SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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ANN FLORSHEIM,

Plaintiff,

- v -

MARRIOTT INTERNATIONAL, INC. D/B/A MARRIOTT MARQUIS, HMC TIMES SQUARE HOTEL, L.P., TIMES SQUARE MARQUIS HOTEL, L.P., TIMES SQUARE HOTEL, INC.

Defendant.

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INDEX NO. 150063/2020

MOTION DATE 09/29/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94

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

BACKGROUND

The within action stems from a claim that plaintiff tripped and fell down within the Marriott Marquis Hotel on November 9, 2019. At approximately 6:00 p.m. on the 34th floor of the hotel, as plaintiff was walking to the elevators, it is alleged that plaintiff stumbled over an expansion joint in the vicinity of the elevator bank.

PENDING MOTION

On September 29, 2022, defendants moved for summary judgment. The motion was fully briefed as of said date, marked submitted and the court reserved decision. For the reasons stated below, the motion is granted.

ALLEGED FACTS

Plaintiff was staying at the hotel with her family, and was quite familiar with the hotel, having stayed there on multiple occasions leading up to the date of the incident. On this stay, plaintiff's room was located on the 34th floor, a floor, according to plaintiff she may or may not have stayed on previously. Plaintiff originally arrived at the hotel on November 7, 2019, two days before the incident. Plaintiff utilized the subject elevator bank each time she departed her floor or returned to it during the three days leading up to and including the date of her fall.

From the time plaintiff first checked in until the time of her incident on the evening of November 9, 2019, she had no difficulty traversing the area of the expansion joint, did not make any complaints to anyone in the hotel nor had any reason to be concerned about any conceivable safety issues. Plaintiff ,who was traveling with her husband and adult daughter, testified that neither her husband nor daughter had any issues traversing the area during the three days at issue nor did they voice any concerns or complaints pertaining to the area regularly traveled over by the three of them. Plaintiff acknowledged she had seen the expansion joint she tripped on her previous trips to the elevator during this stay.

Plaintiff's counsel hired an expert, Marletta, soon after her fall. The expert examined the expansion joint two days after the incident.

Marletta provided photographs and indicated the expansion joint runs 17 feet wide and is raised approximately 5/8 of one inch to 7/8 of one inch. Marletta does not specify where within that 17-foot-wide span the different measurements occur nor is there any relation between the different measurements and the alleged location of the plaintiff's fall within that 17-foot-wide span. Marletta opines that the floor surface had an incredibly slight slope of approximately 4.5° towards the expansion joint that caused a "bump."

Marletta opines that this threshold is a defect due to what the plaintiff could or could not see as she walked up to the threshold but does not address plaintiff 's testimony that she had already seen the threshold prior to her fall. Marletta further opines that the threshold was dangerous because it was not flush and not level and declares that any surface that is not flush and not level is extremely dangerous for pedestrian use. Finally, Marletta opines that the Hotel was negligent because it did not place a sign warning of the condition.

Numerous photographs provided by plaintiff or her expert show a fairly flush threshold with little or trivial defects. Neither party shows a specific tape measurement of the alleged defect.

William Michell (Michell), is the Director of Engineering for the Marriott Marquis. He is familiar with all architectural drawings, blueprints and layouts of the hotel's construction which includes the 34th floor. Michell, reviewing plaintiff's photographs, confirmed that the area in which the plaintiff fell, is the threshold between the hallway and the elevator core.

Michell testified the expansion joint is a necessary:

> …device that allows for movement in buildings. It's a common feature that's been in large commercial buildings. Even in some homes where there is an anticipated movement of the structure or site movement making the geographic area that needs to be provided for and that's what expansion joints do. Any they allow for floor areas that are essentially connected but to still move.

Michell confirmed that the floor area is regularly inspected by the hotel, although he could not recall the last date prior to the incident that the floors were inspected. Michell testified that he was not aware of any issues with regard to any tripping hazard at this threshold, and confirmed the lighting was sufficient. Plaintiff does not dispute the area was well lit.

DISCUSSION

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851 (1985)*; Zuckerman v. City of New York,* 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]).

However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez,* 68 NY2d at 324). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso,* 50 AD3d 535,544 [1st Dept 2008]). "On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v Citibank, N.A.,* 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong,* 2 AD3d 166,168 [1st Dept 2003] ["The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues"], *citing Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404 [1957]).

While generally the issue of whether a dangerous or defective condition exists depends on the particular facts of each case and is properly a question of fact for the jury, where the "trivial nature of the defect outweighs other factors, the case may not be submitted to a jury."

Lansen v. S.L. Green Realty Corp., 103 A.D.3d 521(1st Dept. 2013). As the First Department held in *Lansen*:

> Here, we find that any defect that existed in the sidewalk was trivial. The pictures of the sidewalk presented by plaintiff did not show any significant height differential or significant defect…the conclusory statements of plaintiff's expert witness failed to raise a triable issue of fact. *Id.* at 522.

In *Burko v. Friedland*, 62 A.D.3d 462 (1st Dept. 2009), plaintiff claimed to have tripped and fallen over a claimed height differential of 5/8 of an inch deep. The First Department held "the defect, which did not appear to be a trap or snare by reason of its location, adverse weather or lighting conditions or other circumstances, was trivial." *Burko*, 878 N.Y.S.2d at 65, *citing Trincere v. County of Suffolk*, 90 N.Y.2d 976 (1997); *see also, Rojas v. P&B Bronx Properties*, LLC, 203 A.D.3d 525 (1st Dept. 2022).

As the Court of Appeals advised in *Trincere*, *supra*, "(i)n determining whether a defect is trivial, the court must examine all of the facts presented, including the width, depth, elevator, irregularity and appearance of the defect, along with the time, place and circumstance of the injury." For example, in *Guerriero v. Jand*, 57 A.D.3d 365 (1st Dept. 2008), the court noted that the area of the plaintiff's accident was well lit and that the plaintiff had travelled there several times. Consequently, the purported defect for which its depth was not objectively measured by the plaintiff, was not actionable as a matter of law due to the surrounding circumstances. The First Department in *Stylianou v. The Ansonia Condominium*, 49 A.D.3d 399 (1st Dept. 2008) held that as a matter of law, a height differential between sidewalk slabs between 1/8 of an inch and 3/8 of an inch was "entirely trivial".

Additionally, the First Department held that the plaintiff's expert report "…(was) so lacking in detail as to the slope of the sidewalk flag, where along the alleged slope any

measurements were taken and how the alleged slope was the proximate cause of the plaintiff's fall, that it is insufficient to raise an issue of fact…". *Stylianou*, 853 N.Y.S.2d at 342.

In *Lipsky v. Manhattan Plaza Inc*., 103 A.D.3d 418 (1st Dept. 2013), the First Department ruled that photographs themselves can be used to establish the trivial nature of a purported defect. In *Lipsky*, the court held that the subject pavers had what appear to be a "slight incline or a slope" and therefore summary judgment was appropriate. *Lipsky*, 959 N.Y.S.2d at 182. *See also, Budano v. Gordon*, 110 A.D.3d 543 (1st Dept. 2013); *Figueroa v. Haven Plaza Housing Development Fund Co., Inc*., 247 A.D.2d 210(1st Dept. 1998); *Gaud v. Markham*, 307 A.D.2d 845 (1st Dept. 2003); *Hutchinson v. Sheridan Hill House Corp*. 26 N.Y.3d 66 (2015).

> … defendant " 'may not be cast in damages for negligent maintenance by reason of trivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes, or trip over a raised projection' " (*id.* at 647, quoting *Liebl v Metropolitan Jockey Club*, 10 AD2d 1006, 1006 [2d Dept 1960], *rearg denied* 11 AD2d 946 [2d Dept 1960]; *see also e.g. Trionfero v Vanderhorn*, 6 AD3d 903, 903-904 [3d Dept 2004]; *Squires v County of Orleans*, 284 AD2d 990, 990 [4th Dept 2001]; *Morales v Riverbay Corp.*, 226 AD2d 271, 271 [1st Dept 1996]). *Trincere* and the line of cases in which it stands establish the principle that 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 (*Wilson v Jaybro Realty & Dev. Co.*, 289 NY 410, 412 [1943]).

Hutchinson v. Sheridan Hill House Corp., 26 N.Y.3d 66, 78 (2015).

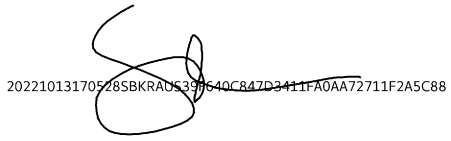
Applying these standards to the case at bar, the Court finds that the defect which plaintiff alleges caused her fall is trivial and defendant is entitled to summary judgment. Plaintiff fell over an expansion joint that served a necessary engineering function in the hotel, in a well lit area, that she had passed many times before in the days leading up to her fall, with a height differential that was never specifically measured but which her own expert asserts was less than an inch.

Defendants have established a *prima facie* entitlement to summary judgment. In opposition plaintiff failed to raise an issue of fact requiring a trial.

WHEREFORE it is hereby:

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.



10/13/2022
DATE

SABRINA KRAUS, J.S.C.

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