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| <b>Edmond v Metropolitan Tr. Auth.-Long Is. R.R.</b>                                                                                                                                                                           |
| 2023 NY Slip Op 35254(U)                                                                                                                                                                                                       |
| April 13, 2023                                                                                                                                                                                                                 |
| Supreme Court, Suffolk County                                                                                                                                                                                                  |
| Docket Number: Index No. 005491/2016                                                                                                                                                                                           |
| Judge: Kathy G. Bergmann                                                                                                                                                                                                       |
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SHORT FORM ORDER

INDEX No. 005491/2016

CAL. No. 202200476OT

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 6 - SUFFOLK COUNTY**PRESENT:**Hon. KATHY G. BERGMANN  
Justice of the Supreme CourtMOTION DATE 9/14/22  
ADJ. DATE 1/31/23  
Mot. Seq. # 002 MotD-----X  
BARBARA EDMOND,

Plaintiff,

- against -

METROPOLITAN TRANSIT AUTHORITY-  
LONG ISLAND RAILROAD, COUNTY OF  
SUFFOLK, TOWN OF BABYLON and  
ROSEMAR CONTRACTING, INC.,Defendants.  
-----XSIBEN & SIBEN  
Attorney for Plaintiff  
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Bay Shore, New York 11706SHEIN JOHNSON P.C.  
Attorney for Defendants Metropolitan  
Transportation Authority and Long Island  
Rail Road Company  
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Melville, New York 11747

Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by the MTA and the LIRR, dated August 1, 2022; Notice of Cross Motion and supporting papers \_\_\_\_; Answering Affidavits and supporting papers by plaintiff, dated December 6, 2022; Replying Affidavits and supporting papers by the MTA and the LIRR, dated December 30, 2022; Other \_\_\_\_; it is

**ORDERED** that the motion by defendants The Metropolitan Transportation Authority and Long Island Rail Road Company for an order granting summary judgment dismissing the complaint against them is granted to the extent of granting summary judgment dismissing the complaint against the Metropolitan Transportation Authority, and is otherwise denied.

This action was brought by plaintiff to recover damages for personal injuries she sustained on November 6, 2015 when she tripped and fell on an asphalt walkway on the westerly side of Straight Path in Wyandanch, allegedly as a result of a height differential between the ground and the metal grid abutting the railroad tracks. The location of the accident is on the north edge of a railroad plate, just west of the Long Island Railroad-Wyandanch Station. It is undisputed that railroad tracks in the area of the accident are embedded in concrete slab within a metal grid, and that the ground abutting the concrete slab is covered with asphalt pavement. A stipulation executed by counsel for the parties, dated

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September 12, 2019, indicates this action has been discontinued as against defendants County of Suffolk and Town of Babylon.

First, defendants the Metropolitan Transportation Authority (MTA) and the Long Island Rail Road Company (LIRR), i/s/h/a Metropolitan Transportation Authority-Long Island Railroad, seek summary judgment dismissing the complaint against the MTA on the ground that the MTA is not a proper party to this action, alleging that the MTA is a separate and distinct entity from its subsidiary, the LIRR, and that the subject grade crossing on Straight Path is owned and operated by the LIRR, not the MTA. It is undisputed that the area of the accident is owned and operated by the LIRR. Accordingly, the MTA may not be liable for the torts committed by a subsidiary arising out of the operations of the subsidiary corporation (*see Noonan v Long Island R.R.*, 158 AD2d 392, 551 NYS2d 232 [1st Dept 1990]). Thus, the branch of motion by defendants the MTA and the LIRR for summary judgment dismissing the complaint as asserted against the MTA is granted.

The LIRR moves for summary judgment dismissing the complaint against it on the ground that plaintiff failed to show that it created the alleged dangerous condition or had actual or constructive notice of the condition. The LIRR alleges that it last worked in the area of the accident a little less than 10 years prior to the subject accident to replace the concrete pads at the subject railroad tracks. The LIRR also avers that the alleged dangerous condition was a trivial defect that is nonactionable as a matter of law. In support of its application, the LIRR submits, *inter alia*, the pleadings, the bill of particulars, and the transcripts of the parties' testimony.

