SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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JACQUELINE GIRARD,

Plaintiff,

- v -

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant.

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INDEX NO. 161946/2015

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this application for summary judgment

By notice of motion, defendants move pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes.

I. BACKGROUND

On February 12, 2015, as plaintiff walked along a pedestrian-only area of Vesey Street, between Church Street and West Broadway, in Manhattan, she tripped on an uneven part of the concrete and fell, sustaining injury.

II. CONTENTIONS

A. Defendant (NYSCEF 16-28)

Defendant denies liability on the ground that it does not own, operate, or control the location where plaintiff fell. Rather, it asserts, the City of New York bears the duty of maintaining roadways and sidewalks in a safe condition. Defendant also denies having created

the condition which allegedly caused plaintiff's fall, or owning the property abutting the location in which plaintiff fell, as its sole duty was to shovel snow and remove trash there.

Defendant offers several affidavits in support:

(1) The principal property specialist in the property records/legal graphics group of the Port Authority Law Department and the custodian of the record property maps maintained by the Port Authority states that defendant did not own the property where plaintiff fell (NYSCEF 24);

(2) The logistics operations manager of the Port Authority World Trade Center (WTC) Construction Department opines that because defendant's activities in the area were limited to snow and trash removal, its maintenance of the area was not a cause of the accident (NYSCEF 25);

(3) The logistics program manager of the Port Authority WTC Construction Department states that not only did the Port Authority not own or control the area where plaintiff fell, but all of defendant's construction work was performed behind a perimeter fence, making it inaccessible to the public (NYSCEF 26);

(4) The Port Authority's construction inspector and engineer denies that it performed any construction in the area where plaintiff fell, claiming that the Lower Manhattan Development Corporation did so (NYSCEF 27); and

(5) A representative of the Port Authority's Law Department states that the height differential on which plaintiff tripped was between 1/4 inch and 3/8 inch (NYSCEF 28).

Defendant offers a photograph that from plaintiff's deposition as evidence of the precise location of her fall (NYSCEF 23) and argues that if it owed her a duty, it cannot be held liable as the condition that caused her to fall constitutes a trivial defect.

B. Plaintiff (NYSCEF 31-37)

Plaintiff argues that defendant owed her a duty because it owned, operated, and controlled the sidewalk/walkway where she fell. In support, she submits the cover page of a recording and endorsement from the New York City Department of Finance Office of the City Register (DOF) showing that in 2006, the United States Postal Service (USPS) conveyed to defendant an easement to the property where she fell, and the cover page of another DOF recording and endorsement showing that in 2003, the property where she fell, which is adjacent to 7 WTC, was conveyed via quitclaim deed to defendant. She also submits an acquisition order and acquisition map, and multiple news articles. (NYSCEF 34).

Plaintiff references the deposition of a Port Authority employee who assisted her after she had fallen. According to the employee, there were "three metallic pieces" protruding from the ground in the area of the accident and that the logistics project manager of the Port Authority's WTC Department details some aspects of the work performed in the WTC area at the time of plaintiff's accident. (NYSCEF 36).

Plaintiff denies that the defect on which she tripped is trivial.

C. Reply (NYSCEF 38-47)

Defendant argues that the property documents submitted by plaintiff do not show that it owned or controlled the area where plaintiff fell. Rather, the 2006 recording and endorsement reflects the conveyance of an easement to the subsurface areas at 90 Church Street and not a conveyance of the property itself, the 2003 quitclaim deed shows that defendant was conveyed the lot containing 7 WTC, which is not adjacent to the area where plaintiff fell, a New York City property statements list showing that the USPS owns 90 Church Street (NYSCEF 43), a New

York City property statements list showing that defendant owned the property located at 7 WTC (NYSCEF 45), and "legible" versions of the maps submitted by plaintiff (NYSCEF 44, 46).

According to defendant, liability may only attach to it as owner of 90 Church Street if plaintiff fell on the sidewalk abutting that property, as opposed to a roadway, for which the City is liable. It refers to the testimony of the Port Authority employee as evidence that plaintiff fell on the roadway of Vesey Street, not the sidewalk. Even if plaintiff had fallen on the sidewalk next to 90 Church Street, moreover, defendant denies liability as the USPS, owns the property abutting the actual area where plaintiff fell. And, although it owns 7 WTC, defendant denies that the accident occurred near it, as evidenced by the property maps it offers.

Defendant reiterates its arguments pertaining to trivial defects.

II. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence to demonstrate the absence of any triable issues of fact. (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues that require a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 533 [1991]; *McGinley v Mystic W. Realty Corp.*, 117 AD3d 504, 505 [1st Dept 2014]). In evaluating such a motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

A. Ownership and control

To be held liable for a dangerous condition on property, defendant must have had

occupancy, ownership, control, or special use of it. (*Gibbs v Port Auth. of New York*, 17 AD3d 252, 254 [1st Dept 2005]; *Pantazis v City of New York*, 211 AD2d 427, 427 [1st Dept 1995] [one must own, maintain, operate or control property to be held liable for dangerous or defective condition]). Although generally, the non-delegable duty to repair and maintain roadways and sidewalks lies with the municipality (*Stiuso v City of New York*, 87 NY2d 889, 891 [1995]; *Cabrera v City of New York*, 45 AD3d 455, 456 [1st Dept 2007]), in New York City, it is the duty of the owner of real property abutting any sidewalk to maintain the sidewalk in a reasonably safe condition (New York City Administrative Code § 7-210; *Fernandez v Highbridge Realty Assocs.*, 49 AD3d 318, 319 [1st Dept 2008]).

Although the parties do not dispute that the photographs depict the exact location where plaintiff fell, they disagree as to whether that location constitutes a sidewalk. As neither party cites authority on the issue, and as the burden of persuasion lies with the movant (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), defendant is not entitled to relief on its assertion that plaintiff did not fall on the sidewalk.

Even assuming that plaintiff fell on the sidewalk, defendant demonstrates that it cannot it cannot be held liable as an owner of abutting real property. As plaintiff alleges that she fell on Vesey Street, between Church and West Broadway, and as the lot on which 7 WTC lies is between Washington Street and West Broadway, defendant cannot be held liable. Defendant also demonstrates that the USPS owned the property at 90 Church Street, as the easement agreement does not convey the property itself. Moreover, its ownership of a subterranean easement does not evidence ownership or control of the surface, and any work it performed above ground was either entirely enclosed behind a perimeter fence, or was limited to snow and trash removal,

neither of which is claimed to have caused the height differential on which plaintiff allegedly tripped.

B. Trivial defect

Plaintiff's reliance on the testimony of the Port Authority employee about the "three metallic pieces protruding from the ground" is misplaced given her acknowledgment that the accident was due to an alleged height differential.

Whether a condition is trivial turns on the width, depth, elevation, irregularity, and appearance of the defect, as well as the context of the time, place, and circumstance of the injury. (*Trincere v Cty. of Suffolk*, 90 NY2d 976, 977-78 [1997] [height differential of under one inch deemed trivial]). The parties do not dispute that the height differential here is less than one inch, and plaintiff fails to present evidence that the defect had other "intrinsic characteristics" or that there were "surrounding circumstances" that would magnify the danger of the condition. (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 78 [2015]; *Morales v Riverbay Corp.*, 226 AD2d 271, 271 [1st Dept 1996] [height differential of one inch, absent additional circumstances, non-actionable]). Plaintiff admits that there was no snow, rain, or ice, and plaintiff had traveled on this path twice a day, five days a week, for three months. (*See Chirumbolo v 78 Exch. St., LLC*, 137 AD3d 1358, 1359 [3d Dept 2016] [defect trivial where the plaintiff traveled in area approximately 100 times prior to accident]). Absent any evidence that the defect presented a danger outside of the height differential, the defect is trivial. (*See, e.g., Cela v Goodyear Tire & Rubber Co.*, 286 AD2d 640, 641 [1st Dept 2001] [less than one-inch deep defect with irregular zig-zag depression spanning nearly two feet in length with sharp edges not trivial]; *Pichardo v 701 W 180th Street, LLC*, 2012 WL 1062814 [Sup Ct, NY County 2012] [defect of at least one inch not trivial because it was a few feet wide, and had irregular, jagged

edge]; *Charbonnet v Bronx Stage & Film*, 2010 WL 128078 [Sup Ct, NY County 2010] [defect in theater actionable where houselights were off and no lights running alongside of seats]). Thus, even if defendant had a duty to maintain the area where plaintiff fell, it cannot be held liable as the defect is trivial as a matter of law.

III. CONCLUSION

For all of these reasons, it is hereby

ORDERED, that defendant's motion for summary judgment is granted and the complaint is dismissed in its entirety with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

12/13/2018
DATE

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION	
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE