SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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STEFANIE KIRCHHEIMER,

Plaintiff,

-against-

NATIONAL RAILROAD PASSENGER CORPORATION and NEW JERSEY TRANSIT CORPORATION,

Defendants.

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Index No. 156233/16
Motion Sequence 004

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

In this personal injury action, defendants National Railroad Passenger Corporation (Amtrak) and New Jersey Transit Corporation (New Jersey Transit) (collectively, Defendants) move pursuant to CPLR 3212 for summary judgment dismissing the complaint, arguing that the condition that is alleged to have caused Plaintiff Stefanie Kirchheimer's ("Plaintiff") injuries is trivial as a matter of law. For the reasons set forth below, the motion is denied.

According to the complaint, Plaintiff slipped and fell on uneven concrete on the platform of NJ Transit's Track 12 at Manhattan's Pennsylvania Station on February 11, 2016. As a result of the accident Plaintiff alleges that she sustained injuries to her left ankle that required surgery on June 23, 2016. It is undisputed that the location where Plaintiff's accident occurred was at all relevant times under the Defendants' exclusive supervision and control.

Ms. Kirchheimer was deposed on July 11, 2017.[1] At her deposition she testified that she was in Manhattan meeting with a client on the date of the accident and had to go through Penn Station in order to take New Jersey Transit back to her home in New Jersey. At approximately 4:30pm she was walking briskly on the Track 12 platform when she tripped over a crack in the concrete (Deposition pp. 24, 26):

[1] A copy of her deposition transcript is submitted as Defendants' exhibit F (Deposition).

Q. And why did you fall?

A. Um, as I was walking to the train, I – I tripped and fell. At that – at that moment, I didn't know why, but when I looked back, I saw that there was uneven ground that was cracked and, um, uneven, and – and that's why I tripped and fell.

* * * *

Q. Could you describe to me in detail what the uneven ground looked like?

A. Um, so I think this particular one – throughout Penn Station and on the tracks, there's various cracked paves and, um, kind of some raised areas, some holes even, um, I don't recall specifically every bit of this part of uneven ground, but it went across the whole part of the platform I was walking on – walking on.

Plaintiff conceded that the platform was not crowded when she approached the platform. Plaintiff also did not recall the height difference of the uneven concrete. *Id.* at 28. However, in photographs annexed to Plaintiff's Bill of Particulars, the height differential at one point on the cracked surface measured approximately ¼ of an inch.[2] The photographs also indicate that the area in question was more than 2½ feet long.

Bryan Tyska was deposed on behalf of Amtrak.[3] His duties include oversight and maintenance of the Penn Station facility. With respect to the area in question, Mr. Tyska testified that the condition was a defect but was not a tripping hazard (Tyska Deposition pp. 20, 29-30):

Q. Looking at Defendant's Exhibit 4, the portion of, I guess, the photograph that's been circled. Would you consider that a defect?

A. Yes.

Q. Now, if a defect like that was noticed, is there a written report that's created?

A. Yes.

* * * *

Q. Before February 11, 2016, had you ever heard of anyone slipping and falling on Platform 12?

A. No. . . .

Q. Before plaintiff's counsel showed you several photographs . . . Specifically he showed you photograph D4, and he asked you whether or not you consider that a defect; right?

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[2] Plaintiff's Bill of Particulars is submitted as Defendants' exhibit D.

[3] Mr. Tyska was deposed on September 11, 2017. A copy of his deposition transcript is submitted as Defendants' exhibit H (Tyska Deposition).

A. Yes.
Q. Would you consider the condition shown in D4 as a tripping hazard?
A. No.
Q. Would you consider the condition shown in D4 a trivial defect?
A. Yes.

Annexed to Defendants' moving papers is a report by Dr. Carl Berkowitz, a professional engineer.[4] Dr. Berkowitz did not personally conduct a site inspection, presumably because the condition was repaired shortly after Plaintiff's fall. He did however examine the photographs annexed to Plaintiff's Bill of Particulars as well as the deposition transcripts.[5] Dr. Berkowitz notes that, at the time of the accident, the Track 12 platform conformed with accepted industry standards and practices for walking surfaces, which generally permit changes in level of less than ¼ of an inch in height. He concludes that "[p]reventative measures were not required other than for the walking surface aesthetics and there was no hazard to eliminate." (Berkowitz Report, pp. 2, 4).

Annexed to Plaintiff's opposition papers is a report by Stanley Fein, a certified engineer.[6] Mr. Fein reviewed the photographs and deposition transcripts, and also visited the scene of the accident after the condition was repaired. Among other things, Mr. Fein stated that his review of the file "revealed that the crack consisted of eroded concrete that was approximately 12 inches long and based on my review of the photos submitted by your office and an extrapolation taken of the flooring at the time of my inspection was ¾ inches deep." He concludes, "with a reasonable degree of engineering certainty, the accident and injuries sustained by Stefanie Kirchheimer on February 11, 2016 was caused by the negligence of New Jersey Transit and Amtrak for not maintaining the platform in a safe manner." Fein Report, p. 2.

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[4] Dr. Berkowitz' report is submitted as Defendants' exhibit I (Berkowitz Report).

[5] The parties also deposed Richard Anderson, an assistant superintendent for New Jersey Transit.

[6] Mr. Fein's report is submitted as Plaintiff's exhibit 4 (Fein Report).

Relying primarily upon the photographs taken of the condition after the accident, Defendants assert that the alleged defect is trivial as a matter of law. Plaintiff opposes that Defendants have not met their *prima facie* burden and that Mr. Fein's report raises a triable issue of fact as to the Defendants' negligence. Defendants reply that Mr. Fein's report should be rejected in its entirety because it was proffered for the first time in opposition to this summary judgment motion. Even were the court to consider his report, Defendants assert that Mr. Fein's conclusions are speculative because they are based upon extrapolation as opposed to material facts and data.

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action.'" *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012) (quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]); *see also Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 (2014) (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof." *Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 (1st Dept 2008).

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 NY2d 976, 977 (1997). 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. *Id.* "In

determining whether a defect is trivial, the court must examine all 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.'" *Cortes v Taravella Family Trust*, 2018 NY App. Div. LEXIS 1283, *2 (2d Dept Feb. 28, 2018) (quoting *Trincere*, 90 NY2d at 978); *see also Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77 (2015); *Flores v New York City Tr. Auth.*, 147 AD3d 553, 554 (1st Dept 2017). The size and dimension of the defect alone are not the ultimate determining factors, meaning that physically small defects can be actionable depending upon their intrinsic characteristics. *Hutchinson*, 26 NY3d at 79.

Here, Defendants have failed to demonstrate that the alleged defective condition is so trivial as to constitute a matter of law for this court to determine. The photographs annexed to the Bill of Particulars, which amount to the only physical evidence of what the condition looked like on the date of the accident, show a network of cracks spanning several feet long. Defendants argue that the height differential created by the crack is less than ¼ of an inch, but Defendants have not shown that the height differential was consistent throughout the entire length of the platform crack. Even if it were the same, the law is clear that a defect need not be of a certain height or depth to be actionable. *Trincere*, 92 NY2d at 977. Moreover, compliance with industry standards, while relevant to the issue of liability, is also not determinative of whether a defect is trivial. *See Kellman v 45 Tiemann Assoc., Inc.*, 87 NY2d 871, 872 (1995) ("alleged compliance with the applicable statutes and regulations is not dispositive of the question of whether [defendant] satisfied its duties under the common law"); *Hayes v Texas Roadhouse Holdings, LLC*, 100 AD3d 1532, 1532 (4th Dept 2012) ("Evidence of a defendant's compliance with industry standards . . . does not establish as a matter of law that such defendant was not negligent").

Cases such as this one require a highly specific fact analysis. Thus, while Defendants correctly cite several cases where claims were dismissed based upon trivial defects, they are all

distinguishable from the case at bar. *See DePascale v E&A Constr. Corp.*, 74 AD3d 1128 (2d Dept 2010) (slip and fall over ¼ height differential between floor tiles); *Guerrieri v Summa*, 193 AD2d 647 (2d Dept 1993) (slip and fall over elevated metal strip used as foul line for darts game); *Marinaccio v LeChambord Restaurant*, 246 AD2d 514 (2d Dept 1998) (slip and fall over rubber mat on restaurant patio). In this case, plaintiff presented photographs depicting a network of cracks that spanned more than 2½ feet long. Defendants claim that the accompanying height differential was only ¼ of an inch, but they have not shown that this was pervasive throughout the condition. Either way, the height differential is only one factor in the court's analysis. Considering the totality of the circumstances, I find there to be a triable issue of fact whether the area as a whole posed an actionable tripping hazard. Thus, this case falls outside the realm of triviality for summary judgment purposes. Accordingly, I find that Defendants have not establishment their *prima facie* entitlement to summary judgment.

In light of the foregoing, it is hereby

ORDERED that Defendants' motion for summary judgment is denied; and it is further

ORDERED that all counsel appear in Part 30 (60 Centre Street, Room 412) for a pre-trial settlement conference on June 4, 2018 at 9:30AM, as previously scheduled.

The Clerk of the Court is directed to mark his records accordingly.

This constitutes the decision and order of the court.

DATED: 4-10-18

Sherry K. Heitler

SHERRY KLEIN HEITLER, J.S.C.