KELLY O'NEILL LEVY
JSC

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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ANASTASIA FRANGIADAKIS, as Administratrix of the Estate of CONSTANTINE BAZAS, deceased, and EUDOXIA BAZAS,

Plaintiffs,

- v -

51 WEST 81ST STREET CORP., RUDD REALTY MANAGEMENT CORP., MIDBORO MANAGEMENT INC., and HERBOL REALTY COMPANY,

Defendants.

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51 WEST 81ST STREET CORP. and RUDD REALTY MANAGEMENT CORP.,

Third-Party Plaintiffs,

- v -

HERBOL REALTY COMPANY,

Third-Party Defendant.

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HERBOL REALTY COMPANY,

Second Third-Party Plaintiff,

- v -

WHITE IRIS INC. d/b/a QUALITY FLORIST, WHITE ORCHID INC., Q FLORIST, and NEW FORCE CONSTRUCTION CORP.,

Second Third-Party Defendants.

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INDEX NO. 150538/2014

MOTION DATE 10/10/2018

MOTION SEQ. NO. 005

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 005) 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 233, 244, 245, 246, 247, 248, 249, 250, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299

were read on this motion to/for SUMMARY JUDGMENT.

HON. KELLY O'NEILL LEVY:

This is a personal injury and wrongful death action arising from an alleged slip and fall.

Plaintiffs Anastasia Frangiadakis (hereinafter, Frangiadakis), as administratrix of the estate of Constantine Bazas, deceased (hereinafter, the decedent), and Eudoxia Bazas move for an order, pursuant to CPLR § 3212, granting summary judgment on liability against defendants 51 West 81st Street Corp. (hereinafter, 51 West) and Rudd Realty Management Corp. (hereinafter, Rudd Realty) (collectively, hereinafter, moving defendants). Moving defendants oppose and cross-move for an order, pursuant to CPLR § 3212, granting summary judgment in their favor, dismissing the complaint and all cross-claims against them. Plaintiffs oppose and second third-party defendant White Iris Inc. d/b/a Quality Florist (hereinafter, Quality Florist) partially opposes the cross-motion as it relates to dismissal of its cross-claims.

BACKGROUND

On October 6, 2013, the decedent was traversing a sidewalk adjacent to the premises located at 447 Columbus Avenue in Manhattan (hereinafter, the premises). The premises was owned by 51 West, managed by Rudd Realty, and the retail space on the ground floor was leased to Quality Florist for use as a flower shop operated by the decedent's family [Deposition of Anastasia Frangiadakis (ex. M to the Fils-Aime aff.) at 88-89]. As the decedent was taking flowers outside to place on the sidewalk for sale (*id.* at 47-48), he allegedly tripped and fell on a 14-by-14-inch piece of plywood placed in front of the premises. On March 1, 2015, the decedent died after being admitted to the hospital due to a second alleged fall that occurred after a hip surgery (*id.* at 152-153). The decedent died prior to getting deposed in this action. As such, his testimony was not preserved.

Patrick Clarke, 51 West's superintendent, testified that he placed the plywood in front of the premises about two–to–three months prior to the accident in order to cover a 12-inch square hole he drilled in the sidewalk as part of a sidewalk vault repair project [Deposition of Patrick

Clark (ex. N to the Fils-Aime aff.) at 14, 72]. The decedent's daughter and administratrix, Frangiadakis, testified that she was in the back of the florist shop at the time of the incident and that she saw her father in the act of falling (Frangiadakis tr. at 48, 60). There is security camera video footage that shows the decedent falling, but there is no observable plywood on the ground in the video [Surveillance Video (ex. B to the Fouhy aff.)].

DISCUSSION

On a summary judgment motion, the moving party has the burden of offering sufficient evidence to make a *prima facie* showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that material factual issues exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or factual findings. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).

Plaintiffs assert that moving defendants are liable because they caused and created the defective condition which allegedly caused the decedent's trip and fall by placing plywood on the ground in a manner that it was not level with the sidewalk, thus creating a tripping hazard. Plaintiffs allege that 51 West is statutorily responsible for maintaining the sidewalk in a reasonably safe condition, pursuant to New York City Administrative Code § 7-210. Plaintiffs also contend that there is no comparative negligence on the part of the decedent since the sole cause of the accident was the plywood on the ground.

Moving defendants assert that: (1) summary judgment should be denied since the decedent passed away before his testimony was preserved and there are no other witnesses with actual knowledge as to the cause of the accident, (2) Frangiadakis' testimony regarding how the decedent identified the plywood as the cause of the accident is inadmissible hearsay and cannot be considered an excited utterance because Frangiadakis' testimony as to when the hearsay statement was made was inconsistent and contradicts other testimony, (3) Frangiadakis' testimony should be rejected altogether because her deposition transcript was allegedly unsworn and unexecuted, (4) since the plywood was less than a half-inch thick, it is a non-actionable trivial defect, and (5) security videos of the accident show that the decedent did not trip over the plywood, but rather the decedent stepped backwards, away from the plywood, and fell.

The court will first consider the assertion that Frangiadakis' testimony should be rejected altogether because her deposition transcript was allegedly unsworn and unexecuted. In *Pavane v. Marte*, the court found that the unsigned excerpts of the defendants' deposition testimony were admissible under CPLR § 3116(a) since they were: (1) submitted by the party deponents themselves and, thus adopted as accurate by those deponents, (2) although unsigned, the depositions were certified by the court reporter, and (3) the plaintiffs did not raise any challenges to deposition's accuracy. *Pavane v. Marte*, 109 A.D.3d 970, 971 (2d Dep't 2013). Frangiadakis' deposition transcript was submitted by plaintiffs, the party deponents, in support of their motion for summary judgment and the transcript was certified by the court reporter as accurate (Frangiadakis tr. at 188). Moving defendants also cite to Frangiadakis' deposition testimony in their own motion papers. Thus, the court finds that Frangiadakis' testimony is admissible.

The court will next consider whether Frangiadakis' specific testimony regarding the decedent's identification of the plywood as the cause of the accident is inadmissible hearsay or

admissible as an excited utterance. Frangiadakis testified that after the decedent fell, she went out to the sidewalk to help him (Frangiadakis tr. at 80). She asked the decedent if he was okay, to which he replied that he could not move his leg (*id.*). She then testified that the neighbor came over and helped her pick the decedent up and placed him inside the store on his chair (*id.*). During this initial interaction, she did not immediately ask the decedent what caused his fall and he did not state what caused his fall (*id.* at 81). Frangiadakis testified that she did not recall the exact time when the decedent first told her that he tripped over the plywood (*id.*). She stated that as soon as they brought the decedent into the store and sat him on the chair, she asked him what happened, and he replied that he tripped over the plywood (*id.* at 82). She estimates that this statement was made approximately five minutes after his fall (*id.*). She also recalls that the decedent repeated the statement that he tripped over the plywood many times before he died (*id.*). The court finds that Frangiadakis' testimony regarding the cause of the accident was consistent, as she initially could not recall exactly when he identified the cause of his fall, but she immediately clarified that it was about five minutes after the accident.

An out-of-court statement is properly admissible under the excited utterance exception when made under the stress of excitement caused by an external event, and not the product of studied reflection and possible fabrication. *People v. Marks*, 6 N.Y.2d 67, 71 (1959); *People v. Edwards*, 47 N.Y.2d 493, 497 (1979); *People v. Brown*, 70 N.Y.2d 513, 518 (1987); *People v. Johnson,* 1 N.Y.3d 302, 307 (2003). While it is critical that a declarant make the statements before having an opportunity to reflect, the relevant period is not measured in minutes or seconds but rather is measured by facts. *People v. Vasquez*, 88 N.Y.2d 561, 579 (2001). The court must also examine "not only the nature of the startling event and the amount of time which has elapsed between the occurrence and the statement, but also the activities of the declarant in the

interim." *Edwards* at 497. Statements that were made in response to an inquiry do not disqualify them as excited utterances. *Id.* at 498-499; *Brown* at 522; *People v. Arnold*, 34 N.Y.2d 548, 549 (1974). Above all else, the decisive factor is whether the surrounding circumstances show that the remarks were not fabricated under the impetus of studied reflection. *Edwards* at 497; *Johnson* at 307. The court in *Langner v. Primary Home Care Servs., Inc.* held that a decedent's statement that her home health aide left her standing unattended on the porch, which she allegedly made to plaintiff shortly after the accident, was admissible as an excited utterance because it was made under the stress of excitement caused by this decedent's fall. *Langner v. Primary Home Care Servs., Inc.*, 83 A.D.3d 1007, 1008 (2d Dep't 2011).

The facts of this case are similar to those in *Langner*. In both cases, a decedent makes a hearsay statement shortly after a fall. The court finds that the decedent in this case similarly could have made the hearsay statement under the stress of excitement from the fall, even though the statement was made five minutes after the fall while he was seated in his chair inside the shop. However, there is no other evidence to show that the decedent made the statement under the stress of excitement caused by his fall. Therefore, the subject statement may potentially be admissible at trial as an excited utterance.

The court will now consider whether the plywood is a non-actionable trivial defect. 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 circumstance of the injury. *Green v. New York City Hous. Auth.*, 7 A.D.3d 287, 288 (1st Dep't 2016); *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 978 (1997) (cement slab that was elevated at an angle 'a little over a half-inch above the surrounding paving slabs' was a trivial defect). There is no "minimal dimension test" or per se rule that a defect must be of a certain

minimum height or depth to be actionable (*id.* at 977-978). A small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses, so that it "unreasonably imperil[s] the safety of" a pedestrian. *Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d 66, 78 (2015), quoting *Wilson v. Jaybro Realty & Dev. Co.*, 289 N.Y. 410, 412, (1943). A defendant seeking dismissal of a complaint on the basis that an alleged defect is trivial must make a *prima facie* showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. *Hutchinson*, 26 N.Y.3d at 79. The test is not whether a defect can catch a pedestrian's shoe, but whether the defect was difficult for a pedestrian to see or to identify as a hazard, or difficult to pass over safely on foot in light of the surrounding circumstances. *Id.* at 80.

Mr. Clarke testified that the subject plywood was cut 14-by-14 inches and was approximately 7/16th of an inch thick to cover a 12-by12 inch hole in the sidewalk (Clarke tr. at 26-27). Mr. Clarke stated that no one ever complained about the plywood in the 2-3 months that it was affixed to the sidewalk (*id.* at 28, 30, 48, 57, 88). However, Mr. Clarke admits that the plywood was not flush with the sidewalk (*id.* at 49). Since the plywood was protruding above the sidewalk near the doorway of the flower shop, it posed an increased risk and hazard to pedestrians who were entering or exiting the shop. Defendants failed to meet their prima facie burden of showing that the plywood was physically insignificant or the surrounding circumstances, namely its proximity to the door of the flower shop, do not increase the risks it poses. Thus, the court finds that the plywood is not a trivial defect and is actionable.

New York City Administrative Code § 7-210 imposes liability on real property owners for failure to maintain their sidewalks in a reasonably safe condition. New York City

Administrative Code § 7-210. It does not impose strict liability upon a property owner, and the injured party has the obligation to prove the elements of negligence to show that the owner is liable. *Harakidas v. City of New York*, 86 A.D.3d 624, 627 (2d Dep't 2011). As New York City Administrative Code § 7-210 is a municipal ordinance, a violation of it is only evidence of negligence. *Martinez v. Khaimov*, 74 A.D.3d 1031 (2d Dep't 2010); *Elliott v. City of New York*, 95 N.Y.2d 730, 734 (2001). Therefore, even assuming, *arguendo*, that 51 West failed to maintain its sidewalk in a reasonably safe condition, this only serves as evidence of 51 West's negligence. Thus, the court finds that 51 West cannot be statutorily liable for negligence, based solely on a violation of New York City Administrative Code § 7-210.

Although Frangiadakis testified that she witnessed the decedent falling, she never explicitly stated that she saw how the decedent's feet interacted with the ground before he fell or why he fell. She only states that she saw the decedent swaying from side to side in the act of falling (Frangiadakis tr. at 48, 60). Frangiadakis testified that she does not recall seeing the decedent's feet when he fell (*id.* at 6). Although the video surveillance footage shows the accident indeed occurred, the video is not conclusive as to what caused the decedent's fall as it only shows the decedent's upper body during the period of his fall and does not clearly show the plywood or any other cause of his fall (Surveillance Video). The video shows the decedent stepping backwards and falling (*id.*). The inconclusive testimony paired with the ambiguous video surveillance footage creates an issue of fact as to the cause of the accident.

As there are triable, material issues of fact including whether the accident was caused by the plywood on the ground, whether the plywood was a tripping hazard, and whether the decedent tripped at all, the court denies both plaintiffs' motion and moving defendants' cross-motion for summary judgment.

The court has considered the remainder of the arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED, that plaintiffs Anastasia Frangiadakis, as administratrix of the estate of Constantine Bazas, deceased, and Eudoxia Bazas' motion for an order, pursuant to CPLR § 3212, granting summary judgment in their favor is denied; and it is further

ORDERED, that defendants/third-party plaintiffs 51 West 81st Street Corp. and Rudd Realty Management Corp.'s cross-motion for an order, pursuant to CPLR § 3212, granting summary judgment in their favor and dismissing the complaint and all cross-claims against them is denied.

This constitutes the decision and order of the court.

12-20-18
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

KELLY O'NEILL LEVY
JSC

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE