SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

----------X

IRIS MOSES,

Plaintiff,

- v -

14TH STREET REALTY ASSOCIATES, L.L.C., 14TH STREET HK REALTY CORP., 242 EAST 14TH STREET ASSOCIATES, L.P., MEL MANAGEMENT CORP., DIVINE OF QUEENS, LLC

Defendants.

----------X

INDEX NO. 452305/2018

MOTION DATE 09/21/2020

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118

were read on this motion to/for JUDGMENT - SUMMARY.

Defendants' motion for summary judgment is denied.

Background

In this trip and fall case, plaintiff claims that on April 21, 2017 at 5 p.m. she tripped and fell as she was trying to step from the sidewalk directly up to a landing. That landing was the top end of a ramp leading from the sidewalk. Plaintiff claims that the dangerous condition was the elevation change between the sidewalk and the landing, the fact that it lacked markings and that there was a defective or non-compliant handrail.

Defendants move for summary judgment dismissing the case on the ground that although plaintiff calls it a step, it was really an elevation between the sidewalk and the landing for the ramp, that it was open and obvious and not inherently dangerous. They claim that there was no duty to warn for a condition that was clearly visible. Defendants contend that there was silver

handrail adjacent to the landing but that plaintiff admitted at her deposition that she never attempted to use it.

Defendants also argue that plaintiff failed to identify the cause of her fall and therefore cannot establish that defendants' purported negligence was the proximate cause of her injuries. They conclude that even if there was a dangerous condition, they did not have any notice of this defect.

In opposition, plaintiff claims that the accident happened while she was walking up a step to get into a KFC. She claims that she could not reach the handrail in time to stop her fall and that the step appeared uneven and dirty after her fall. Plaintiff points to her expert's report, which concludes that the transverse slope of the sidewalk exceeded the applicable regulations promulgated by the NYC Department of Transportation (NYSCEF Doc. No. 117 at 3). The expert claims that single step elevation change contained "no visible markings such as a yellow marking on the riser and edge of landing or any warning sign indicating caution due to a change in elevation" (*id*.). Plaintiff observes that defendants do not offer their own expert affidavit in support of their motion. Plaintiff asserts that defendants had notice in light of the fact that defendant's witness claims the subject step existed for several years prior to plaintiff's fall.

In reply, defendants reiterate that the step was open and obvious. They also assert that plaintiff could not describe the lighting conditions at the time of her accident and did not testify about whether there was sufficient lighting in the area. Defendants also maintain that plaintiff admitted she did not see the step prior to the accident.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make 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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"It is a well-established principle of law that a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500, 856 NYS2d 573 [1st Dept 2008]). Circumstances "include the likelihood of injury to a third party, the potential that such an injury would be of a serious nature, and the burden of avoiding the risk" (*id.*).

"[W]hether 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, 665 NYS2d 615

[1997] [internal quotations and citation omitted]). "Of course, in some instances, the trivial nature of the defect may loom larger than another element. Not every injury allegedly caused by an elevated brick or slab need be submitted to a jury" (*id.*). A court must examine "the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect along with the time, place and circumstance of the injury" (*id.* at 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" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 78, 19 NYS3d 802 [2015]). "The relevant questions are 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).

"[T]he question of whether a condition is open and obvious is generally a jury question, and a court should only determine that a risk was open and obvious as a matter of law when the facts compel such a conclusion" (*Westbrook v WR Activities-Cabrera Markets*, 5 AD3d 69, 72, 773 NYS2d 38 [1st Dept 2004]). "A landlord's duty to maintain premises in a reasonably safe condition . . . is not satisfied by permitting a highly dangerous—but correctable—condition to remain, simply because the dangerous condition is obvious" (*id*. at 74).

As an initial matter, the Court must describe the step over which plaintiff tripped. Although the pictures submitted are of poor quality, the Court is able to see that the elevation is not really a step in the traditional sense. KFC is on the north side of 14th Street and in order to get into the KFC, there is a ramp that runs alongside the building. This ramp runs from east to west. If a patron were to use the ramp as intended, he or she would walk up the ramp while walking westward with the building on the right and with the railing on the left. The ramp's

landing continues past the entrance to the KFC. There is no railing at the end of the landing; instead, if someone went up the ramp and continued straight, they would come to the subject step. That "step", according to the unrebutted measurement from plaintiff's expert, measures from five and a half inches to seven inches above the sidewalk depending on the slope of the uneven sidewalk (NYSCEF Doc. No. 117 at 2). Plaintiff approached the entrance to KFC from the west; instead of passing the entrance to go to the ramp, she attempted to step up on to the landing at the ramp's highest point. Plaintiff claims she tripped and fell as she tried to hoist herself up to the ramp's landing.

The Court finds that there is an issue of fact with respect to whether there was a dangerous condition. A jury could question why there was no barrier to prevent a patron from attempting to step up (or down) from a step measuring nearly half a foot high. If the goal was to make patrons use the ramp, then defendants could have easily installed some type of handrail or other barrier to block people (such as plaintiff) from attempting to step onto the ramp at its highest point. A jury could find that defendants should have included some type of visible warning to highlight the fact that there was a significant step up. In other words, a jury could find that because defendants did nothing to prevent people using that area as a step, defendants gave patrons a choice of using the ramp or a step. The jury could find, in that case, that defendants did or did not fulfill the duty to make it safe.

The handrail also provides an issue of fact; a jury could find that the handrail was situated in a position where it was too far away for plaintiff to grab to prevent her fall when using the step. And the evidence submitted shows that this ramp existed for years prior to plaintiff's fall, thereby raising an issue of fact with respect to defendants' notice. Defendants are certainly

correct that this might be an open and obvious condition, but that is a determination that must be made by the jury

Summary

As the caselaw cited above demonstrates, the question of whether a condition is dangerous is typically left for the jury. And the circumstances here do not justify granting defendants' motion. Although a jury might ultimately agree with defendants' characterization of the step, that does not warrant dismissal.

The Court rejects plaintiff's apparent request to preclude defendants from offering an expert; plaintiff did not cross-move for affirmative relief.

Accordingly, it is hereby

ORDERED that the motion for summary judgment dismissing the complaint is denied.

9/30/2020
DATE

ARLENE P. BLUTH, J.S.C.

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**