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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. MICHAEL D. STALLMAN** PART 5

Index Number : 117008/2002

ESPINOSA, AIDA

VS

J M G REALTY CORP.

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. 57

The following papers, numbered 1 to 12 were read on this motion to/for Summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... & Notice of Cross Motion	1-8
Answering Affidavits — Exhibits	9
Replying Affidavits	10-12

Cross-Motions (3) ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motions are determined in accordance with the annexed memorandum decision and order.

FILED

SEP 20 2006

NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN

Dated: 9/12/06

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 5

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AIDA ESPINOSA,

Plaintiff,

- against -

JMG REALTY CORPORATION, SCULLY SIGNAL COMPANY, PETRO INC., PETROLEUM HEAT AND POWER INC., THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Defendants.

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Index No. 117008/02

DECISION and ORDER

MICHAEL D. STALLMAN, J.:

Before this court are a motion and three cross motions by defendants for summary judgment dismissing the complaint and all cross claims against them.

BACKGROUND

Plaintiff Aida Espinosa alleges that, on December 19, 2001, she allegedly tripped and fell over a raised fuel oil cap in the sidewalk in front of the premises located at 362 West 30th Street in Manhattan. The City of New York and New York City Department of Transportation (DOT) own or maintain the sidewalk where plaintiff fell, and JMG Realty Corporation (JMG Realty), now dissolved, allegedly owned the abutting property. Defendant Scully Signal Company (Scully) allegedly manufactured the fuel oil cap and defendants Petro, Inc. and Petroleum Heat and Power Co., Inc. (collectively, Petro) allegedly delivered heating oil to the abutting property.

Plaintiff essentially alleges that defendants created the hazardous condition which caused plaintiff's injuries, and that defendants negligently failed to correct the defect within a reasonable

period. The bill of particulars and notice of claim against the City and DOT contain similar allegations.

Plaintiff commenced this action against JMG Realty, Scully, the City, and DOT on August 1, 2002. Plaintiff later amended the complaint to add Petro. Defendants asserted cross claims against one another for contribution or indemnification.

The standards for summary judgment are well settled.

> "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action."

(*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986)(internal citations omitted).

As a threshold matter, the Court reject plaintiff's argument that the cross motions should be denied because they were seeking relief from a non-moving party. (*see Mango v Long Is. Jewish-Hillside Med. Ctr.*, 123 AD2d 843, 844 [2d Dept 1986]). Such a technical defect may be disregarded where, as here, there is no prejudice to plaintiff, who had ample opportunity to be heard on the merits of the relief sought (*see Kleeberg v City of New York*, 305 AD2d 549, 550 [2d Dept 2003]).

Scully's Motion for Summary Judgment

Scully admits manufacturing fuel oil caps, but denies any liability to plaintiff since it did not install or maintain the fuel oil cap which allegedly caused plaintiff to trip and fall. To support its position, Scully submits the transcript of the examination before trial of Prakash Patel, one of its technical marketing employees. Prakash testified, in essence, that Scully manufactures fuel oil caps (Quatrone Affirm., Ex C [Prakash EBT], at 9); that the design used for the fuel oil cap complied with the New York Board of Standard and Appeals certification requirements, as evidenced by the

certification number engraved on the fuel oil cap (*id.*, at 18); and that Scully does not get involved with the installation or maintenance of the fuel oil caps it manufactures (*id.*, at 29, 37). Scully further asserts that the submissions are devoid of any proof of a design or manufacturing defect concerning the fuel oil cap, and that it sold the type of fuel oil cap involved in plaintiff's accident for numerous years without any significant claims. As such, Scully satisfies its prima facie burden of establishing entitlement to judgment as a matter of law, by demonstrating that it did not create the alleged defect which caused plaintiff's injuries.

Plaintiff does not submit any evidence to raise a triable issue of fact. Plaintiff does not claim that the alleged protrusion of the fill cap above the sidewalk was due to its design. JMG's argument that summary judgment should be denied due to outstanding discovery is similarly unavailing. "[T]he mere hope that evidence sufficient to defeat the motion may be uncovered during the discovery process is not enough to defeat a motion for summary judgment" (*Drepaul v Allstate Ins. Co.*, 299 AD2d 391 [2d Dept 2002]; *Frierson v Concourse Plaza Assocs.*, 189 AD2d 609, 610 [1st Dept 1993]). Thus, Scully's motion for summary judgment is granted.

JMG Realty's Cross Motion for Summary Judgment

A sidewalk is part of the public street or highway and, therefore, the duty of maintaining it in a reasonably safe condition generally falls upon the municipality (*see City of Rochester v Campbell*, 123 NY 405 [1890]).[1] The owner or occupier of abutting property owes no duty to keep the sidewalk in a safe condition (*Lowenthal v Theodore H. Heidrich Realty Corp.*, 304 AD2d 725,

[1]Plaintiff's alleged fall predates enactment of Administrative Code of the City of NY § 7-210 (c), which generally shifts liability for injuries arising from the failure to maintain or repair sidewalks from the City onto the abutting property owner.

726 [2d Dept 2003]). Liability may be imposed only on the abutting owner or occupier who either created the condition, voluntarily but negligently made repairs, caused the condition to occur because of some special use, or violated a statute or ordinance placing upon the owner or lessee the obligation to maintain the sidewalk (*id.*). The determinative factor is one of possession or control (*Huth v Allied Maintenance Corp.*, 143 AD2d 634, 635 [2d Dept 1988]). Here, JMG Realty had a duty to maintain the sidewalk area around the fuel oil cap because it was installed in the sidewalk for its special use, namely to facilitate the delivery of heating oil to its property (*Santorelli v City of New York*, 77 AD2d 825, 826 [1st Dept 1980][internal citations omitted]).

JMG Realty contends that the alleged condition which plaintiff claims caused her injuries was trivial in nature and, thus, is not actionable as a matter of law. To support its position, JMG Realty relies primarily on photographs of the fuel oil cap and the accident location (Lee Affirm., Ex F), and the testimony of its former president, Frank J. Oteri, taken at an examination before trial held on July 16, 2004.

JMG Realty insists that the photographs show a height differential of approximately one fourth of an inch between the fuel oil cap and the sidewalk, and that such height differential is not actionable as a matter of law. Furthermore, Mr. Oteri testified that the fuel oil cap was not parallel with the sidewalk, and that it was "slightly tilted" with one end higher from the sidewalk that the other (Lee Affirm., Ex G at 20-21). He further testified, however, that he could not tell the exact height that the fuel oil cap was raised (*id.*, at 21, 23).

Contrary to JMG Realty's position, "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 v County of Suffolk*, 90 NY2d 976, 977 [1997]). "Instead, 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" (*id.*, quoting *Guerrieri v Summa*, 193 AD2d 647 [2d Dept 1993][internal citations omitted]).

Based on the submissions, the Court cannot determine, as a matter of law, that the raised fuel oil cap was not hazardous. JMG Realty does not submit evidence of any measurements taken of the oil cap. No measurement of the oil cap was taken in the photographs themselves. Thus, JMG Realty's cross motion for summary judgment is denied.

Petro's Cross Motion for Summary Judgment

Petro acknowledges that it delivered oil to the abutting property the day before the alleged incident, but denies creating or having any notice of the allegedly hazardous condition which caused plaintiff's injuries. Petro also contends that the alleged defect was trivial, and that it had no duty to warn because the condition was open and obvious.

Petro's motion for summary judgment is denied. Although Petro argues that it did not create the allegedly hazardous condition, Petro does not meet its prima facie burden on this point. The height differential between the fill pipe and the sidewalk could have been created at the time of installation of the oil fill box, or could have been due to the wear and tear of the sidewalk around the fill pipe, or both. To the extent that the alleged defect may be attributable to installation of the fill box or oil tank, Petro's Field Service Supervisor testified that he does not know who installed the oil tank, which could have occurred 40 years ago (*see* Svensson Affirm., Ex G [Valenstein EBT], at 21). When asked if he recognized the fill as Petro's fill, he said it could be, because "one-hundred, thousand [sic] fills that look exactly like that" (*ibid*). He stated that Petro was in business for over 100 years, and that Petro's business did include replacing "fill boxes, fill pipes, and caps, depending

on what's bad" (*id.* at 8, 54). Therefore, Petro has not demonstrated a prima facie case that it did not install the fill box.

Although Petro maintains that it did not have constructive or actual notice of the alleged defect, reasonable inferences from the evidence drawn in plaintiff's favor raise issues of fact. The delivery ticket and delivery log essentially state that 167 gallons of heating oil were delivered to the abutting property on December 18, 2001 (Svensson Affirm., Exs I, J). Plaintiff allegedly tripped and fell over the fuel cap the next day. Photographs of the alleged defect suggest a condition that was not transient, a condition that would have developed over time. Petro should have noticed the area around the fill cap when it refilled the tank, because the fuel line from Petro's oil truck must be fitted to the fill pipe to deliver oil (Valenstein EBT, at 23-24). Thus, the fact that Petro did not note any problems around the fill pipe in its delivery tickets, delivery logs, or service logs suggests not that the allegedly hazardous condition did not exist, but rather that Petro did not consider it to be a problem that it should have noted.[2]

As discussed above, whether the alleged defect is trivial cannot be determined as a matter of law. Finally, whether Petro had a duty to warn plaintiff of the allegedly hazardous would not be a defense to liability if Petro had installed the fill box, and the allegedly hazardous condition was due to the installation.[3]

The City's Cross Motion for Summary Judgment

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[2]To be clear, whether Petro had notice of the alleged condition does not, in itself, give rise to liability, if Petro had not caused or created the condition, or if it had no duty to maintain the sidewalk area.

[3]"'Open and obvious' and 'trivial defect' are distinct concepts. Under these circumstances, it is logically inconsistent to make both arguments simultaneously about the same alleged defect" (*Cohen v Empire City Subway*, 1 Misc 3d 902 [A] [Sup Ct, NY County 2003]).

ORDERED that cross motions for summary judgment motion by defendants JMG Realty Corporation, Petro, Inc. and Petroleum Heat and Power Co., Inc. and The City of New York and New York City Department of Transportation are denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: September 12, 2006
New York, New York

ENTER:

J. S. C.

HON. MICHAEL D. STALLMAN