

<b>Rosiello v Barnes &amp; Noble, Inc.</b>
2022 NY Slip Op 32144(U)
January 20, 2022
Supreme Court, Richmond County
Docket Number: Index No. 150395/2019
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND: PART C2

-----X  
JOSEPH ROSIELLO,

HON. THOMAS P. ALIOTTA

*Plaintiff,*

**DECISION AND ORDER**

*-against-*

Index No.: 150395/2019  
Motion No.: 003

BARNES & NOBLE, INC., EFG AND P LLC, THE  
CITY OF NEW YORK, NEW YORK CITY TRANSIT  
AUTHORITY and MTA BUS COMPANY,

*Defendants.*  
-----X

Recitation, as required by CPLR 2219(a) of the following papers numbered "1" through  
"4" were fully submitted on the 10<sup>th</sup> day of November 2021:

	<b>Papers Numbered</b>
Defendants' Notice of Motion, Affirmation, Expert Affidavit, and Supporting with Exhibits.....	1, 2
Plaintiff's Affirmation and Affidavit in Opposition and Supporting Exhibits.....	3
Reply Affirmation and Expert Supplemental Affidavit.....	4

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Upon the foregoing papers, the motion by defendants, BARNES & NOBLE, INC. and  
EFG&P, LLC for an order pursuant to CPLR 3212 dismissing the complaint in its entirety, is  
denied as follows:

This is an action for personal injuries sustained by plaintiff on February 2, 2018 when his  
foot slid over the edge of the sidewalk in a bus stop adjacent to the premises known as 2245  
Richmond Avenue, Staten Island, New York. The premises were occupied by defendant, Barnes  
& Noble, Inc, and maintained by EFG&P, LLC.

It is undisputed that at the time of the accident, plaintiff was walking towards the bus stop in front of the premises with the intent of boarding an approaching bus. Plaintiff fell as he was stepping from the sidewalk into the grassy area of the bus stop. It is plaintiff's allegation that the sidewalk was not the same height as the grassy area/tree well.

Defendant has now moved for summary judgment dismissing the complaint on the grounds that the height differential was neither a defect, nor the proximate cause of plaintiff's fall. In support, defendant submits the expert affidavit of Mark Marpet, Ph.D, P.E. Defendant, relying upon Dr. Marpet's findings after an inspection of the accident site, states that the height differential was trivial in nature, i.e., 0 to .5 inches, and not by definition a defect. Rather, the differential was the "natural consequence of an open and obvious transitional area between the sidewalk surface and tree-belt surface"; and the soil being "compressed by constant bus passenger traffic" (NYSCEF #55, pp.2-3). Thus, this transitional area was not the proximate cause of plaintiff's fall. Instead, the proximate cause was plaintiff's own misstep (*Id.* at p.4). Finally, defendant states that they did not maintain this area (NYSCEF 55, p.3).

Plaintiff contests these statements of material facts and sets forth that defendant's expert has identified the wrong area as the location of plaintiff's accident (NYSCEF 85, p.3). It is plaintiff's statement that the height differential amounted to 1.5 to 3.5 inches. Plaintiff also contests defendant's statements that they did not maintain the grassy area (NYSCEF 85, p.4). Specifically, plaintiff states that the area was maintained by gardeners and snow removal contractors hired by Barnes & Noble. In support of this position, plaintiff relies upon the deposition testimony of Rodothea Karagiannis, an employee of Barnes & Noble (NYSCEF 84, pp.16-28).

When deciding a summary judgment motion the Court's role is solely to identify the existence of triable issues, not to determine the merits of any such issues (*Vega v. Restani Construction Corp.*, 18 NY3d 499, 505 [2012]) or the credibility of the movant's version of events (see *Xiang Fu He v. Troon Management, Inc.*, 34 NY3d 167, 175 [2019] [internal citations omitted]). The Court views the evidence in the light most favorable to the nonmoving party and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v. Shop & Stop, Inc.*, 65 NY2d 625, 626 [1985]). The motion should be denied where the facts are in dispute, where different inferences may be drawn from the evidence or where the credibility of the witnesses is in question (see *Cameron v. City of Long Beach*, 297 AD2d 773, 774 [2d Dept. 2002]). The failure to establish such a *prima facie* showing also requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Weingrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once that initial burden has been satisfied, the burden shifts to the opposing party to come forward with sufficient evidence to raise a triable issue of fact (*Id.*). Since summary judgment is the procedural equivalent of a trial, the presence of any significant doubt as to whether there is a material issue of fact, or where an issue of fact is "arguable", the motion must be denied (see *Phillips v. Kantor & Co.*, 31 NY2d 307, 311 [1972]).

Specifically with regards to premises liability, it has repeatedly been held that an owner of property has a common law duty to maintain his or her premises in a reasonably safe condition (see e.g., *Kellman v. 45 Tiemann Assocs.*, 87 NY2d 871, 872 [1995]); and as to sidewalks, liability under certain factual circumstances is placed onto the abutting property owner thereby relieving the municipality of such responsibility (see Administrative Code §7-210). However, before a landowner may be held liable for a defective condition on his or her

property, a plaintiff must show that the owner created the condition, or that he or she had actual or constructive notice of the condition and a reasonable opportunity to cure (*see Piacquadio v. Recine Realty Corp.*, 84 NY2d 967 [1994]). Once notice is established, plaintiff must still demonstrate the defect was a proximate cause of the damages (*Daeira v. Genting New York, LLC*, 173 AD3d 831, 835 [2d Dept. 2019]), since there can be more than one cause of an accident (*Jaber v. Todd*, 171 AD3d 896, 898 [2d Dept. 2019]). As such, proximate cause is generally a question for the jury (*Jaber v. Todd*, 171 AD3d 898).

Whether a dangerous or defective condition exists depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*see Guerrieri v. Summa*, 193 AD2d 647 [2<sup>nd</sup> Dept 1993]). However, a property owner may not be held liable in damages for “trivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toe or trip over a raised projection” (*see Guerrieri v. Summa*, 193 AD2d 647, quoting *Liebl v. Metropolitan Jockey Club*, 10 AD2d 1006 [internal quotation marks omitted]). Accordingly, not every trip and fall on a sidewalk defect gets submitted to a jury (*see Riser v. New York City Housing Auth.*, 260 AD2d 564 [2<sup>nd</sup> Dept. 1999]).

In deciding the issue of triviality, the court must examine every fact presented, including 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 976, 978 [1997]). Any finding of “triviality” cannot be based on size alone despite a small difference in height or other physically insignificant defect if its intrinsic characteristics or surrounding circumstances magnify the dangers it poses and unreasonably imperil the safety of a pedestrian (*Hutchinson v. Sheridan Hill House Corp.*, 26 NY3d 66, 78-79 [2015], citing *Guerrieri v. Summa*, 193 AD3d

647 and *Wilson v. Jaybro Realty & Development Co., Inc.*, 289 NY 410, 412 [1943]; and *see Trincere v. County of Suffolk*, 90 NY2d 977 [1997] “A mechanistic disposition of a case based exclusively on the dimension of the sidewalk defect is unacceptable.”). The Court may consider additional factors such as a heavily traveled walkway which would “naturally distract” pedestrians from looking down at their feet (*Hutchinson v. Sheridan Hill House Corp.*, 26 NY3d 78, *citing Brenner v. Herricks Union Free School District*, 106 AD3d 766, 767 [2d Dept. 2013]). The issue of whether photographs standing alone or coupled with deposition testimony is sufficient for the Court to find triviality as a matter of law is based upon the facts of each case before it (*see Hutchinson v. Sheridan Hill House Corp.*, 26 NY3d 83).

Here, summary judgment must be denied.

First, it is a question of fact for the jury as to the height differential (*see Xiang Fu He v. Troon Management, Inc.*, 34 NY3d 175 [internal citations omitted]). While defendants sustained their initial *prima facie* burden, plaintiff has demonstrated through the deposition testimony and photographic evidence that a material question of fact exists as to the triviality of the defect (*Id.*). Additionally, it is question of fact whether plaintiff was naturally distracted from looking down at the sidewalk while walking in the direction of the approaching bus (*see Hutchinson v. Sheridan Hill House Corp.*, 26 NY3d 78); and whether plaintiff, defendant or both were the proximate cause of the accident (*Jaber v. Todd*, 171 AD3d 898). Thus, the jury must weigh and determine the credibility of plaintiff and Dr. Marpet as to the triviality of the defect (*Xiang Fu He v. Troon Management, Inc.*, 34 NY3d 175 and *Cameron v. City of Long Beach, supra*).

Second, while a property owner is not responsible to maintain a bus stop, this defendant voluntarily assumed the responsibility to maintain the grass and remove snow in the bus stop. Therefore, it is a question of fact whether the performance of these services caused, created, or

exacerbated the height differential between the sidewalk and the grass where plaintiff alleges to have fallen (*see Piacquadio v. Recine Realty Corp.*, 84 NY2d 967; and *Loiacono v. Stuyvesant Bagels*, 29 AD3d 537 [2d Dept. 2006]). More specifically, the jury must determine whether the grass maintenance and snow removal, or the passenger traffic in the bus stop as opined by Dr. Marpet, caused the compression of the soil (*Daeira v. Genting New York, LLC*, 173 AD3d 835). Therefore, more than one inference that may be drawn from all the evidence before the Court (*Cameron v. City of Long Beach, supra*).

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is denied in its entirety; and it is further

ORDERED, that the conference scheduled for January 27, 2022 is adjourned to March 9, 2022 for a virtual post-note of issue settlement conference at a time to be determined.

This constitutes the decision and order of the Court.

Dated: January 20, 2022

ENTER:



HON. THOMAS P. ALIOTTA, J.S.C.