SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 6

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Paul Lozada,

Index №. 22058/2018E

-against-

Hon. LAURA G. DOUGLAS Justice Supreme Court

Justice Supreme Court

Liat LLC,

----------X

The following papers numbered 1 to (3) were read on this motion (Seq. No. 1)
for Summary Judgment noticed on July 18, 2024

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). (1)
Answering Affidavit and Exhibits	No(s). (2)
Replying Affidavit and Exhibits	No(s). (3)

Upon the foregoing papers, it is ordered that this motion ~~is~~ by the defendant is decided in accordance with the attached memorandum Decision/Order.

Dated:

Dated: 10-25-24

Hon. LAURA G. DOUGLAS Justice Supreme Court , J.S.C.

CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE

MOTION IS..... ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE

☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 22058/2018E

PAUL LOZADA,

Plaintiff,

-against-

LIAT LLC,

Defendant.

DECISION/ORDER

Present:
Hon. Laura G. Douglas
J.S.C.

Part 6

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion for summary judgment (seq. no. 1):

Papers	**Numbered**
Defendant's Notice of Motion, Statement of Material Facts by Dina Aversano DiBlasi, Esq. dated April 12, 2024, Affirmation of Dina Aversano DiBlasi, Esq. dated April 12, 2024 in Support of Motion, and Exhibits ("A" through "H")…….	**1**
Affirmation of Andrew G. Sfouggatakis, Esq. dated June 26, 2024 in Opposition to Motion, Counter-Statement of Material Facts by Andrew G. Sfouggatakis, Esq. dated June 26, 2024, and Exhibits ("A" through "F")……..……	**2**
Reply Affirmation of Dina Aversano DiBlasi, Esq. dated July 31, 2024……..	**3**

Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:

The defendant ("Liat") seeks an order pursuant to CPLR Rule 3212 granting it summary judgment dismissing the plaintiff's complaint on the grounds that the sidewalk defect complained of was trivial in nature and not hazardous or, alternatively, that Liat did not cause, create, or have actual or constructive notice of the defect. The motion is denied in its entirety.

The plaintiff ("Lozada") seeks monetary damages for personal injuries allegedly sustained on January 9, 2018 at approximately 6:00 p.m. when he tripped and fell on a broken sidewalk adjacent to an apartment building owned by Liat. Liat first contends that the height differential presented by the defect was just one-quarter of an inch, which is not actionable.

In support of its motion, Liat relies on Lozada's own deposition testimony. In pertinent part, Lozada testified that he had previously walked by this location, but had not noticed anything wrong with

the sidewalk. On this occasion, he was with his girlfriend and her dog, who were walking to his right. They were looking straight ahead and talking prior to his fall. He was not carrying anything and was not talking on his telephone at the time. Lozada was walking slowly and without a limp, and testified that he was "a big guy". He stated that he tripped when his left foot struck an uneven portion of the sidewalk, which he described as a "little mountain" with the raised portion being two inches high. Lozada identified the defect on certain photograph(s), a v-shaped section of cement in between a gray-colored portion and an orange-colored portion of the sidewalk.

Liat also submits the deposition testimony of Perets Zikry ("Zikry"), an officer and partner in Liat. Zikry testified that the building's live-in superintendent ("Dario") would place the building's garbage out for collection and clean the sidewalk, but he would not perform repairs. Dario would relay any complaints that he received from building residents to Zikry or his son and they would attend to them. They maintain records of the various contractors that they used at the building. Zikry stated that he was not aware of any complaints or violations.

Finally, Liat submits a supporting affidavit from Vasiliki Kefala ("Kefala"), a biomechanist retained to examine Lozada's claims regarding the sidewalk. Kefala inspected the sidewalk on December 6, 2022. She concludes that the elevation differential at the spot of the defect complained of was less than one-half inch. Kefala avers that biomechanic science establishes that an obstruction must have a minimal height of one-half inch to be considered a cause of a pedestrian's trip and fall. She notes that this comports with New York City Administrative Code 19-152, which defines a substantial defect as a tripping hazard if the vertical grade differential between adjacent sidewalk flags is equal or greater than one-half inch or if a surface defect measures one inch or greater horizontally and one-half inch or greater in depth. Kefala also notes that the patched area of the sidewalk was discernable due the color and characteristics of the sidewalk.

Kefala opines that the sidewalk patch did not constitute a tripping hazard, did not violate any applicable codes, and was not the cause of Lozada's fall. Instead, Kefala concludes that Lozada fell because he failed to exercise a reasonable degree of attentiveness while walking on the sidewalk. He was simply walking while minimally distracted, without any visual obstructions, and likely fell due to "scuffing his boots on the ground or tripping over his own feet".

Even if the defect is found not to have been trivial, Liat argues that it did not cause or create the defect and did not have actual or constructive notice of its existence. Zikry testified that Dario regularly swept the sidewalk and would have reported any prior similar accident to the Zikrys. Liat notes the

absence of any evidence that sidewalk repairs were made prior to Lozada's accident or that Liat received any complaints regarding the condition of the sidewalk.

In opposition, Lozada points out that Zikry testified that he did not visit the premises on a regular basis. Moreover, he admitted that Dario would not perform repairs. While Zikry testified that Liat did not repair or replace the subject sidewalk at any time prior to January 2018, Zikry could not recall if certain photographs depicted the sidewalk in the condition that existed when he purchased the property or whether the patch work existed on the sidewalk at that time.

Lozada also notes that Kefala admittedly visited the subject location some five years after Lozada's accident and only after the sidewalk defect had been repaired. In addition, Lozada highlights the fact that Kefala does not state that the took measurements herself, but rather relies on the one-quarter inch measurement apparently taken by Anthony Siconolfi ("Siconolfi"), who appears to be an insurance adjuster.

As to the issue of notice, Lozada contends that Liat has not submitted any inspection, maintenance, or repair records, including evidence of when the sidewalk was last inspected prior to Lozada's accident. Lozada notes that Zikry testified that he did not inspect the sidewalk and could not state if the patch work depicted on certain photographs existed prior to Lozada's accident.

Liat must demonstrate that there are no material issues of fact in dispute and that it is entitled to judgment as a matter of law under these undisputed facts (*see Winegrad v. New York University Medical Center*, 64 NY2d 851 [Ct App 1985] and *Flores v. City of New York*, 29 AD3d 356 [1st Dept 2006]). The moving party's "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Vega v Restani Constr. Corporation.,* 18 NY3d 499, 503 [Ct App 2012]). To defeat such a showing, Lozada must present facts in admissible form demonstrating that genuine, triable issues exist which preclude summary judgment (*see Zuckerman v. City of New York*, 49 NY2d 557 [Ct App 1980] and *Flores v. City of New York*, 29 AD3d 356 [1st Dept 2006]). The pertinent facts must be viewed in the light most favorable to Lozada as the non-moving party (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [Ct App 2011]).

In a trip and fall case, a defendant seeking summary judgment must establish that it did not create the hazardous condition that allegedly caused the fall and did not have actual or constructive notice of the condition for a sufficient period to discover and correct it (*see Javier v. New York City Housing Authority*, 161 AD3d 615 [1st Dept 2018] and *Ash v. City of New York*, 109 AD3d 854 [2nd Dept 2013]). 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, regardless of his prior knowledge of same (*see Trincere v. County of Suffolk,* 90 NY2d 976 [Ct App 1997]). While the existence of a dangerous condition on someone's property that creates liability is generally a question of fact for a jury to decide, a Court may find that the defect alleged is so trivial that it is not actionable as a matter of law (*see Powell v. Centers FC Realty, LLC*, 182 AD3d 495 [1st Dept 2020]). There is no minimum height or depth that is required for a defect to be actionable (*see Trincere v. County of Suffolk*, 90 NY2d 976 [Ct App 1997]). To make that showing, a defendant must demonstrate that the defect is physically insignificant under the circumstances and that the defect's characteristics or the surrounding circumstances do not increase the risk that it presents (*see Hutchinson v. Sheridan Hill House Corp.*, 26 NY3d 66 [Ct App 2015] and *McCabe v. Avalon Bay Communities, Inc.,* 177 AD3d 487 [1st Dept 2019]). Factors to consider include the width, depth, elevation, irregularity, and appearance of the defect, as well as the time, place, and circumstance of the injury (*see Trincere v. County of Suffolk*, 90 NY2d 976 [Ct App 1997]), the plaintiff's familiarity with the location (*see Riley v. City of New York*, 50 AD3d 344 [1st Dept 2008]), and adverse weather or lighting conditions (*see Gaud v. Markham*, 307 AD2d 845[1st Dept 2003]). Whether the alleged defect measured at least one-half inch in violation of 34 RCNY 2-09(f)(5)(iv) is an additional factor to be considered in determining whether a defect is trivial (*see Lopez v. 1675 Realty*, 209 AD3d 407 [1st Dept 2022] and *Trinidad v. Catsimatidis*, 190 AD3d 444 [1st Dept 2021] (whether a defect satisfies the height differential requiring repair under § 19-152 of the Administrative Code of the City of New York is one factor to consider in determining whether a defect is trivial)). While a plaintiff's ability to safely traverse that sidewalk prior to his accident is another factor which can justify a finding that the defect was trivial (*see Riley v. City of New York*, 50 AD3d 344 [1st Dept 2008]), it is generally for a jury to decide whether a sidewalk defect is sufficiently hazardous to impose liability given the unique facts of each case (*see Tineo v. Parkchester South Condominium*, 304 AD2d 383 [1st Dept 2003]).

Here, the Court cannot conclude that this defect was trivial as a matter of law based upon Kefala's affidavit. Kefala's site inspection is not probative, since she concedes that, at the time of her visit, the subject sidewalk was not in the same condition as it was at the time of Lozada's accident because repairs had been made to this section of the sidewalk. Moreover, Kefala's analysis and opinions are based upon the photographs and measurements taken by someone else - Siconolfi, an insurance adjuster, who allegedly measured the elevation at one-quarter inch. However, there is no affidavit or photograph from Siconolfi and no mention of when or how he allegedly took this measurement. Without this

information, it cannot be assumed that Siconolfi's measurement was made at a relevant time and was taken at the spot identified by Lozada.

Similarly, Liat has not satisfied its *prima facie* burden to demonstrate the absence of constructive notice of the subject defect because it has not submitted any evidence establishing its last inspection of this sidewalk prior to Lozada's accident and that the defect was not present at that time (*see Attia v. Slazer Enterprises, LLC*, 215 AD3d 413 [1st Dept 2023] and *Williams v. Beth Israel Hospital Association*, 201 AD3d 429, 430 [1st Dept 2022] ("In support of its motion for summary judgment dismissing the complaint, defendant failed to establish prima facie a lack of constructive notice of the defect in the floor mat on which plaintiff tripped and fell, as its witnesses could not say when the area was last cleaned or inspected, and defendant submitted no documentary evidence thereof."). Evidence of general cleaning procedures is insufficient (*see Smith v. Montefiore Medical Center*, 192 AD3d 609 [1st Dept 2021]). Here, Zikry could not provide this information, there are no documents submitted which contain this information, and Dario, who was the person on-site and responsible for cleaning, did not testify or submit an affidavit.

Under these circumstances, Liat has failed to establish its entitlement to summary judgment. The Court cannot state as a matter of law that the defect was trivial in nature and that Liat did not have constructive notice of same.

Accordingly, it is hereby

ORDERED that summary judgment is denied.

The foregoing constitutes the Decision/Order of this Court.

DATED: October 25, 2024
Bronx, New York

HON. LAURA G. DOUGLAS
J.S.C.