NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

MICHLA DIEN,

Plaintiff,

-against-

Index No: 150055/14
DECISION/ORDER
Motion seq. ●6

80-81 & FIRST ASSOCIATES, L.P.,
EAST WINDS CONDOMINIUM,
JACK RESNICK & SONS, INC.,
APPLE BANK FOR SAVINGS, and
KENIL WORTH MANAGEMENT CORP.,

Defendants.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant Apple Bank for Savings' summary-judgment motion and motion to vacate the note of issue, and defendants East Winds Condominium and Kenil Worth Management's motion for summary judgment.

Papers	**Numbered**
Defendant Apple Bank for Savings' Notice of Motion for Summary Judgment	1
Defendant Apple Bank for Savings' Supplemental Affirmation	2
Plaintiff's Affirmation in Opposition	3
Defendant Apple Bank for Savings' Reply Affirmation	4
Defendant Apple Bank for Savings' Notice of Motion to Vacate Note of Issue	5
Plaintiff's Affirmation in Opposition	6
Defendant Apple Bank for Savings' Reply Affirmation	7
Plaintiff's Sur Reply	8
Defendants East Winds Condominium and Kenil Worth Management's Notice of Motion for Summary Judgment	9
Defendants East Winds Condominium and Kenil Worth Management's Memorandum of Law in Support of Motion	10
Plaintiff's Affirmation in Opposition	11
Defendants East Winds Condominium and Kenil Worth Management's Reply Affirmation	12

Leav & Steinberg, LLP, New York (Vincent F. Provenzano of counsel), for plaintiff.
Harris, King, Fodera & Correia, New York (Josefina Belmonte of counsel), for defendant Apple Bank for Savings.
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, White Plains (Lisa M. Van Batavia and John D. Morio of counsel), for defendants East Winds Condominium and Kenil Worth Management.

Gerald Lebovits, J.

Motion sequence numbers 4, 5, and 6 are consolidated for disposition.

In this trip-and-fall case, defendants East Winds Condominium and Kenil Worth Management Corp. (collectively, the Condominium) and Apple Bank for Savings (Apple Bank) move for summary judgment under CPLR 3212. Apple Bank also moves to vacate the note of issue and certificate of readiness that plaintiff filed in December 2015.

Plaintiff allegedly tripped and fell on a sidewalk outside Apple Bank located at 1555 First Avenue in New York County.

To obtain summary judgment, a moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006] [internal quotation marks and citation omitted]). If the moving party meets this burden, the burden then shifts to the movant's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *accord DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If a court has any doubt about whether triable facts exist, a court must deny summary judgment (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

I. Apple Bank's Motion for Summary Judgment

Apple Bank argues that it is entitled to summary judgment because it does not have a duty to maintain the sidewalk. To meet its burden on this motion, Apple Bank provides a lease to demonstrate that Apple Bank was not obligated to the maintain the sidewalk, as well as the testimony of the Condominium's resident manager that it was the Condominium's responsibility to maintain the sidewalk. In opposition, plaintiff argues that testimony exists — from a bank manager — that armored cars may have used the sidewalk and that the bank knew that falls had occurred in the area. Based on this evidence, plaintiff argues that an issue of fact exists about whether Apple Bank created the defect.

The record reveals that the question posed to the witness, Neil Summer, a bank officer/project manager for the commercial real-estate department, was whether he had ever seen an armored truck on any sidewalk at any location at any bank (Belmonte affirmation, exhibit F, at 31). The witness answered "yes." The witness later corrected his testimony on an errata sheet appended to the examination before trial (EBT) transcript, submitted with the moving papers, that he had misheard the question about the armored truck. He corrected his answer to indicate that he had not witnessed any armored car on the sidewalk at any Apple Bank branch, but had answered "yes" to what he thought was the question whether he had ever seen an armored car by the sidewalk at any Apple Bank branch. Even assuming that the manager testified that he had seen an armored car on the sidewalk at an Apple Bank branch, plaintiff only speculates that it was the same Apple Bank branch in which she claims to have fallen. Plaintiff further speculates that if a truck was driven on the sidewalk, this would have created a defect — the same type of defect that she claims caused her fall. Plaintiff filed her note of issue, indicating that disclosure has been completed, and plaintiff may not rely on speculation to demonstrate a fact issue to defeat summary judgment (*Georgiou v 32-42 Broadway LLC*, 82 AD3d 606, 607 [1st Dept 2011]

[holding that speculation is insufficient to defeat summary judgment]). Summary judgment is granted dismissing the complaint against defendant Apple Bank.

II. The Condominium's Motion for Summary Judgment

The Condominium moves for summary judgment dismissing the complaint on the grounds that (1) plaintiff did not know what caused her to fall and (2) the defect was trivial. Concerning the first ground, proximate cause requires that the defendant's act or failure to act was a "substantial cause of the events which produced the injury" (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993] [internal quotation marks and citation omitted]). Plaintiff's evidence must be sufficient to permit a finding of proximate cause based on logical inferences from the evidence (*Sieling v New York Convention Ctr.*, 35 AD3d 227, 227 [1st Dept 2006]). Failing to identify the cause of a fall may be fatal to the complaint. Otherwise, a jury "would be required to base a finding of proximate cause upon nothing more than speculation" (*Cherry v Daytop Vil., Inc.*, 41 AD3d 130, 131 [1st Dept 2007] [internal quotation marks and citation omitted]).

In moving for summary judgment, the Condominium relies on plaintiff's EBT testimony: when she fell, she did not notice what she had tripped on or how she fell. But plaintiff's affidavit suggests that she tripped, and, therefore, did not lose her balance or faint (Provenzano opposition affirmation, exhibit H, § 17 ["[m]y trip and fall [was] through no fault of my own"]). Plaintiff also avers that she identified what she alleges was the defective condition in a photograph at her deposition (*id.*, § 7 "[a]t my deposition, I was able to point out on those photographs the exact portion of the raised defective sidewalk which caused by trip and fall"]). At her EBT, plaintiff testified that she remembered the location, went back to it approximately two weeks after the incident, and then determined what caused her to fall (Belmonte affirmation, exhibit D at 44-48, 76-77).

On her summary-judgment motion, plaintiff is not required to demonstrate that she knew exactly what she tripped over precisely at the time of the occurrence. No evidence exists that the condition about which plaintiff complains was of a transitory nature and that it could not be identified later — provided that plaintiff knew where she fell — with a reasonable degree of precision. As the nonmoving party, plaintiff is entitled to have the court view the evidence in the light most favorable to her and give her the benefit of all reasonable, favorable inferences that can be drawn from the evidence (*Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). Thus, the court cannot determine based on the evidence presented whether plaintiff will be able to demonstrate at trial that the difference between the pavement slabs caused her fall. Nor can it determined that a jury could not reasonably conclude that plaintiff tripped because of raised pavement. To the extent that this issue is about credibility, a court may not decide credibility issues on a summary-judgment motion (*Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 [1st Dept 1989]).

Concerning the nature of the defect, "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 976, 977 [1997]). Generally, whether a dangerous or defective condition exists depends on the particular circumstances of each case and is an issue of fact for

the jury to determine (*id.*; *Alexander v New York City Tr.*, 34 AD3d 312, 313 [1st Dept 2006]; *Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165, 165-166 [1st Dept 2000]).

A court's "mechanistic disposition of a case based exclusively on the dimension of the sidewalk defect is unacceptable" (*Trincere*, 90 NY2d at 977-978). But "trivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his [or her] toes, or trip over a raised projection," are not actionable (*Morales v Riverbay Corp.*, 226 AD2d 271, 271 [1st Dept 1996] [internal quotation marks and citation omitted]). To determine whether a defect is trivial as a matter of law, the court must examine all 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*, 90 NY2d at 978 [citation omitted]). A court should also consider whether other conditions exist that make an otherwise trivial defect an actionable hazard, such as weather, location, or adverse lighting (*Menendez v Dobra*, 301 AD2d 453, 453 [1st Dept 2003]).

Although elevation differentials of about one inch are trivial and non-actionable (*see e.g. Morales*, 226 AD2d at 271), an otherwise-trivial defect may be actionable where the defect has characteristics of a trap or snare:

> "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 AD2d 220, 221 [1st Dept 2002] [internal quotation marks and citation omitted]).

Defendant must establish that the defect is trivial as a matter of law (*Cela v Goodyear Tire & Rubber Co.* (286 AD2d 640, 641 [1st Dept 2001] [finding that defendant failed to establish that the defect was trivial as a matter of law and that it was "of sufficient magnitude to raise a jury issue as to whether it suffices as a basis for liability"]; *accord Nin v Bernard*, 257 AD2d 417, 417-418 [1st Dept 1999] [holding that lower court properly denied summary judgment for a defect caused by missing tiles with sharp edges located at the top of a stairwell]; *but see Morales*, 226 AD2d at 271 [finding defect trivial as a matter of law because "the differential between the two slabs was, by plaintiff's own testimony, about an inch and possessed none of the characteristics of a trap or a snare"]).

Although the method plaintiff used to measure the difference in height between two pavers — using a key chain, and later measuring the key chain — may not be perfect, defendants have not persuaded the court to exclude plaintiff's method as an invalid or incorrect measurement. Plaintiff stated that the difference between the pavers was 3/4 of an inch to almost an inch. Conflicting testimony that defendants offer — that it measured the difference in height between the pavers and it was less than plaintiff's measurement — does not resolve the issue, but raises a factual issue. In her affidavit, which supplements her EBT testimony, plaintiff avers that there was an edge where she fell — plaintiff thus raises a factual issue about whether the condition was a trivial defect, and the court cannot resolve this issue on this motion. The bank

employee's testimony suggests that one or more people, aside from plaintiff, fell at the same location (Belmonte affirmation, exhibit F, at 21-26).

III. Apple Bank's Motion to Vacate the Note of Issue

Because the court has granted summary judgment to Apple Bank, Apple Bank's motion to vacate the note of issue is denied as academic.

Accordingly, it is

ORDERED that defendant Apple Bank for Savings' summary-judgment motion (motion sequence No. 6) is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that defendants East Winds Condominium and Kenil Worth Management Corp. summary-judgment motion (motion sequence No. 5) is denied; and it is further

ORDERED that Apple Bank for Savings' motion to vacate the note of issue and certificate of readiness (motion sequence No. 4) is denied as academic; and it is further

ORDERED that defendant Apple Bank for Savings serve a copy of this decision and order with notice of entry on all parties and on the County Clerk's Office, which is directed to enter judgment accordingly.

Dated: January 11, 2017

J.S.C.

HON. GERALD LEBOVITS
J.S.C.