SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73
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JOHNNE TAYLOR,

Plaintiff,

-against-

7-ELEVEN, INC., 7 ELEVEN STORE 23367, and CHRISTOPHER STEPHENS,

Defendants.
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Index No.: 513865/2021
Motion Date: 9-16-24
Mot. Seq. No.: 2, 3

DECISION/ORDER

The following papers, which are e-filed with NYCEF as items 37-71, were read on this motion and cross-motion:

In this action to recover damages for personal injuries, in motion sequence No. 2, defendant, 7-Eleven, Inc., moves for an order pursuant to CPLR 3212(a), granting it summary judgment dismissing plaintiff's amended complaint and all cross-claims against it. In motion sequence No. 3, defendants, 7 Eleven Store 23367 s/h/i/a 7 Eleven Store 23367B and Christophe Stephens, cross-move for summary judgment dismissing plaintiff's amended complaint and all cross-claims insofar as asserted against them.

This action arises out of a trip and fall accident that occurred on September 29, 2020, at approximately 6:45 p.m., in the parking lot of a 7-Eleven store located at 145 Hospital Road, Patchogue, New York. Defendant 7-Eleven, Inc. is the owner of the premises and the franchisor. Christopher Stephens is the franchisee and operates the store.

At her deposition, the plaintiff, Johnne Taylor, testified that on the evening in question, after she parked her car in the parking lot on the side of the store, she walked towards the front of the store. Before entering the store, she realized that she forgot her mask. She walked back to her car, got her mask, and walked to the front of the car when tripped and fell. Significantly, Ms. Taylor testified that it was dark out at the time. After she got off the ground, she saw holes in the ground where her foot got caught. She described the hole that her foot made contact with as oval in shape and ½ to 1 inch deep. During the courts of the litigation, the plaintiff exchanged photographs of alleged defect.

Defendant 7-Eleven, Inc. contends that the defect that the plaintiff claims caused her accident is trivial in nature and non-actionable. "'Generally, the issue of whether a dangerous or defective condition exists depends on the particular facts of each case, and is properly a question of fact for the jury'" (*Balbo v. Greenfield's Mkt. of Bethpage, LLC*, 216 A.D.3d 1130, 1130–1131, 190 N.Y.S.3d 146, quoting *Losito v. JP Morgan Chase & Co.*, 72 A.D.3d 1033, 1033, 899 N.Y.S.2d 375). However, "[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" (*Haber v. CVS Pharmacy, Inc.*, 217 A.D.3d 659, 659, 190 N.Y.S.3d 148; *see Trincere v. County of Suffolk*, 90 N.Y.2d 976, 977, 665 N.Y.S.2d 615, 688 N.E.2d 489). "'A defendant seeking dismissal of a complaint on the basis that [an] 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. Only then does the burden shift to the plaintiff to establish an issue of fact'" (*Haber v. CVS Pharmacy, Inc.*, 217 A.D.3d at 659, 190 N.Y.S.3d 148, quoting *Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d 66, 79, 19 N.Y.S.3d 802, 41 N.E.3d 766).

"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'" (*id.* at 660, 190 N.Y.S.3d 148, quoting *Trincere v. County of Suffolk*, 90 N.Y.2d at 978, 665 N.Y.S.2d 615, 688 N.E.2d 489). "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" (*id.*, quoting *Trincere v. County of Suffolk*, 90 N.Y.2d at 977, 665 N.Y.S.2d 615, 688 N.E.2d 489). "'Photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable'" (*id.*, quoting *Schenpanski v. Promise Deli, Inc.*, 88 A.D.3d 982, 984, 931 N.Y.S.2d 650).

Given that plaintiff testified at her deposition that it was dark out and the hole that cause her accident was between ½" to 1" deep, and in light of the photographs that plaintiff exchanged depicting of the alleged defect, the Court finds that the defendant did not demonstrate, prima

facie, that the alleged defect was trivial and therefore, non-actionable *(see Tesoriero v. Brinckerhoff Park, LLC*, 126 A.D.3d 782, 783–84, 5 N.Y.S.3d 261, 263–64). The Court notes that the defendant submitted plaintiff's deposition and the photographs in support of the motion.

Moreover, the photographs submitted by defendant by themselves raise triable issue of fact as to whether defendant 7-Eleven, Inc. had constructive notice of the alleged defect (*see Pitt v. New York City Transit Auth.*, 146 A.D.3d 826, 829, 44 N.Y.S.3d 525, 529; *Batton v. Elghanayan*, 43 N.Y.2d 898, 899, 403 N.Y.S.2d 717, 374 N.E.2d 611; *Zavaro v. Westbury Prop. Inv. Co.*, 244 A.D.2d 547, 548, 664 N.Y.S.2d 611).

Since the defendant failed to meet its prima facie burden, the motion must be denied, regardless of the sufficiency of the plaintiffs' opposition papers (*see Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642). The court has considered defendant 7-Eleven, Inc.'s remaining arguments in support of the motion.

Turing to the cross-motion, defendants 7 Eleven Store 23367 s/h/i/a 7 Eleven Store 23367B and Christophe Stephens also failed to demonstrate, prima facie, entitlement to summary judgment. Their contention that since defendant 7-Eleven, Inc. had the contractual duty to make all necessary repairs to the premises, including the parking lot, there is no basis to hold them liable in this case is without merit. As the owners and operators of the subject 7-Eleven store, these defendants had a nondelegable duty "to provide members of the general public with a reasonably safe premises, including a safe means of ingress and egress" (*Thomassen v. J & K Diner*, 152 A.D.2d 421, 424, 549 N.Y.S.2d 416; *see, Richardson v. Schwager Assocs.*, 249 A.D.2d 531, 531–532, 672 N.Y.S.2d 114; *Gallagher v. St. Raymond's R.C. Church*, 21 N.Y.2d 554, 557, 289 N.Y.S.2d 401, 236 N.E.2d 632; *Ankenbrand v. City of New York*, 133 A.D.2d 798, 520 N.Y.S.2d 180, 181). The fact that defendant 7-Eleven, Inc. may have been contractually required by to make all necessary repairs to the parking lot did not relieve them of this duty. Since the record raises triable issues as to whether defendant 7-Eleven Inc. breached this duty, and whether the breach was a substantial factor in causing plaintiff's injury is, defendant 7-Eleven, Inc. is not entitled to summary judgment.

Accordingly, it is hereby

ORDRED that the motion and cross-motion are **DENIED.**

This constitutes the decision and order of the Court.

Dated: September 16, 2024

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020