SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

PATRICIA CHERNOFF and RICHARD CHERNOFF,

Plaintiffs,

- against -

MIDCO-NOWASH, LLC, STARBUCKS CORPORATION and COLIN DEVELOPMENT LLC,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 12336/08
Motion Seq. Nos.: 02, 03
Motion Dates: 05/21/10
05/21/10

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 02), Affirmation and Exhibits	1
Notice of Motion (Seq. No. 03), Affirmation and Exhibits	2
Affirmation in Opposition and Exhibits	3
Reply Affirmation	4
Reply Affirmation	5

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant Starbucks Corporation ("Starbucks") moves (Seq. No. 02), pursuant to CPLR § 3212, for an order granting it summary judgment dismissing the Verified Complaint and all cross-claims asserted against it. Defendants Midco-Nowash, LLC and Colin Development LLC (hereinafter collectively referred to as "Midco-Nowash") move (Seq. No. 03), pursuant to CPLR § 3212, for an order granting them summary judgment dismissing the Verified Complaint. Plaintiffs oppose the motions.

On January 16, 2008, plaintiff Patricia Chernoff, now deceased, allegedly tripped and

fell "at the uneven and separated curbing within the shopping mall known as the 'La Boutique Mall' in Merrick, New York." *See* Defendant Starbucks' Affirmation in Support Exhibit I ¶ 5. Plaintiffs allege, *inter alia*, that the defendants were negligent in causing and allowing a defective condition to exist at the premises, namely, the curbing located within "La Boutique Mall."

At her Examination-Before-Trial ("EBT"), plaintiff Patricia Chernoff testified that she had stopped at the mall to get a cup of coffee at defendant Starbucks. When she arrived in the parking lot, she parked her car in one of the available parking spots adjacent/perpendicular to the sidewalk about where the accident happened. She got out of the car without difficulty and walked onto the sidewalk near where the accident occurred and walked into defendant Starbucks. She purchased her cup of coffee and then began to walk back to her car. *See* Defendant Starbucks' Affirmation in Support Exhibit J at p. 23. When she got back to her car, she stated that the car that was now parked next to her vehicle to the right (if you were facing her car) was parked at an angle where the nose of said car was such that it was parked closer to her driver's door, cutting down the angle with which she could get into the car. *See id.* at pp. 23, 25. As such, she decided to walk around her car, to the back, in an effort to come up from behind to get in as opposed to squeezing through. *See id.* at p. 23. She stated that, while she was walking to the back of her car, while stepping onto the curbing, her heel got caught in a space in the curb and her shoe got stuck. *See id.* at pp. 24, 27. The heel broke and she was caused to fall forward. *See id.* at p. 24.

Plaintiff Patricia Chernoff did not see the space in the curbing on the way in or at any time beforehand. *See id.* at p. 27. She did not notice it at any time prior to her fall. *See id.* at p. 27. Plaintiff Patricia Chernoff never notified defendant Starbucks or filed an accident report.

Defendant Midco-Nowash, LLC is the owner of the subject property. Defendant Colin Development LLC is the managing agent for the subject property. Elizabeth Ferrara is employed by defendant Colin Development LLC as the Director of Lease Management. Ms. Ferrara admitted in EBT that defendant Colin Development LLC maintains, cleans and is responsible for the parking lot and the brick sidewalk where plaintiff Patricia Chernoff had her accident. *See* Defendant Starbucks' Affirmation in Support Exhibit N at pp. 14, 15.

On February 14, 1997, defendant Starbucks Corporation, as tenant, and Simco Management Co., as landlord, entered into a commercial lease wherein defendant Starbucks agreed to lease a retail store located at 2015 Merrick Road in Merrick, New York. Simco Management Co. is not a named party to this lawsuit. Michael Price was the manager of the defendant Starbucks at the time of plaintiff Patricia Chernoff's accident.

Defendant Starbucks moves for summary judgment dismissing the Verified Complaint and Amended Verified Complaint and all cross-claims against it as it did not have an ownership interest or any control over the area where plaintiff Patricia Chernoff claims to have fallen. In support thereof, defendant Starbucks relies upon the Lease Agreement between defendant Starbucks and Simco Management Co. which was in effect at the time of plaintiff Patricia Chernoff's accident and the EBT testimony of Michael Price and Elizabeth Ferrara.

Paragraph 6.2 of the Lease Agreement provides that, "Landlord shall also repair and maintain all parking areas, sidewalks, landscaping and drainage systems on the Property. . ." This same paragraph provides that, "Landlord shall pay for and make all other structural repairs and/or replacements to the Premises and the Building/Shopping Center (including the Common Areas as defined below)." The "Common Areas" are defined in Paragraph 12.1 of the Lease Agreement as, "All portions of the Building/Shopping Center (excluding the Premises and any other space in the Building/Shopping Center designed to be leased to another tenant for its exclusive use) including, without limitation, landscaped areas, parking lots, curbs and sidewalks." *See* Defendant Starbucks' Affirmation in Support Exhibit L.

Defendant Starbucks has established its entitlement to judgment as a matter of law by demonstrating that it did not own, occupy, control or have any responsibility for the area where plaintiff Patricia Chernoff fell nor did it have a right or obligation to maintain or repair this area. Since the Lease Agreement provides that the landlord controls and maintains the Common Areas of the premises, which include parking lots, curbs and sidewalks, the landlord was responsible for the curb area where plaintiff Patricia Chernoff fell. Additionally, the testimony of both Michael Price and Elizabeth Ferrara reflect that the parking lot of the shopping mall was not the responsibility of defendant Starbucks.

In opposition, plaintiffs fail to raise an issue of fact sufficient to defeat this motion.

While the affirmation in opposition of Michael Sommer, dated April 12, 2011, contains thirty (30) pages of arguments and cites to approximately one hundred (100) cases, plaintiffs offer no evidence to contradict defendant Starbucks' assertion that it simply was not responsible for the area where plaintiff Patricia Chernoff fell.

Accordingly, defendant Starbucks' motion (Seq. No. 02) for summary judgment is granted.

Defendants Midco-Nowash move for summary judgment dismissing the Verified Complaint on the grounds that the alleged defect did not cause a trap or nuisance and any alleged condition was too trivial to constitute a dangerous condition, defendants Midco-Nowash's alleged acts were not the proximate cause of plaintiff Patricia Chernoff's injuries and plaintiffs cannot prove actual or constructive notice of the alleged dangerous condition.

In opposition to the motion, plaintiffs assert that defendants Midco-Nowash have failed to establish *prima facie* that the alleged condition that caused plaintiff Patricia Chernoff to trip and fall was open and obvious and not inherently dangerous. *See Carson v. Baldwin Union Free School Dist.*, 77 A.D.3d 878, 910 N.Y.S.2d 117 (2d Dept. 2010). Plaintiffs further assert that the defect was not trivial.

In support thereof, plaintiffs submit an affidavit of Patrick Wren, a private investigator. *See* Plaintiffs' Affirmation in Opposition Exhibit K. In his affidavit, dated April 19, 2011, Mr. Wren states that, within one week after his meeting with plaintiffs (January 25, 2008), he went to La Petite Mall and defendant Starbucks to take pictures of the condition which caused plaintiff Patricia Chernoff to fall. Mr. Wren further states that "[t]he photographs which were annexed hereto as Exhibit L were the pictures that I took when I went to the accident location shortly after the accident and fairly and accurately depict the defect which ensnared Ms. Chernoff. The defect in this case is an uneven and widely separated piece of curbing which forms the edge of the red brick walkway outside of Starbucks. The defect is located approximately 58 feet west of the west curbline of Merrick Avenue and intersecting at a point approximately 138 feet north of the north curbline in Merrick. The depth of that section of the curb exceeds 1-1/4 inches and on the side of the curbing closest to the walkway it is approximately 2 inches or more. The curb was approximately 5-1/2 inches wide. The curb is separated and eroded and broken on the side of the edging closest to the brickwork. The curbing was painted white and it disguised the dangerous condition and was wide enough to ensnare

either the toe of one's shoe or the heel of one's shoe." *See also* Plaintiffs' Affirmation in Opposition Exhibit L.

"To impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it." *See Leary v. Leisure Glen Home Owners Ass'n, Inc.*, 82 A.D.3d 1169, 920 N.Y.S.2d 193 (2d Dept. 2011); *Williams v. SNS Realty of Long Island, Inc.*, 70 A.D.3d 1034, 895 N.Y.S.2d 528 (2d Dept. 2010); *Dennehy-Murphy v. Nor-Topia Serv. Center, Inc.*, 61 A.D.3d 629, 876 N.Y.S.2d 512 (2d Dept. 2009). *See also Denker v. Century 21 Dept. Stores, LLC*, 55 A.D.3d 527, 866 N.Y.S.2d 681 (2d Dept. 2008); *Rubin v. Cryder House*, 39 A.D.3d 840, 834 N.Y.S.2d 316 (2d Dept. 2007). "A defendant has constructive notice of a defect when the defect is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected." *Dennehy-Murphy v. Nor-Topia Serv. Center, Inc., supra; Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 501 N.Y.S.2d 646 (1986); *Nelson v. Cunningham Associates, L.P.*, 77 A.D.3d 638, 908 N.Y.S.2d 713 (2d Dept. 2010); *Cusack v. Peter Luger, Inc.*, 77 A.D.3d 785, 909 N.Y.S.2d 532 (2d Dept. 2010).

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." *See Perez v. 655 Montauk, LLC*, 81 A.D.3d 619, 916 N.Y.S.2d 137 (2d Dept. 2011); *Sabino v. 745 64th Realty Associates, LLC*, 77 A.D.3d 722, 909 N.Y.S.2d 482 (2d Dept. 2010); *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 665 N.Y.S.2d 615 (1997).

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 A.D.3d 1012, 901 N.Y.S.2d 676 (2d Dept. 2010); *Aguayo v. New York City Hous. Auth.*, 71 A.D.3d 926, 897 N.Y.S.2d 239 (2d Dept. 2010).

Viewing the evidence in the light most favorable to plaintiffs (*see Taylor v. Rochdale Village Inc.*, 60 A.D.3d 930, 875 N.Y.S.2d 561 (2d Dept. 2009); *Judice v. DeAngelo*, 272 A.D.2d 583, 709 N.Y.S.2d 427 (2d Dept. 2000); *Robinson v. Strong Memorial Hosp.*, 98 A.D.2d 976, 470 N.Y.S.2d 2398 (4th Dept. 1983)), defendants Midco-Nowash have failed to

make a *prima facie* showing of entitlement to judgment as a matter of law.

Here, the evidence submitted by defendants Midco-Nowash, including deposition testimony and photographs, was insufficient to demonstrate as a matter of law that the alleged defect was trivial, and therefore not actionable. *See Bolloli v. Waldbaum, Inc.*, 71 A.D.3d 618, 896 N.Y.S.2d 400 (2d Dept. 2010); *Hahn v. Wilheim*, 54 A.D.3d 896, 865 N.Y.S.2d 240 (2d Dept. 2008); *Corrado v. City of New York*, 6 A.D.3d 380, 773 N.Y.S.2d 894 (2d Dept. 2004).

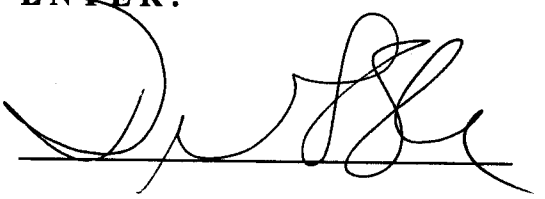
Furthermore, defendants Midco-Nowash failed to demonstrate, as a matter of law, that they did not have constructive notice of the alleged defect. Defendants Midco-Nowash have not made a *prima facie* showing that the alleged defect was not visible and apparent and did not exist for a sufficient length of time to permit defendants Midco-Nowash to discover and remedy it. *See Bolloli v. Waldbaum, Inc. supra; Giulini v. Union Free School Dist. #1*, 70 A.D.3d 632, 895 N.Y.S.2d 453 (2d Dept. 2010); *Smith v. Bay Harbour Assoc., L.P.*, 53 A.D.3d 539, 863 N.Y.S.2d 38 (2d Dept. 2008).

In view of the foregoing, defendant Starbucks' motion (Seq. No. 02) for summary judgment is hereby **GRANTED**. Defendants Midco-Nowash, LLC and Colin Development LLC's motion (Seq. No. 03) for summary judgment is hereby **DENIED**.

The remaining parties shall appear for Trial in Nassau County Supreme Court, Central Jury Part, at 100 Supreme Court Drive, Mineola, New York, on September 12, 2011, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
July 18, 2011