Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CASSANDRA A. JOHNSON IAS Part 2
Justice

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JASON VELASQUEZ,

Plaintiff,

-against-

88 CYPRESS LLC.,

Defendant.

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Index Number 717633/2019

Motion Date November 22, 2023

Motion Seq. No. 2

The following papers numbered E35 to E62 read on this motion by defendant for summary judgment.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits....	E35 to E48
Answering Affidavits.....	E50 to E58
Reply Affidavits.....	E59 to E62

Upon the foregoing papers, defendant's motion for summary judgment is determined as follows:

In this action to recover damages for personal injuries purportedly sustained by plaintiff in a slip and fall on decorative bricks on the sidewalk adjacent to defendant's property, defendant moves for summary judgment and dismissal of plaintiff's complaint contending that no triable issue of fact exists. Defendant contends, *inter alia*, that the deposition testimonies of the parties, including plaintiff and defendant's managing member, together with the affidavit of Michael Pawlowski, an employee of the hardware store and defendant's lessee of the premises, all demonstrate that defendant neither created, had actual or constructive notice of, the condition plaintiff claims was the proximate cause of his injuries. Additionally, defendant contends that there is no objective evidence that plaintiff's incident occurred on the sidewalk in front of Cypress Hardware, defendant's lessee, and that even if plaintiff fell as alleged, defendant contends that the affidavit of Michael Kravitz, P.E., an expert designated by defendant in the field of forensic engineering, demonstrates that defendant is not liable because plaintiff has not established that any defective condition existed.

Plaintiff opposes and argues, *inter alia*, that defendant failed to eliminate all issues of material fact and did not meet its burden to disprove actual or constructive notice of the condition. Plaintiff proffers the affidavit Nicholas Bellizi, P.E., who opines that the decorative bricks were displaced due to long-existing failure to properly install them and that the unrepaired

defect "more likely than not existed for a very long time." As there are competing expert opinions regarding whether the sole condition of the bricks would demonstrate constructive notice to defendant of the dangerous and dangerous condition, summary judgment should be denied.

Pursuant to CPLR 3212, "[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR 3212 [b]; *Rodriguez v. City of New Yor*k, 31 NY3d 312 [2018].) The motion for summary judgment must also "show that there is no defense to the cause of action." (*Id.*). The party moving for summary judgment must make a *prima facie* showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; *see Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824 [2014]; *Brill v City of New York*, 2 NY3d 648 [2004].) Once a *prima facie* showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 NY2d 557 [1980].)

A property owner has a duty to keep his or her property in a "reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk." (*Basso v Miller*, 40 NY2d 233 [1976] [internal quotation marks omitted]; *see Neiderbach v 7-Eleven, Inc.*, 56 AD3d 632 [2d Dept 2008].) In a premises liability case, a defendant real property owner, or a party in possession or control of real property who moves for summary judgment can establish its *prima facie* entitlement to judgment as a matter of law by showing that it neither created the allegedly dangerous or defective condition nor had actual or constructive notice of its existence. (*Chang v. Marmon Enters., Inc.*, 172 AD3d 678 [2nd Dept. 2019].) 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 the defendant to discover and remedy it. (*See Gordon v Am. Museum of Nat. History*, 67 NY2d 836 [1986]; *Denker v Century 21 Dept. Stores, LLC*, 55 AD3d 527 [2d Dept 2008].)

In the instant case, plaintiff JASON VELASQUEZ alleges that he tripped and fell due to a lifted decorative brick that was part of a row of decorative bricks set into the sidewalk adjacent to defendant's property, currently occupied by defendant's lessee, a hardware store named Cypress Hardware. Plaintiff testified that subsequent to the fall, he did not tell anyone at the hardware store that he had fallen over a brick in front of the store and that at no time after that did he go back to the hardware store to advise them of a lifted brick in front of the store. Michael Pawlowski, an employee of defendant's lessee at the time of the incident, averred, *inter alia*, that he was present at work from 10:00 a.m. until approximately 6:30 p.m. or 7:00 p.m. on the day of the incident, that he observed that there were no bricks out of place in any noticeable way when he was arriving to work, that later that day, he was standing outside of the store and did observe plaintiff being taken into the ambulance from the pizzeria, that when he left work that evening, he did not see any bricks out of place, defects or anything else noticeably wrong with the sidewalk. Defendant's managing member, Michael Ho, testified that he was first informed of the incident by employees of the hardware store approximately one week subsequent to the event, that he visited the premises regularly and that he had never been advised of any other accidents occurring on the sidewalk in front of the hardware store.

As to the issue of constructive notice, the conflicting experts presented by the parties would ordinarily raise a triable issue of fact. However, the Court finds that plaintiff's expert fails to do so. Defendant's affiant, Michael Kravitz, P.E., averred in his expert opinion regarding the mechanics of the brick pavers, that after his inspection of the subject sidewalk and review of plaintiff's photographs taken by plaintiff on an unspecified date after the accident, depicting the purportedly lifted brick, he concluded with reasonable certainty in the area of field engineering that the lifted brick paver as depicted by plaintiff's photographs could not have been lifted against gravity in that manner without the aid of human intervention. In contrast, while plaintiff's expert avers to a plethora of regulations pertaining to sidewalk safety relative to decorative sidewalk bricks and his analysis thereto, Bellizi's conclusions are based upon plaintiff's testimony and the photographs taken by plaintiff. Plaintiff's expert did not state when or if he ever performed an on-site inspection of the premises, effectively rendering his conclusions and opinion as purely speculative. (*See Cruz v Deno's Wonder Wheel Park*, 297 AD2d 653 [2d Dept 2002], citing *Santiago v United Artists Communications, Inc.*, 263 AD2d 407 [1st Dept 1999][where the Court concluded that plaintiff's expert affidavit failed to raise a triable issue of fact when plaintiff's expert "never stated when he conducted his on-site inspection of the step, never compared the results of his on-site inspection with any of the photographs of the step, and never stated that the condition of the step at the time of his inspection was the same as that at the time of the accident"]; *see also DeCarlo v Vil. of Dobbs Ferry*, 36 AD3d 749 [2d Dept 2007].)

As such, defendant adequately demonstrated that it had neither actual notice nor constructive notice of any condition claimed by plaintiff to be the proximate cause of his injuries. Plaintiff failed to raise a triable issue of fact. Any remaining contentions or arguments are either without merit or need not be addressed in light of the foregoing determination.

Accordingly, defendant's motion for summary judgment is granted and plaintiff's complaint is dismissed.

This constitutes the decision and order of the court.

Dated: June 10, 2024

Hon. Cassandra A. Johnson, J.S.C.