SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ERIKA M. EDWARDS **PART 11**

Justice

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MERCEDES DE LA CRUZ,

Plaintiff,

- v -

473 WEST 158th STREET CORP., MASSUD RAHBAR, PERRY RAHBAR and MIKE RAHBAR,

Defendants.

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INDEX NO. 155405/2017

MOTION DATE 11/25/2020, 11/25/2020

MOTION SEQ. NO. 001, 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 84

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 82, 83

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents and oral argument conducted on May 13, 2021, the court grants Defendants 473 West 158th Street Corp.'s ("Corporation"), Massud Rahbar's, individually and s/h/a Mike Rahbar's and Perry Rahbar's (collectively "Defendants") motion for summary judgment in part to the extent that the court dismisses Plaintiff Mercedes de la Cruz's ("Plaintiff") complaint against the individual defendants, but denies it as to Defendant Corporation under motion sequence 001. The court denies Plaintiff's motion for partial summary judgment as to liability against Defendant Corporation filed under motion sequence 002.

Plaintiff filed this action against Defendants to recover damages for injuries she allegedly suffered on May 15, 2017, when she tripped and fell when her foot stepped in a hole and caused her to fall on a sidewalk abutting 473 West 158th Street, New York, New York.

Defendants move for summary judgment dismissal of Plaintiff's complaint under motion sequence number 001. Defendants argue in substance that they are entitled to summary judgment dismissal of Plaintiff's complaint based upon the trivial defect doctrine. Defendants rely upon photographs and testimony that Plaintiff did not trip and fall as a result of a dangerous condition on the sidewalk. Defendants further argue that the photographs show only a small crack in the middle of the sidewalk and that the building's superintendent never noticed the crack prior to Plaintiff's accident even though he walked on that area daily for more than three years. Additionally, Plaintiff never noticed the crack prior to the incident. Defendants also allege that Plaintiff failed to demonstrate that they had notice of the alleged defect. Additionally, Plaintiff's expert did not measure the alleged defect, although Plaintiff had four years to measure the alleged defect prior to it being repaired.

Additionally, Defendants argue in substance that the property is solely owned by Defendant Corporation. Furthermore, the individual Defendants had no individual ownership interest in the property, no liability for Plaintiff's alleged injuries and no obligation to inspect or maintain the sidewalk. As such, Defendants argue that the individual defendants are entitled to summary dismissal of Plaintiff's complaint.

Plaintiff moves for partial summary judgment in her favor on the issue of liability as to Defendant Corporation under motion sequence number 002. Plaintiff argues in substance that Defendant Corporation was negligent as a matter of law and such negligence was the proximate cause of Plaintiff's injuries. Plaintiff argues in substance that the evidence demonstrated that Defendant Corporation owned the building located on the premises, that Defendant Massud Rahbar was the owner and president of Defendant Corporation, that he was the property manager, that he and his superintendent were responsible for inspecting the sidewalk abutting the

property and that the superintendent admitted that there was a tripping hazard in the area of the sidewalk where Plaintiff tripped and fell.

Plaintiff further alleges in substance that Defendant Corporation had notice of the defective condition based on Google photographs of the area of the sidewalk where Plaintiff tripped which indicate that the defective condition existed one and three years prior to Plaintiff's accident. Plaintiff's expert affidavit filed in support of Plaintiff's motion for partial summary judgment indicates that the sidewalk area was a dangerous tripping hazard that developed over a prolonged period of time, which included a cracked and broken concrete slab and a depression resulting in an uneven slab, and that such defect was the proximate cause of Plaintiff's injuries.

Defendants and Plaintiff opposed each other's motion.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden,

then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

In an action for negligence, a plaintiff must prove that the defendant owed him a duty to use reasonable care, that the defendant breached that duty and that the plaintiff's injuries were caused by such breach (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]). A motion for summary judgment may be properly granted when a defendant demonstrates that it did not create or have actual or constructive notice of an alleged defective condition which allegedly caused plaintiff's fall (*Rodriguez v New York City Tr. Auth.*, 118 AD3d 618 [1st Dept 2014]).

To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendants' employees to discover and remedy it to correct or warn about its existence (*Lewis v Metro. Transp. Auth.*, 64 NY2d 670, 670 [1984]; *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

"[T]here is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable . . . [i]nstead, whether a dangerous or defective condition exits 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 [1977][internal citations and quotations

omitted]). However, courts have recognized that in some cases where the trivial nature of the purported defect looms larger than another element, then the case need not be submitted to a jury (*Hecht v City of New York*, 60 NY2d 57, 61 [1983]). Courts 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 disposition" (*Trincere*, 90 NY2d at 977 [internal citations and quotations omitted]).

The trivial defect doctrine recognizes that a purported defect may be deemed trivial as a matter of law, but it requires a holding of triviality to be based on all the specific facts and circumstances of the case, not just on size alone . . . and a defendant may not be held liable for negligently maintaining a walkway for trivial defects on the walkway, not constituting a trap or nuisance (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77-78 [2015] [internal citations and quotations omitted]).

The court finds that it is clear that the owner of the premises has a duty to maintain the sidewalk abutting its property in a reasonably safe condition (NYC Admin. Code § 7-210). Based upon the admissible evidence presented, it is also clear that Defendant Company was the sole owner of the premises and that the individual defendants had no individual ownership interest in the premises and they did not owe a duty to Plaintiff. As such, the court grants Defendants' motion to dismiss Plaintiff's complaint as against the individual defendants.

However, the court determines that Defendant Corporation and Plaintiff failed to meet their burden that they were entitled to summary judgment in their favor as a matter of law. Material issues of fact remain to be determined by the trier of fact, including, but not necessarily limited to, whether Defendant Corporation breached a duty owed to Plaintiff to maintain the sidewalk abutting its property in a reasonably safe condition; whether the area of the sidewalk

where Plaintiff fell was a dangerous, hazardous and defective condition, or whether it was a trivial defect; and whether Defendant Corporation had constructive notice of the alleged defective condition in that it existed for a substantial period of time.

Therefore, the court denies Defendant Corporation's motion for summary judgment and Plaintiff's partial motion for summary judgment for liability against Defendant Corporation.

The parties are invited to schedule a settlement conference before the court by contacting the Part 11 Clerk, Ms. Bing Zhao, at SFC-Part11-Clerk@nycourts.gov. Settlement conferences are generally held virtually on Tuesday mornings via Microsoft Teams. Representatives of the parties must have knowledge of the case and authority to settle this matter.

As such, it is hereby

ORDERED that the court grants Defendants 473 West 158th Street Corp.'s, Massud Rahbar's, individually and s/h/a Mike Rahbar's and Perry Rahbar's motion for summary judgment in part to the extent that the court dismisses Plaintiff Mercedes de la Cruz's complaint against Defendants Massud Rahbar, Mike Rahbar and Perry Rahbar, but denies it as to Defendant 473 West 158th Street Corp. filed under motion sequence 001; and it is further

ORDERED that the court denies Plaintiff Mercedes de la Cruz's motion for partial summary judgment as to liability against Defendant 473 West 158th Street Corp. filed under motion sequence 002.

6/1/2021
DATE

ERIKA M. EDWARDS, J.S.C.

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