

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

HOLLY WERTMAN	:	NO. 07-02404
	:	
	:	
v.	:	
	:	CIVIL ACTION - LAW
DOLLAR GENERAL and	:	
MUNCY PROPERTIES, INC. and	:	
GEORGE HUTCHINSON	:	

ORDER

This opinion comes as a result of Defendant’s Motion for Summary Judgment, oral argument for which was heard on March 10, 2009.

Defendant argues that the alleged sidewalk defect in question was a “trivial defect” and therefore Plaintiff cannot recover. In the alternative Defendant argues that the alleged defect was open and obvious to Plaintiff and therefore she cannot recover. Plaintiff argues that the alleged defect was not trivial nor was it open and obvious.

Summary Judgment may be properly granted “...when the uncontroverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. Rauch v. Mike-Mayer, 783 A.2d 815, 821 (Pa. Super. 2001). The movant bears the burden of proving that there are no genuine issues of material fact. Id. In determining a motion for summary judgment, the court must examine the record “in the light most favorable to the non-moving party, accepting as true all well pleaded facts in its pleading and giving that party the benefit of all reasonable inferences.” Godlewski v. Pars

Mfg. Co., 597 A.2d 106, 107 (Pa. Super. 1991). Summary judgment may be properly entered if the evidentiary record “either (1) shows that the material facts are undisputed or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense.” Rauch at 823-24.

Defendant first argues that the alleged sidewalk defect in question was a “trivial defect”. Defendant cites a multitude of case law in support of the notion that a trial court may dismiss a claim on summary judgment if the court finds an alleged defect to be trivial. While this Court finds the “trivial defect doctrine” to be dubious at best, there is sufficient case law to allow this Court to entertain the issue. In addition to the cases presented by Defendant, there is a plethora of case law in support of Plaintiff’s position. In Lowe, the Plaintiff alleged that injury was caused by an elevated portion of the sidewalk, raised at least an inch and a half. Lowe v. Pirozzi, 2006 U.S. Dist. LEXIS 23726 (E.D. Pa.). The Court found there to be sufficient dispute of fact as to whether the defect was trivial. The Court also found significant the fact that the defect was located along the path that customers walk when moving from the parking area to the restaurant entrance. The Court stated that whether the alleged defect was *obviously* trivial is a question best left for the jury to decide. (Emphasis added). Id. The Court in Ozer held that, “If a court concludes that a defect is so trivial that no reasonable juror could impose liability, summary judgment can be appropriate...However, unless a defect is *obviously* trivial, its gravity should be a fact determined in light of the circumstances of the particular case.” Ozer v. Metromedia Restaurant Group, et. al., 2005 U.S. Dist. LEXIS 3447 (E.D.Pa.). *Citing to* Massman v. City of Philadelphia, 241 A.2d 921 (Pa. 1968)(Emphasis added). In Ozer the Court found that a ridge in the parking lot asphalt, raised approximately seven-sixteenths to three-fourth of an inch and within six inches from the sidewalk

curb was not so trivial as to take the issue from a jury. *Id.* at 21. The Court in Waddington found a water main cover with a “downward slope” or “indentation” one-and-a-half to two inches below a sidewalk to be not trivial and therefore not worthy of summary judgment. Waddington v. United States of America, 2008 U.S. Dist. LEXIS 48408 (E.D.Pa.). The Court also found significant the fact that the defect was located close to the entrance to the building. *Id.* Finally, the Court in Gosha found a hole that was large enough for Plaintiff’s heel to enter to not be a trivial defect because the Plaintiff was wearing heeled shoes at the time. Gosha v. City of Philadelphia, 30 Pa.D&C.3d 190 (Pa. Dist. & Cnty. 1982). The Court also found significant the fact that the defect was located in front of an entrance to a large, frequently and heavily used building. The Court stated that, “No definite or mathematical rule can be laid down as to the depth or size of a sidewalk depression necessary to convict an owner of premises of negligence in permitting its continued existence...” *Id.* at 203. *citing to Massman* at 639.

In the case at bar, based upon the pictures supplied to the court, we cannot say definitively that the alleged defect was so obviously trivial as to take the question from the jury. The alleged defect was located close to the entrance/exit-way of the Defendant’s store and was of sufficient width and depth that a person could be caused to fall by having their heel enter the defect. Therefore Defendant’s first argument must fail.

Defendant next argues that the alleged defect was open and obvious to the Plaintiff. The Court notes first the interesting dichotomy of arguing that a defect was both too trivial to be actionable as well as too open and obvious to be actionable. As the Court stated in Villano, pedestrians “must look where they are going,” Villano v. Security Savings Association, 268 Pa.Super. 67, 407 A.2d 440 (1979); Lewis v. Duquesne Inclined Plane Co., 346 Pa. 43, 28 A.2d

925 (1942). However, in finding the question of a trivial defect to be a close one in the case before this Court “we will not hold [pedestrians] responsible for walking so tentatively as to detect nearly-latent defects. Such action exceeds the burden placed upon the ordinarily prudent man under these circumstances.” Donlin v. J.J. Newbury, Co., 466 A.2d 174 (Pa. Super. 1983). Therefore the Court finds that Defendant’s argument must fail.

ORDER

AND NOW, this ___ of March, 2009, it is hereby ordered and directed that Defendant’s Motion for Summary Judgment is DENIED.

BY THE COURT,

Judge Richard A. Gray

cc: Michael Zicoello, Esq.
Michael Frisbie, Esq.
Gary Weber, Esq.