

Garcia v Vernon Woods Apts. Inc.
2020 NY Slip Op 34941(U)
June 23, 2020
Supreme Court, Westchester County
Docket Number: Index No. 64005/2018
Judge: Linda S. Jamieson
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To commence the statutory time period for appeal of right (CPLR § 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Disp x Dec Seq. No. 2 Type SJ

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

-----X

GLORIA LILIANA GARCIA,

Index No.:64005/2018

Plaintiff,

-against-

VERNON WOODS APARTMENTS INC.,

Defendant.

-----X

The following papers numbered 1 to 6 were read on this motion:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Affirmation and Exhibits	1
Affidavit and Exhibit	2
Affidavit and Exhibit	3
Affirmation and Exhibits	4
Reply Affidavit	5
Reply Affirmation	6

Defendant brings its motion seeking summary judgment dismissing the action in this trip and fall case. The facts are straightforward: in July 2017, plaintiff was walking on the sidewalk near her residence, carrying several things, when she tripped and fell, injuring herself. Plaintiff testified at her deposition that she was wearing strappy open-toed sandals at the time. Plaintiff also testified that she fell because "the joint

of the sidewalk is not even." She further testified that one slab of the sidewalk was about an inch higher than the one next to it, although she admitted at her deposition that she had never measured the difference. Plaintiff also testified that there was a gap between the slabs of about two inches, filled with caulk that was uneven, and about one inch below the slabs of the sidewalk. Plaintiff testified that she walked on this sidewalk all of the time, and had never noticed any issues with it. Defendant's witness testified at his deposition that he had never received any complaints about this section of the sidewalk; that night watchmen patrolled the same area every night, and had never reported a problem, and that he himself had never seen any issue with that section of the sidewalk.

Defendant's expert stated in his affidavit that he had measured the exact spot that plaintiff had identified, and there was a height differential of $5/16^{\text{th}}$ of an inch between the slabs, not the inch that plaintiff assumed. He also examined the caulking and determined that it was even rather than an inch below the surface. Plaintiff's expert, in contrast, stated that the height differential between the slabs was about .75 inches, and that it was greater in the past. He also examined the slope of the sidewalk, which was not an issue that plaintiff had raised previously. Plaintiff also failed to raise previously the various maintenance and building codes upon which her expert

relies heavily. A comparison of plaintiff's Bill of Particulars served in February 2019, prior to the depositions in this matter, prior to the Note of Issue, and prior to this motion, with the one she filed in February 2020, after this motion was filed, shows that the initial Bill does not refer to any standards or statutes. As this Bill of Particulars was significantly different, prejudiced defendant greatly by adding entirely new theories of the case, and was without leave of court, it is a nullity. *Elkrichi v. Flushing Hosp. Med. Ctr., Inc.*, 293 A.D.2d 706, 707, 741 N.Y.S.2d 420, 421 (2d Dept. 2002); *Leon v. First Nat. City Bank*, 224 A.D.2d 497, 498, 637 N.Y.S.2d 482, 483 (2d Dept. 1996) ("Since the amended bill of particulars was not served prior to the note of issue and the plaintiffs did not seek leave of court to amend the bill of particulars, the amended bill of particulars was a nullity."). The Court thus disregards all aspects of plaintiff's opposition that reference these standards.

Turning to the merits, it is well-settled that "Generally, the issue of whether a dangerous or defective condition exists on the property of another depends on the facts of each case and is a question of fact for the jury. However, a property owner 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. 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 increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact." *Melia v. 50 Court St. Assocs.*, 153 A.D.3d 703, 703, 60 N.Y.S.3d 331, 333 (2d Dept. 2017). The Second Department went on to explain that "In determining whether a defect is trivial, 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.' There is no 'minimal dimension test' or 'per se rule' that the condition must be of a certain height or depth in order to be actionable. Photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable." *Id.* at 704, 60 N.Y.S.3d at 333. A review of the many photographs here shows that defendant has made such a prima facie showing. The sidewalk appears to be quite ordinary, with no significant height differential between the slabs. The caulking between the slabs also appears standard.¹ This suffices to establish defendant's prima facie case. *Riser v. New York*

¹The only issue - not raised by either party - is that the sidewalk angles at the spot where plaintiff fell. It is certainly possible that plaintiff, who testified at her deposition that she was not looking down, stepped off the sidewalk on to the grass, causing the fall.

City Hous. Auth., 260 A.D.2d 564, 564, 688 N.Y.S.2d 645, 646 (2d Dept. 1999) ("Scrutiny of the photographs identified by the plaintiff as accurately reflecting the condition of the sidewalk at the time of his fall supports the Supreme Court's conclusion that, as a matter of law, the alleged defect, which did not have any of the characteristics of a trap or snare, was too trivial to be actionable."). See also *Kam Lin Chee v. DiPaolo*, 138 A.D.3d 780, 782-83, 31 N.Y.S.3d 509, 511 (2d Dept. 2016) ("the defect at issue was, at most, a rise of slightly more than one inch in a portion of the sidewalk and that neither the alleged defect nor the surrounding circumstances increased the risk to her [Defendants] established that the alleged defect was not only small in size, but was also in a well-illuminated location that Kam Lin Chee had previously traversed on numerous occasions and that nothing in the area obstructed her view of the location and the alleged defect.").

In opposition, plaintiff submits no evidence to convince the Court that any defect was not trivial. The small deterioration at the corner in one photograph is trivial in nature, and cannot rebut defendant's prima facie case. See *Kehoe v. City of New York*, 88 A.D.3d 655, 657, 930 N.Y.S.2d 252, 253 (2d Dept. 2011).

The motion is thus granted in its entirety. The action is

dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
June 23, 2020



HON. LINDA S. JAMIESON
Justice of the Supreme Court

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