SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: PART C-2

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LIBBY MOSES,

Plaintiff,

-against-

THE CITY OF NEW YORK and LAURA JOUDAI,

Defendants.

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HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No.: 152681/2019
Motion No.: 002&003

Recitation, as required by CPLR 2219(a) of the following papers numbered "1" through "5" were marked fully submitted on the 27th day of October 2021.

	Papers Numbered
Plaintiff's Notice of Motion for Summary Judgment, Affirmation and Exhibits (NYSCEF 41-51)	1, 2
Defendant, JOUDAI's, Affirmation in Opposition with Exhibits (NYSCEF 55-70)	3
Defendant, JOUDAI's, Notice of Cross-Motion For Summary Judgment, Affirmation and Exhibits (NYSEF 71-77)	4, 5

Upon the foregoing papers, the motion (No. 002) by plaintiff for summary judgment on the issue of liability and to dismiss defendant, LAURA JOUDAI's, affirmative defense alleging comparative negligence, is denied. The cross-motion (No. 003) for summary judgment by defendant, LAURA JOUDAI, is also denied.

FACTS

Plaintiff, LIBBY MOSES (hereinafter "plaintiff"), commenced this action to recover damages for injuries she sustained on January 12, 2019 when she tripped and fell over a broken, uneven and cracked sidewalk adjacent to property known as 400 Nome Avenue in Staten Island,

New York. The adjacent property is owned by defendant LAURA JOUDAI (hereinafter "defendant"). As a result of said fall, plaintiff alleges to have sustained serious injuries including, *inter alia*, a fractured left wrist.

In the current application, plaintiff moves for summary judgment on the issue of liability and argues that the evidence demonstrates that a handyman repaired the sidewalk adjacent to defendant's home approximately 3-5 years prior to the subject accident. The photographs submitted in support of the motion depict a large crack in the white portion of the sidewalk where the repair was performed. Plaintiff also contends that the photographs identified by both plaintiff and defendant accurately depict the condition of the sidewalk at the time of the accident. Accordingly, it is plaintiff's position that she has established that the defective condition was created by defendant's negligent repair and posits that defendant testified that she knew the crack existed on the sidewalk prior to the time plaintiff fell. Thus, plaintiff argues that she has established that defendant had notice of the condition which caused her to fall and therefore, plaintiff is entitled to judgment on the issue of liability.

Plaintiff further argues that defendant is not entitled to the homeowners' exemption to liability under §7-210 of the Administrative Code of the City of New York (hereinafter "§7-210") since the property is not owner-occupied. In this regard, it is uncontested that defendant does not live at the subject location but that she rents the premises to two tenants. Accordingly, plaintiff has established the defendant was charged with the duty to maintain the sidewalk and is liable for any injuries arising from her failure to do so.

Plaintiff also argues that defendant's affirmative defense of comparative negligence must be dismissed since she has submitted proof establishing that the sole proximate cause of her accident was defendant's negligent repair of the subject sidewalk. In addition, the video footage

irrefutably shows plaintiff walking at a normal pace and looking straight ahead prior to the accident and that she did nothing to cause her fall.

Defendant's opposition is based on substantive and procedural grounds. From a substantive standpoint, defendant argues that plaintiff's motion must be denied since 1) plaintiff has failed to submit proof establishing that the condition complained of was the sole proximate cause of her injuries; 2) she has failed to establish that the defect was not *de minimis* or that it was the result of any negligence on defendant's part; and 3) she has not proven that she is not comparatively negligent *e.g.*, that she failed to observe an open and obvious condition on the sidewalk. Procedurally, defendant argues that a Notice to Produce and Supplemental Notice to Produce were served upon plaintiff seeking medical authorizations and records to determine whether plaintiff suffered any pre-existing medical conditions which could have contributed to her accident. Therefore, as plaintiff has not fully responded to the foregoing, it cannot be determined whether any pre-existing medical conditions contributed to her fall. Based upon these issues of fact, and that further discovery is necessary, plaintiff's motion must be denied.

In opposition, defendant relies upon plaintiff's testimony during both her statutory hearing pursuant to General Municipal Law §50-h and court ordered examination before trial. Specially, plaintiff testified that despite having walked in the same direction hundreds of times prior to the accident, she neither observed the sidewalk condition, nor recalled seeing the defect on the date of the accident. Additionally, she was not wearing her prescription eyeglasses at the time of the accident. Defendant argues that this testimony, taken in conjunction with the photographs, demonstrates a question of fact for the jury that if plaintiff had been looking where she was walking and wearing her eyeglasses, she would have seen the open and obvious condition of the sidewalk and avoided the accident. Defendant further points to the fact that the

accident occurred at 11:23 A.M. and that there was nothing obstructing plaintiff's view of the ground. Defendant also submits in support of the foregoing arguments an expert affidavit from a licensed professional engineer (*discussed infra*). Thus, defendant argues that plaintiff's comparative negligence is a question of fact for determination by a jury which also necessitates a denial of that branch of plaintiff's motion seeking to dismiss the affirmative defense of comparative negligence.

Defendant's cross-motion seeking summary judgment dismissing the complaint and any cross claims is also premised upon the grounds that there was no breach of duty on defendant's part as there was no actionable defect on the subject sidewalk; that the alleged defect was *de minimis* and/or trivial and/or non-actionable; and that the alleged defect was open and obvious.

Michael Simon, a licensed professional engineer, inspected the subject sidewalk on June 19, 2020 (after the date of accident) and reviewed various materials including, *inter alia,* the pleadings; the 50-h and deposition transcripts; the New York City Parks and Recreation Departments' Tree Map; the New York City Department of Transportation Highway Rules; and United States Department of Agriculture Tree Facts. In his opinion, the existence of the roots from a tree located in front of 398 Nome Avenue caused the sidewalk flags to lift and created a height differential between two adjacent flags and, as the roots continued to grow with the passage of time, this growth would cause a greater height differential between the two flags. As a result, the height differential on the date of the accident would have been much less as compared to the date of his inspection. The engineer further states that his opinion is confirmed by a "Google Earth Street View" which illustrates the increase of the size of the tree in height and diameter along with causing the concrete sidewalk to be lifted. Moreover, his inspection of

the condition indicates the difference in the two adjacent sidewalk flags to be only 7/16th of an inch, which, in his opinion, is non-actionable and *de minimis*. This expert also reviewed the video surveillance of the accident and noticed that the plaintiff was looking straight ahead instead of looking where she was walking.

Based upon the evidence tendered by defendant, she argues that any alleged prima facie showing of an entitlement to summary judgment by plaintiff has been rebutted and the burden of proof has now shifted back to the plaintiff. Mr. Simon's affidavit regarding the growth of the tree and its roots over time rebuts plaintiff's arguments that the photographs taken of the subject location nine (9) months following her accident accurately depicts the condition of the sidewalk on the date of her fall. Therefore, absent plaintiff submitting an expert affidavit confirming the alleged height differential of the sidewalk, her testimony standing alone is insufficient to establish that the subject condition is actionable and summary judgment must be denied.

The Court notes that plaintiff has not submitted opposition to defendant's cross-motion or a reply to her motion for summary judgment. It is also noted that defendant did not submit a Statement of Material Facts in compliance with Section 202.8-g of the Uniform Civil Rules for the Supreme Court.

DISCUSSION

It is well established that the proponent of a summary judgment motion must make a *prima facie* showing of its entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1968]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Weingrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once that initial burden has been satisfied, however, the burden shifts to

the opposing party to come forward with sufficient evidence to raise a triable issue of fact (*id.*). Since summary judgment is the procedural equivalent of a trial, the presence of any significant doubt as to whether there is a material issue of fact, or where an issue of fact is "arguable", the motion must be denied (*see Phillips v. Kantor & Co.,* 31 NY2d 307, 311 [1972]).

Specifically with regards to premises liability, it has repeatedly been held that an owner of property has a common law duty to maintain his or her premises in a reasonably safe condition (*see e.g., Kellman v. 45 Tiemann Assocs.*, 87 NY2d 871, 872 [1995]); and as to sidewalks, liability under certain factual circumstances is placed onto the abutting property owner thereby relieving the municipality of such responsibility (*see* Administrative Code §7-210). However, before a landowner may be held liable for a defective condition on his or her property, a plaintiff must show that the owner created the condition, or that he or she had actual or constructive notice of the condition and a reasonable opportunity to cure (*see Piacquadio v. Recine Realty Corp.*, 84 NY2d 967 [1994]). Once notice is established, plaintiff must still demonstrate the defect was a proximate cause of the damages (*Daeira v. Genting New York, LLC,* 173 AD3d 831, 835 [2d Dept. 2019]), since there can be more than one cause of an accident (*Jaber v. Todd,* 171 AD3d 896, 898 [2d Dept. 2019]). As such, proximate cause is generally a question for the jury (*Jaber v. Todd,* 171 AD3d 898).

Whether a dangerous or defective condition exists depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*see Guierrieri v. Summa,* 193 AD2d 647 [2nd Dept 1993]). However, a property owner may not be held liable in damages for "trivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toe or trip over a raised projection" (*see Guierrieri v. Summa,* 193 AD2d 647, *quoting Liebl v. Metropolitan Jockey Club*, 10 AD2d 1006

[internal quotation marks omitted]). Accordingly, not every trip and fall on a sidewalk defect gets submitted to a jury (*see Riser v. New York City Housing Auth.*, 260 AD2d 564 [2nd Dept. 1999]).

In deciding the issue of triviality, the court must examine every fact 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]). Any finding of "triviality" cannot be based on size alone despite a small difference in height or other physically insignificant defect if its intrinsic characteristics or surrounding circumstances magnify the dangers it poses and unreasonably imperil the safety of a pedestrian (*Hutchinson v. Sheridan Hill House Corp.*, 26 NY3d 66, 78-79 [2015], *citing Guerrieri v. Summa,* 193 AD3d 647 and *Wilson v. Jaybro Realty & Development Co., Inc.*, 289 NY 410, 412 [1943]; and *see Trincere v. County of Suffolk,* 90 NY2d 977 [1997] "A mechanistic disposition of a case based exclusively on the dimension of the sidewalk defect is unacceptable."). The Court may consider additional factors such as a heavily traveled walkway which would "naturally distract" pedestrians from looking down at their feet (*Hutchinson v. Sheridan Hill House Corp.*, 26 NY3d 78, *citing Brenner v. Herricks Union Free School District,* 106 AD3d 766, 767 [2d Dept. 2013]). The issue of whether photographs standing alone or coupled with deposition testimony is sufficient for the Court to find triviality as a matter of law is based upon the facts of each case before it (*see Hutchinson v. Sheridan Hill House Corp.*, 26 NY3d 83).

Here, the Court has considered the proof submitted, i.e., the video of the accident; the photographic evidence, which is claimed by plaintiff and defendant to accurately depict the condition of the sidewalk at the time of plaintiff's fall; and the deposition testimony of the respective parties. (*see Hutchinson v. Sheridan Hill House Corp.*, 26 NY3d 83). It is the opinion

of this Court, that construing the evidence in light most favorable to plaintiff, defendant has raised triable issues of fact to defeat summary judgment. For the same reasons, defendant's cross-motion seeking summary judgment is denied.

There are many inferences that can be drawn from the surveillance video submitted by plaintiff in support of the motion that should be resolved by a jury. At the beginning of the video, a gentleman with a walker is walking towards the plaintiff in the center of the sidewalk. However, starting at time frame 00.05, he starts to move to his left while plaintiff is walking to his right. Then, at time frame 00.06, they appear to be looking at each other and at 00.07, the man stops walking as the plaintiff continues to walk towards him. At time frame 00.08, plaintiff while looking straight ahead in the direction of this man, falls. Accordingly, the Court finds it is a question of fact whether plaintiff was naturally distracted from looking down at her feet and the ground while being mindful of another pedestrian with ambulation difficulties approaching her immediately prior to the accident (*Hutchinson v. Sheridan Hill House Corp.*, *citing Brenner v. Herricks Union Free School District, supra*). This video also requires a denial of plaintiff's motion for summary judgment on the issue of comparative negligence especially considering plaintiff's testimony that she had previously walked along that same path and was apparently very familiar with it and never previously noticed the defect at the subject location.

Next, the Court has also considered the report and opinion of defendant's expert engineer which stated, *inter alia*, that the size of the crack was substantially less at the time of plaintiff's fall due to the natural growth and progression of the roots from the neighboring tree. However, when the Court considers the expert's opinion in light of the photographs, a question of fact is clearly presented as to whether the tree roots contributed to the defect in the sidewalk. The tree appears to be an unknown distance from the defect upon which plaintiff fell. More importantly,

the photographs do not depict readily apparent tree roots at or near the defect and, further, the expert does not measure the distance between the tree and the defect. It is a question for cross-examination at trial as to the basis of the expert's opinion that non-visible tree roots contributed to the raising of the sidewalk. This lack of supporting evidence for the expert's opinion also raises a question of fact whether the defect was smaller on the date of the accident and its alleged trivial, non-actionable nature (*Trincere v. County of Suffolk, supra* and *Hutchinson v. Sheridan Hill House Corp., supra*). It is noted that plaintiff's and Mr. Simon's credibility as to the height differential of the defect and whether plaintiff or defendant were either the sole proximate cause or a proximate cause of the accident are questions of fact for the jury (*Jaber v. Todd,* 171 AD3d 898).

Finally, there are also questions of fact as to actual or constructive notice, as well as whether defendant caused and created the defect (*see generally, Yarborough v. City of New York,* 10 NY3d 726 [2008] and *San Marco v. Village/Town of Mount Kisco*, 16 NY3d 111 [2010]). While plaintiff need not prove that a private homeowner performed repairs that immediately resulted in a dangerous condition, plaintiff must still prove that an uneven sidewalk was the result of negligent repairs to avail herself of the cause and create doctrine (*Villamar v. Pacheco,* 135 AD3d 853, 854 [2d Dept. 2016] and *Soto v. City of New York,* 1 AD3d 346, 346 [2d Dept. 2003]). However, considering the expert's opinion that the tree roots were the cause of the lifted sidewalk, a question of fact exists as to the nature and quality of the repairs vis-à-vis the known presence of the tree. The expert's opinion is silent on this issue. Absent proof that the repair work was performed negligently, then defendant's testimony and credibility regarding actual or constructive notice of the alleged defect should be weighed by a jury. Defendant testified that she would regularly inspect the property during the summertime (NYSCEF DOC. 43, pp.13-14),

but that to the best of her recollection, the last time that she would have visited the property was in October 2018 for Sukkot to visit friends (three months prior to plaintiff's accident) and she did not think she saw the crack in the sidewalk (Id. at pp.23-24).

The Court notes that despite plaintiff's failure to oppose defendant's cross-motion, defendant failed to submit a Statement of Material Facts in compliance with Section 202.8-g of the Uniform Civil Rules for the Supreme Court, as well as a certified word count for either the 46-page affirmation in opposition to plaintiff's motion or 37-page affirmation in support of the cross-motion, in compliance with 202.8-b of the Uniform Civil Rules for the Supreme Court. Rather than penalize the defendant solely on a technicality, the Court addressed the underlying merits, finding that there are numerous triable issues of fact which warrant the denial of both the motion and cross-motion (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Accordingly, it is hereby:

ORDERED that the motion (No. 002) by plaintiff LIBBY MOSES for summary judgment on the issue of liability and that portion of the motion seeking dismissal of the affirmative defense of comparative negligence is denied; and it is further

ORDERED that the cross-motion (No. 003) by defendant LAURA JOUDAI for summary judgment dismissing the complaint is denied.

This constitutes the decision and order of the Court.

Dated: January 6, 2022

ENTER:

HON. THOMAS P. ALIOTTA, J.S.C.