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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 24

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Joy Ifill-Colon and Robert Colon,
Plaintiffs,

-against-

153 E. 149th Realty Corp., Baychester Payment Center, LLC, and Wink Check Cashing Corp.,
Defendants.

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Index No. 300356/13

DECISION and ORDER

Present:
Hon. SHARON A. M. AARONS

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of motion, as indicated below:

Papers	Numbered
Notice of Motion and Exhibits Annexed (Defendants Baychester Payment Center, LLC and Wink Check Cashing Corp.)	1
Affirmation in Opposition	2
Reply Affirmation	3

Papers	Numbered
Notice of Motion and Exhibits Annexed (Defendant 153 e. 149th Realty Corp.)	1
Affirmation in Opposition	2, 3
Reply Affirmation	4, 5

Upon the foregoing papers the foregoing motions are consolidated for disposition and decided as follows:

Defendants Baychester Payment Center, LLC (Baychester) and Wink Check Cashing Corp. (Wink), represented by the same counsel, move for summary judgment dismissing the complaint pursuant to CPLR 3212. Plaintiffs submit written opposition. The motion is granted.

By separate motion, defendant 153 E. 149th Realty Corp. (153) moves for summary judgment dismissing the complaint, and for contractual indemnification from defendants Baychester and Wink, pursuant to CPLR 3212. Plaintiffs submit opposition, and defendants Baychester and Wink submit partial opposition. The motion is granted.

Motion by defendants Baychester and Wink

Plaintiff Joy Ifill-Colon[1] allegedly sustained personal injuries on October 13, 2011, as she descended an exterior stairway at the defendants' premises, when her sneaker became "stuck" in a crack in one of the steps. Plaintiff testified at her deposition that the crack was one to two inches deep.

In support of the instant motion, defendants submit a copy of the pleadings and verified bill of particulars; the unsworn, certified deposition testimony of the plaintiff;[2] and two black-and-white copies of photographs depicting the subject stair, which were described as accurate in plaintiff's deposition testimony. Defendants rely on the photographs in arguing that the defect in this case was nonexistent or trivial.

In opposition to the motion, plaintiffs submit the affidavit of Stanley H, Fein, P.E., a professional engineer who opines that based on a review of five color photographs (none of which are annexed to the opposition papers) and the plaintiff's deposition testimony, "the subject crack appears to be elevated approximately 1.5 inches." As a result plaintiffs argue that the defect was not trivial as it constituted a hazardous tripping condition.

In reply, defendants Baychester and Wink submit an affidavit from their expert, Stan A. Pitera, P.E., who submits measurements of the step taken after inspection, as well as color photographs. He concludes that the step was perfectly level and that the crack in the step, at its widest, was no more than ½ inch wide.

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[1]Plaintiff Joy Ifill-Colon's husband sues derivatively. Reference to the singular "plaintiff" herein indicates plaintiff Joy Ifill-Colon, unless otherwise indicated.

[2]A deposition transcript which was not signed, but which is certified by the reporter, may be considered where it is not challenged as inaccurate. (*Ortiz v. Lynch*, 105 A.D.3d 584, 965 N.Y.S.2d 84 [1st Dept. 2013]; *Bennett v Berger*, 283 AD2d 374, 726 N.Y.S.2d 22 [1st Dept. 2001]). The defendants and the plaintiffs rely on the transcript without challenging its accuracy.

Motion by defendant 153

Defendant 153 submits the pleadings; the verified bill of particulars; the signed, certified deposition testimony of the plaintiff; three color photographs of the subject step; the unsigned, certified deposition testimony of Sanford Herman, "managing operator" of the subject premises; the lease agreement between 153 and defendant Baychester; the unsigned, certified deposition testimony of Kenneth Rubero, the principal of Baychester; and the affidavit of Stanley H. Fein, P.E., plaintiff's expert. Defendant 153 maintains that the subject defect was trivial. In addition, based on the lease between 153 and Baychester, which requires Baychester to indemnify 153 for all claims "arising from or in connection with the occupancy and use of the demised premises," defendant 153 seeks indemnification from defendant Baychester.

Discussion

"The issue of whether a dangerous condition exists on real property depends on the particular facts and circumstances of each case, and generally presents a question of fact for the jury" (*Hahn v. Wilhelm*, 54 A.D.3d 896, 898, 865 N.Y.S.2d 240, 241 [2d Dept. 2008]; *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 688 N.E.2d 489, 665 N.Y.S.2d 615 [1997]). However, "injuries resulting from trivial defects are not actionable." (*Hahn*, 54 A.D.3d at 896; *Portanova v. Kantlis*, 39 A.D.3d 731, 732, 833 N.Y.S.2d 652 [2d Dept. 2007]; *Herring v. Lefrak Org.*, 32 A.D.3d 900, 821 N.Y.S.2d 624 [2d Dept. 2006]). In determining whether a defect is trivial, a court must take into account "the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect along with the 'time, place and circumstance' of the injury" (*Trincere v County of Suffolk*, 90 NY2d at 978, quoting *Caldwell v. Village of Is. Park*, 304 NY 268, 274 [1952]). In considering the various factors, the Court of Appeals has made it clear that "there 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), and that "a mechanistic disposition of a case based exclusively on the dimension of the . . . defect is unacceptable" (*Id.* at 977-978). However, "[w]hile a gradual, shallow depression is generally regarded as trivial [citations omitted], the presence of an edge which poses a tripping hazard renders the defect nontrivial." (*Argenio v. Metropolitan Transp. Auth.*, 277 A.D.2d 165, 166, 716 N.Y.S.2d 657 [1st Dept. 2000]; *see also, Gerber v. W. Hempstead Convenience, Inc.*, 303 A.D.2d 212, 756 N.Y.S.2d 553 [1st Dept. 2003]). It is often held that "[g]enerally, the issue of whether a dangerous condition exists depends on the particular facts of each case, and is properly a question of fact for the jury. However, a property owner may not be held liable for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip." (*Turuseta v Wyassup-Laurel Glen Corp.*, 91 A.D.3d 632, 633, 937 N.Y.S.2d 240 [2d Dept. 2012]).

Plaintiffs suggest that the defendants have not established a prima facie case because they rely solely on photographs, without submitting expert testimony. This is not a correct statement of law. Photographic evidence alone may establish prima facie the existence of a trivial defect. "Photographs that fairly and accurately represent the accident site may be used to establish whether a defect is trivial and, therefore, not actionable...." (*Gotay v. New York City Hous. Auth.*, 127 A.D.3d 693, 695, 7 N.Y.S.3d 311 [2d Dept. 2015] [citation omitted]; *see also, e.g., Lipsky v. Manhattan Plaza, Inc.*, 103 A.D.3d 418, 959 N.Y.S.2d 181 [1st Dept. 2013] ["[T]he photographs identified by plaintiff as depicting the location of the accident on the date of the accident show a trivial defect, which is not a trap or snare. The plaza pavers in the photographs are not broken or uneven, and the slight incline or slope of the surface by the drain is shallow and gently graded."]; *Leon v. Alcor Assoc., L.P.*, 96 A.D.3d 635, 946 N.Y.S.2d 574 [1st Dept. 2012] [photographs submitted on the motion, and authenticated by plaintiff, showed that the alleged defect was a gradually sloping patch between two sidewalk flags, and thus trivial]). Based on the photographs submitted, defendants have met their burden of establishing the absence of an actionable

defect in the subject stair.

Plaintiffs' opposition fails to raise an issue of fact. Plaintiff's own testimony that the defect was "about maybe an inch or two" was speculative. (*Vazquez v. JRG Realty Corp.*, 81 A.D.3d 555, 917 N.Y.S.2d 562 [1st Dept. 2011] ["[plaintiff's] testimony that the defect was three-quarters of an inch to one inch in height was speculative, since she did not measure the defect herself...."].) Plaintiff's expert did not examine the step, did not take measurements, did not adduce the photographs on which he relied, and otherwise failed to establish the presence of a defect. *(Garcia v. DPA Wallace Ave. I, LLC*, 101 A.D.3d 415, 955 N.Y.S.2d 320 [1st Dept. 2012] ["The court properly rejected plaintiff's expert's affidavit, as the affidavit was based only on his review of the deposition testimony, and he did not examine the premises."] [citations omitted]). His opinion was based on mere conjecture, and is entirely without probative value. Without an evidentiary basis for his assessment, the conclusions of plaintiff's expert fail to raise an issue of fact, and his conclusion that the defect "appears to be 1 ½ inch in elevation" is speculative.

With respect to that part of defendant 153's motion seeking indemnification from Baychester, the lease contains a broad indemnification clause, which obligates Baychester to indemnify 153 for its own negligence. Although General Obligations Law § 5-321 provides that an agreement that purports to exempt a lessor from its own negligence is void and unenforceable, the subject indemnification provision is not rendered unenforceable by this statute. "[W]here, as here, the liability is to a third party, General Obligations Law § 5-321 does not preclude enforcement of an indemnification provision in a commercial lease negotiated at arm's length between two sophisticated parties when coupled with an insurance procurement requirement." (*Karanikolas v Elias Taverna, LLC*, 120 A.D.3d 552, 556, 992 N.Y.S.2d 31 [2d Dept. 2014] [internal quotation marks omitted]; see *Great N. Ins. Co. v Interior Constr.*

Corp., 7 NY3d 412, 418-419, 857 N.E.2d 60, 823 N.Y.S.2d 765 [2006]; *Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153, 160-161, 366 N.E.2d 263, 397 N.Y.S.2d 602 [1977]).

Consequently (1) the motion by defendants Baychester Payment Center, LLC and Wink Check Cashing Corp. for summary judgement dismissing the plaintiffs' complaint against them is granted; and, (2) the motion by defendant 153 E. 149th Street Realty Corp. is granted dismissing plaintiffs' complaint against it, and awarding defendant 153 E. 149th Street Realty Corp. judgment on its claim for contractual indemnity against defendant Baychester Payment Center, LLC, for defense costs incurred in this action. It is accordingly,

ORDERED that the complaint of the plaintiffs is dismissed, and it is

ORDERED that defendant 153 E. 149th Street Realty Corp. is awarded judgment on its claim for contractual indemnity against defendant Baychester Payment Center, LLC, for defense costs incurred in this action.

Dated: September 3, 2015

SHARON A. M. AARONS, J.S.C.