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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Joan A. Madden **PART** 11
Justice

Index Number : 101993/2011
DIXON, PATRICIA
vs.
CORNER TABLE RESTAURANTS
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

FILED

DEC 19 2012

COUNTY CLERK'S OFFICE

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

Dated: December 17, 2012

_____, **J.S.C.**

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☒ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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PATRICIA DIXON,

101993/11

Index No.: ~~106449/2009~~

Plaintiff,

-against-

CORNER TABLE RESTAURANT, LLC, LH HOSPITALITY LLC and ROCINANTE CORP., each individually and d/b/a JANE,

Defendants.

----------X

JOAN A. MADDEN, J.:

In this personal injury action, defendants Corner Table Restaurant, LLC and LH Hospitality, LLC (together "the moving defendants") move for summary judgment dismissing the complaint against them. Plaintiff and defendant Rocinante Corp. ("Rocinante") each oppose the motion, which is denied for the reasons below.

BACKGROUND

This is a personal injury action arising out of a "trip and fall" incident on December 22, 2010, near 100 West Houston Street, New York, NY outside the Jane Restaurant (hereafter "the Restaurant"). Defendants Corner Table Restaurants and LH Hospitality respectively operate and manage the Restaurant. Defendant Rocinante owns the building where the Restaurant is located. The incident occurred on an exterior metal platform in front of the Restaurant that meets the sidewalk in an area in front of the entrance door. Plaintiff testified that she stepped into a hole on the platform and fell on her nose. She also testified that the area where she fell was dark due to a shadow created by he Restaurant's awning.

The moving defendants argue that they are entitled to summary judgment as the

Restaurant does not use the platform which is part of the public sidewalk and therefore the restaurant is not responsible for it. The moving defendants also argue that the platform is not part of their demised premises and that they leased only the ground floor and the basement of the Restaurant. The moving defendants point out that its lease agreement makes Rocinante responsible for public portions of the building both interior and exterior. The moving defendants further argue that they are entitled to summary judgment as they did not create or have constructive or actual notice of any dangerous condition on the platform, and there was no hazardous condition as the height differential constituting the alleged defect is insufficient.

Plaintiff and Rocinante each oppose the motion. In support of its opposition, Rocinante points to evidence that Restaurant used the platform on a daily basis providing a means to enter and exit the restaurant, that the Restaurant put benches on the platform which were present on accident date, and that Restaurant employees cleaned the platform. Rocinante also points to plaintiff's testimony that there was a shadow created by the Restaurant awning that made platform dark. Plaintiff also argues that the restaurants use of the platform constituted a special use, and that the lack of lighting, the color of the platform and its proximity to the sidewalk created optical confusion and a hazard.

DISCUSSION

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Wingard v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324

(1986).

"The owner or possessor of a property has a duty to maintain the property in a reasonably safe condition and may be held liable for injuries arising from a dangerous condition on the property if such owner or possessor either created the condition, or has actual or constructive notice of it and a reasonable time within which to remedy it." Freidah v. Hamlet Golf and Country Club, 272 A.D.2d 572, 573 (2nd Dep't 2000); see also O'Connor-Miele v. Barhite & Holzinger, Inc., 234 A.D.2d 106 (1st Dep't 1996).

"Whether a dangerous or defective condition . . . create[s] 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), citing Guerrieri v. Summa, 193 A.D.2d 647 (2d Dept. 1993). However, "trivial defects on a walkway not constituting a trap or nuisance, as a consequence of which a pedestrian might . . . trip," are not actionable. Morales v. Riverbay Corp., 226 A.D.2d 271 (1st Dept. 1996). In determining whether an alleged defect is trivial as a matter of law, the court must examine all the facts presented, including the width, depth, elevation, irregularity and appearance of the alleged defect, along with the time, place and circumstances of the injury, and whether it constitutes a trap or snare. Trincere v. County of Suffolk, 90 N.Y.2d at 977, citing Caldwell v. Vill. of Isl. Park, 304 N.Y. 268 (1952).

"Whether a dangerous or defective condition...creates liability 'depends on the peculiar facts and circumstances of each case and is generally a question for the jury." Trincere v. County of Suffolk, 90 N.Y.2d 976, 977 (1997), citing Guerrieri v. Summa, 193 A.D.2d 647 (2d Dept. 1993). Here, there are issues of fact as to whether the purported lack of lighting, the color of the platform, and its proximity to the sidewalk created optical confusion and a hazard.

Next, although it appears that the platform was not part of the premises leased by the

Restaurant, the Restaurant may be held liable for a defect in the platform under the special use doctrine. "The principle of special use ... imposes an obligation on the abutting landowner (or occupier), where he puts part of a public way to a special use for his own benefit, and the part used is subject to his control, to maintain the part so used in a reasonably safe condition to avoid injury to others." See, Balsam v Delma Engineering Corp., 139 A.D.2d 292, 298, appeal dismissed in part, denied in part, 73 N.Y.2d 783 (1988)(citation omitted); see, also, Kaufman v Silver, 90 N.Y.2d 204, 207 (1997). Here, the Restaurant's use of the platform as a means of entering and exiting the Restaurant and the Restaurant's placement of benches on the platform are sufficient to give rise to a duty based on special use of the platform.

Furthermore, the record presents issues of fact as to whether Dixon fell as a result of a lack of lighting on the platform, a condition arguably created by the Restaurant's awning. Freidah v. Hamlet Golf and Country Club, 272 A.D.2d at 573. Finally, given the location of the alleged defect in front of the Restaurant, factual issues exist as to whether the Restaurant had actual or constructive notice the defect. See generally, Gordon v. American Museum of Natural History, 67 N.Y.2d 836 (1986).

In view of the above, it is

ORDERED that the motion by defendants Corner Table Restaurant, LLC and LH Hospitality, LLC for summary judgment dismissing the complaint against it is denied.

DATED: December , 2012

J.S.C.