At her deposition, plaintiff testified that prior to the accident, she walked southbound on a sidewalk of Straight Path. Prior to the accident, she was looking straight ahead. While she was attempting to cross the subject track, her right foot hit the metal track, causing her to stumble, slide, and fall. When asked what caused her to trip, plaintiff answered the black pavement was "unleveled" and was approximately a couple of inches lower than the tracks. She testified that when she fell, she remained on the sidewalk.

At his deposition, Robert Haynie testified that he is a senior project manager of the LIRR. He testified that although grade crossings are installed by the LIRR, he had no knowledge as to whether the LIRR installed the Straight Path grade crossing. He testified that the asphalt along the edge of the concrete grade crossing in the area of the accident is a temporary patch. He testified that typically the LIRR would do a temporary patch, and an on-call third-party contractor would do permanent work. After looking at a photograph of the area of the accident, Haynie testified that "asphalt does not completely come to the lip of the concrete grade crossing" and that there were approximately two or three inches height differential between the asphalt and the concrete panel adjacent to the railroad tracks.

At his deposition, Geddis Lewis testified that he is an assistant engineer of the track right-of-way department of the LIRR. His job duties include maintaining the track structure. He testified that although the asphalt work adjacent to the concrete pads in the area of the accident is within the right-of-way of the LIRR, the asphalt work would not have been performed by the LIRR employees; rather, it would have been performed by outside contractors for the municipality. Lewis testified that if a municipality performed asphalt work within the LIRR's right-of-way, it would need special permission

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from the LIRR to perform that work. He also testified that since his department database only maintains records of the work “when full renewals were completed,” he has no knowledge as to whether the LIRR maintains any records regarding temporary asphalt work.

In his affidavit, Lewis states that he searched the records maintained by his department for work performed at the grade crossing located on Straight Path in Wyandanch for three years prior to the subject accident and that his search found that there was no asphalt concrete resurfacing work performed at that location during the period. His search also found that the area was resurfaced in 1997, 2005, and 2017.

In a trip-and-fall case, a defendant property owner moving for summary judgment has the burden of making a prima facie showing that it neither (1) affirmatively created the hazardous condition nor (2) had actual or constructive notice of the condition and a reasonable time to correct or warn about its existence (*see Parietti v Wal-Mart Stores, Inc.*, 29 NY3d 1136, 1137, 61 NYS3d 523 [2014]; *Breland-Marrow v RXR Realty, LLC*, 208 AD3d 627, 173 NYS3d 601 [2d Dept 2022]; *Meade v New York City Hous. Auth.*, 189 AD3d 1390, 138 NYS3d 564 [2d Dept 2020]; *Rodriguez v New York City Hous. Auth.*, 169 AD3d 947, 94 NYS3d 318 [2d Dept 2019]). Thus, a defendant who moves for summary judgment in a trip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see Dhu v New York City Hous. Auth.*, 119 AD3d 728, 989 NYS2d 342 [2d Dept 2014]; *Cruz v Rampersad*, 110 AD3d at 670, 972 NYS2d 302 [2d Dept 2013]; *Santoliquido v Roman Catholic Church of Holy Name of Jesus*, 37 AD3d 815, 830 NYS2d 778 [2d Dept 2007]). Moreover, 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 (*see Clark v AMF Bowling Ctrs., Inc.*, 83 AD3d 761, 921 NYS2d 273 [2d Dept 2011]; *Moons v Wade Lupe Constr. Co.*, 24 AD3d 1005, 805 NYS2d 204 [3d Dept 2005]; *Fasano v Green-Wood Cemetery*, 21 AD3d 446, 799 NYS2d 827 [2d Dept 2005]).

A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial 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 (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79, 19 NYS3d 802 [2015]; *Sessa v Central Amusement Intl., LLC*, 203 AD3d 863, 160 NYS3d 883 [2d Dept 2022]; *Camara v Costco Wholesale Corp.*, 199 AD3d 509, 154 NYS3d 435 [2d Dept 2021]). In determining whether a defect is trivial, the court must examine all 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 (*see Trincere v County of Suffolk*, 90 NY2d 976, 977, 665 NYS2d 615 [1997]; *Mejias v City of New York*, 183 AD3d 886, 125 NYS3d 112 [2d Dept 2020]; *Hopkins v St. Agnes R.C. Church at Rockville Ctr.*, 160 AD3d 705, 706, 71 NYS3d 362 [2d Dept 2018]). There is no minimal dimension test or per se rule that the condition must be of a certain height or depth in order to be actionable (*see Hutchinson v Sheridan Hill House Corp.*, *supra*; *Dingman v Linchris Hotel Corp.*, 201 AD3d 704, 156 NYS3d 865 [2d Dept 2022]; *Boesch v Comsewogue Sch. Dist.*, 195 AD3d 895, 146 NYS3d 503 [2d Dept 2021]).

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Here, the LIRR has failed to establish its prima facie entitlement to judgment as a matter of law by demonstrating that it did not have constructive notice of the alleged height differential between the ground and the metal grid. The deposition testimony of the parties conflict as to who performed the asphalt work adjacent to the concrete pads in the area of the accident (*see Charlery v Allied Tr. Corp.*, 163 AD3d 914, 915, 81 NYS3d 523 [2d Dept 2018]; *Pyke v Bachan*, 123 AD3d 994, 999 NYS2d 508 [2d Dept 2014]). Haynie testified that while the LIRR would do a temporary patch, such as the asphalt pavement, third-party contractors would do permanent pavement work. Lewis testified that although the area of the asphalt work is within the right-of-way of the LIRR, the work would have been performed by outside contractors for municipality with special permission from the LIRR. Under these circumstances, there are questions of fact as to whether a dangerous condition existed on the ground so as to create liability on the part of the LIRR, who performed the asphalt work, whether the LIRR exercised sufficient control over the work, and whether the LIRR's alleged negligence contributed to the occurrence of the accident (*see Carey v Walt Whitman Mall, LLC*, \_\_AD3d\_\_, 2023 NY Slip Op 01773 [2d Dept 2023]; *Mitzmacher v Bay Country Owners*, 211 AD3d 1025, 182 NYS3d 127 [2d Dept 2022]; *Fidanza v Bravo Brio Rest. Group, Inc.*, 146 AD3d 594, 44 NYS3d 741 [1st Dept 2017]). The LIRR also failed to establish prima facie that the alleged height differential between the ground and the metal grid was trivial and nonactionable, as it did not offer expert evidence or measurements to support its argument (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 19 NYS3d 802 [2015]; *Powell v BLDG 874 Flatbush LLC*, 201 AD3d 534, 157 NYS3d 373 [1st Dept 2022]; *Myles v Spring Val. Marketplace, LLC*, 141 AD3d 425, 35 NYS3d 66 [1st Dept 2016]). There are questions of fact as to whether the alleged height differential was trivial and whether the LIRR had constructive notice of it (*see Blanco v Quality Gas Corp.*, \_\_AD3d\_\_, 2023 NY Slip Op 01160 [1st Dept 2023]; *Powell v BLDG 874 Flatbush LLC*, 201 AD3d 534, 157 NYS3d 373 [1st Dept 2022]; *Mejias v City of New York*, 183 AD3d 886, 125 NYS3d 112 [2d Dept 2020]). The LIRR's other claims are considered and are found to be without merit. Accordingly, the branch of the motion for summary judgment dismissing the complaint against the LIRR is denied.

Dated: April 13, 2023  
J.S.C.

HON. KATHY G. BERGMANN

\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION