Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LESLIE J. PURIFICACION IA Part 39
Justice

Janet Canfield, x

Plaintiff,

-against-

Port Authority,

Defendant.
x

Index Number 702935 2018

Motion Date August 13, 2020

Motion Seq. No. 3

The following numbered papers read on this motion by defendants The Port Authority of New York & New Jersey and Delta Air Lines, Inc., i/s/h/a Delta Airlines, Inc. (collectively referred to as defendants), for summary judgment pursuant to CPLR § 3212, dismissing the complaint of plaintiff Janet Canfield (plaintiff), together with all cross claims.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF 56-71
Answering Affidavits - Exhibits	EF 72-73
Reply Affidavits	EF 74

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action sounding in negligence to recover damages for personal injuries that plaintiff allegedly sustained on or about June 6, 2017, at premises known as Laguardia Airport, Terminal C, Gate C42. Plaintiff has alleged that while she was a pedestrian at the premises, she was caused to slip and/or trip and fall and sustain severe and permanent injuries. Plaintiff has alleged that The Port Authority of New York & New Jersey (Port Authority), owned, operated, controlled, maintained, managed, and repaired the premises, including the building, terminal, appurtenances and fixtures. Plaintiff has further alleged that Port Authority leased the subject premises to Delta Air Lines, Inc., i/s/h/a Delta Airlines, Inc.

(Delta Air Lines), which operated, controlled, managed, maintained, and repaired the premises, including the building, terminal, appurtenances and fixtures.

Defendants have now moved for summary judgment pursuant to CPLR § 3212, to dismiss plaintiff's complaint together with all cross claims. In support of their motion, defendants have first argued that no defect existed, and that even if a defect is found to have existed, any alleged defect was de minimis, open and obvious, and trivial in nature. "'To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented'" (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25 [2019], quoting *Glick & Dolleck, Inc. v Tri–Pac Export Corp.*, 22 NY2d 439, 441 [1968]).

"'Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable'" (*Matter of New York City Asbestos Litig.*, 33 NY3d at 25, quoting *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). On summary judgment, "facts must be viewed in the light most favorable to the non-moving party" (*Matter of New York City Asbestos Litig.*, 33 NY3d at 25 [internal quotes omitted]), and "the proponent of a summary judgment motion 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" (*id.*, at 25-26, quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

"An owner ... in possession of realty owes a duty of reasonable care to maintain the property in a reasonably safe condition" (*Abdul-Azim v RDC Commercial Ctr.*, 210 AD2d 191 [2d Dept 1994]; *see Slavin v Vil. of Sleepy Hollow*, 150 AD3d 924, 925 [2d Dept 2017]; *Yehia v Marphil Realty Corp.*, 130 AD3d 615, 616 [2d Dept 2015]). "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" *(K. A. v City of New York*, 188 AD3d 964, 965 [2d Dept 2020]; *see Dery v K Mart Corp.*, 84 AD3d 1303, 1304 [2d Dept 2011]; *Copley v Town of Riverhead*, 70 AD3d 623, 624 [2d Dept 2010]).

Whether an alleged defect is trivial depends upon an "examination 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" (*Trincere v County of Suffolk*, 90 NY2d 976, 978 [1997], quoting *Caldwell v Village of Is. Park*, 304 NY 268, 274 [1952]; *see K. A. v City of New York*, 188 AD3d at 965; *Ryan v KRT Prop. Holdings, LLC*, 45 AD3d 663, 665 [2d Dept 2007]). However, "a mechanistic disposition of a case based exclusively on the dimension of [a] defect is unacceptable," and "whether 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 at 977).

Furthermore, "[w]hile a landowner or occupant has a duty to maintain its premises in a reasonably safe manner, there is no duty to protect or warn against open and obvious conditions that are not inherently dangerous" (*Gutman v Todt Hill Plaza, LLC*, 81 AD3d 892 [2d Dept 2011] [internal citation omitted]; *see Brett v AJ 1086 Assoc., LLC*, 189 AD3d 1153 [2d Dept 2020]; *Holdos v American Consumer Shows, Inc.*, 91 AD3d 823 [2d Dept 2012]). "'The determination of whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances, and whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case'" (*Brett v AJ 1086 Assoc., LLC*, 189 AD3d at 1153, quoting *Holmes v Macy's Retail Holdings, Inc.*, 184 AD3d 811, 811 [2d Dept 2020]).

The record contains, among other things, copies of the pleadings, plaintiff's affidavit and deposition testimony, the deposition testimony of non-party Cem Demircanli (Demircanli), an employee of non-party ISS Facilities, Inc. (ISS), who appeared on defendants' behalf, and photographs of the premises in the area where plaintiff allegedly fell. Plaintiff testified that while walking through the gate are of the terminal, after she turned a corner, she tripped and fell over a raised portion or the "lip" of an aluminum metal plate which spanned the width of the floor. Plaintiff testified that top of the raised portion of the metal plate measured approximately one inch above the floor. Plaintiff further testified that she did not see the metal plate before her fall and that she did not know what caused the alleged condition of the floor, had no knowledge of any prior accidents involving the alleged condition, and had no knowledge of whether there had been any complaints made to defendants regarding the alleged condition.

Demircanli testified that he was employed as a Facilities Director for the "Delta Terminal" within Laguardia Airport, that contracted with Delta Air Lines for maintenance services within Laguardia Airport and that, in general, Delta Air Lines relied upon his employer, ISS, for maintenance issues, including relating to the floor. Demircanli further testified that he did not know if the floor of the terminal where the subject accident occurred underwent any renovations prior to June 2017, and that the metal plate that plaintiff allegedly tripped and fell on was installed over an "expansion joint" and was intended to "eliminate possible trip hazard due to the expansion joint." He testified that although he never measured the metal plate itself, he estimated that the top of it measured approximately one quarter of an inch in height above the floor.

Demircanli testified that he did now know when the metal plate was installed, that ISS hired non-party Millennium Contracting to install the metal plate, and that Delta Air Lines left the installation entirely up to ISS and ISS's contractors. He further testified that while

he did not know of any prior accidents or complaints relative to this specific metal plate, he did not know if Delta Air Lines ever inspected the metal plate.

Based upon a careful review of the evidence in the record, including the conflicts between plaintiff's and Demircanli's testimony, and unclear copies of photographs of the alleged defect, as well as taking into consideration the location and appearance of the defect along with the time, place and circumstance of plaintiff's alleged injuries, genuine issues of material fact remain as to whether the alleged defect was too trivial to be actionable as a matter of law or was open and obvious (*see Trincere v County of Suffolk*, 90 NY2d at 978; 2008]; *Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Hanus v Long Is. Rail Rd.*, 186 AD3d 679, 682 [2d Dept 2020]; *Bishop v Pennsylvania Ave. Mgt., LLC*, 183 AD3d 685 [2d Dept 2020]; *Hahn v Wilhelm*, 54 AD3d 896, 898-899 [2d Dept 2008]).

Defendants have also argued that plaintiff cannot establish that defendants created the alleged condition or had notice of it. In order "[t]o impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it" (*Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc.*, 61 AD3d 629 [2d Dept 2009]; *see Alonzo v City of New York*, 188 AD3d 1123, 1125 [2d Dept 2020]; *Vargas v Lamberti*, 186 AD3d 1572, 1573 [2d Dept 2020]; *Denker v Century 21 Dept. Stores, LLC*, 55 AD3d 527, 528 [2d Dept 2008]).

"To constitute constructive notice, a condition must be visible and apparent, and must exist for a sufficient length of time before the accident to permit the defendant to discover and remedy it" (*Deveau v CF Galleria at White Plains, LP*, 18 AD3d 695 [2d Dept 2005]; *see Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]; *Vargas v Lamberti*, 186 AD3d at 1573; *Chang v Marmon Enterprises, Inc.*, 172 AD3d 678, 679 [2d Dept 2019]; *Medina v La Fiura Dev. Corp.*, 69 AD3d 686 [2d Dept 2010]). "To meet its prima facie burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (*Meade v New York City Hous. Auth.*, 189 AD3d 1390 [2d Dept 2020]; *see Merchant v New York City Tr. Auth.*, 183 AD3d 647 [2d Dept 2020]; *Pryzywalny v New York City Tr. Auth.*, 69 AD3d 598, 599 [2d Dept 2010]; *Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 599 [2d Dept 2008]).

However, a careful review of the evidence in the record has demonstrated that defendants have failed to point to sufficient evidence to eliminate all triable issues of fact as to whether they had constructive notice of the alleged condition (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Asprou v Hellenic Orthodox Community of Astoria*, 185 AD3d 641, 642 [2d Dept 2020]; *Griffin v PMV Realty, LLC*, 181 AD3d 912, 913 [2d Dept 2020]).

Defendants must do more than merely point to the gaps in plaintiff's case (*see Lauzon v Stop & Shop Supermarket*, 188 AD3d 856 [2d Dept 2020]; *Vumbico v Estate of Wiltse*, 156 AD3d 939, 941 [2d Dept 2017]). Therefore, defendants have failed to establish prima facie entitlement to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324).

Accordingly, defendants' motion is denied in its entirety.

Dated:

MAR 3 1 2021

Hon. Leslie J. Purificacion, J.S.C.

FILED & RECORDED
3/31/2021
12:30 PM
COUNTY CLERK
QUEENS COUNTY