

**Perez v New York Tel.**

2025 NY Slip Op 33616(U)

October 1, 2025

Supreme Court, New York County

Docket Number: Index No. 153134/2020

Judge: Denis Reo

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DENIS REO PART 65

Acting Justice

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INDEX NO. 153134/2020

MYRTA PEREZ,

MOTION DATE 08/04/2025

Plaintiff,

MOTION SEQ. NO. 004

- v -

NEW YORK TELEPHONE, MASONIC HALL AND ASYLUM FUND

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 94, 95, 96, 97, 98, 99, 101, 102, 104, 105

were read on this motion to/for JUDGMENT - SUMMARY

In this trip and fall action, defendants Masonic Hall and Asylum Fund (defendants) move pursuant to CPLR § 3212 for an order granting them summary judgment dismissing plaintiff Myrta Perez's (plaintiff) complaint. Plaintiff opposes the motion. For the reasons set forth, defendants' motion is denied.

On December 26, 2019 at approximately 3 p.m., Plaintiff tripped and fell while she was walking on the sidewalk towards the entrance to the PATH train on 23rd Street in Manhattan. Plaintiff claims that she tripped when her toe caught a cracked portion of the sidewalk. Plaintiff described the area where she fell as "a big hole, a crack, it looked like it was fixed before, but it was broken." Plaintiff Tr. Pg 63, ln. 13-14. Plaintiff was looking straight ahead prior to her fall but still did not see the condition that caused her to fall. As a result of her foot being caught on the condition, plaintiff was caused to fall forward and sustain, inter alia, a left ankle peroneal tear requiring surgery.

Defendants are the owners of the adjacent real property that is commonly referred to as 71 West 23<sup>rd</sup> Street. Defendants assert that the condition that caused plaintiff to fall was trivial warranting summary judgment in their favor. In support of the motion, defendants submit the affidavit of their expert, Stan A. Pitera (Pitera). Pitera examined the area where plaintiff fell on January 7, 2022, more than two years after plaintiff's accident. Without providing any details, Pitera states that he was "informed at the time of the site inspection... that the portion of the sidewalk where Plaintiff's accident occurred had not changed or been altered since Plaintiff's accident." Pitera examined the uneven concrete patch that plaintiff allegedly tripped over and described it as being "24 inches in length by 9 inches in width at its widest point." Additionally, there was a height differential between the patch and the adjacent sidewalk slab of "three sixteenths (3/16) of an inch to one quarter (1/4) of an inch." Photographs of the defect and Pitera's measurements were submitted as exhibits to the motion. It was Pitera's expert opinion, within a reasonable degree of engineering certainty, that the crack that caused plaintiff to fall was not dangerous as a matter of law.

In opposition, plaintiff submits an affidavit from her expert, Stanley H. Fein, P.E (Fein). Fein inspected the area where plaintiff fell approximately twelve (12) days after the accident. Fein described the condition as follows: "[t]he south end of the defect is approximately 109 3/4 feet east and 10 1/2 feet north from the northeast corner of W. 23<sup>rd</sup> Street and 6<sup>th</sup> Avenue. From the south end of the defect for approximately 35 inches in the north direction is a cracked area that has been re-patched. At its largest points, the patched area is 11 1/2 inches in the east/west direction. From the north end of the patched area for about another 73 1/2 inches in the north/south direction, there is also a crack in the sidewalk. At its largest point, the crack is 1 1/2 inches in the east/west direction and 1/2 inch deep." All of Fein's measurements were documented

in accompanying photographs. It is Fein's opinion, with a reasonable degree of engineering certainty, that "this defect was caused by the negligence of the owner of the subject premises for creating a dangerous and hazardous trap by improperly patching a crack in the sidewalk and thereby creating an extreme tripping hazard."

Both plaintiff and defendant submit photographs of the condition that allegedly caused plaintiff to trip and fall. The photographs show that the condition was sheltered by scaffolding and was similar in color to the surrounding area. The photographs also show that the condition was cracked, chipped, and contained loose pieces of cement and that it was raised.

A party seeking summary judgment bears the initial burden of demonstrating its prima facie entitlement to the requested relief (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985], *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Only if the movant meets the prima facie burden does the burden then shift to the party opposing summary judgment to tender evidence, in a form admissible at trial, sufficient to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

A defendant moving for summary judgment on the basis that an alleged defect is trivial must "make a prima facie showing 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" (*Camara v Costco Wholesale Corp.*, 199 AD3d 509, 509–510 [1st Dept 2021]). There is no "per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (*id.* at 510). A "holding of triviality must be based on all the specific facts and circumstances of the case, not size alone" (*id.*). Thus, the "issue is generally a jury question because it is a fact-intensive inquiry" (*McCabe v Avalon Bay Communities, Inc.*, 177 AD3d 487, 489 [1st Dept 2019]). Triable issues of fact precluding the issuance of summary

judgment may be established by conflicting expert affidavits regarding the height differential of sidewalk flags. (*Shapiro v 89<sup>th</sup> Street Development Company, LLC*, 220 AD3d 499 (1st Dept 2023)).

Defendants failed to meet their prima facie burden of establishing that the sidewalk defect was trivial as a matter of law. Defendants' expert did not examine the sidewalk condition until two years after the accident and while defendants' expert asserts that the condition was the same on the day he examined it as it was when plaintiff fell this assertion is premised upon hearsay from an unknown individual that told defendants' expert at the inspection that the condition was identical to what it was when plaintiff's accident occurred two year earlier. The lapse in time between the accident and when defendants' expert took measurements of the condition renders the expert's conclusion speculative (*Camara*, 199 AD3d at 510). Moreover, case law prohibits a court from basing a finding of triviality on size alone (*Suarez v Emerald 115 Mosholu LLC*, 164 AD3d 1130 [1st Dept 2018]). Because 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, granting summary judgment based exclusively on the dimension of the defect is unacceptable (*Camara*, 199 AD3d at 510).

Even assuming that defendants met their prima facie burden, the affidavit of plaintiff's expert, wherein he opines that the condition created an extreme tripping hazard (*Suarez*, 164 AD3d at 1131) and gives conflicting evidence as to the height differential between the sidewalk slabs (*LaRosa v Corner Locations, II, L.P.*, 169 AD3d 512 [1st Dept 2019]) is sufficient to raise a triable issue of fact.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied.

*Denis Reo*

<u>10/1/2025</u>				<u>DENIS REO, A.J.S.C.</u>	
DATE					
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE