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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA Justice

PART 19

Index Number : 113369/2010
RACHELSON, SUSAN
vs
MILLER
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

FILED

AUG 06 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/31/12

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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SUSAN RACHELSON,

Plaintiff,

Index No.: 113369/2010
Submission Date: 5/16/2012

-against-

MILLER & MILLER REALTY CO. LLC,

DECISION AND ORDER

Defendant.

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For Defendant:
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Papers considered in review of this motion for Summary Judgment:

Notice of Motion 1
Mem of Law in Support
of Motion 2
Mem of Law in Opposition. 3
Aff's in Opposition. 4
Reply in Further Support
of Motion. 5
Reply Mem of Law 6

HON. SALIANN SCARPULLA, J.:

In this personal injury action, defendant Miller & Miller Realty ("Miller") moves pursuant to CPLR 3212 for summary judgment dismissing the plaintiff's complaint.

Plaintiff Susan Rachelson ("Rachelson") is a resident of 145 Seaman Avenue in New York City, a building owned by Miller. Rachelson alleges that on July 25, 2010, while traveling on the sidewalk adjacent to the building, she tripped and fell on a defect in the sidewalk. As a result, she alleges that she was violently thrown to the ground, sustaining severe injuries.

[* 3]

In here complaint, Rachelson alleges that Miller was negligent in its ownership, operation, management, maintenance, control, and repair of the sidewalk. Specifically, Rachelson claims that Miller and its agents had actual and constructive knowledge of the existence of a hazardous condition in the sidewalk and failed to take steps to remedy it such as erecting a barricade or otherwise restricting use of the area.

Miller moves for summary judgment on the ground that the defect that allegedly caused Rachelson's injury is trivial. Miller argues that the height of the defect in relation to the adjacent pavement was less than one inch and there were no other obstructions in the surrounding area that may have contributed to the creations of a dangerous condition.

Further, Miller argues that it did not have actual or constructive notice of the alleged defect. Miller claims that no foot traffic obstructed Rachelson's view of the defect, and that Rachelson was a resident of the premises for over twenty years and never made any complaints about the condition of the sidewalk. Finally, Miller alleges that the building's managing agent, Paul Francis ("Francis") performs weekly inspections of the building and sidewalk and never received any complaints about the condition of the walkway until after Rachelson's fall.

In opposition, Rachelson argues that there is no bright-line depth rule to determine what is an actual defect, as opposed to a trivial defect. Consequently, Rachelson argues that Miller has not conclusively shown that the defect is trivial. On the issue of actual and/or constructive notice, Rachelson contends that Francis' deposition testimony, in which he stated that he did not know about the defect until after Rachelson fell, is

contradicted by an affidavit from Kelly Monaghan ("Monaghan"), dated June 2010. The affidavit describes Monaghan's similar fall more than one month prior to Rachelson's and Monaghan's identification of the same defect to the building super "Raul" who claimed he would notify Francis.

On reply, Miller seeks to preclude Monaghan's affidavit because Rachelson failed to disclose Monaghan's name and address as a witness during initial discovery for this matter. Miller argues that Rachelson has failed to proffer a reasonable excuse for failing to disclose Monaghan as an initial witness.

Discussion

The possessor or owner of real property bears a duty at common law to maintain the property in a reasonably safe condition, and may be liable for injuries caused by a dangerous condition on the property if the owner or possessor created, or had actual or constructive notice of, the hazard. *Trujillo v. Riverbay Corp.*, 153 A.D.2d 793, 794 (1st Dept. 1989). Further, New York Administrative Code §7-210 provides that "it shall be the duty of the owner of real property abutting any sidewalk to maintain the sidewalk in a reasonably safe condition." *Tucker v. City of New York*, 84 A.D.3d 640, 641 (1st Dept. 2011).

Failure to maintain the sidewalk in a reasonably safe condition may include: "negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags..." *Tucker*, 83 A.D.3d at 641. However, "'the owner of a public passageway may not be cast in damages for negligent maintenance by reason of trivial

defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes or trip over a raised projection.'" *Morales v. Riverbay Corp.*, 226 A.D.2d 271, 271 (1st Dept. 1996), *quoting Liebl v. Metro. Jockey Club*, 10 A.D.2d 1006, 1006 (2d Dept.1960).

Trivial Defect

In support of its claim that the defect at issue here is trivial, Miller relies on photographs of the defect to illustrate that its height is less than one-inch. However, "whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury." *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 977 (1997).

The defect here, while approximately three quarters of an inch in height, extends along the entire flagstone at the entrance of the building. There is no requirement that a "hole in a public thoroughfare must be of a particular depth before its existence can give rise to a legal liability." *Wilson v. Jaybro Realty & Dev. Co.*, 289 N.Y. 410, 412 (1943). Miller's argument hinges on the height of the defect however, "a mechanistic disposition of a case based exclusively on the dimension of the sidewalk defect is unacceptable." *Trincere,* 90 N.Y.2d at 978. The length of the defect along the sidewalk, as well as the depth, raises an issue of fact as to whether the defect was trivial.

Actual/Constructive Notice

"A defendant seeking summary judgment dismissing the complaint based upon lack of notice must make a prima facie showing affirmatively establishing the absence of notice as a matter of law." *Carrillo v. PM Realty Group,* 16 A.D.3d 611, 612 (2d Dept. 2005). "In order to hold a landowner liable for a dangerous condition on its premises, a plaintiff must demonstrate that the defendant either created, or had actual or constructive notice of the hazardous condition which precipitated the injury." *Aquino v. Kuczinski, Vila & Associates, P.C.*, 39 A.D.3d 216, 219 (1st Dept. 2007) "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it." *Gordon v. American Museum of Natural History,* 67 N.Y.2d 836, 837 (1986); *see also Piacquadio v. Recine Realty Corp.,* 84 N.Y.2d 967, 969 (1994) (dismissing a "general awareness argument" as legally insufficient to establish constructive notice, and hold that liability attaches only when a landowner has actual or constructive notice of the specific condition at issue).

Miller argues that it had no actual or constructive notice of the alleged defect prior to Rachelson's fall. In contrast, Rachelson argues that Miller had actual and/or constructive notice of the defect because Monaghan states in her affidavit that, a month prior to Rachelson's accident, she tripped and fell on a raised portion of the sidewalk in the exact same area where Rachelson fell. Further, Monaghan also states that she notified

the building super Raul who stated that he was aware of the defect and that he would notify Francis about the condition of the sidewalk.

As a preliminary matter, the trial court typically has sound discretion for the degree of penalty associated with failure to comply with discovery orders. *See Hanson v. City of New York,* 227 A.D. 2d 217, 217 (1st Dept. 1996). Preclusion of an affidavit is an extreme measure, which requires a showing that a party's conduct was "willful and contumacious." *Spitzer v. 2166 Bronx Park E. Corps.,* 284 A.D.2d 177 (1st Dept. 2001). Further, affording the defense an opportunity to depose the witness before trial is an adequate remedy to ensure equal examination in preparation for proceedings. *See Cruz v. City of New York,* 81 A.D.3d 505, 506 (1st Dept. 2011).

The issues addressed in Monaghan's affidavit are directly related to questions of fact regarding actual and constructive notice in opposition to the summary judgment motion. There is no evidence that Rachelson willfully or contumaciously withheld Monaghan's testimony to prejudice Miller and therefore Monaghan's affidavit will not be precluded.

Miller has alleged that Francis did not have notice of the defect until after Rachelson's fall. However, Rachelson has raised a genuine issue of fact as to the existence of constructive notice by submitting Monaghan's statement that the defect had existed for over one month and that Miller had a sufficient amount of time to discover and remedy the condition. *See Negri v. Stop & Shop,* 65 N.Y. 2d 625, 626 (1985) (Prima facie

negligence claim established by showing of constructive notice fifty minutes prior to accident occurring).[1]

In accordance with the foregoing, it is

ORDERED that defendants Miller and Miller Realty's motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that should Miller is granted leave to take a deposition of Kelly Monaghan, Miller must notice the deposition within thirty (30) days of notice of entry of this order, and the deposition shall take place no later than twenty (20) days after the date of the notice.

This constitutes the decision and order of the Court.

Dated: New York, New York
July 30, 2012

ENTER:

Saliann Scarpulla, J.S.C.

[1] To ameliorate any prejudice from Miller's late disclosure of Monaghan's statement, Miller is granted post-note of issue leave to depose Monaghan before the trial of this action.