Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____ Submitted - February 21, 2008

A. GAIL PRUDENTI, P.J.
HOWARD MILLER
MARK C. DILLON
WILLIAM E. McCARTHY, JJ.

2007-01549 DECISION & ORDER

Rosemary Cino, et al., plaintiffs-respondents,
v City of New York, et al., defendants-
respondents, HRH Construction, LLC,
appellant.

(Index No. 3183/02)

Malapero & Prisco, LLP, New York, N.Y. (Andrew L. Klauber of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York, N.Y. (Francis F. Caputo and Elizabeth I. Freedman of counsel), for defendant-respondent City of New York.

In an action to recover damages for personal injuries, etc., the defendant HRH Construction, LLC, appeals, as limited by its brief, from so much of an order of the Supreme Court, Kings County (Solomon, J.), dated December 1, 2006, as denied its motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it and granted the cross motion of the defendant City of New York for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

ORDERED that the appeal from so much of the order as granted that branch of the cross motion of the defendant City of New York which was for summary judgment dismissing the complaint insofar as asserted against it is dismissed, as the appellant is not aggrieved by that portion of the order; and it is further,

ORDERED that the appeal from so much of the order as granted that branch of the cross motion of the defendant City of New York which was for summary judgment dismissing all

cross claims insofar as asserted against it is dismissed as academic in light of our determination herein; and it is further,

ORDERED that the order is reversed insofar as reviewed, on the law, and the motion of the defendant HRH Construction, LLC, for summary judgment dismissing the complaint and all cross claims insofar as asserted against it is granted; and it is further,

ORDERED that one bill of costs is awarded to the appellant.

The plaintiffs commenced this action against HRH Construction, Inc. (hereinafter HRH), among others, alleging that the plaintiff Rosemary Cino sustained injuries when she tripped and fell over the raised lip of a sidewalk flagstone. In the order appealed from, the Supreme Court, inter alia, denied HRH's motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it.

A contractor may be held liable for an affirmative act of negligence which results in the creation of a dangerous condition upon a public street or sidewalk (*see Brown v Welsbach Corp.,* 301 NY 202, 205; *Losito v City of New York,* 38 AD3d 854; *Kleeberg v City of New York,* 305 AD2d 549). In support of its motion for summary judgment, HRH met its burden of establishing its entitlement to judgment as a matter of law by submitting evidence demonstrating that it did not perform any work on the portion of the sidewalk where the accident occurred, and thus did not create the allegedly defective condition which caused the injured plaintiff to fall (*see Roark v Hunting,* 24 NY2d 470, 477; *Vrabel v City of New York,* 308 AD2d 443; *Kleeberg v City of New York,* 305 AD2d 549; *Perriconi v St. John's Preparatory High School,* 290 AD2d 546). The parties who opposed the motion failed to submit evidence sufficient to raise a triable issue of fact (*see Duckworth v Village of Monroe,* 38 AD3d 827; *Perriconi v St. John's Preparatory High School,* 290 AD2d 546; *Yass v Deepdale Gardens,* 187 AD2d 506). Accordingly, the Supreme Court should have granted HRH's motion.

In light of our determination, the parties' remaining contentions have been rendered academic.

PRUDENTI, P.J., MILLER, DILLON and McCARTHY, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court