To commence the statutory time period for appeals as of right (CPLR 5513[a]), you may be required to serve a copy of this order, with notice of entry, upon all parties.

Disp _x___ Dec ___ Seq. Nos. __1-2__ Type _SJ__

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------x

CAROL BUSCHEL,

Plaintiff,

-against- Index No. 60024/2016

WHITE PLAINS SHOPPING CENTER ASSOCIATES, LLC, and ATLANTIC ASPHALT and EARTH, INC.,

Defendants.

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The following papers numbered 1 to 6[1] were read on these motions:

Paper	Number
Notice of Motion, Affidavit and Exhibits	1
Memorandum of Law	2
Notice of Motion, Affirmation and Exhibits	3
Affidavits, Affirmation and Exhibits in Opposition	4
Affirmation and Exhibits in Reply	5
Reply Affirmation	6

There are two motions for summary judgment before the Court, one filed by each defendant, in this trip and fall action. The first motion is filed by defendant Atlantic Asphalt and Earth, Inc. ("Atlantic"), the company that installed the speed bump on

[1]Justice Ruderman denied plaintiff's "cross-motion" for summary judgment as untimely, but allowed the Court to consider the portions of it that were submitted in opposition to defendants' motions. There is no basis for the Court to consider plaintiff's "reply," which is now merely an impermissible sur-reply.

which plaintiff tripped. The second was filed by White Plains Shopping Center Associates, LLC ("Shopping Center"), the owner of the premises where the accident occurred.

The facts are not in dispute. Plaintiff was walking from a store to her car, carrying nothing but her purse, when, instead of walking in the crosswalk,[2] she walked over the speed bump and tripped and fell. Plaintiff claimed that there was a crack or "break" in the pavement, where the speed bump met the pavement, that caught her foot. Tellingly, plaintiff admitted at her deposition that she told her doctor that she did not see the speed bump; that she was annoyed with herself and blamed herself for the accident; and that she just did not pick up her feet. She also admitted at her deposition that she "might have" told her doctor that she was "distracted" at the time of the accident.

At her deposition, plaintiff could not estimate the size of the crack or break in the pavement. Instead, she testified that she had no idea how big it was, and stated that she could not even estimate. Although there were multiple images of the speed bump used at the deposition, and submitted to the Court on this motion, none of them showed the size of the "break."

Atlantic's president testified at his deposition that he has installed approximately 1,500 speed bumps over the years. He testified that it is industry practice for there to be a

[2]At her deposition, plaintiff denied understanding that the clearly-demarcated white lines were a crosswalk.

difference of less than an inch between the pavement and the beginning of the speed bump's curve, and preferably under five-eighths of an inch. He testified that he personally had inspected this speed bump, and that it required no adjustments, because it met these standards. He further testified that "the bump in itself is so high that it's obvious to anyone approaching it." There was also a sign posted warning about the speed bump.

As the Second Department has explained,

> Generally, the issue of whether a dangerous or defective condition exists on the property of another depends on the facts of each case and is 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. A defendant seeking dismissal of a complaint on the basis that the 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. Only then does the burden shift to the plaintiff to establish an issue of fact. 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. There is no minimal dimension test or per se rule that the condition must be of a certain height or depth in order to be actionable. Photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable.

Melia v. 50 Court St. Assocs., 153 A.D.3d 703, 703-04, 60 N.Y.S.3d 331, 333 (2d Dept. 2017). The words of the Second Department in the case of *Schenpanski v. Promise Deli,*

Inc., 88 A.D.3d 982, 984, 931 N.Y.S.2d 650, 652 (2d Dept. 2011), are directly on point: "upon reviewing the photographs acknowledged by the injured plaintiff as accurately reflecting the condition of the [crack] as it existed at the time of the accident, and considering all other relevant factors, [defendants] established, prima facie, that the alleged defect was trivial as a matter of law and, therefore, not actionable." *Id.*

As in *Schenpanski*, "plaintiff failed to raise a triable issue of fact" in opposition. Although at her deposition plaintiff clearly stated that she did not know the size of the break, had not measured it, and could not estimate it, in her affidavit on this motion, she changed her position. In her affidavit, plaintiff stated that when she returned to the site of the accident "a short time later," she determined that "the area that trapped my foot had a lip of one and half [sic] to two inches." She attempted to explain this disparity by stating that she was nervous and felt rushed at her deposition. (The Court notes that although plaintiff could have corrected her deposition testimony when the transcript was given to her, she chose not to do so.) "Affidavit testimony that is obviously prepared in support of ongoing litigation that directly contradicts deposition testimony previously given

by the same witness, without any explanation accounting for the disparity, creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment." *Telfeyan v. City of New York*, 40 A.D.3d 372, 373, 836 N.Y.S.2d 71, 72-73 (1st Dept. 2007).

Having read the deposition testimony, and having seen the photographs, the Court determines that plaintiff has failed to rebut defendants' prima facie showing that the alleged defect is trivial. The "defect" does not appear to be significant, or a trap, in any way.

Accordingly, the Court grants defendants' motion for summary judgment, and dismisses the action in its entirety.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
December 14 2018

HON. LINDA S. JAMIESON
Justice of the Supreme Court

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