

**Quinto v Costco Wholesale Corp.**

2007 NY Slip Op 30649(U)

April 3, 2007

Supreme Court, Richmond County

Docket Number: 0012225/2003

Judge: Robert J. Gigante

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

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**ANNETTE A. QUINTO and** :  
**RICHARD QUINTO, her husband,** :  
  
*Plaintiff(s),* :  
  
*-against-* :  
  
**COSTCO WHOLESALE CORPORATION** :  
**a/k/a and/or PRICE/COSTCO, ABC** :  
**LANDLORD CORP. I-X, (said names being** :  
**fictitious, true names unknown) DEF** :  
**TENANTS (said names being fictitious, true** :  
**names unknown) GHI CORP I-X (said names** :  
**fictitious, true names unknown), RST** :  
**MAINTENANCE CORP. I-X (said names** :  
**being fictitious, true names unknown) and** :  
**XYZ CONTRACTING CORP. I-X (said** :  
**names being fictitious, true names unknown),** :  
  
  
*Defendant(s).* :  
-----X

DCM PART 4  
Present:  
Hon. Robert J. Gigante  
  
**DECISION and ORDER**  
  
Index No.: 12225/03  
Motion No.: 3818-003

The following papers numbered 1 to 3 were used on this motion the 15<sup>th</sup> day of February, 2007:

Notice of Motion, Affirmations in Support  
and Exhibits  
(dated November 29, 2006) ..... 1

Affirmation in Opposition  
and Exhibits  
(dated January 18, 2007) ..... 2

Affirmation in Reply  
(dated February 14, 2007) ..... 3

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Upon the foregoing papers, the motion for summary judgment of defendant COSTCO Wholesale Corporation (hereinafter "COSTCO") is denied.

Plaintiff Annette A. Quinto (hereinafter “plaintiff”) brought this action to recover monetary damages for injuries she allegedly suffered on July 25, 2000, when she tripped and fell on a cement sidewalk in front of the COSTCO located on Richmond Avenue, in Staten Island, New York. Her husband Richard Quinto has pleaded a derivative cause of action. According to plaintiff, the section of sidewalk upon which she fell was uneven. In the present application, COSTCO seeks summary judgment and dismissal of the complaint as against it on the ground that the alleged defect is too trivial to be actionable.

A “proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant has satisfied this burden, “the burden shifts to the [opposing party] to lay bare his or her proof and demonstrate the existence of a triable issue of fact” (*Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). However, the court on such a motion is enjoined to accept the evidence tendered by the opposing party as true, and “must deny the motion if there is even arguably any doubt as to the existence of a triable issue” (*Fleming v Graham*, 34 AD3d 525 [2d Dept 2006] quoting *Barker v Briarcliff School Dist.*, 205 AD2d 652, 653 [2d Dept 1994] [internal quotation marks omitted]).

Generally, the determination of whether or not a dangerous or defective condition exists upon premises presents a question of fact for the jury (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997][citations omitted]). However, it has long been recognized that certain defects, by virtue of their “width, depth, elevation, irregularity and appearance . . . along with the time, place and circumstance of the injury” may be so trivial as to preclude liability as a matter of law (*id.* at 978 citing *Caldwell v Village of Is. Park*, 304 NY 268 [1952][internal quotation marks

omitted]).

Here, the photographs submitted by defendant are insufficient to demonstrate, as a matter of law, that the defect in question is too trivial to be actionable. These photographs are not only devoid of any measurable frame of reference, but are insufficient in detail to allow the Court to weigh the width, depth, elevation, irregularity and appearance of the defect on the day of plaintiff's accident. Nor is there any other evidence of the dimensions of the defect in reference to its surroundings.

COSTCO having failed to meet its burden of proof, there is no necessity to consider the sufficiency of plaintiff's opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324).

Accordingly it is,

ORDERED that the defendant's motion for summary judgment is denied.

Dated: April 3, 2007

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Robert J. Gigante, J.S.C.