At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 21ST day of JULY, 2020.

PRESENT:
HON. RICHARD VELASQUEZ
Justice.

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GRACE RESTIVO,

Plaintiff,

Index No.: 519835/2017

-against-

Decision and Order

PAK SLOPE ENTERPRISES LLC and ZAHIDA DIN

Defendants.

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After having heard oral argument on July 8, 2020 and a review of the submissions herein, the Court finds as follows:

Defendants, PAK SLOPE ENTERPRISES LLC and ZAHIDA DIN, move this court pursuant to CPLR 3212 for summary judgment against the plaintiff dismissing plaintiff's complaint. Plaintiff MARY DANIEL opposes the same contending there are material issues of fact.

ANALYSIS

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853 (1985). Once there is a prima facie showing, the burden shifts to the

party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact, which require a trail of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers. A motion for summary judgment will be granted "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing the judgment in favor of any party". CPLR §3212 (b). The "motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." *Id.*

Whether a dangerous or defective condition exists depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*see, Guerrieri v Summa*, 193 AD2d 647). However, a property owner may not be held liable in damages for " 'trivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes, or trip over a raised projection' " (*Guerrieri v Summa*, 193 AD2d 647, *supra, quoting Liebl v Metropolitan Jockey Club*, 10 AD2d 1006; *see also, Hecht v City of New York*, 89 AD2d 524, mod on other grounds 60 NY2d 57; *Mascaro v State of New York*, 46 AD2d 941, affd 38 NY2d 870; *Levine v Macy & Co.,* 20 AD2d 761); *quoting, Marinaccio v. LeChambord Rest.*, 246 AD2d 514, 515, 667 NYS2d 395 (1998).

"Ordinarily, a defendant moving for summary judgment in a trip-and-fall case has the burden of establishing that it did not create the hazardous condition that allegedly

caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it. However, a defendant can make its prima facie showing of entitlement to 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, 855 [2013] [citations omitted]; *see Kudrina v 82-04 Lefferts Tenants Corp.*, 110 AD3d 963, 964 [2013]). Generally, the issue of whether a dangerous or defective condition exists depends on the particular circumstances of each case, and is properly a question of fact for the jury (*see Riser v New York City Hous. Auth.*, 260 AD2d 564 [1999]; *see also Trincere v County of Suffolk,* 90 NY2d 976, 977 [1997]; *Corrado v City of New York,* 6 AD3d 380 [2004]).

In the present case, the defendants, contend the plaintiff is unable to identify what caused her to fall and as such the complaint should be dismissed. In a trip-and-fall case, a plaintiff's inability to identify the cause of the fall is fatal to the cause of action, because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation (*see Kudrina v. 82–04 Lefferts Tenants Corp.*, 110 AD3d 963, 964, 973 NYS2d 364; *Dennis v. Lakhani*, 102 AD3d 651, 652, 958 NYS2d 170; *Califano v. Maple Lanes*, 91 AD3d 896, 897, 938 NYS2d 140; *Alabre v. Kings Flatland Car Care Ctr., Inc.*, 84 AD3d 1286, 1287, 924 NYS2d 174). In opposition, the plaintiff, contends the plaintiff met their prima facie burden by alleging the area of the sidewalk that was the cause of the fall.

Contrary to defendants allegations in the present case the plaintiff does identify the area that caused her to fall. Specifically, at deposition plaintiff testified as follows:

> "Pg. 69 Lines 6-11 "Again, I can't really see it. Again, it's like right on this side here..... because -- you could see where I fell -- when I went back, you could see it was all broken up, but I don't see that over here, where I fell..."

In the present case, it is clear from the deposition testimony of the plaintiff herself that she identified the area around the fire hydrant that was all broken up and she clearly indicated during this testimony that the picture shown to her does not show the area where she fell because the fire hydrant is blocking that part of the picture. Additionally, defendant cannot meet his burden of establishing that he did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it, as his own deposition testimony acknowledges his notice of the condition. Therefore, there are numerous issues of fact that are best left for a jury to decide.

Accordingly, defendants motion for summary judgment is hereby denied, for the reasons stated above.

This constitutes the Decision/Order of the Court.

Date: July 21, 2020

RICHARD VELASQUEZ, J.S.C.

So Ordered
Hon. Richard Velasquez

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