SHORT FORM ORDER

INDEX No. 610866-17
CAL. No. 19-01236OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT F. QUINLAN
Justice of the Supreme Court

MOTION DATE 11-21-19 (003)
MOTION DATE 1-9-20 (004)
ADJ. DATE 6-25-20
Mot. Seq. # 003 - MD
004 - MD

----------X
ANN O'DEA,

Plaintiff,

- against -

GREENVIEW GARDENS LLC, GREENVIEW APARTMENTS, INC., GREENVIEW PROPERTIES INC., GREENVIEW MGMT, LLC & VERIZON NEW YORK INC,

Defendants.

----------X

SALENGER SACK KIMMEL BAVARO
Attorney for Plaintiff
180 Froehlich Farm Blvd.
Woodbury New York 11797

CONSOLIDATED EDISON CO. ATTORNEY
Four Irving Place, Rm. 1800
New York, New York 10003

BARTLETT LLP
Attorney for Defendant Town of Islip
320 Carleton Avenue, Suite 7500
Central Islip, New York 11722

WILLIAM J. FITZPATRICK, ESQ.
Attorney for Defendant Cablevision
525 Townline Road, Suite 1
Hauppauge, New York 11788

LEWIS BRISBOIS BISGAARD & SMITH
Attorney for Defendant Verizon
77 Water Street, 21st Floor
New York, New York 10005

BRODY O'CONNOR & O'CONNOR
Attorney for Defendant Greenview
7 Bayview Avenue
Northport, New York 11768

Upon the following papers read on these e-filed motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers filed by defendant Verizon New York, Inc., on October 18, 2019; filed by defendants Greenview Gardens LLC, Greenview Apartments, Inc., Greenview Properties, Inc. And Greenview Management, LLC, on January 3, 2020; Answering Affidavits and supporting papers filed by plaintiff, on February 18, 2020 ; Replying Affidavits and supporting papers filed by defendants Greenview Gardens LLC, Greenview Apartments, Inc., Greenview Properties, Inc. And Greenview Management, LLC, on February 25, 2020; filed by defendant Verizon New York, Inc., on June 23, 2020 ; Other supplemental affirmation in support of motion for summary judgment filed by defendant Verizon New York, Inc, on November 6, 2019 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#003) by defendant Verizon New York, Inc., and the motion (#004) by defendants Greenview Gardens, LLC, Greenview Apartments, Inc., Greenview Properties, Inc., and Greenview Management, LLC, are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by defendant Verizon New York, Inc. for summary judgment dismissing the complaint and cross claims against it is denied; and it is further

ORDERED that the motion by defendants Greenview Gardens, LLC, Greenview Apartments, Inc., Greenview Properties, Inc., and Greenview Management, LLC, is denied.

This action was commenced by plaintiff Ann O'Dea to recover damages for injuries she allegedly sustained on September 20, 2016, at approximately 12:30 p.m., in front the premises known as 17 Deborah Court, Islip, New York. Specifically, plaintiff alleges that she was carrying a bag of garbage from her apartment to the dumpster in the parking lot, when her left foot rolled on a utility box which was set lower into the concrete sidewalk, causing her to fall. It is undisputed that defendants Greenview Gardens, LLC, Greenview Apartments, Inc., Greenview Properties, Inc., and Greenview Management, LLC (collectively, Greenview) owned and managed the property, and that defendant Verizon New York, Inc. (Verizon) originally installed the utility box.

Plaintiff testified that she resided at a townhouse style apartment that she rented from Greenview from October 1, 2013 until September 30, 2017. Plaintiff testified that on September 20, 2016, she exited her townhouse to take her garbage out to the community dumpster, which was located across the parking lot from her home. Plaintiff testified that the weather that day was "beautiful and sunny." She further testified that she took this route from her front door to the parking lot at least two times per day, every day. Plaintiff testified that as she was walking toward the dumpster, her left foot rolled on the lip of an indentation in the sidewalk, which housed what she described as a metal plate, set below the grade of the sidewalk. Plaintiff testified that her left foot rolled to the left, down onto the plate, and she stumbled and fell. Plaintiff testified that she estimates the height differential between the plate and the sidewalk to be approximately two inches. Plaintiff testified that she was aware that the plate was there, as she had previously observed the uneven nature of the sidewalk due to the plate. Further, plaintiff testified that she had brought the uneven pavement to the attention of Greenview employee, Christina Silva, in 2013 before she moved in.

Robert Ghanbari, superintendent for Greenview, testified that part of his job duties included walking the property at Greenview three times per week to inspect the premises and to clear any garbage that accumulated. Ghanbari testified that he was aware of the subject utility box and sidewalk where plaintiff fell. He testified that he had inspected the subject utility box approximately five to six years before plaintiff's fall, and considered it to be a tripping hazard. Ghanbari testified that he notified the property manager of Greenview, per his usual custom, and that the property manager contacted Verizon, the installer and owner of the utility box, to report the hazard. Ghanbari testified that he recalled a Verizon employee responding to the complaint to inspect the utility box. Ghanbari testified that the sidewalk was never altered and that the utility box was never remedied.

David Keller, local manager of construction for Verizon, testified that the subject utility box, or RPZ box, existed on the property of Greenview for the purpose of allowing Verizon technicians to access underground cables for telephone service. Keller testified that generally, once these utility boxes are installed, they do not require maintenance. Keller testified that the utility box was likely installed by Bell Atlantic Telephone, a predecessor company to Verizon. Keller avers in his affidavit that he searched Verizon's "business records" and did not find any complaints with respect to the subject utility box, nor were there any records of work being performed on the subject utility box subsequent to its installation.

Verizon now moves for summary judgment dismissing the complaint and cross claims against it, arguing that the alleged dangerous condition was not created by Verizon, and that the condition was open and obvious, and not inherently dangerous. Verizon also argues that Greenview owed plaintiff the duty of care that was breached. In support of its motion, Verizon submits, inter alia, photographs of the subject sidewalk, and the transcripts of the deposition testimony of plaintiff, Robert Ghanbari, and David Fuller. Verizon also offers a supplemental affirmation in support of its motion, and attaches the affidavit of David Fuller. Plaintiff opposes the motion, arguing that Verizon had actual notice of the alleged dangerous condition caused by its utility box, and that questions of fact exist with respect to whether the defect was trivial and open and obvious. Plaintiff submits the affirmation of her attorney.

Initially, the Court will consider the supplemental affirmation in support of Verizon's motion, as well as the affidavit of David Fuller, as plaintiff has had the opportunity to respond to it in her opposition papers (*see* ***Bayly v Broomfield***, 93 AD3d 909, 939 NYS2d 634 [3d Dept 2012]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The moving party has the initial burden of proving entitlement to summary judgment (*id.*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*id.*). Once the moving party has made the requisite showing, the burden then shifts to the opposing party, who is then required to present admissible evidence and facts sufficient to require a trial on any issue of fact (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). On such motion, the court is charged with determining whether issues of fact exist while viewing any evidence in a light most favorable to the non-moving party; the court is not responsible for resolving issues of fact or determining issues of credibility (*see* ***Chimbo v Bolivar***, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; ***Pearson v Dix McBride, LLC***, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see* ***Chimbo v Bolivar***, *supra*; ***Benetatos v Comerford***, 78 AD3d 750, 911 NYS2d 155 [2d Dept 2010]).

A landowner has a duty maintain his or her 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, 386 NYS2d 564 [1976]; *see* ***Nallan v***

Helmsley-Spear, Inc., 50 NY2d 507, 429 NYS2d 606 [1980]). Liability for a dangerous or defective condition on property is generally "predicated upon ownership, occupancy, control, or special use of the property" (***Tilford v Greenburgh Hous. Auth.***, 170 AD3d 1233, 1235, 97 NYS3d 278 [2d Dept 2019]). "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" (***Palladino v City of New York***, 127 AD3d 708, 709, 7 NYS3d 207 [2d Dept 2015]). For a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, "it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence" (***Touloupis v Sears, Roebuck & Co.***, 155 AD3d 807, 808, 63 NYS3d 518 [2d Dept 2017], quoting ***Lezama v 34-15 Parsons Blvd, LLC***, 16 AD3d 560, 560, 792 NYS2d 123 [2d Dept 2005]). "To meet its initial burden on the issue of lack of constructive notice, the defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall" (***Gairy v 3900 Harper Ave., LLC***, 146 AD3d 938, 939, 45 NYS3d 564 [2d Dept 2017], quoting ***Mavis v Rexcorp Realty, LLC***, 143 AD3d 678, 39 NYS3d 190 [2d Dept 2016]).

Further, a landowner "has no duty to protect against an open and obvious condition provided that, as a matter of law, the condition is not inherently dangerous" (***Espinosa v Fairfield Props. Group, LLC***, 160 AD3d 927, 927, 72 NYS3d 487 [2d Dept 2018], quoting ***Salomon v Prainito***, 52 AD3d 803, 805, 861 NYS2d 718 [2d Dept 2008]). The issue of whether a dangerous condition is open and obvious "is fact-specific and usually a question for a jury" (***Davidoff v First Dev. Corp.***, 148 AD3d 773, 775, 48 NYS3d 755 [2d Dept 2017]). In some cases, a "condition that is generally apparent to a person making reasonable use of their senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" (***Dalton v N. Ritz Club***, 147 AD3d 1017, 1017, 46 NYS3d 900 [2d Dept 2017]). "A court may determine whether a condition is hazardous and open and obvious as a matter of law when the established facts compel that conclusion, and may do so on the basis of clear and undisputed evidence" (***Fishelson v Kramer Props., LLC***, 133 AD3d 706, 707, 19 NYS3d 580 [2d Dept 2015], quoting ***Tagle v Jakob***, 97 NY2d 165, 169, 737 NYS2d 331 [2001]). A defendant seeking to dismiss a complaint on the basis of the trivial defect doctrine "must make a prima facie showing that (1) 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" (***Kozik v Sherland & Farrington, Inc.***, 173 AD3d 994, 996, 103 NYS3d 128 [2d Dept 2019]).

Viewing the evidence in the light most favorable to plaintiff, Verizon has failed to establish a prima facie case of entitlement to summary judgment (*see* ***Trincere v County of Suffolk***, 90 NY2d 976, 665 NYS2d 615 [1997]; ***Rodriguez v Sheridan One Co., LLC***, 177 AD3d 801, 110 NYS3d 316 [2d Dept 2019]; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). "A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" (***Tesoriero v Brinckerhoff Park, LLC***, 126 AD3d 782, 783, 5 NYS3d 261, 263 [2d Dept 2015], quoting ***Oldham-Powers v Longwood Cent. Sch. Dist.***, 123 AD3d 681, 682, 997 NYS2d 687, 688 [2d Dept 2014]). Here, the location of the alleged defect on a sidewalk of a residential apartment community, in close proximity to the residence's front door, renders it more likely to be subjected to extensive foot traffic and distracted pedestrians (*see* ***Hutchinson v Sheridan Hill House Corp.***, 26 NY3d 66, 19 NYS3d 802 [2015]; ***Brenner v Herricks Union Free Sch. Dist.***, 106 AD3d 766, 964 NYS2d 605 [2d Dept 2013]). Viewing the evidence in the light most

favorable to the plaintiff, the Court is not able to determine that the alleged defective condition was trivial as a matter of law.

Verizon also contends that it cannot be held liable in this action as it did not create the allegedly dangerous condition and that it did not have actual or constructive notice of the defect. "A defendant moving for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (***Altinel v John's Farms***, 113 AD3d 709, 710, 979 NYS2d 360, 362 [2d Dept 2014]; *see* ***Ingram v Long Is. Coll. Hosp.***, 101 AD3d 814, 956 NYS2d 107 [2d Dept 2012]). However, the evidence submitted by Verizon fails to eliminate triable issues of fact with respect to whether Verizon was notified by Greenview of the uneven surface at the utility box, and whether Verizon responded to this notice, as the testimony of Ghanbari and Keller differ on this material issue (*see* ***Chimbo v Bolivar***, *supra*).

As Verizon has failed to satisfy its prima facie burden on the motion, the Court need not consider the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Greenview also moves for summary judgment dismissing the complaint and cross claims asserted against it, arguing that the utility box that plaintiff tripped on was not under its control, and that the alleged dangerous condition on the sidewalk was open and obvious and not inherently dangerous. In support of its motion, Greenview submits, inter alia, transcripts of the depositions of plaintiff, Robert Ghanbari, and David Fuller. Plaintiff opposes the motion, arguing that Greenview had actual and constructive notice of the alleged dangerous condition caused by the uneven sidewalk surrounding the utility box, and that questions of fact exist with respect to whether the defect was trivial. Plaintiff submits the affirmation of her attorney

Greenview's motion for summary judgment in its favor is denied, as untimely. CPLR 3212 (a) provides that if no date for making a summary judgment motion has been set by the court, such a motion "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown" (*see* ***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 786 NYS2d 379 [2004]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]). As explained by the Court of Appeals in *Brill*, the "good cause" requirement set forth in CPLR 3212 (a) "requires a showing of good cause for the delay in making the motion – a satisfactory explanation for the untimeliness – rather than simply permitting meritorious, nonprejudicial filings, however tardy" (***Brill v City of New York***, *supra* at 652; *see* ***Bricenio v Perez***, 178 AD3d 1002, 115 NYS3d 406 [2d Dept 2019]; ***Bargil Assoc., LLC v Crites***, 173 AD3d 958, 100 NYS3d 897 [2d Dept 2019]). "No excuse at all . . . cannot be "good cause" (*id.*). Absent a showing of good cause, "a court has no discretion to entertain even a meritorious, non-prejudicial summary judgment motion" (***Hesse v Rockland County Legislature***, 18 AD3d 614, 614, 795 NYS2d 339 [2d Dept 2005], quoting ***Brill v City of New York***, *supra*). Although the statutory 120-day period for making a summary judgment motion expired in this case on October 18, 2019, the defendants' motion was not made until January 3, 2020, the date it was served (*see* CPLR 2211).

Greenview improperly denominated the motion as a cross motion. A cross motion can only be made for relief against a "moving party," and must be made returnable at the same time as the original motion (CPLR 2215; ***Gaines v Shell-Mar Foods, Inc.***, 21 AD3d 986, 987-988, 801 NYS2d 376 [2d Dept 2005]; *see* ***Sanchez v Metro Bldrs. Corp.***, 136 AD3d 783, 25 NYS3d 274 [2d Dept 2016]; ***Williams v Sahay***, 12 AD3d 366, 783 NYS2d 664 [2d Dept 2004]). It is an "improper vehicle for seeking affirmative relief from a non-moving party" (***Mango v Long Is. Jewish-Hillside Med. Ctr.***, 123 AD2d 843, 844, 507 NYS2d 456 [2d Dept 1986]). Here, plaintiff was not a "moving party" in the prior motion for summary judgment made by defendant Verizon. As Greenview offers no good cause or excuse in the moving papers for the delay in making the motion, the Court does not have discretion to entertain the motion on its merits (*see* ***Miceli v State Farm Mut. Auto Ins. Co.***, *supra*; ***Brill v City of New York***, *supra*; ***Tapia v Prudential Richard Albert Realtors***, 79 AD3d 735, 911 NYS2d 919 [2d Dept 2010]; ***Brewi-Bijoux v City of New York***, 73 AD3d 1112, 900 NYS2d 885 [2d Dept 2010]).

Accordingly, the motion by defendant Verizon New York, Inc. for summary judgment dismissing the complaint and cross claims against it is denied, and the motion by defendants Greenview Gardens, LLC, Greenview Apartments, Inc., Greenview Properties, Inc., and Greenview Management, LLC, is denied.

Dated: July 27, 2020

Hon. Robert F. Quinlan, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**