Galstyan v Joa & Mok Realty, Corp.
2025 NY Slip Op 32949(U)
July 22, 2025
Supreme Court, Kings County
Docket Number: Index No. 531119/2021
Judge: Ingrid Joseph
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At an IAS Term, Part 83 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 22nd day of July, 2025.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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ANNETA GALSTYAN,

Plaintiff,

-against-

JOA & MOK REALTY, CORP., BAY PARKWAY SEAFOOD PALACE, INC. and C.W.C. RESTAURANT, INC.,

Defendants.

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Index No.: 531119/2021

DECISION AND ORDER

Mot. Seq. No. 4

The following e-filed papers read herein:	NYSCEF Doc Nos.
Amended Notice of Motion/Amended Statement of Material Facts/ Amended Affirmation in Support/Exhibits.....	79 – 82
Affirmation in Opposition/Response to Statement of Material Facts/Exhibits.....	85 – 89
Reply Affirmatio/Exhibits.....	93 – 95

Plaintiff Anneta Galstyan ("Plaintiff") commenced this action seeking damages for personal injuries allegedly sustained on November 21, 2021, around 11:00PM, when she tripped and fell due to the alleged dangerous condition of the sidewalk abutting the premises located at 2172 86th Street in Brooklyn, New York (the "Premises"), which is owned by defendant Joa & Mok Realty Corp. and occupied by defendant Bay Parkway Seafood Palace, Inc. (collectively, the "Moving Defendants").[1]

Moving Defendants move for an order granting them summary judgment and dismissing Plaintiff's complaint on the grounds that (a) the alleged defect was trivial in nature and (b) they

[1] Plaintiff was previously granted a default judgment against defendant C.W.C. Restaurant Inc. (NYSCEF Doc No. 47).

did not have actual or constructive notice of the alleged defect (Mot. Seq. No. 4). Plaintiff opposes the motion.

In their motion, Moving Defendants preemptively argue that their motion is timely. Moving Defendants previously moved for summary judgment, which had a return date of February 11, 2025. Since no opposition had been filed, Moving Defendants assert that they assumed the motion would be adjourned at Plaintiff's request; thus, they did not appear on the return date. Counsel for Moving Defendants states that he only realized the motion was marked off a week before he filed the instant motion. Since the prior motion was timely filed, Moving Defendants argue that Plaintiff is not prejudiced.

Turning to the merits of their motion, Moving Defendants claim that the alleged defect was de-minimis and thus, non-actionable. In support, Moving Defendants cite to the report of their expert Michael Cronin, a professional engineer, who states that the measurement of the height differential between the sidewalk flags was 3/8 of an inch. In addition, Moving Defendants submit screenshots of surveillance video, which show multiple individuals traversing the same area of the sidewalk prior to Plaintiff's accident without issue. Moving Defendants further cite to Plaintiff's deposition transcript in which she testified that she walked the subject area daily and never observed the condition. With respect to Plaintiff's expert Eugene Camerota's report, Moving Defendants contend that it fails to raise a triable issue of fact.

Moving Defendants further claim that they were not on notice of any alleged dangerous condition. Moving Defendants rely on the deposition testimonies of their witnesses Marcia Lee (manager at Bay Parkway) and Kee Yeung (Ms. Lee's husband who helped out at Bay Parkway). At their depositions, Mr. Yeung and Ms. Lee testified that they were not aware of any condition and that they had not received any complaints prior to Plaintiff's accident. Ms. Lee further testified that she was on the sidewalk twice a day and never noticed any dangerous condition.

In opposition, Plaintiff argues that the motion should be denied on procedural grounds. Since Moving Defendants' prior motion was marked off after they failed to appear, Plaintiff contends that they had to move to vacate their default. In addition, Plaintiff asserts that the instant motion is time-barred since it was filed more than 60 days after the Note of Issue was filed, and no good cause is established.

With respect to Moving Defendants' argument that the defect is trivial, Plaintiff contends that their expert's report should be precluded since an expert exchange was not done prior to the

filing of the Note of Issue. Moreover, according to Plaintiff, Mr. Cronin's report is not based on all material facts and fails to specify with sufficient particularity the records he reviewed. Plaintiff further disputes Mr. Cronin's measurement of the sidewalk's elevation. Contrary to Mr. Cronin's conclusion that the height differential is 3/8 of an inch, Plaintiff maintains that the measurement shown in his report is actually half an inch. In addition, Plaintiff argues that Mr. Cronin did not take into account the surrounding circumstances, such as the fact that Plaintiff testified it was dark outside and there were no artificial exterior lights in the immediate vicinity. Plaintiff further submits the sworn report of its expert, Eugene R. Camerota, whose measurement of the height differential was 1/2 of an inch. Nonetheless, Plaintiff maintains that since the two experts disagree on the significance of the defect, summary judgment is not appropriate. Turning to the issue of constructive notice, Plaintiff argues that there are triable issues of fact. According to Plaintiff, Moving Defendants have failed to proffer an affidavit or sworn testimony as to when the sidewalk was last cleaned or inspected.

In their reply, Moving Defendants maintain that their initial motion was marked off, and not denied on default as Plaintiff contends. Moving Defendants further insist that the instant motion is not untimely and even if it were deemed to be, they have demonstrated good cause. With respect to the triviality issue, Moving Defendants rely on Plaintiff's testimony that she walked on that sidewalk daily since 2019 without issue and without observing the subject condition. Plaintiff further testified that nothing was obstructing her view leading up to the accident. Moving Defendants also rely on their witnesses' testimonies that they never received prior complaints and that they never observed the condition. Regarding Plaintiff's arguments about their expert, Moving Defendants assert that an expert affidavit may still be considered pursuant to CPLR 3212 (b). In addition, Moving Defendants argue that Mr. Cronin's affidavit sets forth all the materials he reviewed in making his determination (e.g. surveillance video, photographs, Plaintiff's expert report). Moreover, Moving Defendants maintain that Plaintiff's own expert's measurements show that the height differential is less than 1/2 of an inch.

Concerning the issue of notice, Moving Defendants point out that Plaintiff did not oppose the portion of their motion about actual notice. Moving Defendants, however, continue to argue that they did not have constructive notice. According to Moving Defendants, the alleged defect was neither visible nor apparent.

"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, 493 [2d Dept 2005], citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *see Sucre v Consolidated Edison Co. of N.Y., Inc.*, 184 AD3d 712, 714 [2d Dept 2020]). "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" (*Sanchez v Ageless Chimney Inc.*, 219 AD3d 767, 768 [2d Dept 2023], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where, as here, a plaintiff's action is based on a trip-and-fall accident, a defendant's entitlement to summary judgment is contingent on establishing that it "maintained the premises in a reasonably safe condition and that [it] did not create a dangerous or defective condition on [its] property or have either actual or constructive notice of a dangerous or defective condition for a sufficient length of time to remedy it" (*Villano v Strathmore Terrace Homeowners Ass'n, Inc.*, 76 AD3d 1061, 1061 [2d Dept 2010]). A defendant has constructive notice if the defect (1) is visible and apparent and (2) existed for a sufficient length of time before the accident to allow the defendant to discover and remedy it (*see Gordon v Am. Museum of Nat. Hist.*, 67 NY2d 836, 837 [1986]). "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (*Williams v Is. Trees Union Free Sch. Dist.*, 177 AD3d 936, 938 [2d Dept 2019]). Mere testimony of general practices is insufficient to establish lack of constructive notice (*see Buffalino v XSport Fitness*, 202 AD3d 902, 903 [2d Dept 2022]; *Goodyear v Putnam/N. Westchester Bd. of Co-op. Educ. Servs.*, 86 AD3d 551, 552 [2d Dept 2011]; *Birnbaum v New York Racing Ass'n, Inc.*, 57 AD3d 598, 599 [2d Dept 2008]).

Here, Moving Defendants' reliance on their witnesses' testimonies is unavailing since it is not only contradictory, but also devoid of any reference to the last time the sidewalk was inspected (*see Pena v Pep Boys-Manny, Moe & Jack of Delaware, Inc.*, 216 AD3d 809, 810 [2d Dept 2023] [testimony of manager's regular practice to inspect area multiple times a day is insufficient where there is no evidence as to when the area was last inspected on date of plaintiff's accident]; *see also*

Pairazaman v Sei Oung Yoon, 2022 NY Misc LEXIS 15584, at *3 [Sup Ct, Queens County, Dec. 9, 2022, index No. 705244/2021]). Where, as here, a defendant has "failed to proffer any evidence to establish when the area in question was last inspected or cleaned relative to the time when the plaintiff fell", it has failed to meet its prima facie burden (*Oliveri v Vassar Bros. Hosp.*, 95 AD3d 973, 975 [2d Dept 2012]).

The Court next considers the portion of Moving Defendants' motion arguing that the alleged defect is trivial. As the Second Department has stated,

> 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 . . . However, a property owner may not be held liable in damages for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip" (*Schenpanski v Promise Deli, Inc.*, 88 AD3d 982, 983 [2d Dept 2011]).

"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. Only then does the burden shift to the plaintiff to establish an issue of fact" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015]). "Photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable" (*Green v NY City Hous. Auth.*, 137 AD3d 748, 749 [2d Dept 2016]). "In determining whether a defect is trivial as a matter of law, 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" (*Snyder v AFCO Avports Mgt., LLC*, 232 AD3d 209, 213 [2d Dept 2024] [internal quotation marks and citations omitted]).

Upon consideration of the facts and circumstances of the case, the Court finds that Defendant has failed to establish that the alleged defect was trivial as a matter of law. Whether the height differential of the subject area where Plaintiff tripped is 3/8 of an inch or 1/2 of an inch, the elevation of the flag is not dispositive since there are still other factors the Court must consider (*see Trincere v County of Suffolk*, 90 NY2d 976, 977-978 [1997]). Here, Plaintiff testified that her accident occurred at 11PM, that it was dark next to the restaurant, and that there were no streetlights in that area. She further testified that her left foot got caught in the hole between the "slots" in the sidewalk. Thus, in looking at the circumstances, the Court finds that there is an issue of fact (*see Mc Kenzie v Crossroads Arena, LLC*, 291 AD2d 860, 861 [4th Dept 2002])

After consideration of the evidence submitted, the Court finds that Defendant failed to establish, prima facie, that it did not have constructive notice or that the alleged defect was trivial. Since Defendant failed to meet its initial burden, the Court need not consider the sufficiency of Plaintiff's opposition (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Accordingly, it is hereby

ORDERED, that Defendant's motion (Mot. Seq. No. 4) for summary judgment dismissing Plaintiff's complaint is denied.

All other issues not addressed herein are without merit or moot.

This constitutes the decision and order of the Court.

HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice