

Munoz v City of New York
2012 NY Slip Op 32064(U)
August 3, 2012
Supreme Court, New York County
Docket Number: 112972/2009
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE ^{BARBARA JAFFE}
J.S.C.
Justice

PART 5

Index Number : 112972/2009

MUNOZ, YVONNE

vs

CITY OF NEW YORK

Sequence Number : 001

SUMMARY JUDGMENT

CAL. #74

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2

3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

AUG 06 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/3/12

AUG 03 2012

BARBARA JAFFE
J.S.C. J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG.

☐ SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
YVONNE MUNOZ and EMIR MUNOZ,

Index No. 112972/09

Plaintiffs,

Argued:

5/1/12

Motion seq. no.:

001

-against-

DECISION & ORDER

THE CITY OF NEW YORK, TWO COLUMBUS
ASSOCIATES L.L.C., THE CHURCH OF ST. PAUL
THE APOSTLE, NEW YORK CITY a/k/a THE
CHURCH OF ST. PAUL THE APOSTLE and THE
MISSIONARY SOCIETY OF ST. PAUL THE
APOSTLE IN THE STATE OF NEW YORK,

Defendants.

-----X
BARBARA JAFFE, JSC:

For plaintiffs:

Mary A. Bergam, Esq.
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New York, NY 10038
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For Church:

Frank Raia, Esq.
Rivkin Radler LLP
926 RXR Plaza
Uniondale, NY 11556-0926
516-357-3000

By notice of motion dated November 23, 2011, defendant The Church of St. Paul the
Apostle (Church) moves pursuant to CPLR 3212 for an order summarily dismissing the
complaint against it. Plaintiffs oppose.

On September 25, 2008, plaintiff Yvonne Munoz fell on the sidewalk in front of the
Church at 60th Street and Ninth Avenue in Manhattan when her foot became caught between two
misleveled sidewalk flags. At a 50-h hearing held on February 27, 2009, plaintiff testified that
the defect was approximately an inch and half in height, and that her right foot became caught
between the two flags. Photographs taken of the condition, which were authenticated by
plaintiff, reflect a hole between the two flags consisting of eroded and uneven concrete, with a

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depth and width of approximately one inch each. (Affirmation of Frank Raia, Esq., dated Nov. 23, 2011 [Raia Aff.], Exh. E).

The Church argues that based on plaintiff's testimony that the defect was an inch and a half in height and photographs of the condition, the defect was trivial and thus the Church cannot be held liable for her injuries. (Raia Aff.). Plaintiffs deny that the condition was trivial. (Affirmation of Mary A. Bergam, Esq., dated Mar. 21, 2012). In reply, the Church maintains that as the defect was no more than one inch deep, it was trivial, and that in any event, it was also open and obvious. (Reply Affirmation, dated Mar. 28, 2012).

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 [1st 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 [1st Dept 2000]; see *Abreu v NYCHA*, 61 AD3d 420, 421 [1st Dept 2009] [lengthy irregularity in cement might have been capable of catching plaintiff's sandal]).

Thus, sidewalk defects measuring one inch have been found to be not trivial. (*Cuebas v Buffalo Motor Lodge/Best Value Inn*, 55 AD3d 1361 [4th Dept 2008] [sidewalk slabs with height

differential of one inch insufficient to satisfy defendant's burden of showing defect was trivial]; *Boxer v Metro. Transp. Auth.*, 52 AD3d 447 [2d Dept 2008] [where plaintiff alleged defect was one inch and defendant alleged it was one-half inch, triable issues of fact existed]; *Mishaan v Tobias*, 32 AD3d 1000 [2d Dept 2006] [photographs showing broken and cracked sidewalk and portion of sidewalk raised at least one inch raised triable issue]).

Here, as the gap which caused plaintiff to fall allegedly had a height differential of approximately one inch, it was not trivial as a matter of law. (See *Nin v Bernard*, 257 AD2d 417 [1st Dept 1999] [precise dimensions of defect are not dispositive as to whether defect was trivial]). Moreover, the photographs show an irregular and sudden height differential in an otherwise smooth sidewalk. The Church has thus failed to establish, *prima facie*, that the defect was trivial and therefore not actionable. (See *Fazio v Costco Wholesale Corp.*, 85 AD3d 443 [1st Dept 2011] [plaintiff's testimony that concrete in depressed area was eroded, broken up and uneven created triable issue as to whether defect was trivial]; *Tese-Milner v 30 E. 85th St. Co.*, 60 AD3d 458 [1st Dept 2009] [photographs showing depressed area in sidewalk with rough and uneven surface did not unequivocally establish defect was trivial]; *DeLaRosa v City of New York*, 61 AD3d 813 [2d Dept 2009] [defendant failed to establish that defect consisting of height differential between two concrete slabs on sidewalk was trivial]; *Cuebas*, 55 AD3d at 1361 [same]; *Herrera v City of New York*, 262 AD2d 120 [1st Dept 1999] [elevation differential of between 3/8th to one inch between sidewalk sections, sloping downward in direction plaintiff had been walking, with gap of up to one and 1/2 inches in width, not trivial]).

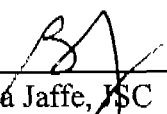
Moreover, the Church's claim that the defect was open and obvious constitutes an affirmative defense that may be raised at trial, and not a ground upon which to dismiss the

[* 5]
complaint. (*See Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89 [1st Dept 2011] [open and obvious nature of defect not fatal to plaintiff's negligence claim and relevant only to plaintiff's comparative fault]; *Clark v AMF Bowling Ctrs., Inc.*, 83 AD3d 761 [2d Dept 2011] [same])).

Accordingly, it is hereby

ORDERED, that defendant The Church of St. Paul the Apostle's motion for summary judgment is denied.

ENTER:


Barbara Jaffe, JSC

DATED: August 3, 2012
New York, New York

BARBARA JAFFE
J.S.C.

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