SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 17
Present: Hon. Sharon M.J. Gianelli

_____X

TAVONIA TAYLOR-THOMPSON,

Plaintiff, Index No: 610301/2017

-against - Motion Seq. No: 002

WHEATLEY PLAZA ASSOCIATES, L.P. and CASTAGNA REALTY CO., INC., Decision and Order

Defendants.

_____X

Papers submitted on this motion:
Defendants Notice of Motion and Affirmation in Support _____X
Plaintiff Affirmation in Opposition _____X
Defendants Reply _____ X

This action was commenced by the filing of a Summons and Complaint on September 29, 2017. An Answer was interposed on February 13, 2018. The action is one to recover for personal injuries sustained as a result of a trip and fall which occurred on a sidewalk on June 9, 2015.

Defendants now move for an Order granting Defendants summary judgment as against Plaintiff, dismissing Plaintiff's action in its entirety and all cross-claims and counter-claims.

Factual History

Plaintiff claims that on June 9, 2015 she was caused to trip and fall on the sidewalk at the premises 320 Wheatley Plaza, Town of Greenvale, County of Nassau, State of New York, for which Plaintiff claims damages for personal injuries. Plaintiff alleges that the

subject sidewalk was in a broken, cracked, uneven, un-level, depressed, raised, dilapidated and/or otherwise dangerous condition.

Defendants move for summary judgment dismissing Plaintiff's Complaint, on the basis that Defendants did not cause the alleged condition complained of, had no actual or constructive notice of the alleged condition complained of, and the alleged condition complained of was trivial, and as such the Defendants cannot be liable for negligence.

Defendant argues that Plaintiff admitted that at the time of her accident, she was walking while holding her telephone in both hands looking down at a message on it and also having a conversation with her co-worker, Jordyn.

Defendants claim that the deposition testimony establishes that Defendants had no prior notice of a defective condition, nor did they create the defect. Additionally, Defendants allege that the defect, if any, was trivial and non-actionable.

In Opposition, Plaintiff argues that Defendants have failed to establish that they did not create the subject defect in the sidewalk; that they did not have actual or constructive notice of the defective condition of the sidewalk; that the defect was trivial; and/or that Plaintiff was the sole proximate cause of the accident.
Accordingly, Defendants' motion must be denied in its entirety.

Specifically, Plaintiff argues that at the time of the incident, Plaintiff was walking from her car to a store when she stepped onto the brick walkway and remained standing still

for a few seconds, while she checked a message on her phone, then she proceeded to walk towards the storefront. Plaintiff took four or five steps when a brick shifted under her right foot causing her to fall. After Plaintiff fell, she looked at the ground to see what caused her to fall and saw that one of the bricks was loose. A store manager also went to check the area where Plaintiff fell and said that the brick was rocking.

Further, Plaintiff cites to the deposition testimony of Defendants' witness who testified that individual bricks would need adjusting in the springtime due to a "thaw and freeze situation" which can move a brick, or several bricks. The witness further testified that in the two years prior to June 9, 2015, he had observed loose bricks on the sidewalks at Wheatley Plaza. The witness did not know the last time prior to June 9, 2015 that the sidewalk in front of the store was inspected but that at no time prior to June 9, 2015 did the witness or the maintenance staff at Wheatley Plaza walk the sidewalks to test for loose bricks.

Finally, Plaintiff submits the report of an expert who opines that the sidewalk failed to meet the standard of care for safe walking surfaces and that Defendants failed to maintain a safe premise. The report also addresses the subject defect being an inconspicuous hazard. In his report, the expert opines that the paver Plaintiff stepped on was not stable and therefore was not acceptable for a safe walking surface.

Analysis

The summary judgment standards are well-settled. The movant must establish the cause of action or defense by submitting evidentiary proof in admissible

form "sufficiently to warrant the court as a matter of law in directing judgment" (*Zuckerman v City of New York, 49 N.Y.2d 557 [1980]*). Failure to do so "requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851 [1985]*). When such a showing has been made by the movant, then to defeat summary judgment "the opposing party must show facts sufficient to require a trial of any issue of fact" (*CPLR § 3212, subd [b]*; *Zuckerman v City of New York, supra at 562*). On a summary judgment motion, the evidence must be viewed in a light most favorable to the non-moving party *(Branham v Loews Orpheum Cinemas, Inc., 8 N.Y.3d 931 [2007])*.

Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the facts and circumstances of each case and is generally a question of fact for the jury *(Ress v Incorporated Vil. of Hempstead, 276 A.D.2d 681 [2nd Dept. 2000])*. However, defects that are trivial in nature are not actionable *(Smith v A.B.K. Apartments, Inc., 284 A.D.2d 323 [2nd Dept. 2001])*. A landowner is not liable to a pedestrian injured by a defect in a public sidewalk abutting the landowner's premises unless the landowner either created the defective condition or caused it to occur because of some special use, or unless a statute or ordinance places the obligation to maintain the sidewalk upon the landowner and expressly makes the landowner liable for injuries occasioned by the failure to perform *that duty (See Rodriguez v City of Yonkers., 106 A.D.3d 802 [2d Dept. 2013]; Long v Town of Southold, 96 A.D.3d 808 [2d Dept. 2012]; Winberry v City of New York, 257 A.D.2d 618 [2d Dept. 1999]*. The use of a portion of sidewalk as a driveway can constitute a special use (*see Katz v City of*

New York, 18 A.D.3d 818 [2d Dept. 2005]; Tedeschi v KMK Realty, Corp., 8 A.D.3d 658 [2d Dept. 2004].

A Defendant who moves for summary judgment in a trip-and-fall case has the initial burden of making a *prima facie* case 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 *(see Sloane v Costco Wholesale Corp., 49 A.D.3d 522 [2d Dept. 2008]).*

At the summary judgment phase of the litigation, the burden is on the movant to eliminate all material issues of fact. Here, Defendants claim that the evidence establishes that Defendants had no prior notice of a defective condition, nor did they create the defect. Additionally, Defendants allege that the defect, if any, was trivial and non-actionable. However, Defendants have failed to sufficiently establish that the defect is trivial.

Plaintiff has demonstrated that issues of fact exist with respect to notice and the creation of the defect, sufficient to require a trial by a jury in this matter. Upon review of all papers submitted, Defendant has failed to satisfy its burden of proof of entitlement to summary judgment.

Accordingly,

It is

ORDERED, that Defendants' motion for an Order granting Defendant summary judgment as against Plaintiff, is Denied; and

It is

ORDERED, that Defendants' motion for an Order dismissing Plaintiff's action in its entirety and all cross-claims and counter-claims, is Denied; and

All applications not specifically addressed herein are Denied.

This constitutes the Decision and Order of the Court.

DATED: Mineola, New York
May 12, 2020

HON. SHARON M.J. GIANELLI,
Justice of the Supreme Court

The conformed signature on this Order and copies thereof shall be deemed original.

ENTERED

May 18 2020

NASSAU COUNTY
COUNTY CLERK'S OFFICE