

<p><b>Saab v CVS Caremark Corp.</b></p>
<p>2015 NY Slip Op 31461(U)</p>
<p>August 3, 2015</p>
<p>Supreme Court, New York County</p>
<p>Docket Number: 152673/12</p>
<p>Judge: Paul Wooten</p>
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<p>This opinion is uncorrected and not selected for official publication.</p>

**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY****PRESENT:** HON. PAUL WOOTEN  
Justice**PART** 7**MICHAEL SAAB,****Plaintiff,**  
- against -  
INDEX NO. 152673/12**CVS CAREMARK CORPPORATION and CENTRAL  
RUG & CARPET MART, LLC,**MOTION SEQ. NO. 002**Defendants.****The following papers, numbered 1 to 3, were read on this motion by defendants for summary judgment.****Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...****PAPERS NUMBERED**1**Answering Affidavits — Exhibits (Memo) \_\_\_\_\_**2**Replying Affidavits (Reply Memo) \_\_\_\_\_**3**Cross-Motion:**  Yes  No

This is a personal injury action commenced by Michael Saab (plaintiff) on or about May 23, 2012 against the defendants to recover damages for injuries allegedly sustained on March 3, 2012 when plaintiff tripped and fell on a cracked sidewalk near the intersection of 14<sup>th</sup> Street and 8<sup>th</sup> Avenue in New York, New York, in front of the CVS store.

Before the Court is a motion by the defendants, pursuant to CPLR 3212, for summary judgment dismissing the complaint on the grounds that proximate cause cannot be established and that plaintiff's inability to identify the cause of his fall is fatal to his action. Moreover, defendants contend that the alleged condition is a non-actionable "trivial defect" as a matter of law. In opposition, plaintiff maintains, among other things, that defendant's motion for summary judgment should be denied because triable issues of fact exist. It is plaintiff's contention that he has not speculated as to the cause of his fall, that the defendants had notice, and that the defects in the sidewalk are not trivial.

In support of its motion, defendant attaches, *inter alia*, the affidavit of John McManus, P.E., a professional engineer; the deposition testimony of plaintiff; and photographs of the alleged defective condition. In support of her opposition, plaintiff submits an attorney affirmation and an affidavit from plaintiff.

#### DISCUSSION

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Meridian Management Corp. v Cristi Cleaning Svc. Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v NY Univ. Medical Cntr.*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a *prima facie* case showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (see *Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012], citing *Alvarez*, 68 NY2d 320, 324 [1986]; *Santiago v Filstein*, 35 AD3d 184, 185-86 [1st Dept 2006], quoting *Winegrad*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof of inadmissible form of sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980], *DeRosa v City of NY*, 30 AD3d 323, 325 [1st Dept 2006].

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). 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 Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978], *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

“Whether a dangerous or defective condition exists on the property of another so as to create liability ‘depends on the particular 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]; see *Aguayo v New York City Hous. Auth.*, 71 AD3d 926, 927 [2d Dept 2010]; *Velez v Institute of Design & Constr., Inc.*, 11 AD3d 453, 453 [2d Dept 2004]; *Pennella v 277 Bronx Riv. Rd. Owners*, 309 AD2d 793, 794 [2d Dept 2003]; *Riser v New York City Hous. Auth.*, 260 AD2d 564, 564 [2d Dept 1999]). However, a property owner may not be held liable in damages for trivial defects, not constituting a trap or nuisance (see *Aguayo*, 71 AD3d at 927; *Outlaw v Citibank, N.A.*, 35 AD3d 564 [2d Dept 2006]). In determining whether a defect is trivial, “a court must examine all of the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect, along with the time, place, and circumstances of the injury” (*Pennella*, 309 AD2d at 794; see *Trincere*, 90 NY2d at 978; *Aguayo*, 71 AD3d at 927; *Outlaw*, 35 AD3d at 564).

After examination of the photographs and the other evidence presented in the record and considering all the relevant factors, this Court finds that as a matter of law the alleged defect in the sidewalk, a crack on the sidewalk with a slight elevation differential of not more than 1/4 of an inch, did not have the characteristics of a trap or nuisance and was too trivial a defect to be actionable (see *Pennella*, 309 AD2d at 794; see *Trincere*, 90 NY2d at 978; *Aguayo*, 71 AD3d at 927). In opposition, the plaintiff failed to raise a triable issue of fact. Accordingly,

defendants' motion for summary judgment dismissing the complaint is granted.

#### CONCLUSION

For these reasons and upon the foregoing papers, it is,

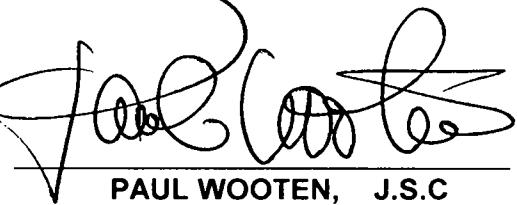
ORDERED that defendants' motion, pursuant to CPLR 3212, seeking summary judgment dismissing the complaint is granted, and the complaint is hereby dismissed, with costs and disbursements to the defendants upon the submission of an appropriate bill of costs; and it is further,

ORDERED that counsel for defendants is directed to serve a copy of this Order with Notice of Entry upon the plaintiff and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 8/3/15

Enter:



PAUL WOOTEN, J.S.C

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate: :  DO NOT POST  REFERENCE