SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** 12

Justice

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NANCY OKUNIEWICZ,

Plaintiff,

- v -

THE CITY OF NEW YORK, SOUTH STREET SEAPORT LIMITED PARTNERSHIP, SEAPORT MANAGEMENT DEVELOPMENT COMPANY, LLC,

Defendants.

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INDEX NO. 159075/2019

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30-55 were read on this motion for summary judgment.

By notice of motion, defendants move pursuant to CPLR 3212 for an order summarily dismissing the complaint against them. Plaintiff opposes.

I. PERTINENT BACKGROUND

In her amended complaint, plaintiff alleges that, while at Pier 17 in Manhattan, she tripped and fell over an unmarked curb that was not visible and apparent, causing her to sustain injuries. She asserts causes of action for negligence, in addition to several statutory violations. (NYSCEF 17). In her bill of particulars, she states that:

> The nature of the condition was a hidden trap and hazard that caused optical confusion, in that the walkway and driveway were the same color that starts off level on both sides of walkway and then proceeds to slowly drop on left without any setoff or warning of decreased slope. Furthermore, the condition was hidden by the setting sun which casted [sic] shadows as well as moderate crowds which further obstructed her view of the optically confused area.

(NYSCEF 42). Based on defendants' statement of material facts (NYSCEF 31) and plaintiff's

response to it (NYSCEF 54), the following facts are undisputed:

(1) Plaintiff's accident occurred at approximately 6:30pm when the weather was clear, the sun was setting, and it was still light out.

(2) Plaintiff was walking with her son and his girlfriend, who were approximately 20 feet in front of her when the accident occurred. There were a lot of other people in the area.

(3) The accident occurred in a mixed vehicular and pedestrian area of Pier 17. The surface of the area was partly grey brick and partly grey wood. Plaintiff was walking on grey brick when the accident occurred, far from the grey wood.

(4) Plaintiff was walking on the sidewalk and did not see the curb before stepping from it onto a lower roadway or walkway, falling forward to the ground. She neither tripped nor slipped. She described having been walking when suddenly, there was no more sidewalk.

(5) Plaintiff was looking in front of her as she walked. Within 10 feet of her fall, she did not look down toward the ground.

(6) Plaintiff did not see the curb before her accident occurred. She later observed an approximate three-inch differential in height between the curb and either side of the curb.

Additionally, while it is uncontested that the curb over which plaintiff fell was also made of brick, defendants assert that it was lighter in color and of a different material and surface than the surrounding brick, whereas plaintiff claims that curb is of a uniform color and material. The parties rely on the same photographs of the accident site. (NYSCEF 47, 48, 50).

At her 50-h hearing, plaintiff testified that within 10 feet of the site of her accident, she was looking ahead, not at the ground, and she denied having seen before her accident a "white area" she called a curb. Rather, she saw no "distinction between any area." (NYSCEF 40). At her deposition, plaintiff denied having seen the curb "at all" before the accident, and reiterated that

she was looking "generally in front of [herself]" while she was walking. (NYSCEF 43).

II. CONTENTIONS

Defendants deny that plaintiff's accident resulted from ocular confusion, arguing that the curb, which is of a color, material, and surface that differ from the surrounding area, is readily apparent to a person reasonably using their senses. They maintain that the absence of other claimed accidents in the area and the clear and sunny weather conditions that day support their position that the curb was neither a hazardous condition nor hidden trap, and reject plaintiff's claim of ocular confusion given her admission that she did not look at the ground within 10 feet of the accident. Defendants allege that the cited statutory violations are inapplicable.

While plaintiff, in opposition, concedes that the statutes she cites in the pleadings do not establish a basis for recovery, she contends that defendants fail to meet their burden of establishing that the condition was open and obvious and not inherently dangerous as a matter of law. She argues that the surrounding conditions must be considered to assess whether the curb caused ocular confusion, including the number of people in the area and shadows created by the setting sun; that there were no prior similar accidents is, alone, insufficient to deny her claim.

By affidavit submitted with her opposition papers, plaintiff states, in addition to reiterating the above undisputed facts, that, "At the time of my fall, I was looking forward, and ahead of me. I could see the ground as part of my normal field of vision," and that she saw the curb before the accident, but as the colors blended together she could not discern at the time that it was not level with the adjacent walkway. (NYSCEF 53).

In reply, defendants assert that plaintiff sets forth information in her affidavit that conflicts with her prior sworn testimony specifically her claim that she saw the curb before her accident, thereby improperly attempting to create a triable issue of fact. They offer an affidavit of

a senior vice president of the parent company of defendant South Street Seaport Limited Partnership, in which he states that other than plaintiff's accident, he is unaware of any pedestrian accidents at the curb in issue.

III. ANALYSIS

A. Summary judgment standard

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Auth. of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

B. Plaintiff's affidavit

An affidavit prepared by a witness which directly contradicts his or her prior deposition testimony creates only a feigned issue of fact, which is insufficient to defeat a motion for summary judgment. (*Danis v John C. Food Corp.*, 179 AD3d 606 [1st Dept 2020]; *Telfeyan v City of New York*, 40 AD3d 372, 373 [1st Dept 2007]; *cf. Botfeld v Wong*, 104 AD3d 433 [1st Dept 2013] [statements in affidavit which did not directly contradict prior deposition testimony properly supported reversal of summary judgment]).

As plaintiff testified at both her deposition and a 50-h hearing that she did not see the

curb at any point before her accident, her affidavit to the contrary is properly disregarded.

C. Optical confusion

Landowners have a duty to maintain their property in "a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk." (*Musano v City of New York*, 182 AD3d 491, 491-92 [1st Dept 2020], citing *Basso v Miller*, 40 NY2d 233, 241 [1976]).

While a condition that is visible to one "reasonably using his or her senses" is not inherently dangerous (*Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 599 [1st Dept 2012], *lv denied* 24 NY3d 907 [2014]; *quoting Tagle v Jakob,* 97 NY2d 165, 170 [2001]), a condition may be dangerous when it creates an illusion of a flat surface, obscuring a step or drop-off (*Langer*, 92 AD3d at 599; *Saretsky v 85 Kenmare Corp.*, 85 AD3d 89, 92 [1st Dept 2011]). "[F]indings of liability have typically turned on factors, such as inadequate warning of the drop, coupled with poor lighting, inadequate demarcation between raised and lowered areas, or some other distraction or similar dangerous condition" (*Langer*, 92 AD3d at 599, *quoting Schreiber v Philip & Morris Rest. Corp.,* 25 AD2d 262, 263 [1st Dept 1966], *affd* 19 NY2d 786 [1967]).

Here, the photographic evidence demonstrates that the color of the curb differed in color or shade, surface, and material from the surrounding area. In conjunction with the absence of prior accidents in the area, defendants sustain their *prima facie* burden on this motion. (*Langer*, 92 AD3d at 599 [fact that there were no prior accidents and step well-illuminated satisfied burden of proving that it was not dangerous condition]).

Plaintiff raises triable issues of fact in opposition as the color of the curb, while different than the surrounding area, is similar enough to permit a reasonable trier of fact to find that it created optical confusion, especially as the area was crowded and the sun was setting.

(*Buonchristiano v Fordham Univ.*, 146 AD3d 711, 712 [1st Dept 2017] [plaintiff raised triable issue of fact through photographic evidence and expert testimony as to whether color and position of step created optical confusion]; *Saretsky*, 85 AD3d at 92 [reversing summary judgment where sidewalk and walkway were similar shades of grey, marked only by faded red line on edge]; *cf. Langer*, 92 AD3d at 599 [no optical confusion where stairs well-lit and marked with signs and reflective strips]).

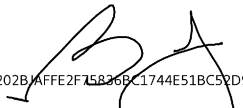
That plaintiff was not looking down and did not see the curb does not defeat her claim as a matter of law. (*Buonchristiano*, 146 AD3d at 712 [reversing summary judgment where plaintiff was looking at trees and flowers as she walked but also looked ahead and did not see step]; *Saretsky*, 85 AD3d at 92 [testimony that plaintiff "did not see" step down to sidewalk did not suggest that she was not looking]; *cf. Abraido v 2001 Marcus Ave., LLC*, 126 AD3d 571, 572 [1st Dept 2015] [no optical confusion where plaintiff looking toward car when she fell] *Langer*, 92 AD3d at 599 [no optical confusion where plaintiff looking at bartender when she fell]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is denied; and it is further

ORDERED, that the parties contact the court jointly by email to cpaszko@nycourts.gov to schedule a settlement conference with Justice Jaffe.



2/16/2022
DATE

BARBARA JAFFE, J.S.C.

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