Short Form Order

SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 7 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

x

LORRAINE FERRARO and GEORGE FERRARO, her husband

Plaintiffs,

-against-

GOOD SAMARITAN HOSPITAL MEDICAL CENTER,

Defendant.

x

Index No. 602922/2017

Motion Submitted: 10/10/2019
Motion Sequence: 002

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....	X
Answering Papers.....	X
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

This motion by the defendant Good Samaritan Hospital Medical Center ("the Hospital") for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint is determined as provided herein.

The plaintiffs in this action seek to recover damages for personal injuries the plaintiff Lorraine Ferraro (the plaintiff") allegedly suffered as the result of her fall in the Hospital's parking lot during the early morning hours of October 25, 2016. She alleges that she fell in a depressed, cracked, uneven, broken and hazardous area of the Hospital's visitor's parking lot. The Hospital seeks summary judgment dismissing the complaint based on the plaintiff's testimony at her examination-before-trial at which she testified that she fell as she was stepping from the sidewalk to the parking lot and that she not feel her foot hit the asphalt before her ankle buckled, causing her to fall. In addition, it maintains that the defect that caused the plaintiff's fall was trivial based upon photographs taken by the plaintiff's husband George Ferraro on the day of her accident which were identified as the site of the plaintiff's accident by both of the plaintiffs at their examinations-before-trial. Finally, it seeks dismissal of the

complaint based upon a lack of actual or constructive notice of the defect that allegedly caused the plaintiff's fall.

"On a motion for summary judgment, the moving party has the burden to establish 'a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (***Voss v Netherlands Ins. Co.***, 22 NY3d 728,734 [2014], *quoting* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324 [1986]). "If the moving party fails to meet this initial burden, summary judgment must be denied 'regardless of the sufficiency of the opposing papers'" (***Voss v Netherlands Ins. Co.***, 22 NY3d at 734, *quoting* ***Vega v Restani Constr. Corp.***, 18 NY3d 499 [2012] [internal quotation marks, citation and emphasis omitted]). "In other words, the burden does not shift to the non-moving party to persuade the court against summary judgment" (***Voss v Netherlands Ins. Co.***, 22 NY3d at 734).

While the plaintiff did at times testify at her examination-before-trial that her foot did not hit the asphalt before she began to fall, she also testified that her foot went into a depression before her ankle buckled. In light of the conflicting evidence submitted in support of the motion, the Hospital has failed to establish their *prima facie* entitlement to judgment as a matter of law (***Cruz v Valentine Packaging Corp.***, 167 AD3d 707, 708-09 [2d Dept 2018], citing ***Goulet v Anastasio***, 148 AD3d 783, 784 [2d Dept 2017]; ***Fajardo v City of New York***, 95 AD3d 820, 821 [2d Dept 2012]; ***Martinez v Martinez***, 93 AD3d 767, 768 [2d Dept 2012]; ***Camarillo v Sandoval***, 90 AD3d 593, 594 [2d Dept 2011]). "Any inconsistencies in [the plaintiff's] deposition testimony raise[s] an issue of credibility that must be resolved by the factfinder" (***Cruz v Valentine Packaging Corp.***, 167 AD3d at 709, *citing* ***Martinez v Martinez***, 93 AD3d at 768; ***Camarillo v Sandoval***, 90 AD3d at 594).

"[P]roperty owners 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 (***Kavanagh v Archdiocese of City of New York***, 152 AD3d 654, 655 [2d Dept 2017], *citing* ***Trincere v County of Suffolk***, 90 NY2d 976, 977 [1979]). "There is no 'minimal dimension test or per se rule' that the condition must be of a certain height or depth to be actionable" (***Kavanagh v Archdiocese of City of New York***, 152 AD3d at 655, *quoting Trincere v County of Suffolk*, 90 NY2d at 977 [internal quotation marks omitted]). "In determining whether a defect is trivial as a matter of law, 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'" (***Kavanagh v Archdiocese of City of New York***, 152 AD3d at 655, *quoting* ***Trincere v County of Suffolk***, 90 NY2d at 978, *quoting* ***Caldwell v Village of Is. Park***, 304 NY 268, 274 [1952]; *citing* ***Hutchinson v. Sheridan Hill House Corp.***, 26 NY3d 66 [2015]). " 'Photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable'" (***Kavanagh v Archdiocese of City of New York***, 152 AD3d at 655, *quoting* ***Schenpanski v Promise Deli, Inc.***, 88 AD3d 982, 984 [2d Dept 2011]).

"'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'" (***Kavanagh v Archdiocese of City of New York***, 152 AD3d at 655, *quoting* ***Hutchinson v Sheridan Hill House Corp.***, 26 NY3d at 79).

Standing alone, the photographs of the site of the plaintiff's accident which have been submitted by the Hospital do not establish that the defect that is alleged to have caused the plaintiff's fall was trivial.

In a premises liability case, a defendant real property owner or a party in possession or control of real property that moves for summary judgment has the initial burden of making a prima facie showing that it neither created the allegedly dangerous or defective condition nor had actual or constructive notice of its existence (***Williams v Is. Trees Union Free School Dist.***, __ AD3d__, 2019 WL 6139187 at * 1 [2d Dept Nov. 20, 2019], *citing* ***Pilgrim v Avenue D Realty Co.***, 173 AD3d 788 [2d Dept 2019]; ***Gorokhovskiy v NYU Hosps. Ctr.***, 150 AD3d 966 [2d Dept 2017]; ***Kyte v Mid–Hudson Wendico***, 131 AD3d 452 [2d Dept 2015], lv denied, 26 NY3d 915 [2015]; ***Pampalone v FBE Van Dam, LLC***, 123 AD3d 988 [2d Dept 2014]). "A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it" (***Williams v Is. Trees Union Free School Dist.***, 2019 WL 6139187 at * 1, *citing* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 837–838 [1986]; ***Chang v Marmon Enters., Inc.***, 172 AD3d 678 [2d Dept 2019]). "To meet its initial burden on the issue of lack of constructive notice, the defendant must offer evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (***Williams v Is. Trees Union Free School Dist.***, 2019 WL 6139187 at * 1, *citing* ***Radosta v Schechter***, 171 AD3d 1112, 1113 [2d Dept 2019]; ***Lombardo v Kimco Cent. Islip Venture, LLC***, 153 AD3d 1340 [2d Dept 2017]; ***Birnbaum v New York Racing Assn., Inc.***, 57 AD3d 598, 598–599 [2d Dept 2008]).

The hospital maintains that it lacked actual or constructive notice of the defect that is alleged to have caused the plaintiffs fall based upon the testimony of its Director of Plant Engineering, Michael Meade, at his examination-before-trial. He testified in general as to the Hospital's maintenance policies with respect to the parking lot. He also testified that he learned of the plaintiff's accident *some time* in 2017 at which time he conducted his own investigation of this incident. He testified that he was unable to discern the area where the plaintiff fell as he did not observe any sort of depression or unlevel pavement in the subject parking lot. Meade's testimony fails to establish a lack of notice to the Hospital. He provided no information regarding when the lot was last inspected or maintained prior to the plaintiff's accident nor does he provide any information indicative of the fact that the lot was in the same condition when he conducted his investigation as it was when the plaintiff fell.

In view of the fact that the Hospital has not established its entitlement to summary judgment, the burden does not shift to the plaintiffs to establish the existence of issues of fact and the sufficiency of their papers in opposition is irrelevant.

In conclusion, the defendant Good Samaritan Hospital Medical Center's motion for summary judgment is denied.

The foregoing constitutes the Order of this Court.

Dated: December 18, 2019
Mineola, NY

Karen V. Murphy
J.S.C.

ENTERED
JAN 0 2 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE