

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE
J.S.C.
Justice

PART 12

Index Number : 150390/2011
SHANE, MICHAEL
vs.
SUPERNOVA NEW YORK REALTY LLC
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 150390/11
MOTION DATE
MOTION SEQ. NO. 001

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 10

Answering Affidavits — Exhibits No(s) 13-20

Replying Affidavits No(s) 21

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7/8/13

[Signature] J.S.C.

BARBARA JAFFE
NON-FINAL DISPOSITION

- 1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
MICHAEL SHANE,

Plaintiff,

- against -

Index No. 150390/11

Mot. seq. no: 001  
Subm.: 3/6/13

**DECISION AND ORDER**

SUPERNOVA NEW YORK REALTY LLC,

Defendant.  
-----X

BARBARA JAFFE, J.:

**For plaintiff:**

Richard J. Katz, Esq.  
Richard J. Katz, LLP  
80 Broad St., 33<sup>rd</sup> Fl.  
New York, NY 10004  
212-233-1515

**For defendant:**

Patricia A. Hughes, Esq.  
Cartafalsa, Slattery *et al.*  
560 White Plains Rd., Ste. 300  
Tarrytown, NY 10591  
914-606-9793

By amended notice of motion dated June 28, 2012, defendant SNYT LLC i/s/h/a Supernova New York Realty LLC moves pursuant to CPLR 3212 for an order summarily dismissing the complaint against it. Plaintiff opposes.

I. PERTINENT BACKGROUND

On March 5, 2009, at approximately 6:00 p.m., plaintiff, a guest at the Sheraton Hotel and Towers at 801 Seventh Avenue in Manhattan (the hotel), was returning to the hotel when he allegedly tripped on the stairs ascending to the landing leading to the hotel doors, causing him to sustain injuries. (Affirmation of Patricia A. Hughes, Esq., dated June 25, 2012 [Hughes Aff.], Exhs. D, E). The hotel premises are owned by defendant. (*Id.*, Exh. B).

At a deposition held on March 28, 2012, plaintiff testified that he fell on the second step from the top when the front of his boot became caught in a space where two pieces of granite joined; the two pieces had a height differential of approximately one-half inch. Plaintiff did not

use the handrail although he had used the stairs approximately 12 times prior to his fall without complaint. (Hughes Aff., Exh. E).

George Irizarry, the hotel's security officer on duty at the time of the incident, testified at his deposition on April 24, 2012 that to his knowledge, there had been no prior incident of anyone falling on the steps due to any defect related to the step on which plaintiff allegedly fell. (*Id.*, Exh. F).

By affidavit dated September 8, 2012, Dr. Stephen I. Rosen, plaintiff's expert witness in the fields of human factors and slip, trip and fall analysis, states that he examined the defect and accident site, and observed that the height differential between the two granite slabs is apparent both in photographs and in person, and appeared unchanged from the date of the accident. In his professional opinion, the defect is the type that can cause a person to catch his foot or shoe and fall, as plaintiff did. He also saw that the defect is located in a heavily trafficked area, which is not particularly well-lit, making its observation or detection difficult, and concludes that defendant failed to maintain its property in a safe condition in violation of sections 27-127 and 27-128 of the New York City Building Code, and Article 1, Section 27-2005 of the Housing Maintenance Code of the City of New York. (Affirmation of Richard J. Katz, Esq., dated Sept. 23, 2010 [Katz Aff.], Exh. G).

## II. CONTENTIONS

Defendant contends that the alleged defect is trivial, that no reasonable person would foresee it as a hazard, and that plaintiff has offers no evidence that the alleged defect presents a foreseeable hazard. (Mem. of Law, dated June 25, 2012).

Plaintiff argues that there exist genuine issues of material fact as to defendant's

negligence in failing to maintain the steps properly, relying on Rosen's expert opinion that defendant violated applicable safety codes. He asserts that defendant's contention that the defect was trivial is insufficient absent an expert opinion, and that the defect's height differential is not the only measure; rather, all relevant factors must be considered, including that the accident's locus in a high traffic area which was poorly illuminated, and that plaintiff did not see what caused his fall until after the accident. (Katz Aff.).

In reply, defendant maintains that Rosen never inspected the step and that his affidavit simply repeats plaintiff's testimony. It also asserts that the premises, including the stairs, are properly maintained, and that there is no evidence supporting plaintiff's allegation that it violated the building code. Defendant also denies that the area is poorly lit, and observes that plaintiff registered no complaint about the lighting. (Reply Affirmation, dated September 25, 2012).

### III. ANALYSIS

It is well-settled that "[t]he owner of a public passageway 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." (*Morales v Riverbay Corp.*, 226 AD2d 271 [1<sup>st</sup> Dept 1996]). Whether a defect in a sidewalk is trivial does not depend solely on its dimensions. Rather, "whether a dangerous or defective condition exists on the property of another so as to create liability 'depends on the peculiar facts and circumstances of each case' and is generally a question of fact for the jury." (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]; quoting *Guerrieri v Summa*, 193 AD2d 647 [2d Dept 1993]). "[E]ven a trivial defect may constitute a snare or trap." (*Argenio v Metro. Transp. Auth.*, 277 AD2d 165, 166 [1<sup>st</sup> Dept 2000]; see *Abreu v NYCHA*, 61

AD3d 420, 421 [1<sup>st</sup> Dept 2009] [lengthy irregularity in cement might have been capable of catching plaintiff's sandal]).

However, defects of one-half-inch in height differential have been held to be trivial, in the absence of any evidence showing that the defect presented a significant hazard by reason of location, adverse weather or lighting conditions, or other circumstances giving the defect the characteristics of a trap or snare. (*Boynton v Haru Sake Bar*, 2013 WL 2436365, 2013 NY Slip Op 04113 [1<sup>st</sup> Dept] [photographic evidence showed that height difference of one-half-inch between level of sidewalk and frame to cellar hatch doors was trivial]; *Mangar v Parkash 180 LLC*, 99 AD3d 607 [1<sup>st</sup> Dept 2012] [defendant established that half-inch height differential at top of two-step exterior stairway was trivial]; *Schwartz v Bleu Evolution Bar & Restaurant Corp.*, 90 AD3d 488 [1<sup>st</sup> Dept 2011] [gap in sidewalk flags of half-inch in width and height was trivial and plaintiff did not show that defect presented significant hazard]; *Gaud v Markham*, 207 AD2d 845 [1<sup>st</sup> Dept 2003] [height differential of less than inch between defective area and rest of stairway landing leading to entrance of building was trivial]). Thus, to the extent that it is undisputed that the defect measured approximately a half-inch in height, defendant established, *prima facie*, that the defect was trivial and therefore not actionable.

In opposition, however, Rosen's expert testimony demonstrates the existence of triable issues as to whether the defect had the characteristics of a trap or snare, as its dimensions permitted a person to catch his or her foot in it, and the area was heavily-trafficked and poorly illuminated. (*See eg Glickman v City of New York*, 297 AD2d 220 [1<sup>st</sup> Dept 2002] [even if defect was trivial, plaintiff's expert's opinion that location of defect, in area of parking lot where person may be more focused on traffic than looking at ground, may have increased hazard raised triable

issue]; *Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165 [1st Dept 2000] [holding that summary judgment was inappropriate where plaintiff tripped in Grand Central Terminal when her toe became caught in quarter-inch deep depression in floor, based on fact that location of depression was in heavily-trafficked pedestrian area, making it less likely to be observed, and fact that plaintiff's expert witness concluded defect constituted tripping hazard]; *Cohen v Cayer Synergy 73<sup>rd</sup> LLC*, 2008 WL 4641988, 2008 NY Slip Op 32798[U] [Sup Ct, New York County] [holding that photographs submitted by plaintiff showing sharp edge which may constitute tripping hazard, and fact that plaintiff testified she tripped at night and area was not well-lit, constituted issues for jury]; *see also Boxer v Metro. Transp. Auth.*, 52 AD3d 447 [2d Dept 2008] [where defect in sidewalk was between one-quarter and one inch in height, evidence submitted including circumstances of accident, raised issue whether it was too trivial to be actionable]).

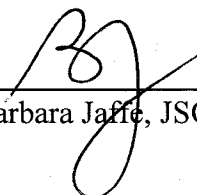
#### IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion for an order granting it summary judgment is denied; and it is further

ORDERED, that the parties appear for the previously-scheduled mediation on July 10, 2013 at 10:30 am at 80 Centre Street, Room 106, New York, New York.

ENTER:

  
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Barbara Jaffe, JSC

DATED: July 8, 2013  
New York, New York