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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 10th day of May, 2017.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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PABLO JOSE CALIXTO LOPEZ,

Plaintiff,

- against -

ZHEN JIN LI and NEW FU XING MARKET II CORP.,

Defendants.

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Index No.: 503325/2012

DECISION AND ORDER

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

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	1/2,
Opposing Affidavits (Affirmations).....	3
Memoranda of Law	4, 5
Reply Affidavits (Affirmations).....	6

Upon the foregoing cited papers and after oral argument, the decision and order for this motion is as follows:

Plaintiff Pablo Jose Calixto Lopez (hereinafter the "Plaintiff") seeks to recover damages for personal injuries he allegedly sustained on July 20, 2012, when he allegedly tripped over a metal door frame at a business located at 4322 8th Avenue, Brooklyn, New York.

Defendants property owner Zhen Jin Li and tenant New Fu Xing Market II Corp. (hereinafter "the Defendants") move for an order, pursuant to CPLR §3212, granting them summary judgment

and dismissing all claims asserted against them. In support of the Defendants' motion for summary judgment, the Defendants contend that they were without actual or constructive notice of the alleged defect and that to the extent that the alleged defect existed at all it was open and obvious and not inherently dangerous. In opposition to the motion, the Plaintiff argues that the motion for summary judgement must be denied because there is conflicting testimony by the parties regarding the alleged incident at issue that creates a material issue of fact with regard to whether the Defendants had constructive notice of the alleged defect.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853; *see also Akseizer v. Kramer,* 265 A.D.2d 356 [2nd Dept, 1999]. Moreover, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642.

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action"*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Moreover, as the Court of Appeals made clear in *Andre v. Pomeroy* "when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated." *Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131,

320 N.E.2d 853 [1974]; *see also McElwain v. Olashansky*, 220 A.D.2d 394, 395, 631 N.Y.S.2d 886, 886 [2nd Dept, 1995].

In general "the issue of whether a dangerous or defective condition exists depends on the particular facts of each case, and is properly a question of fact for the jury." *Ayala v. Gutin*, 49 A.D.3d 677, 677, 853 N.Y.S.2d 665, 666 [2nd Dept, 2008]. However, a trivial defect may not be actionable. See *Hagood v. City of New York*, 13 A.D.3d 413, 413, 785 N.Y.S.2d 924 [2nd Dept, 2004]. Morever, "in determining whether a defect is trivial, a court must examine all the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect, along with the time, place, and circumstances of the injury." *Smith v. A.B.K. Apartments, Inc.*, 284 A.D.2d 323, 725 N.Y.S.2d 672, 673 [2nd Dept, 2001]; see also *Ortiz v. 82-90 Broadway Realty Corp.*, 117 A.D.3d 1016, 1016, 986 N.Y.S.2d 133, 135 [2nd Dept, 2014]; *Corrado v. City of N.Y.*, 6 A.D.3d 380, 380, 773 N.Y.S.2d 894 [2nd Dept, 2004].

Turning to the merits of the instant motion, the Court finds that the Defendants have provided sufficient evidence to show that they did not have either actual or constructive notice of the defect at issue. In support of their motion, the Defendants rely primarily on the Examination Before Trial (EBT) testimony of Yan Xuan Liang, an employee of Defendant New Fu Xing Market II Corp. In her EBT testimony, Yan Xuan Liang testified that she was present at the store when the alleged incident occurred but did not see the alleged incident (Motion, Exhibit F, Page 11). Yan Xuan Lian testified that prior to this alleged incident, no one had complained about or had been previously injured by the metal frame of the doorway (Motion, Exhibit F, Pages 19, 20). When asked again, Yan Xuan Liang repeated that no one had made any complaints about the subject doorway prior to the alleged incident (Motion, Exhibit F, Page 27). The Defendants also rely on an affidavit from Yan Xuan Liang in which she states (Motion, Exhibit G, Paragraph 6) that she had personally observed the metal base to the door frame earlier that day and it did not appear to be raised or loose. The testimony of Yan Xuan

Liang that she was the store manager, had never received any complaints regarding the alleged condition and had observed the doorway on that day and witnessed no defect is sufficient to support the Defendants *prima facie* burden. *See Hayden v. Waldbaum, Inc.*, 63 A.D.3d 679, 679, 880 N.Y.S.2d 351, 351 [2nd Dept, 2009].

In opposition, the Court finds that the Plaintiff has raised a material issue of fact that prevents this Court from granting summary judgment. The Plaintiff also points to the EBT testimony of Yan Xuan Liang who stated that while she received no complaints about the condition prior to the alleged incident, she was aware of metal bar(s) sticking up at the entrance (Motion, Exhibit F, Pages 19, 20). Yan Xuan Liang seeks to clarify her response of "yes" to the question of whether she was aware of any metal bars sticking up at the entrance. Her errata sheet clarifies "yes" to be modified to "yes, there was a normal metal door frame on and above the concrete." However, that answer following the word yes is not responsive to the question and makes her response unclear and peculiar. Therefore whether the Court were to rely on the original or the clarification the witness affirms she was aware of metal bar(s) sticking up at the entrance. See *Torres v. Bd. of Educ. of City of N.Y.*, 137 A.D.3d 1256, 29 N.Y.S.3d 396 [2nd Dept, 2016]. These self-contradictory statements "reveal[s] that there is an issue of fact as to whether the defendants had actual or constructive notice of the allegedly dangerous condition." *O'Hanlon v. Bodouva*, 251 A.D.2d 474, 474, 674 N.Y.S.2d 436, 436 [2nd Dept, 1998].

What is more, the photos presented by the Defendants of the defect at issue are insufficient to address whether the condition constituted a dangerous defect. In this case probably more appropriately termed a tripping hazard. As stated above "the issue of whether a dangerous or defective condition exists on the property of another depends on the peculiar circumstances of each case and presents a question of fact for the jury." *Portanova v. Kantlis*, 39 A.D.3d 731, 732, 833 N.Y.S.2d 652, 653 [2nd Dept, 2007]. As a result, the Defendants' motion is denied.

Based on the foregoing, it is hereby ORDERED as follows:

The Defendants' motion for summary judgment is denied.

The foregoing constitutes the Decision and Order of the Court.

Enter:

May 10, 2017

Carl J. Landicino
Justice Supreme Court