SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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KING LEUNG, PIU LEUNG

Plaintiff,

- v -

MADISON STREET PARTNERS, LLC,LEE CHUNG CAFE,

Defendant.

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INDEX NO. 157788/2018

MOTION DATE 03/05/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63

were read on this motion to/for DISMISS.

The motion by defendants for summary judgment dismissing this case is granted.

Background

Plaintiff King Leung ("plaintiff") contends that he was walking from his home on Madison Street when his right foot got caught in a red string used to tie up garbage bags, causing him to fall. He claims he fell in front of a restaurant operated by defendant Lee Chung Café and premises owned by defendant Madison Street Partners, LLC. Plaintiff Piu Leung brings derivative claims based on her husband's injuries.

Defendants move for summary judgment on the ground that the garbage bags were open and obvious. They emphasize that the garbage bags were put neatly on the street and point to photographs that depict the garbage bags arranged right next to the curb (NYSCEF Doc. No. 45). Defendants claim that there was no dangerous condition and, even if there was, they did not have proper notice of it. They also conclude that plaintiff should have watched where he was going.

In opposition, plaintiff points out that he broke his leg as a result of this fall. He testified that on the date of the accident, he was looking straight ahead and the accident happened right near his home (NYSCEF Doc. No. 44 at 22). Plaintiff admitted that he saw the garbage as he was walking but "did not see the rope" (*id*. at 25-26). He explained that he was walking so closely to the garbage bags "Because there were like two people in front of me and also, someone was just like standing there so I had to walk closer to the garbage" (*id*. at 29). Plaintiff admitted that he did not ask anyone to move (*id*. at 30). Plaintiff also acknowledged that there was nothing blocking his view and that he could see the garbage, although not the red string (*id*.).

Plaintiff argues that defendants co-mingled garbage from the restaurant and the residential tenants of the building, in violation of Department of Sanitation regulations. He argues that defendants did not inspect the sidewalk and the garbage bags prior to the incident although a witness for defendants testified that there was a practice for inspecting garbage in the evenings. Plaintiff maintains that there are issues of fact to whether defendants created the condition by placing the red ties on the garbage bags toward the sidewalk instead of the street. He argues that the garbage placed by the defendants at the curb constitutes debris, "which had no legitimate purpose being at the curb."

In reply, defendants insist that plaintiff's arguments about regulations and garbage procedures are irrelevant. They stress that there is no testimony that the tie on the garbage bag was facing inward and that photographs do not support this theory. Defendants conclude that they have met their prima facie burden and the case should be dismissed.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id*.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977, 665 NYS2d 615 [1997] [internal quotations and citation omitted]). "Of course, in some instances, the trivial nature of the defect may loom larger than another element. Not every injury allegedly caused by

an elevated brick or slab need be submitted to a jury" (*id.*). A court must examine "the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect along with the time, place and circumstance of the injury" (*id.* at 978).

"There is no per se rule with respect to the dimensions of a defect that will give rise to liability on the part of a landowner or other party in control of premises . . . and even a trivial defect may constitute a snare or trap" (*Argenio v Metro. Transp. Auth.*, 277 AD2d 165, 166, 716 NYS2d 657 [1st Dept 2000] [internal citations omitted]). "While a gradual, shallow depression is generally regarded as trivial the presence of an edge which poses a tripping hazard renders the defect nontrivial" (*id.* [internal citations omitted]).

"A small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 78, 19 NYS3d 802 [2015]). "The relevant questions are whether the defect was difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances" (*id.* at 80).

The Court grants the motion on the ground that the alleged defect was open and obvious. "[A] landowner has no duty to warn of an open and obvious danger. By contrast, a latent hazard may give rise to a duty to protect entrants from that danger. While the issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question, a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion" (*Tagle v Jakob*, 97 NY2d 165, 169, 732 NYS2d 331 [2001] [citations omitted]).

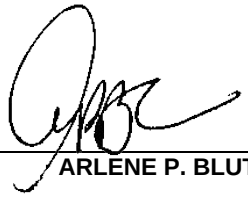
The Court finds that the garbage bags were an open and obvious condition that plaintiff could have avoided. He admitted (and the photographs demonstrate) that he walked close to the garbage bags because there were people ahead of him and he chose not to ask them to move. The First Department has found that garbage bags can constitute and open and obvious condition sufficient to meet a defendant's prima facie burden on summary judgment (*Ruiz v 221-223 E. 28th St., LLC*, 143 AD3d 553, 553, 39 NYS3d 431 [1st Dept 2016] [granting defendant's motion for summary judgment on the ground that the garbage bags, upon which plaintiff tripped and fell, were open and obvious]).

This is not a case where the garbage bags completely blocked the sidewalk or where plaintiff slipped over a substance coming from the garbage bags. Rather, plaintiff claims that he decided to walk right next to the bags in order to get around other people and his foot got caught on a tie for one of the bags. The photos, which were apparently taken by plaintiff Piu Leung (plaintiff's wife), demonstrate that the ties were perpendicular to the street (and not facing the sidewalk) and that the bags were right next to the curb (NYSCEF Doc. No. 63). The Court is unable to conclude that these bags were anything other than an open and obvious condition and that plaintiff caused the accident by choosing to walk right next to them. Based on the photos, there was ample room for plaintiff to safely walk by the bags. Instead, he chose to walk right next to the garbage bags and, unfortunately, he tripped and fell.

Plaintiff's reliance on extraneous issues, like mixing the garbage from the residents and the restaurant or the garbage bag procedures of defendants, does not compel a different outcome. Plaintiff did not raise a material issue of fact as to why he chose a walking route directly towards the garbage bags.

Accordingly, it is hereby

ORDERED that the motion by defendants for summary judgment dismissing the complaint is granted and the Clerk is directed to enter judgment accordingly along with costs and disbursements upon presentation of proper papers therefor.



3/8/2021
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION		
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐	REFERENCE