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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

MIRIAM ROSEN,

Plaintiff,

-against-

FIFTH LENOX TERRACE ASSOCIATES, FIFTH LENOX TERRACE CORP., and HAMPTON MANAGEMENT CO., LLC.,

Defendants.

INDEX NO. 153721/2014
MOTION DATE 12-09-2015
MOTION SEQ. NO 001
MOTION CAL. NO

The following papers, numbered 1 to 10 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits	5-6, 7, 8,
Replying Affidavits	9, 10

Cross-Motion: ☐ Yes **X No**

Upon a reading of the foregoing cited papers, it is Ordered, that defendants' Defendants Fifth Lenox Terrace Associates and Hampton Management Co.'s motion for summary judgment dismissing all claims and cross claims asserted against them is granted.

This is an action to recover for personal injuries sustained by plaintiff, Miriam Rosen, on November 2, 2013 when she tripped and fell on a sidewalk abutting a building located at 470 Lenox Avenue, New York, N.Y. (herein "Building") owned and operated by defendants. This action was commenced by summons and complaint dated April 15, 2014. Defendants Fifth Lenox Terrace Associates and Hampton Management Co. (herein "Defendants") have appeared in this action. Defendant Fifth Lenox Terrace Corp. has not appeared in this action as is in default

Plaintiff alleges that she tripped on a two-inch gap between two concrete flagstones on the sidewalk abutting the Building. Plaintiff testified that the accident occurred at approximately 8:45 p.m. The sidewalk was approximately 4 ½ feet wide. Plaintiff walked on the sidewalk in question on a daily basis over the course of eight months prior to the accident. During this time, plaintiff never noticed any defects on the sidewalk and never made any complaints about the sidewalk to defendants.

On the date of the accident, plaintiff's right sneaker became stuck on "something," but she did not observe what caused her fall. Four months after her fall, plaintiff returned to the place of her fall. She alleges that an uneven portion of the sidewalk caused her fall. Plaintiff was does not know the height or depth of any alleged misleveling of the sidewalk in question.

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

Raymond Lyte, doorman to the Building, was deposed on behalf of the Defendants. He testified that he did not see plaintiff fall. Lyte was informed by someone that a woman had fallen on the sidewalk. Lyte went outside and saw the woman who had fallen being helped to stand. Lyte has worked as a doorman for the Building since 2006, and has not seen any work being performed on the sidewalk where plaintiff fell. The condition of the sidewalk is the same today as it was on the date of plaintiff's fall. Lyte stated that the portion of the sidewalk where plaintiff fell was level. Since he began working at the Building in 2006, Lyte has not seen any repairs or maintenance done on the sidewalk at issue.

Defendants now move for summary judgment dismissing all claims and cross-claims asserted against them arguing that plaintiff is unable to identify the cause of her fall, and that the alleged defect causing her fall is trivial.

In support of summary judgment, the Defendants provide an affidavit from Stafford Woodley, the Building's superintendent, stating that the sidewalk at issue is in the same condition as it was on the date of plaintiff's fall. Defendants also submit pictures of the sidewalk and an affidavit from Stanley H. Fein, a licensed professional engineer, who states that he inspected the alleged raise identified by plaintiff as causing her fall. Fein concluded that the raise between the two sidewalk flags was less than 1/4 of an inch, with a dept of up to 1 inch and a length of 96 inches. The area has no jagged edges and no features that would cause a specific tripping hazzard.

In opposition to Defendant's motion, plaintiff submits an attorney's affirmation, a copy of her Bill of Particulars, and a copy of her deposition transcript. Plaintiff argues that at her deposition she identified the area where she fell, and that whether the alleged sidewalk defect is trivial is an issue of fact.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]).

New York City Administrative Code § 7–210 provides that it shall be the duty of the owner of real property abutting any sidewalk to maintain such sidewalk in a reasonably safe condition, and the owner shall be liable for any injury to person or property, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition.

"To subject a property owner to liability for a dangerous condition on its premises, a plaintiff must demonstrate that the owner created, or had actual or constructive notice of the dangerous condition that precipitated the injury. A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the dangerous condition (assuming that the condition existed), nor had actual or constructive notice of its existence (Ceron v. Yeshiva University, 126 A.D.3d 630, 7 N.Y.S.3d 66, 68 [1st Dept., 2015]). In the case of actual or

constructive notice, plaintiff must also show that the owner had a sufficient opportunity, with the exercise of reasonable care, to remedy the situation" (Smith v. Costco Wholesale Corp., 50 A.D.3d 499, 856 N.Y.S.2d 573, 575 [1st Dept., 2008]). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (Ceron, Supra).

Defendants make a prima facie showing that they did not create or have notice of the alleged defective condition. There is no testimony that Defendants created the alleged defective condition. Lyte testified that no work has been performed on the sidewalk since 2006. Woodley states that the sidewalk is in the same condition as it was on the day of the accident. Plaintiff offers no evidence to rebut Defendants' prima facie showing.

"A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie 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 v. Sheridan Hill House Corp., 26 N.Y.3d 66, 41 N.E.3d 76, 79, 619 N.Y.S.3d 802, 810 [2015]). "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" (Mazza v. Our Lady of Perpetual Help Roman Catholic Church, --- N.Y.S.3d ----, 2015 WL 9486157 [2nd Dept., 2015]).

Defendants make a prima facie showing that the alleged defect was trivial and unactionable. Fein's expert report, the pictures of the sidewalk, Woodley's affidavit, and Lyte's testimony establish the trivial nature of the sidewalk's alleged defect. Plaintiff does not offer any evidence to rebut Defendants' prima facie showing.

Accordingly, it is ORDERED, that defendants' FIFTH LENOX TERRACE ASSOCIATES and HAMPTON MANAGEMENT CO., LLC.`s motion for summary judgment dismissing all claims and cross-claims asserted against them is granted, and it is further,

ORDERED, that all claims and cross claims asserted against defendants FIFTH LENOX TERRACE ASSOCIATES and HAMPTON MANAGEMENT CO., LLC. are hereby severed and dismissed, and it is further,

ORDERED, that the Clerk enter judgment accordingly, and it is further,

ORDERED, that the caption is amended to read as follows:

MIRIAM ROSEN

Plaintiff,

-against-

FIFTH LENOX TERRACE CORP.,

Defendant.

, and it is further,

ORDERED, that the moving defendants serve a copy of this Order with Notice of Entry upon the remaining parties, the General Clerk's Office (Room 119), and the County Clerk (Room 141B), who, upon service of a copy of this Order with Notice of Entry, are directed to amend the caption and the Court's records accordingly.

Enter: MANUEL J. MENDEZ
J.S.C.

Dated: January 7, 2016

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE