

Milov v 135 Bay 26th St. Condo Assoc.

2025 NY Slip Op 33068(U)

July 24, 2025

Supreme Court, Kings County

Docket Number: Index No. 526029/2020

Judge: Ingrid Joseph

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 24th day of July, 2025.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
STELLA MILOV,

Plaintiff,

Index No.: 526029/2020

-against-

DECISION AND ORDER

135 BAY 26TH STREET CONDO ASSOCIATES,
SVETLANA SAVITSKIY, TATYANA SOLODOVNIK,
TATYANA MIRO, YULIA TEMNOGOROD,
DINA BRITAN, and DMITRY OVODENKO,

Mot. Seq. No. 6

Defendants.
-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Motion Seq No. 6

Notice of Motion/Affirmation in Support/ Statement of Material Facts/Exhibits	136 – 145
Affirmation in Opposition/ Memorandum of Law in Opposition/ Response to Statement of Material Facts	146 – 148
Reply Affirmation/ Exhibit	150 – 151

Plaintiff Stella Milov (“Plaintiff”) commenced this action seeking damages for personal injuries allegedly sustained on February 28, 2020, around 7:20 a.m., when she tripped and fell on the sidewalk abutting the premises located at 135 Bay 26th Street in Brooklyn, New York (the “Premises”). The Premises are owned and operated by defendant 135 Bay 26th Street Condo Associates (“Defendant”).¹ Specifically, Plaintiff contends that she tripped on a raised sidewalk flag abutting the Premises.

Defendant now moves for an order pursuant to CPLR 3212, granting it summary judgment dismissing Plaintiff’s complaint (Mot. Seq. No. 6). In its motion, Defendant claims that it is

¹ The Premises are a condominium complex governed by a condominium board with individual unit owners.

entitled to summary judgment because the defect is trivial and does not constitute a trap or nuisance. First, Defendant avers that the measurement of the defect renders it trivial. According to Defendant, the sidewalk flag defect ranged from 1.25 to 1.5 inches (affirmation of Richard Umbach, exhibit D). Defendant also references Plaintiff's deposition testimony in which she identified a picture shown to her as the "place [where she] tripped over" (Plaintiff tr at 32, lines 5-7). This photograph included a tape measure, which Defendant asserts reflects an elevation of 1.18 inches or three centimeters. Defendant contends that the flag elevation is not irregular since it went straight across the flag.

Second, Defendant avers that the circumstances surrounding the accident render the defect trivial. Defendant argues that the defect was clearly visible to the Plaintiff.² Defendant notes that Plaintiff did not testify to any obstructions blocking Plaintiff's view of the defect. Additionally, Defendant maintains that Plaintiff's testimony establishes that the accident took place during daylight, and clear weather.

Third, Defendant claims that the photographs provided accurately represent the accident site and establish that the defect was trivial. Defendant relies on testimony from Svetlana Savitsky, a resident of the Premises and head of the Premises' Condominium Board. Ms. Savitsky testified that the photograph of the Premises was a fair and accurate depiction of the Premises (Savitsky tr at 12, lines 23-25; at 13, lines 1-3, 14-21). Ms. Savitsky testified that there were no prior accidents or lawsuits related to the Premises (Savitsky tr at 16, lines 23-25; at 17, lines 3-7). Additionally, Ms. Savitsky testified that the raised sidewalk flag was not brought to her attention by any owner of a unit in the Premises (Savitsky tr at 21, lines 18-23).

Finally, Defendant asserts that Plaintiff cannot rely on the Administrative Code of City of New York § 19-152 to establish that the defect is not trivial. Defendant claims that Section 19-152 merely requires a property owner to repair a sidewalk flag defect raised by one half inch or more and is not evidence of negligence. Additionally, Defendant avers that Administrative Code of City of New York does not displace the common law of New York State, as it is not a New York State statute. Therefore, Defendant maintains that the defect is trivial and not actionable.

In opposition, Plaintiff argues that Defendant fails to meet its burden to establish entitlement to summary judgment and fails to eliminate all questions of fact. Plaintiff claims that because Defendant did not cause or create the defect through negligent repairs, there is a question

² According to Defendant, Plaintiff's photographs show that the defect was visible from a distance.

of fact as to how the defect came into existence. Plaintiff contends that the defective condition is actionable and not trivial. Plaintiff asserts that the measurement of 1.5 inches taken by Richard Umbach, Defendant's insurance adjuster, is the undisputed measurement of the defect. Plaintiff claims that the defect is not trivial because Defendant failed to bring an expert witness to testify or affirm that the measure taken by Mr. Umbach was trivial. Plaintiff argues that a one-half inch flag raise constitutes an actionable defect, or at least, a defect that raises an issue of fact. Additionally, Plaintiff contends that Administrative Code of City of New York §§ 7-210 and 19-152³ establish that the defective condition was not trivial because the flag measurement ranged from 1.25 to 1.5 inches. While Defendant did not move on the basis that it lacked notice, Plaintiff maintains that Defendant provided testimony about the general inspecting and cleaning practices, but no testimony regarding the last inspection of the accident site.

