

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

D33011
G/prt

_____AD3d_____

Submitted - November 1, 2011

MARK C. DILLON, J.P.
RUTH C. BALKIN
JOHN M. LEVENTHAL
ARIEL E. BELEN, JJ.

2010-06488

DECISION & ORDER

Chris M. Figueroa, appellant, v City of New York,
et al., defendants, 843 Greene Avenue Corp., et al.,
respondents (and a third-party action).

(Index No. 25560/06)

Paul G. Vesnaver, Esq., PLLC, Baldwin, N.Y. (Victor A. Carr of counsel), for
appellant.

Cascone & Kluepfel, LLP, Garden City, N.Y. (Olympia Rubino of counsel), for
respondent 843 Greene Avenue Corp.

Morris, Duffy, Alonso & Faley, New York, N.Y. (Anna J. Ervolina and Andrea M.
Alonso of counsel), for respondent Floral Construction, Inc.

In an action to recover damages for personal injuries, the plaintiff appeals, as limited by his brief, from so much of an order of the Supreme Court, Kings County (Sherman, J.), dated May 26, 2010, as granted that branch of the motion of the defendant 843 Greene Avenue Corp. which was for summary judgment dismissing the complaint insofar as asserted against it, granted that branch of the cross motion of the defendant Floral Construction, Inc., which was for summary judgment dismissing the complaint insofar as asserted against it, and, in effect, searched the record and awarded summary judgment to the defendant Luigi Spagnolo Contracting.

ORDERED that the order is reversed insofar as appealed from, on the law, and those branches of the motion of the defendant 843 Green Avenue Corp. and the cross motion of the defendant Floral Construction, Inc., which were for summary judgment dismissing the complaint insofar as asserted against each of them are denied, with one bill of costs to the plaintiff payable by the defendants 843 Greene Avenue Corp. and Floral Construction, Inc.

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FIGUEROA v CITY OF NEW YORK

One night in October 2005, the plaintiff allegedly was injured when he stepped into a hole in the sidewalk in front of property that was then owned by the defendant 843 Greene Avenue Corp. (hereinafter 843 Greene). Although it was dark outside, the plaintiff saw the hole, which he later described as two to three inches wide, three inches long, and three inches deep, but he did not try to avoid it. The plaintiff commenced this action against 843 Greene, Floral Construction, Inc. (hereinafter Floral), 843 Greene's general contractor on a construction project on the premises, and Luigi Spagnolo Contracting (hereinafter Spagnolo), the cement subcontractor on the construction project, as well as the City of New York, and Keyspan Energy Delivery (hereinafter Keyspan). Spagnolo defaulted in answering the complaint.

843 Greene moved, and Floral cross-moved, inter alia, for summary judgment dismissing the complaint insofar as asserted against them. In the order appealed from, the Supreme Court, among other things, granted the aforementioned branches of the motion and cross motion and also, in effect, searched the record and awarded summary judgment to Spagnolo. The plaintiff appeals from so much of the order as awarded summary judgment to 843 Greene, Floral, and Spagnolo.

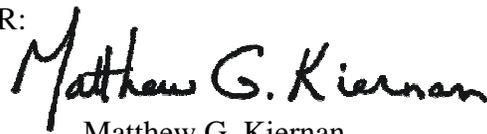
843 Greene and Floral failed to meet their prima facie burdens of establishing their entitlement to judgment as a matter of law. First, they failed to establish, prima facie, that they did not create the defect or that they lacked actual or constructive notice of it (*see Walsh v Super Value, Inc.*, 76 AD3d 371, 375). Second, they failed to establish as a matter of law that the defect was trivial and therefore not actionable (*see Fairchild v J. Crew Group, Inc.*, 21 AD3d 523, 524; *cf. Milewski v Washington Mut., Inc.*, 88 AD3d 853, *2). Finally, they failed to establish that the plaintiff's act of stepping into the hole despite having seen it in time to avoid it was the sole proximate cause of his injuries (*see Soto v New York City Tr. Auth.*, 6 NY3d 487, 492). Specifically, the plaintiff's conduct is relevant to the fact-finder's determination of his comparative negligence, but it does not excuse 843 Greene and Floral's own alleged negligence in either creating the defect or not remedying it despite having actual or constructive notice of it in time to do so (*see CPLR 1411; Soto v New York City Tr. Auth.*, 6 NY3d at 492; *Cupo v Karfunkel*, 1 AD3d 48, 51; *Tulovic v Chase Manhattan Bank*, 309 AD2d 923, 924; *cf. Williams v City of New York*, 71 AD3d 1135, 1137).

The parties' remaining contentions are without merit.

Accordingly, the Supreme Court erred in granting those branches of 843 Greene's motion and of Floral's cross motion which were for summary judgment dismissing the complaint insofar as asserted against each of them and by, in effect, searching the record and awarding summary judgment to Spagnolo.

DILLON, J.P., BALKIN, LEVENTHAL and BELEN, JJ., concur.

ENTER:



Matthew G. Kiernan
Clerk of the Court