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

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 105359/2009

WASHINGTON, BERTHA

VS.

MARRANO DEVELOPMENT AFFILIATES

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

otion to/for _____

No(s). 1, 2

No(s). 3

No(s). 4

Upon the foregoing papers, it is ordered that this motion is



DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 12/22/11

HON. EILEEN A. RAKOWER 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
COUNTY OF NEW YORK: PART 15

----------X

BERTHA WASHINGTON,

Plaintiffs,

- against -

MARRANO DEVELOPMENT AFFILIATES, L.P. and WASHFIELD MANAGEMENT CORPORATION,

Defendants.

----------X

Index No. 105359/09

**DECISION and ORDER**

Mot. Seq. 001



HON. EILEEN A. RAKOWER

Bertha Washington ("Plaintiff") brings this action for personal injuries sustained on July 24, 2006 when she tripped and fell on the sidewalk on the west side of the building located at 310 West 143rd in New York County. Plaintiff, a tenant of the building, testified at her deposition that she exited the building out the back door in order to mail a letter. After mailing the letter, she decided to walk around toward the front of the building and sit outside because of the nice weather. As she was walking, the toes of one of her feet caught a raised portion of the sidewalk, causing her to fall forward with her left arm outstretched. As she fell, her left arm came into contact with glass from a broken beer bottle.

Presently before the court is a motion by Defendants for summary judgment. Defendants provided, *inter alia*, Plaintiff's deposition testimony, along with photographs of the sidewalk taken by Plaintiff's daughter the day after the accident, with markings by Plaintiff indicating the portion of the sidewalk where she tripped (made at her deposition). Defendants also annex the deposition transcript of Nancy DeSimone, the property manager of the premises. DeSimone testified that she inspected the accident location in 2009 (the first time she received notice of the accident by way of this lawsuit). She testified that at the location of the accident, she observed "slight elevations" among the sidewalk flags, "like a quarter inch or less." Based upon the foregoing testimony, Defendants assert the condition which caused Plaintiff's fall was a "trivial defect," and that they are entitled to judgment as a matter of law accordingly.

Plaintiff submits an affirmation in opposition. Plaintiff provides the affidavit of engineer Scott Silberman. Silberman states that he inspected the accident location on June 22, 2009. He observed that

> On the West side of the building there is a large walkway constructed of concrete, similar to a public sidewalk. Within the path of travel, one of the concrete slabs, or flags, is higher than the adjacent slab. The vertical grade differential was measured and found to be one (1) inch high. The corner of the slab was broken and there was vegetation growing within the crack, as well as the perimeter of the slab itself.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. ( *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). ( *Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]). "[I]f it is reasonable to disagree about the material facts or about what may be inferred from undisputed facts, summary judgment may not be granted. Moreover, in deciding whether there is a material triable issue of fact, 'the facts must be viewed in the light most favorable to the nonmoving party'" (*Ferluckaj v. Goldman Sachs & Co.*, 2009 NY Slip Op 2483 [2009])

Generally, the issue of "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]). However, in cases where the alleged defect is "trivial" in nature, judgment as a matter of law is appropriate (*id.*). The determination of whether a defect is trivial requires "examination 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" (*id.* at 978). "[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" (*id.* at 977).

> [E]ven a trivial defect may constitute a snare or trap .... While a gradual, shallow depression is generally regarded as trivial ... the presence of an edge which poses a tripping hazard renders the defect nontrivial .... Furthermore, factors which make the defect difficult to detect present a situation in which an assessment of the hazard in view of the peculiar facts and circumstances is appropriate ... (*Glickman v. City of New York,* 297 A.D.2d 220, 221 [1st Dept. 2002]).

Here, the court cannot conclude as a matter of law that the defect was trivial. There is conflicting evidence in the record as to the height differential of the sidewalk flags. While DeSimone testified that the differential was only about a quarter of an inch, the Silberman affidavit states that he measured the flag and recorded a differential of one inch. The court further notes that DeSimone did not testify that she actually measured the alleged defect. While Defendants object to the Silberman affidavit on the grounds that his inspection was conducted in 2009, Silberman states in his affidavit that Plaintiff accompanied him to the accident location and verified that the sidewalk was in the same condition as it was on the day of the accident, distinguishing this case from *Figueroa v. Haven Plaza Hous. Dev. Fund Co.*, 247 A.D.2d 210 [1st Dept. 1998]), relied upon by Defendants.

Nor can the court conclude as a matter of law that Defendants did not have constructive notice of the alleged defect. Although the record does not indicate that any complaints were made about the alleged defect, or that Defendants or their agents actually observed the condition, Plaintiff's expert opines that it "is a longstanding condition given the time it would take for a portion of walkway to settle or heave and the vegetation growth to form."

Wherefore it is hereby

ORDERED that Defendants' motion to dismiss is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: December 22, 2011

EILEEN A. RAKOWER, J.S.C.