Plaskett v Splish Splash at Adventureland, Inc.
2014 NY Slip Op 33416(U)
December 22, 2014
Supreme Court, Bronx County
Docket Number: 17570/07
Judge: Mark Friedlander
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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25

DOROTHY PLASKETT,

Plaintiff,

-against-

SPLISH SPLASH AT ADVENTURELAND, INC.,

Defendant.

MEMORANDUM DECISION/ ORDER
Index No. 17570/07

HON. MARK FRIEDLANDER:

Defendant Splish Splash at Adventure Land, Inc. moves for summary judgment dismissing plaintiff's action in its entirety. Plaintiff Dorothy Plaskett opposes the motion. Plaintiff's action arises out a "trip and fall" which occurred on July 7, 2007, during plaintiff's first visit to defendant's water park, located in Riverhead, Suffolk County, New York. For the reasons set forth hereinafter, defendant's motion is granted.

Movant argues that the location of plaintiff's fall was not dangerous as a matter of law, as demonstrated by photographs of the location, and the interpretation of such photographs by movant's expert, who finds the condition complained of to be trivial. In addition, movant claims that there is no evidence that the claimed condition was the cause of plaintiff's fall (as plaintiff and her friend only noticed the existence of the condition after the fall), and further that there is no proof that defendant either created the condition or had any notice (actual or constructive) of its existence.

Plaintiff visited the water park with her friend, Kendra Graham ("KG"), her daughter, and other persons, mostly youngsters. According to deposition testimony by plaintiff and KG, they had already experienced one water ride, and were walking on a path toward an attraction known as "splash landing" when the accident occurred. Plaintiff was wearing flip-flops, and, according to her friend, they all had wet feet, presumably from the first ride. Plaintiff may have been carrying a flotation device, which she had picked

up for use during the ride. The children were walking just ahead of the adults when plaintiff fell.

None of the party noticed the condition complained of, or were ensnared by it, until plaintiff fell. After the fall, plaintiff was taken by park personnel to the first aid station, where she complained of both knees bleeding and a cut hand. After receiving first aid, plaintiff and her group ate lunch at the water park and took the children to a wave pool before departing the premises. While the latter activities were in progress, KG took photos of the spot where plaintiff fell. Twelve days later, plaintiff initiated this action. At this point, plaintiff is claiming that, as a result of this fall, she sustained injuries requiring arthroscopic surgeries to her shoulder and to her knee, a lumbar laminectomy and, ultimately, hip surgery as well.

The parties to this action describe the location of the accident very differently. While defendant contends that the condition complained of was trivial in nature, plaintiff and KG describe a pavement which was uneven and cracked, a hole that was at least two inches deep which trapped her foot, a 2.5 inch differential in height between concrete slabs, an area of cracked and missing concrete with a width of over eight inches. All of the measurements are estimates, as no one measured any of the features described. In the single fall, plaintiff claimed to have twisted so that she fell simultaneously on her hand, shoulder, knee and buttocks.

Plaintiff and KG describe plaintiff as having been walking closest to the edge of the path, but KG stated at deposition that plaintiff was not at the very edge as she walked. Nevertheless, all pictures of the area complained of show the "condition" complained of to be at the very edge, where the side of the path meets the "paving blocks" (stone bricks several inches high, marking the border) which divide the path from the grass and trees of the park-type surroundings.

Defendant's employees also photographed the area at some point, and plaintiff complains that such photographs are not properly authenticated. However, the photographs submitted by both parties are

attached to the motion papers and the Court finds no material difference between them, insofar as their depiction of the location of the fall. That is, whatever the vantage point and/or resolution quality of the photos of the two sides, the aspect of the area which matters for an evaluation of the level of danger it presents is the same. Thus, in the view of the Court, it makes no difference which set of photos is considered, or eliminated, by either the Court, or the experts, in reaching an opinion on this matter.

Deposition testimony was also elicited from Lisa Mindlin, a former employee of defendant, who responded to the accident scene as an EMT, and from Mike Bengston, defendant's general manager since 2005. Both described looking for the cause of plaintiff's fall and finding no condition which could justify a complaint. In addition, Bengston described in detail defendant's procedures for inspecting the premises, including daily morning inspections with a checklist (by others) and a walk through by Bengston himself at the start of each day. He stated that the morning inspections of all walkways found no problems with them. Bengston's affidavit is also attached to the moving papers. In it, he adds that there were no complaints about that walkway in the year prior to the accident, that the entire premises had been inspected by the State without any citation being issued, and that defendant had taken the step of having a pre-season inspection by an independent entity, PLH and Associates, which cited other problems (that defendant addressed), but found no defect at the subject walkway.

Plaintiff's expert, Jacques Wolfner ("JW") a licensed professional engineer, has provided an affidavit, which is attached to the moving papers. JW states that his background includes the study of land surveying and photogrammetry, the latter being the process of determining dimensions and relationships of physical objects from photographs. Based on the photographs provided by plaintiff, JW determined that the alleged defect could be no greater than ¾ of an inch in depth. He describes this as the difference in height between two adjoining concrete slabs. He also notes that there is an area of cracking concrete close to the edge of the

walk, but states that there is no 2 inch hole, and the area is not a tripping hazard. He opines that the alleged defects in the area are inconsequential and do not, as of the time of the photograph, require repaving or other intervention.

Based on all of the above, movant argues that the purported defect was trivial as a matter of law, that there can be no doubt that defendant did not create the defect, that there are no records which show actual notice to defendant, and that, based on the inspection schedule, and plaintiff's inability to show when the condition arose, defendant cannot be charged with constructive notice. Movant also lists criticisms of plaintiff's expert, but that will be considered infra.

In its brief, defendant also claims that plaintiff cannot establish causation, in that she is merely speculating that the area she first noticed after her fall was in fact the cause of the accident. KG also did not see plaintiff's feet at the time of her fall, so that she cannot provide additional information linking the fall to the claimed defect. In support of this argument, defendant cites *Teplitskaya v. 3096 Owners*, 289 A.D.2d 477, but that is a case in which a plaintiff was found dead after a possible fall which no one had witnessed, and it was held speculative to regard loose paint chips around him as a cause of his fall. It is fairly clear that the presumption connecting this alleged defect to this plaintiff's fall at its precise locale is quite a bit stronger than that in the cited case. Suffice it to say here that, if the defect were held to be actionable, movant could not find much comfort from this, the weakest of its arguments.

Movant cites the persuasive First Department decision in *Morales v. Riverbay*, 226 A.D.2d 271, in support of the argument as to the trivial nature of the asserted defect. In addition, the Second Department decision in *Trincere v. Suffolk County*, 232 A.D.2d 400, is frequently cited for this proposition. It enunciates the common sense rule that, while there is no hard and fast standard, based on size alone, which can be used to decide this issue, taking account of all the circumstances, a defect of one inch or less should not normally

subject a municipality like the county to liability. What brings that principle into the ambit of the instant controversy is the size of the outdoor facility in which plaintiff fell. The plethora of outdoor walks, subject to the insults of nature, seems vastly different from an indoor vestibule of a multiple dwelling, and a defect of the same size might, under all the circumstances, be actionable in latter but not in the former.

Plaintiff also cites a case with the unlikely but somewhat appropriate name of *Riser v. NYCHA*, 260 A.D.2d 564, in which a defendant elicited summary judgment after submitting photographs (provided by plaintiff) of a defect of one inch. Similarly, *Larsen v. SL Green*, 103 A.D.3d 521, mis-cited by defendant, demonstrates a consistent result reached recently by the First Department, which can be applied here, even though the facts there are somewhat different.

In general, though, the cases involving this type of issue are legion, and include results opposite to the above, as will be further discussed infra, in considering plaintiff's opposition. Each case rests on its specific facts, and no two are truly alike. In the end, much depends on the photographs provided, which may sometimes stand irrefutable by even the wordiest brief.

In her opposition to the motion, plaintiff claims to have fallen because of a mis-leveled, broken, cracked portion of walkway with missing concrete and a hole. A description of the fall is offered which somewhat mirrors plaintiff's account of the number of body parts which simultaneously struck the ground. In plaintiff's characterization, her right foot struck the mis-leveled flag and went into a "void" created by the hole, where it became caught by the hole. That seems to be a fairly large number of nearly simultaneous occurrences and, as movant notes in a reply, it does not comport with the nature of the fall described above, in that there is no complaint of a twisting of the ankle. In general, as will be seen with regard to the report of plaintiff's expert, there seems to be a pattern here of attributing to this accident every possible trap to the foot, every possible consequence of a fall, and every possible defect in a walkway.

Plaintiff notes that Bengston, at his deposition, stated that, if his inspections revealed broken concrete, this would be reflected in his report and addressed. When shown the photos, he claimed that he could not tell from the photo whether or not such a condition would be reportable. No proof can be adduced from this testimony, which reflects only the cautious vagueness of the deponent. What constitutes broken concrete that should be addressed is subject to dispute, as the dueling expert reports demonstrate. The mere fact that Bengston's checklist includes broken concrete does not prove that he failed to properly inspect the area in question that morning. He may not have considered what he saw to be worthy of noting. It is also possible that the break was not yet present that morning. More on that infra.

Plaintiff's expert, Nicholas Bellizzi ("NB") has prepared an affidavit, which is attached to the opposition papers. In it, he states that there was a significant height differential of 2 inches, which constituted a hazard and could entrap plaintiff's footwear. He characterizes the condition as dangerous, and as a trap or snare. Further, he claims that plaintiff's carrying of an inflatable tube heightened the danger, by making it less likely that she would see the defect. He also says the color of the sidewalk made the defect difficult to detect, and that it evidently existed over a long period, so that defendant should have discovered it. NB also claims that the defect indicates a violation of the standards of the American Society for Testing and Materials ("ASTM") although he offers no backup for the applicability of such standards to this situation, or for their authoritative nature in general.

It must be noted with regard to the above that there are serious weaknesses in NB's affidavit. He claims no expertise in photogrammetry, and thus no professional ability to assess measurements from photos. (It is not clear why neither expert was able to inspect the actual walkway. In a suit begun 12 days after the accident, one would have thought each side had reason to get an expert to the scene before the scene was changed in any way). It is suggested in NB's affidavit that he relied on the measurements of the

scene claimed by plaintiff and KG at their depositions, although both testified that they had never measured the claimed defects, or even gotten close to the ground to observe them carefully. It also appears that a majority of NB's experience relates to design of highways and roadways, not walkways.

NB's statement as to the color of the sidewalk making detection more difficult is not explained or supported. The photos show a rather ordinary color for a walkway, which, in the light of day, should not obscure anything. This conclusion appears to the Court untenable. Further, the statement that the condition was in existence for a long period is utterly conclusory. Not a single fact or explanation is offered to support it. In reference to the height differential between two slabs, the statement is at least comprehensible. However, with regard to the broken concrete, the photos show a modest crows' feet pattern of cracks that could well have resulted from the step of a heavy person, between the morning inspection by Bengston and the time of plaintiff's fall. This is particularly the case, if the corner of the concrete slab had been slightly weakened previously, but not visibly so, by upward pressure from the roots of a nearby tree.

JW, in his report, mentioned that the tree roots nearby might have been pushing up against the slab, and plaintiff takes that to mean that defendant should have noticed such long running event. However, the Court concludes that the long running aspect of it (the growth of tree root) might have been invisible from above, until it caused the crack, which could have happened suddenly when someone put pressure from above at the right spot. In other words, tree root growth, which occurs underground, cannot by itself prove the existence of a condition of long standing which should have been noticed.

Plaintiff argues that JW's photogrammetry is conclusory, but does not indicate why. JW has indicated his academic background in the discipline and has demonstrated the results of his application of such process. The fact that he does not accompany his results with a lengthy tutorial on the science involved is not problematic. Plaintiff then asserts that JW measured the height differential in the wrong place, but does not

show proof of such accusation. JW was well aware of the location of the event, from all of the photographs, and the size of the affected area is in fact rather small. Thus, there is no reason to suppose that he placed the ruler inaccurately. Plaintiff attempts to conclude from her unsupported charge that the only reliable evidence as to the size of the defect is the testimony of plaintiff herself and of KG. Yet, this is evidence of the most unreliable sort, as neither person measured anything at all, or has any applicable experience in estimating sizes, and further, both changed their estimates from the time of their depositions to the time of preparing affidavits in opposition, apparently allowing the defect to grow larger in their memories. Plaintiff complains that defendant took photos from the wrong angle in an attempt to minimize the condition, but, as has been set forth supra, the Court has analyzed all of the photographs, and finds them similar, so that it is plaintiff's own photographs that show the condition to be minimal in size.

Plaintiff cites *Rivas v. Crotona*, 74 A.D.3d 541, for the proposition that a defendant must establish the dimensions of the defect in order to persuade a court that it was trivial. That case, however, dealt with a missing tile in a lobby, and the defendant there adduced no evidence whatsoever as to the depth of the hole, unlike what has been adduced here. *Herring v. Lefrak*, 32 A.D.3d 900, is cited for the proposition that mere presentation of photos is insufficient as proof of triviality, but that decision seems to turn on other factors. The court there said the evidence included photos, thus alluding to additional items of proof. All that can be gleaned from that case is that the photos shown there were unconvincing.

Plaintiff invokes *Elliot v. E.220th St Realty*, 1 A.D.3d 262, for the purpose of showing that there is no minimum size which will guaranty a finding of a trivial defect. This proposition is well established and, presumably, not contested by movant. A multitude of decisions stress that the location and circumstances must be considered as well as the size. However, in *Elliot*, as in many other cases cited by plaintiff, the defect was located on a staircase, rendering any issue greater and any defect more dangerous, because of the

prospect of falling down the stairs. Also, in that case, it was found that the depression was sharp, abrupt and capable of catching plaintiff's heel, which it did. It is worth noting that the plaintiff there was in an urban building where heels are commonly worn. In the instant case, people characteristically walk in flat, informal footgear, rendering it well nigh impossible to credit the idea that plaintiff's foot was "caught" in a trap by the cracks shown in the photos.

Plaintiff's expert attempts to argue that the defect here was magnified by the crowds which impeded a view of the ground. However, the only evidence as to such crowding is that the youngsters were walking ahead of them. This hardly qualifies as intense crowding, such that a defendant must anticipate limited visibility. The incident took place in a water park, known for spread out spaces, located in Riverhead, on Long Island's eastern end – hardly a hotbed of overpopulation. By contrast, *Argenio v. MTA*, 277 A.D.2d 165, also cited by plaintiff, involves a tripping hazard inside Grand Central Station, which surely does not resemble suburban water parks.

Much is made of the exacerbation of the defect by its "edge." It is claimed that the photos display such edge. However, the photos fail to convincingly show that any change in ground level was accompanied by a sharp edge. Nor do the decisions mentioned by plaintiff support her argument, in that what they describe seems nothing like the instant case. In *Cela v. Goodyear*, 41 A.D.3d 128, although the depression was one inch deep, it was located in a "sharp zigzag" between one and two feet long. In *Nin v. Bernard*, 257 A.D.2d 417, the defect was at the edge of a landing, on the top stair of a steep set of stairs. Clearly, the sharp edges described here are of a nature, and constitute a threat, unlike anything shown in the photos of the water park.

It would take an inordinate amount of time and space to discuss all of the many cases cited by both parties hereto, but the above fairly representative sample will convey accurately the reasons for the Court's

conclusions that no precedent prevents the grant of summary judgment to a defendant in a case like this one. Suffice it to say generally that other cases cited by plaintiff, in a similar fashion, deal with defects on staircases, with lengthy irregularities in a sloping ramp, with a shallow depression running across an entire sidewalk, and with parking lots (which are smaller in area, and in which pedestrians are distracted by the danger of moving cars), all areas very different from the one considered here.

Plaintiff's counsel seeks to critique the cases cited by defendant by suggesting that they do not involve a 2 inch height differential, or a sharp edge, or a defect that is hard to see, or a defect that is a snare, unlike the instant defect, which, in plaintiff's view, has all of the above. The problem with that critique is that the photos do not bear out plaintiff's claim with regard to any of those claimed features of the water park walkway area.

Plaintiff next turns to movant's claim of lack of notice. Plaintiff cites *Karten v. NYC*, 109 A.D.2d 126, for the proposition that notice can be established through photos which show an evident long-standing condition. However, as is amply demonstrated in the very quotation contained in plaintiff's papers, the road condition in that case involved a defective repair or repaving which was amply demonstrated by the irregularly painted crosswalk line shown in the photo. Thus, the city could be liable for creation of the condition as well. In any event, the 2-3 inch road depression and the tell-tale mis-painted line were far more probative of notice than anything shown here. The court there found that the defect could not have been caused by truck traffic. Yet, here, it is the Court's conclusion that the cement cracks could have resulted from a heavy step on the morning of the accident.

The brief interval between photos taken shortly after the accident on the one hand, and the morning inspection by defendant on the other, is said to demonstrate notice, but it does not, if the condition could have been aggravated in between the two events, to a level which would for the first time make it a danger.

Plaintiff's counsel insists that the condition existed for a long time but, like his expert, requires that this declaration be taken on faith, without substantiation. As has been explained supra, the mere fact that a growing tree root could have precipitated the walkway condition does not mean that the condition was evident the whole time the root was growing. It merely means that the condition became evident when the cement reacted, and that could have happened at any point.

Another decision cited, *Denyssenko v. Plaza*, 8 A.D.3d 207, is said to show an example of a non-trivial defect and of presumed notice, but it relates to a parking lot, and a pothole filled with water. The court there does not specify the facts which led it to find an "apparently long standing" defect. It may have been the water in the pothole, but, in any event, it does not in any way demonstrate why the instant condition should be found to be of long standing.

Plaintiff cites cases in which supermarkets or groceries seeking summary judgment failed to establish their own lack of constructive notice, but the defendant here did establish that prima facie by showing its comprehensive inspection schedule. If a supermarket fails to show how often it inspects its floors, it cannot claim that an accumulation of vegetable debris was of short duration. In other, similar, cases, muddy water on interior stairs constituted evidence of a long standing problem, as did a trail of yogurt in a grocery, showing the tracks of shopping carts that had passed over it. These conditions have no relevance here. In any event, the claimed lack of notice is secondary here, as the Court finds that the defect was too trivial to be actionable.

The affirmation in opposition by plaintiff's counsel covered 122 paragraphs, spread over 42 pages. That is somewhat of a record in this Part for a trip and fall case. Part of the blame for this is the tendency in the opposition papers to repeat arguments and factual assertions, when a single reference to them would suffice. A weak argument is never rendered stronger by mere repetition.

In movant's reply, the prime argument revolves around the lateness of plaintiff's expert disclosure. Defendant argues that the disclosure comes after the filing of the note of issue, and for the first time in response to a summary judgment motion. Defendant cites a series of decisions affirming trial courts which rejected consideration of such affidavits. Unfortunately for defendant, though, it appears to the Court that movant, perhaps counting on the unavailability of a possible sur-reply to plaintiff, is eliding the distinction between two types of non-disclosure. The cases cited by defendant all relate to the failure of a party to disclose even the identity of its expert until after the close of discovery. Here, defendant served a demand for such disclosure in 2008, and plaintiff did not respond until January 2012. Although that response was seemingly late, the identity of the NB was in fact disclosed prior to the close of discovery, along with a summary of his views. Thus, as a technical matter, the cases cited do not apply.

Movant's argument is more properly directed to the substance of NB's affidavit, to the extent that it attempts to supply a new theory of liability not disclosed during discovery. It cannot be gainsaid that the 2012 expert disclosure contained so many claims and theories as to be an attempt at misdirection by surplusage. Movant rightly complains about this in its initial motion papers, even before it had received the NB affidavit in connection with plaintiff's opposition.

In the 2012 disclosure, NB opined that the walkway was improperly constructed and repaired; that there was improper paving, excavation, opening and backfilling; that there were improper saw cuts for the slabs; that there was an improper foundation; that there was improper mixing of cement and concrete; that there was a failure to ensure that the pathway was brought up to a level grade; that there was a failure to keep the pathway from sinking; and a failure to hire competent contractors and personnel; and a failure to heed complaints.

There can be no doubt that not one of the above claims remains. As of 2012, this matter had been in

progress for more than four years. Much discovery had taken place, and plaintiff, as well as her expert, knew or should have known that the above plethora of claims had fallen by the wayside, if the claims were ever seriously maintained. Mixed in with the above were relevant claims about the cracked concrete and the uneven slabs, but the surplus items were only excusable for a quickly drafted complaint, not for an expert exchange near the close of discovery.

Further, as movant notes, the expert exchange asserts defendant's violation of the New York City Administrative Code, even though the accident took place nearly 100 miles from New York City, rendering the city's code meaningless. Plaintiff also accused defendant of violating Local Law 14, even though no such law exists in the jurisdiction containing the water park. Clearly, the 2012 disclosure constituted little more than a compilation of boiler plate items, with too little regard for their relevance to this action.

Now, for the first time, as opposition to the summary judgment motion, plaintiff has injected an affidavit by NB that is properly tailored to this proceeding. The question is not whether NB can be heard to oppose summary judgment. Under the case law cited by defendant, he can, because his identity was disclosed, although belatedly, prior to the close of discovery. What is subject to scrutiny, though, is the extent to which his current affidavit includes an attempt to inject a new theory of liability, not revealed in the pastiche of claims that was served in the 2012 disclosure. Any such new theory would be impermissible.

The most obvious attempt at injecting a new theory or claim is NB's attempt to invoke the ASTM standards. Having finally realized that his references to New York City rules and to a non-existent local law are somewhat absurd, NB now wrongly characterizes the purported disregard of ASTM standards as a statutory violation, which it is not. In fact, there is nothing mandatory about them. But this is of no moment. This material was improperly introduced at too late a date. They cannot be considered. In any event, even if they were to be considered, they do not constitute a basis for finding liability. Movant contends that the

version cited by NB is outdated. Even if it were not outdated, it is clear that it applies primarily to construction (which seems to be NB's specialty) and not to maintenance, which is the issue here. Further, even such wording as applies to maintenance leaves room for interpretation as to what constitutes cracking or broken pavement, particularly in an extensive outdoor area such as a water park. There is no proof of any type offered to relate the ASTM standards to expanses such as water parks. For all of the above reasons, the ASTM, an advisory guideline, may not be considered here.

Similarly, the Bill of Particulars served by plaintiff after the close of discovery and rejected by defendant, cannot survive, as plaintiff never sought leave to serve it, and it, like NB's affidavit, seeks to assert new theories (such as violations of the ASTM) not previously disclosed.

Movant claims that the affidavits of plaintiff and KG, attached to the opposition papers, cannot be considered because they contradict previous deposition testimony of those affiants. Thus, to the extent they purport to show factual issues, such "issues," under a multitude of precedential decisions, would be deemed feigned issues of fact. Specifically, according to defendant, plaintiff, in her deposition testimony, claimed that the height differential was two inches, and that her foot got caught on uneven concrete. In her later affidavit, she claimed that the height differential was 2.5 to 3 inches, and that her flip flop went into a void (although it appears to the Court that plaintiff was claiming throughout that her foot and footgear did multiple things as she began to fall, as difficult as that is to envision).

Further, according to defendant, KG stated at deposition that she could not approximate the number of inches involved, while in her later affidavit, she swore that the height differential was 2.5 inches and that the dimensions of the cracked portion of concrete were six to seven inches. (The Court, having viewed all the photographs, finds the numbers given in the affidavits to be extremely unrealistic). Finally, although movant seeks to find a contradiction in KG's account of the cause of plaintiff's fall, the Court finds no clear conflict. At

deposition, KG stated that she did not see plaintiff's feet when plaintiff fell. By contrast, when she stated in her affidavit that the pavement condition caused plaintiff's fall, she may have been referring to seeing the condition after the fall. In such case, the question is whether KG had sufficient basis to be sure of the cause, not whether she was changing her account of observing the fall as it unfolded.

In general, though, it cannot be denied that the accounts of some details have been progressively magnified as the case progressed. To the extent that later versions offered by plaintiff and KG contradict or exaggerate earlier ones, the later ones cannot be accepted for the purpose of establishing a claim. And, as has been detailed supra, the earlier version of the facts, as put forth by plaintiff, does not suffice.

Movant notes correctly that plaintiff has not countered its argument that defendant had no actual notice of the alleged condition, and that there is no evidence to show defendant created the condition. Defendant once again stresses that it received no prior complaints regarding the walkway, and has no records of previous injuries at that location. Defendant would have the Court glean from this that it had no constructive notice as well, but constructive notice can be established without these prior complaints and incidents, but rather by evidence of the long-standing nature of the condition. That is why the notice is "constructive," rather than actual. Unfortunately for plaintiff, though, the evidence as to the long-standing nature of the condition consists of conclusory pronouncements, unsupported by any party's photographs.

Movant's argument that the condition could not have been dangerous because its employees did not record it during their numerous inspections is a prime example of circular reasoning. It is precisely the claim of plaintiff that movant's employees failed to note and address a dangerous condition. Similarly circular (or perhaps just self-evident) is movant's assertion that it could not have had notice of the dangerous condition, because the condition was not dangerous. The Court need not address these arguments further, except to say that they are a waste of time, and are unnecessary to the determination of the result reached here.

More perplexing is movant's strident denunciation of plaintiff's expert for declaring that his opinion was based on a police report, defense diagrams and his inspection of the accident scene – none of which are present, or occurred, in this action. If NB had actually stated that these influenced his report, his bona fides might truly be placed in question. However, movant does not say where in NB's affidavit, or in the expert disclosure, these questionable statements occur, and the Court has not been able to find them anywhere in the motion papers, despite expending too much time searching. Presumably, whoever wrote that denunciation should abstain from the single malt while drafting replies.

Movant cannot draw comfort from its citation of *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, because that case found no constructive notice, based on the presence of wax paper on the museum steps. Clearly, the wax paper could have blown onto and away from the steps in seconds, more quickly and easily than a walkway can degrade. The instant situation is different, and therefore somewhat more difficult, even if the Court is inclined to agree that constructive notice is lacking here.

By contrast, movant correctly questions plaintiff's invoking of *Tesak v. Marine*, 254 A.D.2d 717, in which a dangerous condition was found in a sidewalk defect of minimal size. There, the defect was so close to the defendant's front door that approaching pedestrians would have been looking at the door, not the sidewalk. In that case, plaintiff's expert actually inspected the scene and determined that the distraction of the need to deal with the door magnified the defect. In the instant case, though, plaintiff was on a walkway in an open area, with no immediate, built-in distraction. The fact that the children were walking in front of plaintiff and KG is not the same, in that it is not a built in distraction, which could cause injury to be foreseeable. In a spread out water park, it is not to be expected that persons will necessarily crowd so close as to distract each other.

Movant is also correct in deflating plaintiff's claim that her carrying of the flotation device caused the

defect to be obscured. Even if the evidence were clearer that it was plaintiff herself who was carrying the flotation device at the time she fell (and her account of falling contains no reference to what happened to the flotation device, or whether she did or did not fall on it), plaintiff cannot claim to have been so insensitive to her surroundings, so as to create a trap out of a triviality, merely because of such device. If there had been evidence that defendant, through a promotion, encouraged patrons to buy a device so large as to make walking more dangerous, there might be a claim. In this case, no detail has emerged to suggest such a scenario.

Similarly, movant is correct in asserting that its pre-season retention of an independent consultant to inspect the premises is usable as some evidence to show that there could not be a defect of long-standing. It disclosed the information during discovery, and the mere fact that plaintiff never took the deposition of the consultant is irrelevant here. As movant notes, it is not obliged to compel its adversary to depose a non-party.

In the final analysis, it is the photos which must determine the result here. In all of the wider angle photos taken of the scene, from whatever angle, the so-called defect cannot be visualized at all. It is only with a camera practically on top of it that the scene reveals a minimal disarray of a tiny piece of walkway, so close to the edge of the path, that the pedestrian would have to practically seek to brush against the side paving stones in order to encounter it. Plaintiff was free to take whatever photos she wanted, and, because she initiated suit within twelve days, to have her attorney return and take photos at a point in time close to the accident, in order to record the true magnitude of the claimed defect. If the photos submitted are the best she could come up with, the defect must indeed be ruled de minimis.

As has been stated supra, the submission by plaintiff's expert is not sufficient to overcome the clear evidence of the photos. His statements are either conclusory or admittedly based on estimates by the

plaintiff and her friend, rather than on scientific measurement, as was the opinion of defendant's expert. NB's report is replete with legal jargon as to traps and snares, seemingly borrowed from a lexicon of appellate decisional language, rather than from a road engineer's professional experience. It appears tailored for the purpose of elevating a non-defect into a legally actionable danger. Both NB and plaintiff attribute alarming features to this walkway which do not appear to exist, and plaintiff goes further by attributing to it a type of fall which involved so many body parts as to be impossible to imagine. The overwhelming import of the totality of the evidence presented is that plaintiff's fall had nothing to do with the minor irregularity which she blames, and is perhaps more likely a normal risk of walking in flip-flops with wet feet.

For all of the above reasons, defendant's motion for summary judgment in its favor is granted in all respects, and plaintiff's action is dismissed.

This constitutes the Decision and Order of the Court.

Dated: 12/22/14

MARK FRIEDLANDER, J.S.C.