At a term of the Supreme Court of State of New York, held in and for the County of Erie, 92 Franklin Street, Buffalo, NY held on the 28 day of Aug. 2023.

PRESENT: HON. LYNN W. KEANE, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE

KATHLEEN JAY,

Plaintiff,

-vs –

WEGMAN'S FOOD MARKET,

Defendant.

DECISION AND ORDER

INDEX NO. 801166/2022

In this action to recover damages for personal injuries, Wegman's Food Market ("defendant") has moved under CPLR §3212 for summary judgment.

Kathleen Jay ("plaintiff") commenced this action for injuries sustained after she tripped and fell on a sidewalk as she was exiting defendant's market on Transit Road in Williamsville, NY on September 11, 2021.

The plaintiff claims her foot caught in a crack or seam located between the sidewalk and the curb.

Defendant seeks an order granting summary judgment on the grounds that the sidewalk where plaintiff fell was not defective, and even if a defective condition did exist, it was trivial in nature. Additionally, defendant alleges that it neither created nor had received actual or constructive notice of the allegedly defective sidewalk condition.

Summary Judgment

It is well settled that the proponent of a motion for summary judgment must make the prima facie showing of their entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. See Alvarez v Prospect Hospital, 68 N.Y.2d 320 (1986); Zuckerman v City of New York, 49 N.Y.2d 557 (1980). To obtain summary judgment, the moving party must establish its claim by tendering sufficient evidentiary proof in admissible

form sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. See Friends of Animals, Inc. v Associated Fur Mfrs., Inc., 46 N.Y. 2d 1065 (1979). Such proof may include deposition transcripts, as well as other admissible documentary proof annexed to an attorney's affirmation. See CPLR §3212 (b); Olan v Farrell Lines Inc., 64 N.Y.2d 1092 (1985).

Once such a showing has been established, "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, 68 N.Y.2d at 324 citing Zuckerman v City of New York, 49 N.Y.2d 557 (1980). "[O]ne 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....mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." Zuckerman at 562.

"A defendant moving for summary judgment in a slip-and-fall case has the burden of demonstrating, prima facie, that it did not create the alleged dangerous condition or have actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (*Jeremias v Lake Forest Estates*, 147 A.D.3d 742, 742, 46 N.Y.S.3d 188). Constructive notice of a hazardous condition exists when the condition is visible and apparent and has existed for a sufficient length to time to allow the defendant a reasonable opportunity to discover and remedy it (*see Gordon v American Museum of Natural History*, 67 N.Y.2d 836, 837, 492 N.E.2d 774, 501 N.Y.S.2d 646). "To meet its initial burden on lack of constructive notice, the defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall" (*Jeremias v Lake Forest Estates*, 147 A.D.3d at 742). Further, "a defendant can make its prima facie showing of entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation" (*Mitgang v PJ Venture HG, LLC*, 126 A.D.3d 863, 863-864, 5 N.Y.S.3d 302). Ellis v Sirico's Catering, 194 A.D.3d 692, 692 (2d Dept 2021.)

DISCUSSION

Notice

Defendant seeks summary judgment on the basis that it did not create nor have actual or constructive notice of the allegedly dangerous condition. In support of this claim, defendant avers that it was never made aware of prior falls and denies having ever received complaints about the sidewalk in question.

There is nothing in the record to indicate when, or by whom, the sidewalk was installed.

Trivial Defect

A defendant seeking to dismiss a complaint on the grounds of "trivial defect" must make prima facie showing that the defect is, under the circumstances, physically insignificant and the characteristics of the defect or the surrounding circumstances do not increase the risk it poses. Richards v Starbuck's Corp., 192 AD 1152, 1153. (2d Dept 2021)

Photographs in the record, at NYSCEF #17–20, reveal a linear depression, which has been described in this litigation as a crack or seam, between the slabs of cement making up the sidewalk. There is a curb shown in the photographs, separating the sidewalk from the parking area/roadway.

Plaintiff has retained the services of an expert, Dennis A. Andrejko, an architect, who identified the seam as an isolation joint, with a spacing width of up to ¾ inch in width and similar depth. He also found that the curb has an approximate 5 and half inch to 6-inch height between the parking area/roadway and the walkway.

Mr. Andrejko states that isolation joints, also known as expansion joints, are generally recommended to be no greater than ½ inch in width and filled with elastic/pliable joint filler. According to Mr. Andrejko, the height of the expansion joint should be no more than ¼ inch below the walkway surface. In his report, submitted by plaintiff in opposition to defendant's motion, Mr. Andrejko determined that conditions not meeting this criterion were noted in the area and created a tripping hazard where plaintiff fell.

Mr. Andrejko concludes that conditions in the area of the sidewalk and curb, where the plaintiff fell, constitute tripping hazards, for failing to be in compliance with a number of standards and codes, including: The American National Standards Institute (ANSI) Accessible and Usable Buildings and Facilities (ICC A1 17.1-2009); The Americans Disabilities Act (ADA) 2010 ADA Standards for Accessible Design; The Property Maintenance Code of New York State (2010) and ASTM F1637 Standard Practice for Safe Walking Surfaces.

CONCLUSION

Even if defendant met its initial burden on the motion, the court finds that plaintiff sustained her burden of demonstrating a triable issue of fact with respect to liability. Plaintiff alleged, and by competent evidence established, more than a trivial difference in elevation. She claims she fell after her foot became caught in a

crack or seam between the two slabs of concrete. Additionally, she submitted the affidavit of an expert who, based on his inspection of the site, confirmed the existence of a seam and its role in causing the fall. Plaintiff's expert further stated that the defect constituted a tripping hazard. See, Tesak v Marine Midland, 254 A.D.2d 717, 678 NYS 2d (Fourth Dept 1998)

Defendant has also failed to meet its initial burden of establishing that it did not have actual notice of a dangerous condition. There is nothing in the record to when the sidewalk was installed, and the defendant has not denied installing it.

WHEREFORE, it is,

ORDERED, that Wegman's Food Market motion, seeking an order granting summary judgment, and dismissing plaintiff's complaint, is DENIED.

DATED: Aug. 28, 2023

HON. LYNN W. KEANE, J.S.C.