SHORT FORM ORDER

INDEX No. 10-928
CAL. No. 11-01553OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 12-15-11
ADJ. DATE 4-12-12
Mot. Seq. # 001 - MD

MARY RUTIGLIANO,

Plaintiff,

- against -

SACHEM CENTRAL SCHOOL DISTRICT,

Defendant.

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Upon the following papers numbered 1 to 22 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 15 - 19 ; Replying Affidavits and supporting papers 20 - 22 ; Other memorandum of law 14 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendant Sachem Central School District for an order granting summary judgment dismissing the complaint is denied.

This action arises out of a personal injury claim by the plaintiff for injuries she allegedly sustained on May 28, 2009 as a result of a trip and fall accident that occurred on a sidewalk located in front of the Samoset Middle School (Samoset), which is a building within the Sachem Central School District (Sachem). In her complaint, the plaintiff alleges that Sachem failed to maintain the sidewalk, causing a dangerous and defective condition to exist, resulting in her injuries.

Sachem now moves for summary judgment dismissing the complaint on the ground that the alleged dangerous condition was a trivial defect that is non actionable as a matter of law. In support of its motion, Sachem submits, among other things, copies of the pleadings, the transcript of the plaintiff's testimony at a municipal hearing, deposition transcripts of the parties, photographs of the area of the sidewalk where the plaintiff fell and the shoes that she was wearing at the time, and the affidavit of a nonparty witness.

The plaintiff testified at a 50-h municipal hearing on October 7, 2009, and she was deposed on March 22, 2011. Her testimony was essentially the same at both proceedings and can be summarized as follows: She arrived at Samoset at approximately 1:30 p.m. to pick up her son, who was in the seventh grade. Her daughter, who was driving, parked in the circular driveway, and she exited the vehicle and walked towards the main entrance of the school. It was a nice day, and as she walked she was looking straight ahead when she suddenly fell. She indicated that her foot "got jammed" on "a piece of wood or a depression of the floor." She did not see what caused her to fall beforehand, but she did see it after her fall. The plaintiff described the cause of her fall to be an "angular crack with wood around it and foliage within it." She identified at least three photographs of the alleged defective condition which were taken by her husband the day after her accident, showing the condition as it was the day before. She also identified a second group of photographs taken by her husband eight days later showing the same area with the foliage removed.[1]

At his deposition, Vincent Clark (Clark) testified that he was employed by Sachem as the chief custodian at Samoset at the time of the plaintiff's accident. He was told about the accident a couple of days later, and he inspected the sidewalk at the front of the school to try to figure out where it had occurred. He stated that he could not identify the location of the accident. Upon being shown the photographs taken by the plaintiff's husband, he testified that he had seen the area on the day of his inspection, and that "it had grass growing" when he saw it. Clark indicated that he inspected the area in front of the school on a daily basis, that he had noticed the broken sidewalk and the grass growing within it before the plaintiff's accident, and that he did not order any repair work to be done: because "it was level, everywhere was level." He stated that the grass he saw had grown in dirt in the area, that the grass was higher than the level of the sidewalk, and that he had the grass removed within a week after the plaintiff's accident. Clark further testified that he knew of no complaints regarding the area where the plaintiff fell, that no one had previously fallen there, and that the area was used by the students on a daily basis to walk to their school buses.

In his affidavit, Louis J. Cozzetto, Jr. (Cozzetto) swears that he is a general adjuster employed by Network Adjusters, Inc., which was retained to investigate the plaintiff's accident on behalf of Sachem. He states that, on November 11, 2009, he inspected the location where the plaintiff allegedly fell. He attaches two photographs to his affidavit which he indicates were taken by him on that date and show the depth of the alleged defective condition "at two different points." Cozzetto further swears that he "measured the depth of the condition at a number of different points. At the 3 different corners of the triangular shaped area, the height discrepancy was no more than 1/4 to 3/8 of an inch. For all portions of the triangular shaped area, there was no height discrepancy greater than 3/8 of an inch."

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth***

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[1] This second group of photographs, marked as "Exhibit G" at the plaintiff's deposition on March 22, 2011, was not submitted by Sachem, but is included in the plaintiff's opposition to the motion.

v Barreto, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

Whether a particular height difference between sidewalk slabs constitutes a trivial defect is generally a question of fact and depends on the circumstances of each case, including the depth, width, elevation, irregularity and appearance of the defect, as well as the time, place and circumstances of the injury (*see* ***Trincere v County of Suffolk***, 90 NY2d 976, 665 NYS2d 615 [1997]; ***Zalkin v City of New York***, 36 AD3d 801, 828 NYS2d 485 [2d Dept 2007]; ***Taussig v Luxury Cars of Smithtown Inc.***, 31 AD3d 533, 818 NYS2d 593 [2d Dept 2006]). While a gradual shallow depression is generally regarded as trivial, the presence of an edge which poses a tripping hazard may render an otherwise minor elevation a non-trivial defect (*see* ***Ain v Three School St.***, 8 AD3d 413, 778 NYS2d 308 [2d Dept 2008]; ***McKenzie v Crossroads Arena,*** 291 AD3d 860, 738 NYS2d 779 [4th Dept 2002]; ***Argeno v Metropolitan Transp. Auth.***, 277 AD2d 165, 716 NYS2d 657 [1st Dept 2000]; ***Niv v Bernard***, 257 AD2d 417, 638 NYS2d 237 [1st Dept 1995]). Moreover, the issue of whether a height differential between two surfaces of a sidewalk constitutes a dangerous condition is usually a question of fact for the jury unless defendant's proof establishes, as a matter or law, that the defect is too trivial to be actionable and possesses none of the characteristics of a trap or snare (*see* ***Trincere v County of Suffolk***, *supra*; ***Zalkin v City of New York***, *supra*; ***Joseph v Villages at Huntington Home Owner's Assn., Inc.***, 39 AD3d 481, 835 NYS2d 231 [2d Dept 2007]).

Here, Sachem failed to establish that the sidewalk depression and the wood within it constituted a trivial defect and was not actionable as a matter of law (*see* ***Ain v Three School St.***, *supra*; ***Herring v Lefrak Org.***, 32 AD3d 900, 821 NYS2d 624 [2d Dept 2006]; ***Argeno v Metropolitan Transp. Auth.***, *supra*; ***McKenzie v Crossroads Arena***, *supra*). Although the measurements taken by Cozzetto indicate a depth of no more than 3/8 of an inch, that does not establish as a matter of law that the area was a trivial defect. "[T]here 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 NY2d at 977; *see* ***Vani v County of Nassau***, 77 AD3d 819, 909 NYS2d 742 [2d Dept 2010]). In addition, a condition that is generally apparent "to a person making reasonable use of their senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" (***Mazzarelli v 54 Plus Realty Corp.***, 54 AD3d 1008, 1009, 864 NYS2d 554 [2d Dept 2008]; *see* ***Clark v AMF Bowling Centers, Inc.***, 83 AD3d 761, 921 NYS2d 273 [2d Dept 2011]). The plaintiff's testimony that the condition was covered with "foliage," and Clark's testimony supporting that allegation, raises an issue of fact as to whether the defect posed a tripping hazard or constituted a trap or snare (*see* ***Gerber v W. Hempstead Convenience, Inc.***, 303 AD2d 212, 756 NYS2d 553 [1st Dept 2003]; ***Argeno v Metropolitan Transp. Auth.***, *supra*; ***McKenzie v Crossroads Arena***, *supra*; ***Niv v Bernard***, *supra*). In addition, Sachem's contention that the shoes that the plaintiff was wearing on the day of her accident "could have easily contributed to plaintiff's fall," is mere speculation which cannot support a grant of summary judgment herein. The same is true for the contention that the use of the area by students to get to their buses establishes that the defect was trivial as a matter of law.

Indeed, viewing the evidence in a light most favorable to plaintiff and resolving all reasonable inferences in her favor, the photographs of the sidewalk and Clark's testimony raises an issue of fact as the existence of constructive notice of the alleged defect (*see* ***Batton v Elghanayan***, 43 NY2d 898, 403 NYS2d 717 [1978]; ***Taylor v New York City Tr. Auth.***, 48 NY2d 903, 424 NYS2d 888 [1979]; ***Calderon v Noonan Towers Co., LLC***, 33 AD3d 495, 823 NYS2d 135 [1st Dept 2006]; ***Brandes v Incorporated Vil. of Lindenhurst***, 8 AD3d 315, 777 NYS2d 720 [2d Dept 2004]; ***De Gruccio v 863 Jericho Turnpike. Corp.***, 1 AD3d 472, 767 NYS2d 274 [2d Dept 2002]). The Court notes that Sachem makes much of the alleged inconsistency in plaintiff's markings on the subject photographs showing where her foot contacted the alleged defective condition. It is Sachem's contention that this inconsistency establishes that the plaintiff cannot identify the cause of her fall, requiring the dismissal of her complaint. It is not clear from the plaintiff's testimony, the colloquy between the attorneys present at the plaintiff's deposition, and the markings themselves, whether such an inconsistency exists as a matter of law.

Failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Accordingly, Sachem's motion for summary judgment dismissing the plaintiff's complaint is denied.

Dated: June 19, 2012

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION