 NYS2d 31; *see generally* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Plaintiff, in opposition, failed to submit evidence showing that a triable issue exists (*see* ***Viviano v KeyCorp***, 128 AD3d 811, 9 NYS3d 154; ***Goldberg v Village of Mount Kisco***, 125 AD3d 929, 5 NYS3d 149 [2d Dept 2015]; *cf.* ***Buglione v Spagnoletti***, 123 AD3d 867, 999 NYS2d 453 [2d Dept 2014]; ***Stanojevic v Scotto Bros. Rest. Enters., Inc.***, 16 AD3d 575, 792 NYS2d 147 [2d Dept 2005]). "Since it is just as likely that the accident could have been caused by some other factor, like a simple misstep or loss of balance, any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation" (***Teplitskaya v 3-96 Owners Corp.***, 289 AD2d 477, 478, 735 NYS2d 585 [2d Dept 2001]).

Thus, absent evidence from which a jury could rationally conclude that plaintiff's fall was more likely due to the alleged defective condition of the walkway than a loss of balance or a misstep, defendants' motion for summary judgment dismissing the complaint is granted. The motion by plaintiff for an order consolidating this action with an action entitled *Sandra Bernardi, plaintiff, against UGL Services Unicco Operations Co. and C&W Facility Services, Inc.*, assigned index number 602576/2018, therefore, is denied, as moot.

Dated: March 4, 2019

J.S.C.

HON. DAVID T. REILLY

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION