SHORT FORM ORDER

INDEX No. 600281/2022
CAL. No. 202300938OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

HON. CHRISTOPHER MODELEWSKI
Justice of the Supreme Court

MOTION DATE 10/04/2023
ADJ. DATE 03/25/2024
Mot. Seq. # 002-MD

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ROSA RODRIGUEZ,

Plaintiff,

- against -

SETAUKET GULF AUTOMOTIVE CENTER and 90 RTE 25A SETAUKET REALTY, LLC,

Defendants.

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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by defendants, filed September 11, 2023; Answering Affidavits and supporting papers by plaintiff, filed January 2, 2024 ; Replying Affidavits and supporting papers by defendants, filed March 25, 2024; it is

ORDERED that defendants' motion for summary judgment dismissing the complaint is denied.

Plaintiff commenced this action to recover damages for injuries she allegedly sustained when she tripped and fell on a hole in the ground at the premises owned and operated by defendants. Plaintiff alleged that defendants were negligent in their maintenance of the premises, and that their negligence was the proximate cause of her injuries.

Defendants now move for summary judgment dismissing the complaint, arguing that plaintiff cannot identify the cause of her fall, that the alleged defect was trivial and non-actionable, that they had no notice of the alleged defect, and that they had no duty to make the area where plaintiff fell safe, because they could not reasonably foresee customers walking there. In support of the motion, defendants submit, among other things, plaintiff's deposition testimony.[1] Plaintiff opposes the motion,

[1]The video submitted by defendants is inadmissible and was not considered in determination of the motion, as it was not authenticated by a party with personal knowledge of the videotape, nor did defendants submit any other evidence tending to establish the video's accuracy and authenticity (*see* ***Read v Ellenville Nat. Bank***, 20 AD3d 408, 799 NYS2d 78 [2d Dept 2005]). "[A] videotape may be authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintainer of the equipment that the videotape accurately represents the subject matter depicted. . . Testimony, expert or otherwise, may also establish that a videotape truly and accurately

arguing, among other things, that she identified the cause of her fall, and submits the affidavit of her son, Joseph Dominguez, Jr.

Plaintiff testified that on December 18th, 2019, she pulled her vehicle into the gas station owned and operated by defendants. Her son was in the vehicle with her, and she parked beside a gas pump and exited her vehicle. She testified that she did not observe ice or any other defects on the ground. She took one step after exiting her vehicle, and her foot became "stuck" in a hole in the ground, and she lost her balance and fell. She testified that she did not see the hole before her accident, and that after the accident, she did not look around the area to see what caused her to fall. She testified that the first time she actually observed the hole was when she visited the gas station again a "long time" after the day she fell. She stated that she did not know how much time had passed from the date of the accident to the date she returned to the gas station.

On a motion for summary judgment, the movant has the burden to show that it is entitled to judgment as a matter of law and that there are no disputed issues of material fact (CPLR 3212; ***Matter of New York City Asbestos Litig.***, 33 NY3d 20, 99 NYS3d 734 [2019]). If the movant meets its burden, then the non-movant must show that there is a material issue of fact to be resolved at trial (***Matter of Eighth Jud. Dist. Asbestos Litig.***, 33 NY3d 488, 105 NYS3d 353 [2019]). If the movant does not meet its burden, then the motion must be denied without consideration of any opposing papers (***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). On summary judgment, the Court must view the evidence in the light most favorable to the non-moving party (*id.*).

The court will first address defendants' argument that plaintiff could not identify the cause of her accident. "A property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition" (***Wilson v Rye Family Realty, LLC***, 218 AD3d 836, 837, 193 NYS3d 274 [2d Dept 2023]; *see* ***Patterson v H.E.H., LLC***, 217 AD3d 879, 191 NYS3d 479 [2d Dept 2023]). A defendant moving for summary judgment in a premises liability case has the initial burden of making a prima facie showing that it neither created the alleged defective condition nor had actual or constructive notice of its existence (*see* ***Pena v Pep Boys-Manny, Moe & Jack of Delaware, Inc.***, 216 AD3d 809, 188 NYS3d 197 [2d Dept 2023]; ***Tomala v Islandia Expressway Realty, LLC***, 216 AD3d 696, 187 NYS3d 795 [2d Dept 2023]). However, "[a] plaintiff's inability in a premises liability case to identify the cause of the fall is fatal to the cause of action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation" (***Belmonte v City of New York***, 220 AD3d 727, 728, 197 NYS3d 554 [2d Dept 2023]; *see also* ***Adzei v Edward Bldrs., Inc.***, 221 AD3d 639, 198 NYS3d 755 [2d Dept 2023]; ***Padilla v CVS Pharm.***, 175 AD3d 584, 107 NYS3d 428 [2d Dept 2019]). "Where it is just as likely that some factor other than negligence by the defendant, such as a misstep or loss of balance, could have caused an accident, any determination by the trier of fact as to causation would be based upon sheer speculation" (***Belmonte v City of New York***, 220 AD3d 727, 728, 197 NYS3d 554).

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represents what was before the camera . . . Evidence establishing the chain of custody of the videotape may additionally buttress its authenticity and integrity, and even allow for acceptable inferences of reasonable accuracy and freedom from tampering" (*id.* at 409 [quotations and citations omitted]). Here, defendants have done none of these things, and merely introduced the purported video of the accident by way of an attorney affirmation.

Defendant's submissions were sufficient to establish a prima facie case of entitlement to summary judgment (*see* ***Belmonte v City of New York***, 220 AD3d 727, 197 NYS3d 554). Through the submission of plaintiff's deposition testimony, defendants have demonstrated that plaintiff did not see the hole which allegedly caused her accident until at least several months after her accident (*see* ***Gold v 35 E. Assoc. LLC***, 136 AD3d 453, 24 NYS3d 622 [1st Dept 2016] [plaintiff's testimony as to existence of defect was speculative where plaintiff admitted that they only noticed defect two weeks after alleged accident]; ***Dennis v Lakhani***, 102 AD3d 651, 958 NYS2d 170 [2d Dept 2013] [plaintiff only speculated as to the cause of fall where they first observed alleged defect two days after fall]). Defendants, therefore, demonstrated that plaintiff could only speculate as to the cause of her alleged fall (*see* ***Belmonte v City of New York***, 220 AD3d 727, 197 NYS3d 554).

In opposition, plaintiff raised a triable issue of fact (***Mottola v Harvest on Hudson, LLC***, 122 AD3d 914, 997 NYS2d 476 [2d Dept 2014]). Plaintiff offers the affidavit of her son, Joseph Dominguez Jr., ("Dominguez") along with photographs of the hole which allegedly caused plaintiff's fall, which were taken two to three months after the alleged accident. The affidavit provides circumstantial evidence that allows for an inference to be drawn regarding the cause of plaintiff's alleged fall (*see* ***Cross v Roberts***, 162 AD3d 852, 78 NYS3d 249 [2d Dept 2018]; ***Pajovic v 94-06 34th Rd. Realty Co., LLC***, 152 AD3d 781, 59 NYS3d 138 [2d Dept 2017]). Mr. Dominguez avers that he was present in his mother's vehicle at the time of her fall, though he did not witness the accident occur. He averred that he became aware of her fall a "short time" after it occurred, and he exited the vehicle and observed his mother lying on the ground. He also observed a hole in the ground inches away from his mother's foot. He averred that the photographs submitted along with his affidavit accurately depicted the hole as he had observed it on the day of the accident.

Defendants contend in their reply that the affiant is not credible, and point to inconsistencies between the affirmation and his deposition testimony. The deposition transcript of Mr. Dominguez, which defendants submitted for the first time on reply, is not admissible to establish their prima facie case (***Pawelic v Siegel***, 220 AD3d 883, 198 NYS3d 193 [2d Dept 2023]). Regardless, a determination as to the credibility of fact witnesses is the province of a jury, not the court at the summary judgment stage (*see* ***Spilman v Matyas***, 212 AD3d 859, 183 NYS3d 473 [2d Dept 2023]).

The court next addresses defendants' argument that the defect which allegedly caused plaintiff's accident was trivial. A defendant moving for summary judgment dismissing the 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" (***Hutchinson v Sheridan Hill House Corp.***, 26 NY3d 66, 79, 19 NYS3d 802 [2015]; *see* ***Bradley v US Brownsville III Hous. Dev. Fund Corp.***, 213 AD3d 902, 185 NYS3d 181 [2d Dept 2023]). To determine whether a defect is trivial, the court must consider 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" (***Trincere v County of Suffolk***, 90 NY2d 976, 978, 665 NYS2d 615 [1997] [internal quotation marks omitted], quoting ***Caldwell v Village of Is. Park***, 304 NY268, 274, 107 NE2d 441 [1952]; *see* ***Drew v N & P USA Realty, LLC***, 213 AD3d 734, 182 NYS3d 756 [2d Dept 2023]). Summary judgment is inappropriate where "the dimensions of the alleged defect are unknown and the photographs and descriptions inconclusive" (***Hutchinson v Sheridan Hill***

House Corp., 26 NY3d at 84, 19 NYS3d 802; *see* ***Curry v Eastern Extension, LLC***, 202 AD3d 907, 159 NYS3d 684 [2d Dept 2022]).

Here, defendants have failed to demonstrate, prima facie, that the defect in question was trivial and non-actionable because they have failed to submit evidence which establishes the "the width, depth, elevation, irregularity and appearance of the defect" (***Trincere v County of Suffolk***, 90 NY2d 976, 978, 665 NYS2d 615; *see* ***Hutchinson v Sheridan Hill House Corp.***, 26 NY3d 66, 19 NYS3d 802). The photographs relied upon by defendants do not depict the defect clearly, and as such, the court cannot objectively discern any of its characteristics. Thus, defendants have failed to conclusively establish the dimensions and other relevant characteristics of the alleged defect. In any event, the affidavit of Mr. Dominguez and the photographs attached thereto submitted in opposition raise a triable issue of fact as to whether the defect was trivial (*see* ***Hutchinson v Sheridan Hill House Corp.***, 26 NY3d 66, 19 NYS3d 802).

Next, the court will address defendants' argument that they lacked notice of the alleged defect. In a premises liability action, a defendant property owner, or a party in possession or control of real property, moving for summary judgment has the initial burden of making a prima facie showing that it neither created the alleged dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time (***Williams v Island Trees Union Free Sch. Dist.***, 177 AD3d 936, 114 NYS3d 118 [2d Dept 2019]). "A defendant has constructive notice of a defect when the defect is visible and apparent, and existed for a sufficient length of time before the accident that it could have been discovered and corrected" (***Taliana v Hines REIT Three Huntington Quadrangle, LLC***, 197 AD3d 1349, 1351-1352, 154 NYS3d 136 [2d Dept 2021]). To meet its initial burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the accident site was last inspected prior to the plaintiff's accident (*see* ***Clark v Stop & Shop Supermarket Co., LLC***, 204 AD3d 746, 164 NYS3d 463 [2d Dept 2022]; ***Falco-Averett v Wal-Mart Stores, Inc.***, 174 AD3d 506, 101 NYS3d 642 [2d Dept 2019]; ***Reed v 64 JWB, LLC***, 171 AD3d 1228, 98 NYS3d 636 [2d Dept 2019]). Mere reference to general practices, without evidence regarding any specific cleaning or inspection in the subject area, is insufficient to establish lack of constructive notice (*see* ***Armenta v AAC Cross County Mall, LLC***, 219 AD3d 790, 195 NYS3d 111 [2d Dept 2023]; ***Vinokurova v Edith and Carl Marks Jewish Community House of Bensonhurst, Inc.***, 212 AD3d 751, 183 NYS3d 124 [2d Dept 2023]).

Here, defendants have failed to demonstrate that they lacked constructive notice of the alleged defect (*see* ***Armenta v AAC Cross County Mall, LLC***, 219 AD3d 790, 195 NYS3d 111). Defendants' witness and the premises owner, Kevin Hearney, testified that he did not know when the last time the site of plaintiff's accident had been inspected, and only testified as to general inspection practices. Therefore, defendants have failed to meet their initial burden on the issue of lack of constructive notice (*see id.*).

Finally, the court turns to defendants' argument that they are not liable to plaintiff because it was not reasonably foreseeable that a patron would traverse the area where plaintiff allegedly fell. "A property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition" (***Wilson v Rye Family Realty, LLC***, 218 AD3d 836, 837, 193 NYS3d 274 [2d Dept 2023]). The scope of that duty is defined by "the foreseeability of the possible harm, an issue

which can be resolved by the court when but a single inference can be drawn from undisputed facts" (***Pusey v Stark***, 166 AD3d 918, 919, 88 NYS3d 422 [2d Dept 2018] [internal quotations and citations omitted]). "The likelihood of the injured party's presence in light of the frequency of the use of the area determines the question of foreseeability" (*id.*). Where reasonable minds could disagree as to whether it was foreseeable for plaintiff to traverse the area where the alleged accident occurred, summary judgment is inappropriate (*see* ***Powers v 31 E 31 LLC,*** 24 NY3d 84, 94, 996 NYS2d 210 [2014]; ***Desroches v Heritage Builders Group, LLC***, 187 AD3d 1369, 133 NYS3d 311 [3d Dept 2020]).

Defendants have failed to establish, prima facie, that the injury experienced by plaintiff was not foreseeable (*see* ***Powers v 31 E 31 LLC,*** *supra*).[2] The court cannot resolve this issue at the summary judgment stage because the evidence submitted by defendants allows for more than a single inference to be drawn. Here, the evidence submitted by defendants does not establish, as a matter of law, that they could not have foreseen that a customer on the premises would walk upon the paved concrete island whereupon plaintiff was allegedly injured (*see* ***Desroches v Heritage Builders Group, LLC***, 187 AD3d 1369, 133 NYS3d 311; ***Ellis v Lansingburgh Cent. School Dist.***, 163 AD3d 1146, 80 NYS3d 524 [3d Dept 2018]).

Accordingly, defendants' motion for summary judgment dismissing the complaint is denied.

The foregoing constitutes the decision and Order of the Court.

Dated: July 24 2024

HON. CHRISTOPHER MODELEWSKI, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

[2]Defendants assert, by way of an attorney affirmation, that the island of the gas pump where plaintiff allegedly tripped and fell "was not meant to be traversed. When pumping gas, a person typically stands on the lower surface of the gas station and does not need to step upon the island where the gas pump is physically located." Defendants submit no admissible evidence in support of these statements.