In its reply, Defendant argues that based on the facts, including the measurement of the defect and the circumstances of the injury, the defect is trivial. Defendant avers that case law cited by Plaintiff merely shows that the court can determine whether a defect is trivial. Defendant states that the Plaintiff's measurement of the defect should be used because Defendant's measurement was taken before Plaintiff testified as to the exact location of the accident. Defendant contends that a sidewalk flag elevated to about one inch is trivial; the condition was open and visible; Plaintiff did not notice the defect; and the defect is not a trap or snare. Further, Defendant asserts that Administrative Code of City of New York § 19-152 does not assign liability to sidewalk flags raised over one-half inch. Lastly, Defendant claims that it proved lack of notice through deposition testimony.⁴

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact'" (*Kolivas v Kirchoff*, 14 AD3d 493, 493 [2d Dept 2005], citing *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; see *Sucre v Consolidated Edison Co. of N.Y., Inc.*, 184 AD3d 712, 714 [2d Dept 2020]). "The proponent for the summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence

³ The Court notes that Plaintiff cited to 22 NYCRR § 19-152 in her memorandum of law, however the section she included in her opposition is from Administrative Code of City of New York § 19-152.

⁴ The Court notes that "the function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds or evidence for, the motion" (*USAA Federal Savings Bank v Calvin*, 145 AD3d 704, 706 [2d Dept 2016]). Here, Defendant first raised its lack of notice argument in its reply.

of any material issues of fact” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sanchez v Ageless Chimney Inc.*, 219 AD3d 767, 767 [2d Dept 2023], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (see *Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]; *Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to defeat a motion for summary judgment (*Zuckerman*, 49 NY2d at 562).

NYC Administrative Code § 7-210 imposes liability against a real property owner for failure to maintain sidewalks abutting their property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature and the burden of avoiding the risk (see *Basso v Miller*, 40 NY2d 233, 241 [1976]; *Kellman v 45 Tieman Assoc.*, 87 NY2d 871 [1995]; *Doyle v State*, 271 AD2d 394 [2d Dept 2000]; *Giulini v Union Free School Dist. No. 1*, 70 AD3d 632 [2d Dept 2010]; see also Rules of City of New York Dept of Transportation [34 RCNY] § 2-09 [f] [1]; Administrative Code of City of NY § 7-210). The scope of a landowner's duty to maintain property in a reasonably safe condition may also include the duty to warn of a dangerous condition (see *Tagle v Jakob*, 97 NY2d 165 [2001]; *Cupo v Karfunkel*, 1 AD3d 48 [2d Dept 2003]). NYC Administrative Code § 19-152 requires property owners to repair sidewalk flags with substantial defects (Administrative Code of City of NY § 19-152).⁵

Generally, whether a dangerous or defective condition exists is a question of fact for the jury unless the defect is demonstrated to be trivial as a matter of law (see *Trincere v County of Suffolk*, 90 NY2d 976 [1997]; *Hymanson v A.L.L. Assoc.*, 300 AD2d 358 [2d Dept 2002]; *Brown v Heron Flatbush, LLC*, 236 AD3d 853, 854 [2d Dept 2025]). A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that under the circumstances, the defect is physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risk it poses (see *Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66 [2015], citing *Alvarez*, 68 NY2d at 324; *Rubin v Sivan Merrick, LLC*,

⁵ A sidewalk flag raised by one half inch or more is a substantial defect (Administrative Code of City of NY § 19-152(a)(4)).

235 AD3d 789, 790 [2d Dept 2025]). Only after the defendant has satisfied its threshold burden does the burden then shift to the plaintiff to establish an issue of fact (*see Hutchinson* 26 NY3d at 79; *Snyder v. AFCO Avports Management, LLC*, 232 AD3d 209, 212 [2d Dept 2025]).

The “trivial defect doctrine” stands for the proposition that a defendant cannot use the doctrine to prevail on a summary judgment motion solely on the basis of the dimensions of an alleged defect (*see Hutchinson* 26 NY3d at 84). Thus, the Court’s determination of whether a condition is trivial does not rest exclusively upon the dimension or depth of the sidewalk defect in inches but must be made upon an examination of all the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury (*see Trincere* 90 NY2d at 977-78, quoting *Caldwell v Village of Island Park*, 304 NY 268 [1952]; *Mayorga v Kokkoris*, 218 AD3d 559, 560 [2d Dept 2023], *lv to appeal denied* 40 NY3d 908 [2023]; *Brown v Heron Flatbush, LLC*, 236 AD3d 853, 854 [2d Dept 2025]). “There is no ‘minimal dimension test’ or per se rule that a defect must be of a certain minimum height or depth in order to be actionable.” (*Trincere*, 90 NY2d at 977; *see Dingman v Linchris Hotel Corp.*, 201 AD3d 704, 705 [2d Dept 2022]). In deciding whether a defendant has met its burden of showing prima facie triviality, a court must, except in unusual circumstances, avoid interjecting the question of whether the plaintiff might have avoided the accident simply by placing her feet elsewhere (*see Hutchinson*, 26 NY3d at 84).

In support of its motion, Defendant presents several photographs of the subject sidewalk flag. Four of the photographs contain a measuring tape, showing the height of the raised flag. The photograph taken by Plaintiff’s counsel shows the measurement of the defect to be three centimeters, which equates to approximately 1.18 inches (NYSCEF Doc No. 142). Mr. Umbach annexed two photographs to his affirmation, the first photograph measures the defect at 1.25 inches, and the second photograph measures the defect at 1.5 inches. The differences in Plaintiff’s and Defendant’s measurements raises an issue of fact to be determined by a jury. Additionally, the cases cited by Defendant are distinguishable because Plaintiff testified that she did not regularly traverse the site of the incident and the sidewalk measurement Plaintiff relies on is from a photograph with a measurement (*Fisher v JRMR Realty Corp.*, 63 AD3d 677 [2d Dept 2009] [plaintiff testified that she regularly traversed the area and did not notice the uneven sidewalk before the accident]; *Shiles v Carillon Nursing and Rehabilitation Center, LLC*, 54 AD3d 746 [2d

Dept 2008] [plaintiff testified that the defect elevation was two inches, but photographs of the area indicated that the elevation was less]).

Even if the Court were to consider Defendant's untimely argument as to lack of notice, the Defendant's motion for summary judgment would not survive. A defendant is entitled to summary judgment in an action arising out of a trip-and-fall if the defendant established that it "maintained the premises in a reasonably safe condition and that [it] did not create a dangerous or defective condition on [its] property or have either actual or constructive notice of a dangerous or defective condition for a sufficient length of time to remedy it" (*Villano v Strathmore Terrace Homeowners Ass'n, Inc.*, 76 AD3d 1061, 1061 [2d Dept 2010]; *Reed v 64 JWB, LLC*, 171 AD3d 1228, 1228 [2d Dept 2019]). A defendant has constructive notice of a defect if it is visible and apparent and existed before the accident for a sufficient length of time to allow the defendant to discover and remedy the defect" (*Gordon v Am. Museum of Nat. Hist.*, 67 NY2d 836, 837 [1986]; *Rubin v Sivan Merrick, LLC*, 235 AD3d 789, 791 [2d Dept 2025]). A defendant must provide evidence as to when the area was last inspected relative to the time when the accident occurred (*Williams v Is. Trees Union Free Sch. Dist.*, 177 AD3d 936, 938 [2d Dept 2019]). General practices without evidence regarding a specific inspection of the accident location does not establish a lack of constructive notice (*Giantomaso v T. Weiss Realty Corp.*, 142 AD3d 950, 951 [2d Dept 2016]; *Ahmetaj v Mountainview Condominium*, 171 AD3d 683, 684 [2d Dept 2019]).


Here, Ms. Savitsky testified that Defendant does not employ or assign any person to regularly clean or inspect the property (Savitsky tr at 16, lines 7-22). Additionally, Defendant did not submit evidence as to the last time the property was inspected. Therefore, Defendant failed to establish a lack of constructive notice.

After consideration of the evidence submitted, the Court finds that Defendant failed to establish, prima facie, that it did not have constructive notice or that the alleged defect was trivial. Since Defendant failed to make a prima facie showing, the Court does not need to consider the sufficiency of Plaintiff's opposition (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Accordingly, it is hereby
ORDERED, that Defendant's motion (Mot. Seq. No. 6) for summary judgment on the issue
of liability on the basis that the alleged defect is trivial is denied.

All other issues not addressed herein are without merit or moot.

This constitutes the decision and order of the Court.



HON. INGRID JOSEPH, J.S.C.
**Hon. Ingrid Joseph
Supreme Court Justice**