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 16th day of September, 2025.

HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

----------X

KRYSTAL DOWNES,

Index No.: 517585/2022

Plaintiff,

-against-

DECISION & ORDER
Mot Seq. No. 2

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

----------X

The following e-filed papers read herein: NYSCEF Doc. Nos.:

Notice of Motion/Affirmation in Support/Exhibits Annexed.....	25 - 41
Memorandum of Law in Support.....	42
Affirmation in Opposition/Exhibits Annexed.....	51-52
Affirmation in Reply and Further Support.....	53

This action arises out of a slip and fall on June 25, 2021. Krystal Downes ("Plaintiff") alleges that she suffered personal injuries after falling down the stairs at her apartment building, owned by New York City Housing Authority ("NYCHA" or "Defendant"), located at 335 Sutter Avenue in Brooklyn, New York. Plaintiff avers that she stepped onto a crack in a step, causing her to fall forward and slam her head and neck on the platform below. It is undisputed that Plaintiff fell and was injured.

Defendant moves for an order, pursuant to CPLR § 3212, dismissing Plaintiff's complaint on the grounds that: (1) the condition complained of by Plaintiff is trivial and non-actionable, (2) Plaintiff cannot make out a prima facie case against NYCHA due to contradictions between the testimonies at her deposition and her 50h hearing and (3) NYCHA did not create or have actual or constructive notice of the complained of condition (Mot. Seq. No. 2).

In its Memorandum of Law, Defendant contends that the crack alleged by Plaintiff to have caused her injuries was a trivial defect which, as a matter of law, could not have caused the accident. Defendant cites to photographic evidence and an affidavit from expert Jeffrey J. Schwalje, a professional engineer. Mr. Schwalje measured the crack to be 0.75 inches in length and 0.5 inches in width. After examination of the stairwell, he determined that it was properly maintained, that there was enough space for Plaintiff to safely plant her foot, and that "the small chip in the second tread is not a safety hazard and would not cause a person to trip, slip or otherwise lose their balance" (NYSCEF Doc. 26, ¶ 8). Moreover, Defendant notes that the crack was mostly on the nosing of the step where one would not typically place their foot. Defendant argues that because the defect was trivial and did not possess any of the characteristics of a trap or nuisance, it is entitled to summary judgement as a matter of law. In further support, Defendant cites to *Grosskopf v. 8320 Parkway Towers Corp.* (88 AD3d 765 [2d Dept 2011]). In that case, the Second Department held that "a chip measuring less than two inches wide, located almost entirely on the nosing of the second to last step from the bottom, and not on the walking surface" was not actionable (*Grosskopf*, 88 AD3d at 766). Defendant emphasizes that the defect in the instant case is smaller than the one in *Grosskopf* and argues it must likewise be deemed unactionable.

In opposition, Plaintiff argues that NYCHA failed to make a prime facie case that the crack in the stairway was not inherently dangerous. Plaintiff argues that the defect was located where someone would step and that there is no requirement that a defect be of a certain size to be considered actionable. Furthermore, Plaintiff remarks that she was carrying 10 bags of groceries and a stroller up multiple flights of stairs due to dysfunctional elevators. She claims these circumstances increased the danger of the defect. Plaintiff also relies on *Hutchinson v. Sheridan Hill House Corp.* (26 NY3d 66 [2015]), which decided three cases. In one of those cases, the Court of Appeals found that an issue of fact as to whether a chip on the nosing of a step measuring 3.25 inches wide and .5 inches deep was trivial. Plaintiff urges the Court to consider the parallels between *Hutchinson* and the instant case and deny summary judgment. Plaintiff also submits an affidavit from her expert Harold Krongelb, a professional engineer. Mr. Krongelb opined that the 0.75 inch by 0.5 inch depression in a step could cause a pedestrian's foot to rotate forward suddenly, causing a fall. In this specific instance, he concluded that the "depression was hazardous, not trivial, and a substantial factor in the fall and should have been repaired" (NYSCEF Doc. 26, ¶ 8). Plaintiff argues that Defendant did not meet its prima facie burden showing the defect was

trivial. Further, Plaintiff argues that even if Defendant did establish its prima facie case, conflicting expert affidavits raise issues of fact regarding triviality.

In its reply affirmation, Defendant argues that Plaintiff's reliance on *Hutchinson* is misplaced. Defendant contends that the defect in that case was substantially larger and that the plaintiff's contentions in that case were supported by an architectural monograph explaining the risk of broken tread, unlike in the instant case. Defendant further emphasizes that the defects comparable in size and location to the one in the instant case have consistently been deemed trivial. Defendant also disputes that Mr. Krongelb's affidavit raises any issue of fact. It argues that Krongelb's reasoning about how stepping on the crack could destabilize the foot is based on "speculative biomechanical theories of instability," rather than objective standards. (NYSCEF Doc. 53, ¶ 9).

The Court notes that "summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable" (*Elzer v Nassau County*, 111 AD2d 212, [2d Dept 1985]; *Steven v Parker*, 99 AD2d 649, [2d Dept 1984]; *Galeta v New York News, Inc.*, 95 AD2d 325 [1st Dept 1983]).

The Court will first address Defendant's argument that the alleged defect was trivial. "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 [2d Dept 2024] [internal quotation marks and citations omitted]). "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]). When making a motion to dismiss on the grounds that an alleged defect is trivial the defendant has the burden of "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*, 26 NY3d at 79).

Here, through the photographs and its expert report, Defendant has met its prima facie burden of establishing that the alleged defect was trivial. The size of the subject defect was small and comparable to cracks and chips in stairways or steps deemed trivial by other courts (*see Guerriero v Jand*, 57 AD3d 365, 366 [1st Dept 2008] [alleged defect that measured 6 inches long

and 1/64th of an inch wide was trivial]; *Gillis v Herzog Supply Co., Inc.*, 121 AD3d 1334, 1336 [3d Dept 2014] [chip in edge of curb measuring 5 ½ inches wide and .5 inch deep was trivial]).

However, Plaintiff provided competing expert testimony which determined that the crack was a substantial factor in Plaintiff's fall. Despite Defendant's contention, Mr. Krongelb's affidavit contained reasoning to support his determination. It was not "speculative, conclusory, [or] unsupported by any evidence in the record" (*Grosskopf*, 88 AD3d at 766, citing *Micciola v Sacchi*, 36 AD3d 869 [2d Dept 2007]). Mr. Krongelb cited to relevant building code which requires uniform treads, explained the forces that would act on the foot of a pedestrian who stepped on the crack, and provided a diagram depicting those forces. Since the parties have presented conflicting expert opinions, issues of fact warrant the denial of Defendant's motion (*see Poliziani v. Culinary Inst. of Am.*, 167 AD3d 790 [2d Dept 2018]).

The Court next addresses Defendant's argument that the complaint must be dismissed because of contradictions in Plaintiff's testimonies. Defendant asserts that Plaintiff identified one specific defect during the 50h hearing and another defect located on a different step during her deposition. Defendant argues that Plaintiff's inability to consistently identify the alleged defect would make any cause of action stemming from it speculative. In opposition, Plaintiff concedes she "may not have been the most specific person in describing what happened in the broadest sense" (NYSCEF Doc. 51, ¶ 16). However, Plaintiff assert that she has remained consistent regarding "how and why" her accident took place (*id.*). That is, Plaintiff has always maintained that her left foot struck a crack in the steps, of about 1 inch by 1.5 inches, going down the stairwell with nothing in her hands in the process of transporting groceries. Plaintiff argues that any alleged inconsistencies between statements at the 50h hearing and those at her deposition are not significant enough to prevent her from establishing a case. In reply, Defendant asserts that the ability to consistently identify the correct defect is essential to Plaintiff's case and Plaintiff's inability to do so entitles Defendant to summary judgment. In addition, Defendant claims that Plaintiff failed to address why she identified two different defects, one in her 50h hearing and another at the deposition.

In a premises liability case, "[a] defendant can make its prima facie showing of entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation" (*Barretta v Michaels Stores, Inc.*, 230 AD3d 1208, 1209 [2d Dept 2024], citing *Alvarez v Staten Is. R.T. Operating Auth.*, 225 AD3d 830, 830-831 [2d Dept

2024] [internal quotation marks omitted]). Nonetheless, "[i]t is enough to avoid summary judgment that he was able to identify the site of his fall, and his expert was subsequently able to identify defective conditions at that spot" (*Rodriguez v Leggett Holdings, LLC*, 96 AD3d 555, 555 [1st Dept 2012]). "On a motion for summary judgment the court must not weigh the credibility of witnesses unless it clearly appears that the issues are feigned and not genuine" (*6243 Jericho Realty Corp. v AutoZone, Inc.*, 27 AD3d 447, 449 [2d Dept 2006]).

Here, Plaintiff saw the defect after the accident and has since identified it in photographs. While there appeared to have been some confusion as to the precise location of the alleged defect, its ultimate identification by Plaintiff, which is supported by her own testimony and expert opinion, does not rise to the level of speculation. These facts do not rise to the level of speculation. Differences in how Plaintiff recounted the story at different times amount to credibility issues that must be determined by a jury.

The Court next turns to Defendant's argument that it did not have notice of the defect. In support, Defendant submits the deposition transcript of the building supervisor, James McFaddin, and Mr. McFaddin testified that prior to June 25, 2021, he did not receive any complaints regarding the subject staircase. Mr. McFaddin testified that he visits the building daily and conducts formal inspections on a monthly basis. Defendant also submits Mr. McFaddin's log report from his inspection the day before the accident. The report does not note any defect. In addition, Defendant argues that Plaintiff testified that she had never seen the crack prior to her accident or made any complaints to NYCHA about the condition of the steps.

In opposition, Plaintiff argues that a triable issue of fact exists as to whether Defendant had constructive notice. According to Plaintiff, a "jury could infer from plaintiff's photograph . . . that the condition existed for a sufficient length of time for [Defendant] to have discovered it and had time to repair it" (NYSCEF Doc No. 51, ¶ 22).

In reply, Defendant contends that photographs taken months after the accident do not establish how long the condition existed prior to the fall. Moreover, Defendant argues that the mere existence of chip cannot create an inference of constructive notice.

A defendant has constructive notice of a defect if it is visible and apparent and existed before the accident for a sufficient length of time to allow the defendant to discover and remedy the defect" (*Gordon v Am. Museum of Nat. Hist.*, 67 NY2d 836, 837 [1986]; *Rubin v Sivan Merrick, LLC*, 235 AD3d 789, 791 [2d Dept 2025]). "[A] jury could infer from the irregularity, width, depth

and appearance of the defect…exhibited in the photographs that the condition must have come into existence over such a length of time that knowledge of such condition should have been acquired by the defendant in the exercise of reasonable care." (*Karten v New York,* 109 AD2d 126, 137 [1st Dept 1985]). "Photographs may be used to prove constructive notice if they were taken close in time to the subject accident and if there is testimony that the conditions depicted in the photographs are substantially the same as those that existed on the day of the accident" (*Gennaro v Cord Meyer Dev. Co. & LLC*, 57 AD3d 725, 725 [2d Dept 2008]).

Defendant's reliance on *Muniz v. NY City Tr. Auth.* (30 AD3d 388 [2d Dept 2006]) is unavailing. In *Muniz*, the court found that 12-day-old photographs were not sufficient to allow a jury to determine the existence of constructive notice on the day of the incident. There, the alleged defect was a slab of concrete that was "clearly broken rather than worn away" (*Muniz*, 30 AD3d at 389; *cf. Taylor v NY City Tr. Auth.*, 63 AD2d 630 [1st Dept 1978], *affd* 48 NY2d 903 [1979] [photographs of defect on a subway step "taken about one month after the accident clearly show that the condition did not develop overnight"]). Here, the nature of the defect is not so apparent. Three months is not an excessive amount of time between the date of the incident and the first known picture of the defect, especially in consideration of Plaintiff's testimony that the condition was substantially the same on the day of the accident. Accordingly, the issue of whether Defendant had constructive notice must be left for the jury to decide.

Accordingly, it is hereby

ORDERED, Defendant's motion (Mot. Seq. No. 2) for summary judgment 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