

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D32446  
W/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - September 15, 2011

A. GAIL PRUDENTI, P.J.  
REINALDO E. RIVERA  
LEONARD B. AUSTIN  
SHERI S. ROMAN, JJ.

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2010-09774

DECISION & ORDER

Florence Kehoe, etc., plaintiff-respondent, v City of New York, defendant-respondent, Vincent Avitable, appellant.

(Index No. 23825/08)

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Gannon, Lawrence & Rosenfarb, New York, N.Y. (Lisa L. Gokhulsingh of counsel), for appellant.

Jacoby & Myers, LLP, Newburgh, N.Y. (Finkelstein & Partners [George A. Kohl, 2nd], of counsel), for plaintiff-respondent.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Edward F. X. Hart and Jane L. Gordon of counsel), for defendant-respondent.

In an action to recover damages for personal injuries, the defendant Vincent Avitable appeals, as limited by his brief, from so much of an order of the Supreme Court, Kings County (Velasquez, J.), dated September 8, 2010, as denied his motion for summary judgment dismissing the complaint insofar as asserted against him and granted that branch of the cross motion of the defendant City of New York which was for summary judgment dismissing his cross claim against it.

ORDERED that the appeal from so much of the order as granted that branch of the cross motion of the defendant City of New York which was for summary judgment dismissing the cross claim of the defendant Vincent Avitable is dismissed as academic in light of our determination of the appeal from so much of the order as denied the motion of the defendant Vincent Avitable for summary judgment dismissing the complaint insofar as asserted against him; and it is further,

ORDERED that the order is reversed insofar as reviewed, on the law, and the motion of the defendant Vincent Avitable for summary judgment dismissing the complaint insofar as asserted against him is granted; and it is further,

October 4, 2011

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ORDERED that one bill of costs is awarded to the defendant Vincent Avitable.

On October 8, 2007, Grace Sapienza (hereinafter the decedent) was walking on the sidewalk abutting the real property of the defendant Vincent Avitable when she allegedly tripped and fell and was injured. Three days later, she died of complications from her fall. The plaintiff, as representative of the decedent's estate, commenced this action to recover damages against Avitable and the City of New York. Avitable answered and cross-claimed against the City for contribution and indemnification. Avitable moved for summary judgment dismissing the complaint insofar as asserted against him on the ground that the defect was trivial as a matter of law and, therefore, not actionable. The City cross-moved, inter alia, for summary judgment dismissing the cross claim. The Supreme Court, among other things, denied Avitable's motion. We reverse insofar as reviewed.

Generally, 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 [internal quotation marks omitted]). However, not every injury allegedly caused by a defect in a sidewalk must be submitted to the jury. "[A] trivial defect on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes or trip on a raised projection, is not actionable" (*Riser v New York City Hous. Auth.*, 260 AD2d 564, 564). In determining whether a defect is trivial as a matter of law, the court should consider "the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury" (*Trincere v County of Suffolk*, 90 NY2d at 978, quoting *Caldwell v Village of Is. Park*, 304 NY 268, 274; see *Fisher v JRMR Realty Corp.*, 63 AD3d 677, 678).

Here, upon reviewing photographs of the defect and considering all other relevant factors, including all of the deposition testimony, we conclude that Avitable established, prima facie, that the alleged defect was not actionable, as it was trivial and did not possess the characteristics of a trap or nuisance (see *Shiles v Carillon Nursing & Rehabilitation Ctr., LLC*, 54 AD3d 746; *Riser v New York City Hous. Auth.*, 260 AD2d at 564). In opposition, the plaintiff failed to raise a triable issue of fact.

In light of our determination, we need not address the parties' contention regarding Avitable's alleged liability under the Administrative Code of the City of New York § 7-210(6) in his capacity as the nonoccupying owner of the three-family residence where the accident took place.

Accordingly, the Supreme Court should have granted Avitable's motion for summary judgment dismissing the complaint insofar as asserted against him.

PRUDENTI, P.J., RIVERA, AUSTIN and ROMAN, JJ., concur.

ENTER:



Matthew G. Kiernan  
Clerk of the Court