SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. J. MACHELLE SWEETING **PART** 62

Justice

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YVETTE GARRETT,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY TRANSIT AUTHORITY

Defendants.

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INDEX NO. 160103/2016

MOTION DATE 07/19/2021, 07/23/2021, 09/24/2021

MOTION SEQ. NO. 002 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 43, 45, 47, 48, 49, 50, 51, 52, 53, 54, 62, 64, 83, 84, 85

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

The following e-filed documents, listed by NYSCEF document number (Motion 003) 34, 35, 36, 37, 38, 39, 40, 41, 42, 44, 46, 55, 56, 57, 58, 59, 60, 61, 63, 79, 80, 81, 82

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 004) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 87, 88, 89, 90, 91, 94, 95

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

This is an action for personal injuries allegedly sustained by plaintiff on September 10, 2015 at approximately 10:00 a.m. as a result of an alleged trip and fall while walking on Foley Square Park in Manhattan.

Pending now before the court are three motions:

The first is Motion #002, wherein defendant The New York City Transit Authority ("NYCTA") seeks an order, pursuant to Civil Practice Law and Rules ("CPLR") Sections 3211 and 3212, granting summary judgment in favor of NYCTA and and dismissing plaintiff's complaint against NYCTA.

The second is Motion #003, wherein defendant The City of New York (the "City") seeks an order: (a) pursuant to CPLR §3212, granting summary judgment in favor of the City and dismissing plaintiff's complaint and all cross-claims with prejudice as to the City; or in the alternative (b) granting contractual indemnification in favor of the City and against NYCTA.

The third is Motion #004 wherein plaintiff seeks an order, pursuant to CPLR 3212, granting her summary judgment with respect to all defendants, on the grounds that there are no triable issues of fact as to defendants' negligence.

Upon the forgoing documents, and upon oral arguments held before the undersigned on February 3, 2022, these motions are decided as follows:

Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable

issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

The proponent of a summary judgment motion 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, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, "We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Timeliness and Procedural Objections

As a preliminary matter, the parties raised procedural arguments with respect to the timeliness of the motions.

The City argues that plaintiff's motion is untimely pursuant to the Part Rules of the undersigned that are currently in effect. However, this argument is without merit, whereas here, there exists a July 19, 2018 court order by Honorable Judge Lisa A. Sokoloff (NYSCEF Document #10) that provides that any dispositive motions must be made within 120 days of the filing of the Note of Issue ("NOI"). Here, the NOI was filed on May 26, 2021 and plaintiff's motion was filed on September 24, 2021. Accordingly, plaintiff's motion was timely filed.

Plaintiff next argues that defendants' motions are defective because they each failed to annex a separate Statement of Material Facts pursuant to 22 NYCRR 202.8-g(a). NYCTA and the City each conceded the omission, and each attempted to cure the defect by attaching a Statement of Material Facts to their respective reply papers. The City also addressed the error in a letter to the court (NYSCEF Document #90) as did NYCTA (NYSCEF Document #93).

As NYCTA properly argues, 22 NYCRR 202.8-g(a) does not require that the motion be denied or marked off. *See also* Abreu v Barkin and Assoc. Realty, Inc., 69 AD3d 420 (Sup. Ct. App. Div. 1st Dept 2010) ("We reject defendants' argument that plaintiff's failure to provide a fully supported counterstatement of disputed facts in opposition to defendants' motion for summary judgment, in accordance with Rule 19–a of the Commercial Division of the Supreme Court (22 NYCRR 202.70), required the court to deem defendants' statement of material facts admitted. While the rule gives a motion court the discretion to deem facts admitted, the court is not required to do so. There was sufficient evidence in the record to raise triable issues of fact and the court

was not compelled to grant summary judgment solely on the basis of blind adherence to the procedure set forth in Rule 19–a").

Further, the Appellate Division, First Department has repeatedly held:

> [t]hat it is the general policy of the courts to permit actions to be determined by a trial on the merits wherever possible and for that purpose a liberal policy is adopted with respect to opening default judgments in furtherance of justice to the end that the parties may have their day in court to litigate the issues . . ..

38 Holding Corp. v. New York, 179 A.D.2d 486 (App. Div. 1st Dept. 1992); *See also* Gluck v. McDonough, 139 A.D.3d 628 (2016) (referencing that "strong public policy favors resolving cases on the merits") and Acosta v. Riverdale Dev., LLC, 72 A.D.3d 525 (2010) ("Finally, vacatur here was consistent with the strong public policy favoring resolution of cases on their merits"). Given this, the court declines to reject either NYCTA's or the City's papers for procedural defects and instead considers these motions on the merits.

Substantive Arguments Made by Defendants

Defendants City and NYCTA each argue that the complaint should be dismissed against them.

First, the City argues that they bear no responsibility for the metal grating that plaintiff alleges caused her to fall. NYCTA does not seek dismissal of the complaint on these grounds, but does oppose the City's argument that NYCTA bears responsibility for the grate.

Second, the City and NYCTA both argue that regardless of who is responsible for the metal grating, the complaint should nevertheless be dismissed because plaintiff is unable to adequately specify the defect that caused her to fall.

Third, NYCTA, but not the City, argues that even if the court were to find that plaintiff adequately identified the defect that caused her to fall, plaintiff can not prevail because such defect is *de minimus*.

Each of these grounds is discussed in detail below.

Responsibility For The Metal Grate

The City argues, in one branch of its motion, that plaintiff's claim of where she fell was within 12 inches of a metal NYCTA grating, which is the sole responsibility of NYCTA under New York City Department of Transportation Highway Rule 34 (RCNY §2-07). The City argues that it was an out-of-possession owner of the grating and that NYCTA is solely responsible for its maintenance. The City further argues that even if this court were to deny the City's motion for summary judgment, the City is entitled to indemnity from NYCTA under the terms of the lease between the City and NYCTA.

In opposition, NYCTA argues that it does not have any record that the accident location was part of the subway system maintained by NYCTA, and it does not have any record of any maintenance or repairs being performed at the location. In support of its argument, NYCTA relies on the testimony of Burim Marke ("Marke"), who had been working for NYCTA for 14 years (EBT transcript at NYSCEF Document #38). NYCTA argues that Marke testified that he did not believe that NYCTA was responsible for repairing the area of the park which allegedly caused plaintiff's accident because they had never done repairs there and had no ability to replace the hex tiles. NYCTA argues that Marke also testified that every single NYCTA surface grating of which he was aware (known as "vent bay covers") was surrounded by a 12-inch-wide concrete border but, in this case, the area was not surrounded by the usual 12-inch concrete perimeter.

As noted above, the function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination, and the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact. Here, the City and NYCTA each allege that the other party is responsible for the grate, and there is a clear dispute over which party, if any, actually has maintenance and repair responsibility over the alleged accident location. Accordingly, summary judgment is denied to the City on these grounds.

Whether Plaintiff Can Identify the Defect

In a different branch of its motion,[1] the City argues that regardless of who is responsible for the metal grating, any claim of a defect is speculative, as plaintiff could not identify any defect either in the grating or abutting sidewalk that caused her to trip; and plaintiff could not identify in the photographs (which had been taken by plaintiff herself) exactly where she fell.

Similarly, NYCTA, in one branch of its motion, also argues that regardless of who is responsible for the metal grating, this action should be dismissed because plaintiff does not know or cannot show the actual or specific defective condition which caused her fall, and that plaintiff's entire case is "based upon improper guesswork and speculation." NYCTA argues that when plaintiff was shown photos that were attached to the Notice of Claim and was asked to circle the location of the condition that caused her to trip, she could not point out a specific condition in any of the photos which she claims caused her accident.

[1] The City did not argue in their motion that summary judgment should be granted because the City did not have prior written notice of the alleged defect.

Contrary to the arguments made by both the City and NYCTA, it has been routinely held in premises liability lawsuits that a plaintiff need not recall the exact manner in which he or she fell, but must merely identify enough information for a trier of fact to find, based on logical inferences, that the alleged defect proximately caused the accident (Sowa v Zabar, 67 Misc 3d 1237(A) [Sup. Ct. App. Div. 1st Dept 2021]). *See also* Cuevas v City of New York, 32 AD3d 372 (Sup. Ct. App. Div. 1st Dept 2006) (While plaintiff could not recall the exact manner in which his foot became entrapped in the alleged defect, and could not describe the way it looked on the night of the accident prior to his fall, he repeatedly identified the gap/hole between the sidewalk and the depressed cable vault cover as the condition that trapped his foot and caused him to fall); Alvarado v Grocery, 183 AD3d 447 (Sup. Ct. App. Div. 1st Dept 2020) ("Plaintiff stated that he believed that the hand truck he was using became stuck in a hole or crack that was on the first or second stair from the top of the cement stairway, and that he did not see the defect before he fell because 'it was a little bit dark' and he was pushing the hand truck ahead of him. Such testimony provides a sufficient nexus between the condition of the stairway and the circumstances of his fall to establish causation").

Here, plaintiff testified that she tripped over the "uneven, raised portion" of the grating, that the transition from sidewalk to grating was somehow uneven and "the grate is higher than the sidewalk." Plaintiff also testified that Photo A and Photo C both show the same grate; that the area she circled in Photo C shows the alleged defect at the edge of the grate that caused her to trip; and that the area she circled in Photo A shows the area on the metal grate itself where she "landed" after she fell. Given the totality of plaintiff's testimony, including plaintiff's deposition (NYSCEF Document #53) and the photos, which were marked by plaintiff herself (NYSCEF Documents #49

and #58), this court finds that plaintiff has identified with sufficient specificity, the alleged defect that caused her fall.

Finally, with respect to defendants' claims that plaintiff was inconsistent in her claims of the exact defect that caused her to fall, such "inconsistencies in plaintiff's versions of the events present issues for the trier of fact" *see* Faber v New York City Hous. Auth., 202 AD2d 269 (Sup. Ct. App. Div. 1st Dept 1994). Accordingly, summary judgment is denied, to both the City and NYCTA, on these grounds.

Whether the Alleged Defect is *De Minimis*

NYCTA argues, in another branch of its motion, that, even assuming *arguendo* that a defect exists and plaintiff adequately identified it, plaintiff's case still fails because the alleged defect is *de minimus*, and that "if it exists at all, is so slight that [...] this Court should, as a matter of law, dismiss plaintiff's complaint." NYCTA argues that in this case, plaintiff produced photographs, which she herself took shortly after the accident, that purport to show the defective condition which caused her accident. NYCTA contends that the photos fail to show any defect or to provide any support for plaintiff's testimony regarding the presence of a difference in height between the grating and the surrounding park surface.

As the New York Court of Appeals has held in Hutchinson v Sheridan Hill House Corp., 26 NY3d 66 [N.Y. Ct. of Appeals 2015]:

> [...] the trivial defect doctrine is best understood with our well-established summary judgment standards in mind. In a summary judgment motion, the movant must make a prima facie showing of entitlement to judgment as a matter of law before the burden shifts to the party opposing the motion to establish the existence of a material issue of fact [...]. 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.

Here, NYCTA did not proffer an expert opinion, a survey, any measurements, or any evidence to support its argument that the defect was *de minimus*. *See* Lovetere v Meadowlands Sports Complex, 143 AD3d 539 (1st Dept 2016) ("Defendants established entitlement to judgment as a matter of law by submitting deposition testimony, *expert opinion*, and photographic evidence showing that the alleged hazardous defect in the ceramic floor tile (a 'spall') was physically insignificant and trivial"); Forrester v Riverbay Corp., 135 AD3d 448, 449 (1st Dept 2016) ("Defendant established its entitlement to summary judgment by *submitting evidence* showing that the allegedly uneven floor on which the fur from plaintiff's slippers got caught was a trivial defect and not actionable as a matter of law"); Serafin v Dickerson, 25 Misc 3d 1211(A) (Bronx. County Sup Ct 2009) ("In support of their motion for summary judgment, *Defendants' have presented affidavits attesting that '[t]he fence posts are annexed to and placed in the side of the concrete walkway,' photographs which show the chain-link fence closely follows the outline of the concrete strip, and a survey*, in which the solid line indicating the concrete strip is identical in length to the broken line indicating dimensions of the chain-link fence. This evidence is sufficient to satisfy Defendants' prima facie burden of showing the chain-link fence encroachment is *de minimis*.")

Here instead, NYCTA asks this court to rely solely on the photographs taken by plaintiff, which do not show the dimensions, or the full context, of the alleged defect. This is insufficient to meet NYCTA's burden in showing that the defect was trivial. *See, e.g.* Munasca v Morrison Mgt. LLC, 111 AD3d 564 (1st Dept 2013) ("The pictures submitted by defendants in support of their motion do not unequivocally demonstrate that the complained-of defect is trivial as a matter of law since its size is not discernable and the photos appear to show that the defect has an edge, which could constitute a tripping hazard [...]. There is also no evidence showing the defect's dimensions at the time of the accident [...]. Defendants' reliance on plaintiff's testimony that the

height difference between the sidewalk flags at the time of her accident was approximately one inch, is insufficient to satisfy their i burden, since the testimony was at best an estimate of the actual size of the defect, and was not based on an actual measurement"); Valentin v Columbia Univ., 89 AD3d 502 (1st Dept 2011) ("Contrary to defendant's contention, it failed to establish that the defect was trivial as a matter of law, since there is a lack of evidence demonstrating the size of the gap between the pavers"); Rivas v Crotona Estates Hous. Dev. Fund Co., Inc., 74 AD3d 541 (1st Dept 2010) ("The motion court improperly determined that dismissal of the complaint was warranted on the ground that the defect that allegedly caused plaintiff's accident was so trivial as to be nonactionable. The photographs, which show a missing portion of a triangular tile in the lobby floor, do not unequivocally demonstrate that defect is trivial [...]. In the absence of evidence demonstrating the depth of the defect, and in light of plaintiff's testimony that her injury resulted from her heel getting caught in a hole caused by a missing tile, issues of fact remain as to whether the nature of the defect was such as to constitute a tripping hazard"); Denyssenko v Plaza Realty Services, Inc., 8 AD3d 207 (1st Dept 2004) ("The photographic evidence of the alleged hazard in defendant's parking lot to which plaintiff attributes her harm, showing a jagged-edged pothole filled with water, does not permit the conclusion that the defect was trivial as a matter of law").

In sum, the court finds that NYCTA has failed to meet its burden in showing that the defect was *de minimus*.

Plaintiff's Motion for Summary Judgment

Plaintiff argues that there are no triable issues of fact as to the plaintiff as to defendants' negligence. However, as discussed in detail above, there remain questions of fact as to who owned, controlled and was responsible for the metal grate in question. Accordingly, plaintiff's motion for summary judgment is denied.

Conclusion

Given the findings made herein, it is hereby:

ORDERED that NYCTA's motion (Motion #002) seeking summary judgment in its favor and dismissing plaintiff's complaint against NYCTA is DENIED; and it is further

ORDERED that the City's motion (Motion #003) seeking summary judgment in its favor and dismissing plaintiff's complaint and all cross-claims with prejudice as to the City is DENIED; and it is further

ORDERED that plaintiff's motion (Motion #004) seeking summary judgment in plaintiff's favor and against all defendants is DENIED.

7/26/2022
DATE

HON. J. MACHELLE SWEETING, 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