At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 5th day of November, 2022.

PRESENT:
CARL J. LANDICINO, J.S.C.

----------x

ROBIN JACKSON,

Plaintiffs,

-against-

97 EUCLID REALTY LLC,

Defendants.

----------x

Index No.: 510228/2019

DECISION AND ORDER

Motion Sequence #2

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	28-29, 31-40,
Opposing Affidavits (Affirmations)	41-45,
Reply Affidavits (Affirmations)	46,
Memorandum of Law	30

After a review of the papers and oral argument the Court finds as follows:

The instant action results from a trip and fall incident that allegedly occurred on February 16, 2019. The Plaintiff, Robin Jackson (hereinafter the "Plaintiff") allegedly injured herself when she purportedly tripped on the sidewalk abutting the premises known as 97 Euclid Avenue, Brooklyn, New York (hereinafter the "Premises"). The Premises are apparently owned by Defendant 97 Euclid Realty, LLC. (hereinafter the "Defendant").

The Defendant now moves (motion sequence #2) for an order pursuant to CPLR 3212 granting summary judgment and dismissing the complaint. The Defendant contends that the defective condition

alleged by the Plaintiff is not defective or dangerous and is otherwise *de minimus* in nature. The Defendant also argues that the Plaintiff's testimony reflects that she did not see the alleged defective condition prior to her accident and is therefore speculating as to the cause of her fall and purported injuries.

The Plaintiff opposes the motion. The Plaintiff contends that the Defendant has failed to meet its *prima facie* burden. Specifically, the Plaintiff argues that the she did identify the condition that caused her to trip and fall, the Defendant had notice of the condition at issue, and the condition was not *de minimus* in nature.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.' " *Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005], *citing Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], *citing Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Rous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 558-559, 610 N.Y.S.2d 50 [2d Dept 1994].

The Sidewalk Law

Sidewalk liability is covered by §7-210 of Administrative Code of City of N.Y. (hereinafter "the Sidewalk Law"). The Sidewalk Law provides in pertinent part that:

> b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.
>
> c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.

Here, there is no indication that the Defendant is exempt from the Sidewalk Law, which provides that the Defendant is, *inter alia*, responsible to maintain its sidewalk in a safe condition. Generally, in a premises liability action, a defendant makes a *prima facie* showing of its entitlement to summary judgment by presenting sufficient evidence to show that they neither created nor had actual or constructive notice of the allegedly dangerous condition. *See Hackbarth v. McDonalds Corp.*, 31 A.D.3d 498, 499, 818 N.Y.S.2d 578 [2nd Dept, 2006] *Curtis v Dayton Beach Park No. 1 Corp.*, 23 AD3d 511, 512 [2nd Dept, 2005]. The movant can meet this burden by submitting testimony showing when the area in question was last cleaned or inspected, or by submitting evidence as to whether any complaints had been received between the time the area was last cleaned or inspected and the time of the alleged incident. *See Perez v.*

New York City Hous. Auth., 75 A.D.3d 629, 630, 906 N.Y.S.2d 299 [2nd Dept, 2010]; *Williams v SNS Realty of Long Is., Inc.*, 70 AD3d 1034 [2nd Dept, 2010]; *Rios v New York City Hous. Auth.*, 48 AD3d 661, 662 [2nd Dept, 2008].

"Whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury." *Fasano v. Green-Wood Cemetery*, 21 AD3d 446, 446, 799 N.Y.S.2d 827, 828 [2d Dept 2005]. Such facts and circumstances include "the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury." *Trincere v. Cty. of Suffolk*, 90 NY2d 976, 978, 688 N.E.2d 489, 490 [1997], *quoting Caldwell v. Vill. of Island Park*, 304 NY 268, 107 N.E.2d 441 [1952]. "Indeed, before the burden can shift to the plaintiff, defendants 'must make a *prima facie* showing that the defect is, under the circumstances, physically insignificant *and* that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses.'" *Suarez v. Emerald 115 Mosholu LLC*, 164 AD3d 1130, 1131, 82 N.Y.S.3d 22, 24 [2d Dept 2018], *quoting Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d 66, 79, 41 N.E.3d 766, 774 [2015] (emphasis added in *Suarez*).

Turning to the merits of the instant motion (motion sequence #2), the Defendant contends that the sidewalk condition alleged by the Plaintiff is not actionable and is otherwise *de minimus* in nature. In support of its position, the Defendant relies on the deposition of the Plaintiff, the deposition of Yossi Goldberg, and the report of David E. Behnken, P.E.

As part of her deposition testimony, when asked how many times she had walked on that sidewalk she stated, "100 times." (See Defendant's Motion, Exhibit "A", Page 88). When asked if she had previously seen the condition at issue she stated "[y]es." When asked if the purported sidewalk defect existed for some time, she stated that "it had to be repaired some time because there was a shoe print inside

it, but since I've been there, there was some cracks in the ground there." (See Defendant's Motion, Exhibit "A", Page 88-90). When asked if the condition had existed for the thirteen years she had lived in the area, she stated "[y]es." (See Defendant's Motion, Exhibit "A", Page 90). When asked if she was familiar with this condition she stated "I seen the condition, but I didn't pay it no mind. I just looked because there was a lot of cracks in the ground, I walked by it, back and forth." (See Defendant's Motion, Exhibit "A", Page 93). As to identifying the purported defect, the Plaintiff stated, "[a]s I was walking down, I tripped on this little- I tripped on that curb piece. The little- the little foot step in the cement, there's a piece sticking out, I guess- not I guess, I know there's a piece sticking out because I felt my foot hit it." "I felt my left foot hit the piece in the ground, the little piece sticking out, the cement." (See Defendant's Motion, Exhibit "A", Page 97).

As part of his report, David E. Behnken, P.E. states that he inspected the area at issue and that "[t]he sidewalk in front of the 97 Euclid Avenue apartment building in Brooklyn, New York, including the patch identified by Ms. Robin Jackson during deposition testimony as the location of her alleged February 16, 2019 fall down accident, was properly constructed and maintained safe for its intended use without a substantial defect." Mr. Behnken thereafter states that "[a]n analysis of the dimensions and configuration of the sidewalk patch (the area identified to be the cause of her alleged fall by Ms. Jackson) reveals that its variation from the constructed condition of the sidewalk, and the risk presented to pedestrians, is minimal." Mr. Behnken also opined that "[h]ad Ms. Jackson exercised reasonable and expected care for her own safety and been attentive to her surroundings as she traversed the sidewalk as she had hundreds of times in the past, her accident, in all probability, would not have occurred." (See Defendant's Motion, Exhibit "B", Report of David E. Behnken, P.E).

During his deposition, Yossi Goldberg stated that he is employed by Defendant "97 Euclid Realty." When asked to specify, Mr. Goldberg stated "I work for a management company which manages

that building." (See Defendant's Motion, Exhibit "C", Pages 6-7) When asked to identify a specific work order form during his deposition, Mr. Goldberg stated "[t]here were some repairs that were needed to the sidewalk around the building." When asked to specify further he stated "[t]here were some cracks in the sidewalk that were fixed, that were repaired." (See Defendant's Motion, Exhibit "C", Pages 45-46) When Mr. Goldberg was asked to view a photograph of the alleged defect at issue and asked whether this was the repair he referred to, Mr. Goldberg stated "[i]t definitely looks like a repair. I do not recall when." As to whether he had ever inspected the repairs made on this part of the sidewalk, Mr. Goldberg stated "[a]gain, I don't recall what happened then." (See Defendant's Motion, Exhibit "C", Page 57) When asked if he knew when the area at issue was repaired or whether the photo represents how the subject area looked on the date of the accident, Mr. Goldberg stated "I do not." (See Defendant's Motion, Exhibit "C", Page 64).

In opposition, the Plaintiff relies primarily on the affidavit of Harold Krongelb, P.E. Mr. Krongelb stated that he had inspected the area at issue and found "...that the section of the concrete sidewalk where Robin Jackson tripped and fell had been replaced." (See Plaintiff's Affirmation in Opposition, Exhibit "A", Paragraph 7) Mr. Krongelb stated that he based his opinions on a review of the photos of the defect. He stated that there was "a ¾ inch differential in elevation between the section of the concrete sidewalk abutting the patch and the highest point of the patch." (See Plaintiff's Affirmation in Opposition, Exhibit "A", Paragraph 13) Mr. Krongelb thereafter opined that "[b]ased on my experience examining sidewalks and walkways, my site examination of April 19, 2022, my experience evaluating personal injury incidents, my experience with good and accepted practices, my experience with codes, regulations, and standards, and assuming the description of the incident is correct, it is my professional opinion with a reasonable degree of Engineering certainty that a substantial factors [sic] in causing Robin Jackson's trip and fall and

subsequent injury was the 3/4 inch difference in sidewalk elevation and the patchwork repair to the sidewalk." (See Plaintiff's Affirmation in Opposition, Exhibit "A", Paragraph 28)

The Court finds that there is a material issue of fact regarding whether a defect constituted a tripping hazard or was *de minimis* or trivial as a matter of law. Additionally, the photographs provided do not support Defendant's argument that the alleged condition was trivial. The question of whether a defective or dangerous condition exists usually is a question for the jury. "There is no 'minimal dimension test or per se rule' that the condition must be of a certain height or depth to be actionable." *Martyniak v. Charleston Enterprises, LLC*, 118 AD3d 679, 680, 987 N.Y.S.2d 413 [2d Dept 2014], quoting *Trincere v. Cnty. of Suffolk*, 90 N.Y.2d 976, 977–78, 688 N.E.2d 489 [1997]; see also *Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d 66, 79, 41 N.E.3d 766, 774 [2015]; and *Kam Lin Chee v. DiPaolo*, 138 AD3d 780, 783, 31 N.Y.S.3d 509, 512 [2d Dept 2016]. "In sum, there are no shortcuts to summary judgment in a slip-and-fall case." *Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d 66, 84, 41 N.E.3d 766 [2015]; see also *Pitt v. New York City Transit Auth.*, 146 AD3d 826, 827, 44 N.Y.S.3d 525 [2d Dept 2017]. What is more, even assuming the condition at issue could be described as open and obvious, "the open and obvious condition of the sidewalk did not absolve the appellants of liability but instead presented an issue of fact as to the plaintiff's comparative fault." *Cupo v. Karfunkel*, 1 AD3d 48, 53, 767 N.Y.S.2d 40, 44 [2d Dept 2003].

Additionally, the Plaintiff's testimony was sufficient to identify the condition that allegedly caused her fall. She was familiar with the condition, and she states that her foot caught the lip of the raised cement. The fact that she may not have been conscious after the fall, her recollection of the condition and the area where she fell together with her description of what she felt in relation thereto is sufficient to defeat the Defendant's summary judgment motion based upon Plaintiff's inability to identify the hazard. Defendant's reliance on *Teplitskaya v. 3096 Owners Corp.*, 289 AD2d 477, 735 N.Y.S.2d 585 [2d Dept 2001] is

misplaced in that the plaintiff in that case had died prior to the scheduled deposition. Similarly, in *Reed v. Piran Realty Corp.*, 30 AD3d 319, 320, 818 N.Y.S.2d 58 [1st Dept 2006], the plaintiff in that case suffered a brain injury that caused memory loss. In both cases there were no other witnesses to the accidents. "...Plaintiff's evidence need not positively exclude every possible cause of his fall...it must be sufficient to permit a finding of proximate cause based on logical inferences, not speculation." *Teplitskaya v. 3096 Owners Corp.*, 289 AD2d 477, 735 N.Y.S.2d 585 [2d Dept 2001]; *see Schneider v. Kings Highway Hosp. Ctr., Inc.*, 67 N.Y.2d 743, 745, 490 N.E.2d 1221, 1222 [1986] and *Secof v. Greens Condo.*, 158 AD2d 591, 592, 551 N.Y.S.2d 563 [2d Dept 1990]. The Plaintiff has sufficiently identified the alleged cause of her fall considering the totality of the factors presented and addressed herein. Accordingly, the Defendant's motion is denied.

Based upon the foregoing, it is hereby ORDERED as follows:

The Defendant's motion for summary judgment (motion sequence #2) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
FILED
2022 NOV 18 AM 9:33