

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS Part 19

Justice

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DELORES BECK,

Plaintiff,

-against-

Index No: 15804/07
Motion Date: 10/8/08
Motion Cal. No: 6
Motion Seq. No: 4

THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY AND DELTA AIR LINES, INC.,

Defendants.

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The following papers numbered 1 to 17 read on this motion by defendant Delta Air Lines, Inc., for an order, pursuant to CPLR § 3212, dismissing the action against it on the grounds that plaintiff does not know what, if anything, caused her to fall, that there is no proof that Delta Airlines caused plaintiff to fall, and that any defects in the area of plaintiff's fall were trivial.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits-Memorandum of Law.....	1 - 7
Affidavits in Opposition-Exhibits -Memorandum of Law.....	8 - 13
Reply Affirmation -Memorandum of Law.....	14 - 17

Upon the foregoing papers, it is hereby ordered that the motion is disposed of as follows:

This is an action commenced by plaintiff Delores Beck ("plaintiff") against defendants Port Authority of New York and New Jersey ("Port Authority") and Delta Air Lines, Inc. ("Delta") to recover damages for personal injuries allegedly sustained as a result of a trip and fall on November 28, 2006, on a roadway leading from parking lot 5 to the Delta Air Lines Terminal at La Guardia Airport.¹ Delta now moves for summary judgment dismissing the complaint insofar as asserted against it on the grounds that plaintiff does not know what, if anything, caused her to fall, that there

¹By decision and order of this Court dated September 12, 2008, defendants' motion for summary judgment dismissing the complaint as to the Port Authority was granted and the complaint was dismissed as to it.

is no proof that Delta Airlines caused plaintiff to fall, and that any defects in the area of plaintiff's fall were trivial.

Summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, *supra*.

“A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (citations omitted).” Gregg v. Key Food Supermarket, 50 A.D.3d 1093 (2nd Dept. 2008); Sloane v. Costco Wholesale Corp., 49 A.D.3d 522 (2nd Dept. 2008); Frazier v. City of New York, 47 A.D.3d 757 (2nd Dept. 2008); Ulu v. ITT Sheraton Corp., 27 A.D.3d 554 (2nd Dept. 2006); White v. L & M Corporate, Inc., 24 A.D.3d 659 (2nd Dept. 2005); Beltran v. Metropolitan Life Ins. Co., 259 A.D.2d 456 (2nd Dept. 1999). “Where there is no indication in the record that the defendant created the alleged dangerous condition or had actual notice of it, the plaintiff must proceed on the theory of constructive notice.” Rabadi v. Atlantic & Pacific Tea Co., Inc., 268 A.D.2d 418, 419 (2nd Dept. 2000); see, also, Ramos v. Castega-20 Vesey Street, LLC, 25 A.D.3d 773 (2nd Dept. 2006); Klor v. American Airlines, 305 A.D.2d 550 (2nd Dept. 2003); O'Callaghan v. Great Atlantic & Pacific Tea Co., 294 A.D.2d 416 (2nd Dept. 2002). “To constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time prior to the accident to permit the defendant's to discover and remedy it.” Green v. City of New York, 34 A.D.3d 528, 529 (2nd Dept. 2006); see, Stone v. Long Island Jewish Medical Center, Inc., 302 A.D.2d 376 (2nd Dept. 2003); Blaszczyk v. Riccio, 266 A.D.2d 491 (2nd Dept. 1999); Russo v. Evenco Development Corp., 256 A.D.2d 566 (2nd Dept. 1998); Dima v. Breslin Realty, Inc., 240 A.D.2d 359 (2nd Dept. 1997); Kraemer v. K-Mart Corp., 226 A.D.2d 590 (2nd Dept. 1996). Defendant's burden, however, cannot be satisfied merely by pointing to gaps in the plaintiff's case. See, Gregg v. Key Food Supermarket, *supra*; Stroppel v. Wal-Mart Stores, Inc., 53 A.D.3d 651 (2nd Dept. 2008); DeFalco v. BJ's Wholesale Club, Inc., 38 A.D.3d 824, 825 (2nd Dept. 2007). “Only after the defendant has satisfied its threshold burden will the court examine the sufficiency of the plaintiff's opposition (citations omitted).” Doherty v. Smithtown Cent. School Dist., 49 A.D.3d 801 (2nd Dept. 2008); see, also, Gregg v. Key Food Supermarket, *supra*; Seabury v. County of Dutchess, 38 A.D.3d 752 (2nd Dept. 2007); Yioves v. T.J. Maxx, Inc., 29 A.D.3d 572 (2nd Dept. 2006).

Delta sought to meet its burden of establishing that it neither affirmatively created the defective condition that caused plaintiff's fall, or had actual or constructive notice of the condition and a reasonable time to correct it or warn of its existence [see, Todd v. City of New York, 19 A.D.3d 587 (2nd Dept. 2005), citing, Mercer v. City of New York, 88 N.Y.2d 955, 956 (1996)], by submitting affidavits of its employees and deposition testimony. The most telling admission was contained in the affidavit of Anthony Cairo, Delta's employee who oversaw the facilities and concessions, in which he stated:

The general area in which plaintiff allegedly fell is within the area of Delta's leasehold. The area includes a gradual incline in the roadway and, further on, a crack in the asphalt. The crack was about a quarter of an inch wide. I know of no complaints regarding the incline or the crack. If the incline or the crack had needed to be repaired, Delta would have put it out to bid. There is lighting everywhere in the area.

This statement established that Delta had actual notice of a defect, notwithstanding plaintiff's equivocation as to whether she tripped on raised "cement" or "asphalt" or a "crack" in the inclination. Although a plaintiff's inability to identify the cause of his or her fall may be fatal to his or her cause of action [Guterrez v. Iannacci, 43 A.D.3d 868 (2nd Dept. 2008); Jackson v. Fenton, 38 A.D.3d 495 (2nd Dept. 2007); See, Bottiglieri v. Wheeler, 38 A.D.3d 818 (2nd Dept. 2007); Rodriguez v. Cafaro, 17 A.D.3d 658 (2nd Dept. 2005); Grant v. L & J G Stickley, Inc., 20 A.D.3d 506 (2nd Dept. 2005)], it does not absolve a defendant's burden on a motion for summary judgment of initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it or that the pathway was not in a defective condition. See, Gestetner v. Teitelbaum, 52 A.D.3d 778 (2nd Dept. 2008); Gregg v. Key Food Supermarket, 50 A.D.3d 1093 (2nd Dept. 2008); Sloane v. Costco Wholesale Corp., 49 A.D.3d 522 (2nd Dept. 2008); Frazier v. City of New York, 47 A.D.3d 757 (2nd Dept. 2008); Ulu v. ITT Sheraton Corp., 27 A.D.3d 554 (2nd Dept. 2006); White v. L & M Corporate, Inc., 24 A.D.3d 659 (2nd Dept. 2005); Beltran v. Metropolitan Life Ins. Co., 259 A.D.2d 456 (2nd Dept. 1999). Here, the deposition testimony of plaintiff, as well as that of Anthony Cairo, together with the photographs of the area where plaintiff fell, not only sufficiently identify the defect that allegedly caused plaintiff's accident, but conclusively establish that Delta had notice of the defective condition. Thus, those branches of the motion seeking dismissal based upon lack of actual and constructive notice of the allegedly defective condition must be denied. Consequently, to prevail on this summary judgment motion, Delta must establish, as asserted, that the defect in the area of plaintiff's fall was trivial.

It is recognized that a property owner may not be held liable for "trivial defects, not constituting a trap or a nuisance over which a pedestrian might merely stumble stub his or her toes or trip." Ambroise v New York City Tr. Auth., 33 A.D.3d 573 (2nd Dept. 2006); see, Taussig v Luxury Cars of Smithtown, 31 A.D.3d 533 (2nd Dept. 2006). See, also, Ayala v. Gutin, 49 A.D.3d 677 (2nd Dept., 2008); Pennella v. 277 Bronx River Road Owners, Inc., 309 A.D.2d 793 (2nd Dept. 2003). Thus, notwithstanding the duty to maintain its premises in a reasonably safe manner, a

property owner “has no duty to protect or warn against an open and obvious condition, which, as a matter of law, is not inherently dangerous (citations omitted).” Gagliardi v. Walmart Stores, Inc., 52 A.D.3d 777 (2nd Dept. 2008); Rao-Boyle v. Alperstein, 44 A.D.3d 1022 (2nd Dept. 2007); Errett v Great Neck Park Dist., 40 A.D.3d 1029 (2nd Dept. 2007); Morgan v. TJX Companies, Inc., 38 A.D.3d 508 (2nd Dept. 2007); Sclafani v. Washington Mut., 36 A.D.3d 682 (2nd Dept. 2007). Ramsey v. Mt. Vernon Board. of Education, 32 A.D.3d 1007 (2nd Dept. 2006); Zimkind v Costco Wholesale Corp., 12 A.D.3d 593 (2nd Dept. 2004); Cupo v. Karfunkel, 1 A.D.3d 48 (2nd Dept. 2003). “Of course, in some instances, the trivial nature of the defect may loom larger than another element. Not every injury allegedly caused by an elevated brick or slab need be submitted to a jury (citations omitted). However, a mechanistic disposition of case based exclusively on the dimension of the sidewalk defect is unacceptable.” Trincere v. County of Suffolk, 90 N.Y.2d 976, 977-978 (1997); see also, Ayala v. Gutin, 49 A.D.3d 677 (2nd Dept. 2008); Outlaw v. Citibank, N.A., 35 A.D.3d 564 (2nd Dept. 2006); Taussig v. Luxury Cars of Smithtown, Inc., 31 A.D.3d 533 (2nd Dept. 2006). There is no “‘minimal dimension test’ or per se rule that a defect must be of a certain minimum height or depth in order to be actionable (Trincere v. County of Suffolk, 90 N.Y.2d 976, 977, 665 N.Y.S.2d 615, 688 N.E.2d 489).” Boxer v. Metropolitan Transp. Authority, 52 A.D.3d 447 (2nd Dept. 2008); Hahn v. Wilhelm, 54 A.D.3d 896 (2nd Dept. 2008). “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’ (Trincere v. County of Suffolk, 90 N.Y.2d 976, 978, 665 N.Y.S.2d 615, 688 N.E.2d 489; see Taussig v. Luxury Cars of Smithtown, Inc., 31 A.D.3d 533, 818 N.Y.S.2d 593).” Ayala v. Gutin, 49 A.D.3d 677 (2nd Dept. 2008); Portanova v. Kantlis, 39 A.D.3d 731 (2nd Dept. 2007); Zalkin v. City of New York, 36 A.D.3d 801, 801-802 (2nd Dept. 2007); Mishaan v. Tobias, 32 A.D.3d 1000 (2nd Dept. 2006). see, Outlaw v. Citibank, N.A., 35 A.D.3d 564 (2nd Dept. 2006); Velez v Inst. of Design & Constr., 11 A.D.3d 453 (2nd Dept. 2004).

Here, plaintiff, a seventy one year old musician and tennis player, allegedly was injured when she tripped and fell due to a “crack” or “raised crack” as she was walking, with luggage in tow, on the roadway leading from parking lot 5 to the Delta Air Lines Terminal at LaGuardia Airport. In support of its claim that the defect that caused plaintiff to fall was trivial, Delta offered the testimony and affidavit of Anthony Cairo to the effect that the crack was about a quarter of an inch wide and had been there for years. Also submitted on this issue was the deposition testimony of Officer Christine Discolo, the Port Authority police officer who attended to plaintiff after her fall, who described the area where plaintiff fell, as follows:

Just a minor elevated bump, not even – I don’t know how many inches, and then a little further down was maybe like a crack in the pavement, maybe about two inches, two inches wide and deep, that was after the bump, so. . .

Also submitted were photographs of the area where plaintiff fell. Considering the appearance of the defect, which did not have any apparent characteristics of a trap or snare, and the other relevant circumstances of the accident, Delta’s submissions were sufficient to make a prima facie showing

that the alleged defect was too trivial to be actionable. See, Ambroise v. New York City Transit Authority, 33 A.D.3d 573 (2nd Dept. 2006).

Once the moving party makes a prima facie showing of entitlement to summary judgment in its favor, it is incumbent upon the opposing party to come forth with evidentiary proof in admissible form sufficient to demonstrate the existence of triable issues of fact. Chalasanani v. State Bank of India, New York Branch, 283 A.D.2d 601 (2nd Dept. 2001); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); Pagan v. Advance Storage and Moving, 287 A.D.2d 605 (2nd Dept. 2001); Gardner v. New York City Transit Authority, 282 A.D.2d 430 (2nd Dept. 2001). In opposition, plaintiff argues that the discrepancy as to the size of the crack raised by the conflicting testimony of Anthony Cairo and Officer Discolo raises an issue of fact as to whether the defect was trivial. This argument has merit.

There is a plethora of decisions denying summary judgment because of the courts' finding of a question of fact as to whether the defect was trivial. See, e.g., Boxer v. Metropolitan Transp. Authority, 52 A.D.3d 447 (2nd Dept. 2008)[The evidence submitted regarding the circumstances of the accident, including the deposition testimony, raises issues of fact as to whether the alleged defect was too trivial to be actionable]; Hahn v. Wilhelm, 54 A.D.3d 896 (2nd Dept. 2008)[the deposition testimony of the parties, and the photographs identified by the plaintiff and the president of Xavier's Restaurant as depicting the defect at the time of the accident, demonstrated that a triable issue of fact exists as to whether the defect was trivial]; Portanova v. Kantlis, 39 A.D.3d 731 (2nd Dept. 2007)[The photographs submitted, together with the other evidence regarding the circumstances of the accident, raise questions of fact as to whether the alleged defect was too trivial to be actionable, and whether it constituted a trap, snare, or nuisance]; Mishaan v. Tobias, 32 A.D.3d 1000 (2nd Dept. 2006)[“Those photographs, together with the other evidence presented, showed the existence of a factual question as to whether the alleged defect was trivial”]; Adsmond v. City of Poughkeepsie, 283 A.D.2d 598 (2nd Dept. 2001)[“Review of the photographs of the crack and consideration of all relevant factors and surrounding circumstances (citations omitted) demonstrate that the issues of whether the crack constituted a dangerous condition and whether the injured plaintiff's own conduct in failing to avoid an open and obvious defect are matters for jury resolution.”].

Similarly, there is a plethora of decisions granting summary judgment because the courts found the defect to be trivial as a matter of law. See, e.g., Zalkin v. City of New York, 36 A.D.3d 801 (2nd Dept. 2007)[“the 3/4 of an inch difference in the height elevation between the edge of the concrete slab which had caused the plaintiff to fall and the adjacent concrete slab was too trivial to be actionable”]; Hawkins v. Carter Community Housing Development Fund Corp., 40 A.D.3d 812 (2nd Dept. 2007)[“defendants established their entitlement to judgment as a matter of law by demonstrating that the alleged defect did not, by reason of its location, adverse weather, or lighting conditions, or other relevant circumstances, have any of the characteristics of a trap or snare, and was too trivial to be actionable”]; Ambroise v. New York City Transit Authority, 33 A.D.3d 573 (2nd Dept. 2006)[“Considering the appearance of the defect, which did not have any of the characteristics of a trap or snare, and the other relevant circumstances of the accident, the defendant's submissions were sufficient to make a prima facie showing that the alleged defect was too trivial to be

actionable”]. What is clear is that there is no bright line for determining whether a defect is trivial. See, Felix-Cortes v. City of New York, 54 A.D.3d 358 (2nd Dept. 2008)[“Upon consideration of the photographic exhibits which were admitted into evidence at the trial, as well as the time, place, and circumstances of the accident (citations omitted), there exists a valid line of reasoning and permissible inferences which could have led the jury to conclude that the defect which caused the plaintiff’s accident was not trivial in nature.”].

Here, a scrutiny of the photographs depicting the area of plaintiff’s fall reveal the cracks in the roadway between the terminal and the parking lot. The “raised crack” or “bump,” however, cannot be discerned. Under such circumstances, this Court cannot find as a matter of law that the defect was too trivial to be actionable. “Furthermore, the fact that the defect may have been open and obvious did not negate the defendant’s duty to maintain its premises in a reasonably safe condition, but rather, may raise an issue of fact as to the plaintiff’s comparative negligence (citations omitted).” Fairchild v. J. Crew Group, Inc., 21 A.D.3d 523 (2nd Dept. 2005); Ruiz v. Hart Elm Corp., 44 A.D.3d 842 (2nd Dept. 2007). Accordingly, although Delta’s showing in support of the motion for summary judgment, which included photographs of the accident site, was sufficient to demonstrate as a matter of law that the allegedly defective condition was too trivial to be actionable [(see, Berry v. Rocking Horse Ranch Corp., __ A.D.3d __, __ N.Y.S.2d __, 2008 WL 5006470 (2nd Dept. 2008); Herring v. Lefrak Organization, 32 A.D.3d 900 (2nd Dept. 2006)], plaintiff has successfully raised a triable issue of fact in opposition to Delta’s prima facie showing, precluding summary disposition of this matter. Thus, that branch of the motion seeking dismissal based upon the trivial nature of the defective condition is likewise denied, and the motion by defendant Delta Air Lines, Inc., for summary judgment dismissing the complaint is denied in its entirety.

Dated: December 12, 2008

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J.S.C.