SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 2
NASSAU COUNTY

MARSHA LEVINE,

Plaintiff(s),

-against-

WESTBURY PROPERTIES LLC, STAPLES INC., AND J.P. MORGAN CHASE,

Defendant(s).

ORIGINAL RETURN DATE:03/26/12
SUBMISSION DATE: 03/26/12
INDEX NO.: 13992/10

MOTION SEQUENCE #2

The following papers read on this motion:

Notice of Motion for Summary Judgment	1
Reply Affirmation in Support	2
Affirmation in Opposition	3
Memorandum of Law	4

Motion by defendants for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on June 16, 2010, at approximately 1:00 p.m. Plaintiff alleges that she tripped and fell on a defective, broken sidewalk in front of the Staples Store at 49 West Jericho Turnpike, Huntington, New York. Specifically, plaintiff alleges that the defect (hole) is approximately eight inches wide and two and a half inches deep.

In support of their motion, defendants submit, *inter alia*, the deposition testimony of plaintiff; the deposition testimony of Stephen Ferrante, a facility manager of JP Morgan Chase Bank, N.A.; Mr. Ferrante's site inspection reports from July 8, 2009 through June 7, 2010; and an affidavit of Robert Czuchnicki, a Senior Field Investigator with Liberty Mutual Insurance.

Plaintiff appeared for her examination before trial on July 25, 2011. Plaintiff testified that she went to Staples to purchase an inkpad for her calculator. She had

been at the Staples store approximately 20 times prior to the date of the accident.

Plaintiff parked her vehicle in a row of parking spaces along the curb in front of the Staples store. She parked between three and ten spots to the right of the front entrance to the Staples store. A sidewalk of red brick and then cement is next to the curb. Plaintiff had a clear view from her vehicle to the entrance to Staples. Plaintiff exited her vehicle and walked to the curb. She did not recall how far it was to the Staples entrance or how wide the sections of brick and cement were.

The accident occurred on the sidewalk where the brick and cement met "not far" from her car. She had a purse over her shoulder and was holding her old inkpad in her hand. Plaintiff believes that her right heel got caught in the hole. She fell forward and to the left. There was nothing in the immediate vicinity of plaintiff's fall. Plaintiff testified that after she fell, she saw a "moon" or crescent-shape hole but could not describe it other than that it looked deep, about two to three inches, but admitted that she never took a close look at the alleged defect on the day of the accident. She could not recall any external marking that would identify the area where she fell. Plaintiff admitted that she had never seen the "hole" on any of her prior trips to Staples. There was no debris on the ground and the ground was not wet. No one ever told plaintiff that there was a "hole" in front of the Staples store and she did not know if anyone complained of such a "hole."

Plaintiff returned to the accident location sometime after the accident with her attorney and was able to identify the "hole" but again could not describe it. The "hole" looked the same as it did at the time of the accident. There were no other "holes" in the area when plaintiff returned. Plaintiff also testified that her attorney took photographs and measurements of the "hole" before plaintiff returned with him and showed her those photographs.

Mr. Ferrante testified that when he inspected the property he did not see anything that he would classify as a defect on the sidewalk near the Staples store. Further, site inspection reports from Mr. Ferrante's monthly inspections of the premises show that in the 11 months prior to the alleged accident, including on June 7, 2010, the premises was in good condition.

Mr. Czuchnicki was assigned to investigate the location of the accident and took photographs and measurements of the subject chip in the cement in front of Staples. Mr. Czuchnicki opines that the subject chip in the cement was "2–1/2 inches wide at its widest point, 8 inches in length and 3/4 of a inch deep on May 5, 2010."

In opposition to the motion, plaintiff asserts that the motion for summary judgment should be denied for the following reasons:

a) the investigation and photographs relied upon by defendants were taken approximately one and one-half months before plaintiff's accident and lack foundation. There is no admissible proof that the conditions depicted in defendants' photographs fairly and accurately depict the conditions on the date of plaintiff's accident;

b) defense counsel failed to exchange certain photographs as required by the Preliminary Conference Stipulation and Order, dated September, 28, 2011, and Compliance Conference Order, dated December 1, 2011. Consequently, the photographs were not served prior to the instant motion for summary judgment;

c) plaintiff's photographs, which have proper foundation, clearly indicate an actionable defect that is not trivial;

d) defendants had prior actual notice of the subject defect in the matter of *Grundleger v Staples, et al.*, Supreme Court, Suffolk County, Index No. 019406/2009.

In response thereto, defendants' counsel asserts that counsel for defendants in the *Grundleger* action was very uncooperative in providing documents from that action for use in this action. After several unreturned telephone calls to counsel in the *Grundleger* action, defendants obtained color copies of the photographs by physically appearing at counsel's office on December 1, 2011.

Defendants also argue that plaintiff's opposition papers should not be considered by the court because the papers were not timely served.

Turning to the merits, defendants maintain that they established *a prima facie* entitlement to judgment as matter of law that the alleged defect is trivial or *de minimis* and not actionable by submitting the affidavit, measurements and photographs of Robert Czuchnicki.

It is well settled that "[a] defendant who moves for summary judgment in a slip and fall case has the initial burden of making a *prima facie* showing that it did not

create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it" (*Cusack v Peter Luger, Inc.*, 77 AD3d 785, 786 [2d Dept 2010]; *Steisel v Golden Reef Diner*, 67 AD3d 670, 671 [2d Dept 2009]; *see, Rivera v 2160 Realty Co., L.L.C.*, 4 NY3d 837, 838 [2005]; *Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Arslan v Richmond North Bellmore Realty, LLC*, 79 AD3d 950, 951 [2d Dept 2010]; *Weeman v Rouse SI Shopping Center, LLC*, 79 AD3d 855 [2d Dept 2010]).

"To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" *(Gordon v American Museum of Natural History*, 67 NY2d at 837; *Nelson v Cunningham Associates, L.P.*, 77 AD3d 638 [2d Dept 2010]; *Viera v Riverbay Corp.*, 44 AD3d 577, 579 [1st Dept 2007]; *see also, Rivera v 2160 Realty Co., L.L.C., supra*).

"Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the circumstances of each case and is generally a question of fact for the jury." *Perez v 655 Montauk, LLC*, 81 AD3d 619 [2d Dept 2011]; *see Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997].

Further, "[p]roperty owners (and tenants) 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" (*Freas v Tilles Center*, 89 AD3d 680 [2d Dept 2011]; *Trincere v County of Suffolk, supra*; *DeLaRosa v City of New York*, 61 AD3d 813 [2d Dept 2009]; *Ricker v Board of Educ. of Town of New Hyde Park*, 61 AD3d 735 [2d Dept 2009].

In determining whether a defect is trivial as a matter of law, a 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 circumstances of the injury (*see Sabino v 745 64th Realty Assoc., LLC, supra*; *Richardson v JAL Diversified Mgt.*, 73 AD3d 1012 [2d Dept 2010]; *Aguayo v New York City Hous. Auth.*, 71 AD3d 926 [2d Dept 2010]).

Viewing the evidence in the light most favorable to the non-movant (*Taylor v Rochdale Village Inc.*, 60 AD3d 930 [2d Dept 2009]; *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt.*, 7 NY3d 96 [2006]; *see Mosheyev v*

Pilevsky, 283 AD2d 469 [2d Dept 2001]; *see Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), the court finds that defendants failed to make a *prima facie* showing that the alleged defect was trivial and therefore, not actionable. *Ricker v Board of Educ. of Town of New Hyde Park, supra; Perez v 655 Montauk, LLC, supra; Boxer v Metropolitan Transportation Authority,* 52 AD3d 447 [2d Dept 2008]. Accordingly, the motion is denied.

This decision constitutes the order of the court.

Dated: May 2, 2012

HON THOMAS P. PHELAN

ENTERED
MAY 04 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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