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| <b>Martinelli v D'Agostino's</b>   |
| 2018 NY Slip Op 31057(U)   |
| May 30, 2018   |
| Supreme Court, New York County   |
| Docket Number: 155095/2016   |
| Judge: Barbara Jaffe   |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

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JOSEPH MARTINELLI,

Plaintiff,

- v -

D'AGOSTINO'S,

Defendant.

INDEX NO. 155095/2016

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 2

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document numbers 31-56 were read on this application for summary dismissal

By notice of motion and motion, defendant moves pursuant to CPLR 3212 for an order summarily dismissing the complaint on the ground that the sidewalk defect which allegedly caused plaintiff to trip and fall is trivial as a matter of law and thus not actionable. (NYSCEF 31, 32). Plaintiff opposes. (NYSCEF 45).

I. BACKGROUND

On the morning of March 17, 2015, plaintiff allegedly tripped and fell over the joint between two uneven flags on the sidewalk abutting defendant's premises. At an examination before trial (EBT) held on January 16, 2017, plaintiff testified that as he exited the premises, he observed that the weather was "perfect," the pavement was "dry," and the sidewalk was not crowded. He then tripped and fell on the sidewalk, but did not look down or see what had caused him to fall. When he returned to the location a few days later, he noticed that a sidewalk flag was raised. (NYSCEF 32, 40). Plaintiff also testified that certain photographs offered by defense

counsel as exhibits at the EBT accurately depict the location where he fell and the condition of the sidewalk at the time of the accident. (*Id.*).

On February 2, 2017, defendant's store manager testified at his EBT that at the time of the incident, his duties included inspecting the subject sidewalk; other employees cleaned it. He had noticed no defects in the sidewalk before plaintiff's accident and, if he had, or if there had been a complaint about it, he would have reported it to his superiors. No complaint or report was made. (NYSCEF 32, 41).

By affidavit dated September 6, 2017, a defense law clerk states that on September 5, 2017, he measured and photographed the defect on which plaintiff allegedly tripped, and recorded a height differential of three-eighths of an inch, as seen in his photographs. (NYSCEF 33, 42).

## II. CONTENTIONS

Defendant relies on the photographs of the sidewalk and the absence of notice of a defect in maintaining that the defect is trivial as a matter of law. It asserts that the photographs relied on by plaintiff raise no factual issue, as they do not show that the bottom of the ruler is flush with the lower flag, and thus, it is impossible to see the height of the differential. (NYSCEF 32).

Plaintiff's counsel alleges, based on the photograph, that the tip of the ruler is flush with the lower flag and that defendant's contrary interpretation evidences an issue of fact as to the height differential, thereby precluding summary dismissal. Moreover, he observes, whether a defect is trivial generally constitutes an issue of fact. (NYSCEF 45).

In reply, defendant observes that plaintiff fails to offer an affidavit from one with personal knowledge as to the circumstances of the taking of his photographs, and that without it, neither the photograph nor his contentions pertaining thereto raise issues of fact, as there is no

way to determine who took it, when it was taken, what the weather conditions were on the date it was taken, or whether the defect depicted therein is the defect which allegedly caused him to fall. (NYSCEF 56).

### III. ANALYSIS

Whether a small sidewalk defect is trivial as a matter of law and therefore not actionable does not depend solely on its dimensions, but on “all the specific facts and circumstances of the case,” such as where the “surrounding circumstances or intrinsic characteristics” increase the risk it poses. (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77 [2015]). Characteristics which render a defect difficult to see or identify as a hazard, or difficult to walk on safely may constitute evidence that the defect, although small, constitutes a trap or snare, as may other physical characteristics, such as a jagged edge or rough surface, or other nearby defects, ambient lighting, and location. (*Hutchinson*, 26 NY3d at 78-79). Absent such indicia, a small sidewalk defect is trivial as a matter of law. (*Id.*). Thus, a defendant seeking summary dismissal on the ground that a defect is trivial as a matter of law must establish, *prima facie*, that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. (*Id.* at 79). If the defendant satisfies that burden, the burden shifts to the plaintiff to establish an issue of fact. (*Id.*).

Defendant’s photographs demonstrate that the height differential between the two flags is less than one inch and, given plaintiff’s testimony that the weather was perfect and that the pavement was dry and free of obstructions, the defect at issue is trivial as a matter of law, as it is small and there are no surrounding circumstances that would increase any risk it poses. (*See Hutchinson.*, 26 NY3d at 79 [defendant made *prima facie* showing that cylindrical projection was trivial as a matter of law by providing evidence of small size and that hazard not magnified

by circumstances, as area well-illuminated and unobstructed, and projection not jagged]; *Copley v Town of Riverhead*, 70 AD3d 623, 624 [2d Dept 2010] [walkway slightly raised above adjacent unpaved ground was trivial as matter of law, as plaintiff fell during daytime, with clear weather, unobstructed views and no debris]).

Absent an affidavit from an expert or one with knowledge of the defect or of the photographs themselves, the photographs offered by plaintiff create no triable issue. (*See Santiago v United Artists Communications, Inc.*, 263 AD2d 407, 407–08 [1<sup>st</sup> Dept 1999] [plaintiff failed to raise triable issue of fact, despite submitting expert affidavit along with photographs, as affidavit lacked inspection date, comparison of inspection results to photographs, and statement that condition of defect as depicted in photos was same as that at time of accident]; *cf. Narvaez v 2914 Third Ave. Bronx, LLC*, 88 AD3d 500, 501 [1<sup>st</sup> Dept 2011] [plaintiff raised issue of fact through testimony that she tripped over flag as she was walking, with many people around her, and expert's report and affidavit stating raised sidewalk flag was tripping hazard]).

Even if plaintiff's photographs demonstrate that the height differential between the flags exceed one inch, the difference alone raises no issue. (*See Chee v DiPaolo*, 138 AD3d 780, 782–83 [2d Dept 2016] [rise of slightly more than one inch on portion of sidewalk trivial as a matter of law, as surrounding circumstances did not increase risk to plaintiff as it was sunny day and nothing blocked her view of sidewalk]).

#### IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion for summary judgment is granted, and the complaint is dismissed in its entirety, and the clerk is directed to enter judgment accordingly.

5/30/2018  
DATE

  
BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

DO NOT POST

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: