

**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 <sup>BARBARA JAFFE</sup>  
J.S.C.  
Justice

PART 5

Index Number : 112972/2009  
MUNOZ, YVONNE  
vs  
CITY OF NEW YORK  
Sequence Number : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

CAL. #74

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

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

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.

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:**

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**For Church:**

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Uniondale, NY 11556-0926  
516-357-3000

**FILED**

**AUG 06 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**

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 60<sup>th</sup> 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

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 [1<sup>st</sup> 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 [1<sup>st</sup> Dept 2000]; see *Abreu v NYCHA*, 61 AD3d 420, 421 [1<sup>st</sup> 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 [4<sup>th</sup> 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 [1<sup>st</sup> 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 [1<sup>st</sup> 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. 85<sup>th</sup> St. Co.*, 60 AD3d 458 [1<sup>st</sup> 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 [1<sup>st</sup> 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]).

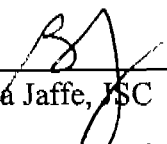
Moreover, the Church's claim that the defect was open and obvious constitutes an affirmative defense that may be raised at trial, and not a ground upon which to dismiss the

complaint. (*See Saretsky v 85 Kenmare Realty Corp.*, 85 AD3d 89 [1<sup>st</sup> 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.

AUG 03 2012

**FILED**  
AUG 06 2012  
NEW YORK  
COUNTY CLERK'S OFFICE