

**Garcia v City of New York**

2007 NY Slip Op 30016(U)

March 5, 2007

Supreme Court, New York County

Docket Number: 0115912

Judge: Eileen A. Rakower

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

PRESENT: Rakower  
Justice

PART 5

Index Number : 115912/2005

GARICA, ANA

INDEX NO. \_\_\_\_\_

vs

CITY OF NEW YORK

MOTION DATE \_\_\_\_\_

Sequence Number : 003

MOTION SEQ. NO. \_\_\_\_\_

DISMISS

MOTION CAL. NO. \_\_\_\_\_

s motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits CROSS MOTIONS

1

Replying Affidavits opp

2, 3, 4

5, 6, 7

Cross-Motion:  Yes  No

8, 9, 10

11, 12

Upon the foregoing papers, it is ordered that this motion

Reply 13, 14, 15

**FILED**

MAR 12 2007

NEW YORK  
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

Dated: 3/5/07

[Signature]  
**EILEEN A. RAKOWER** s.c.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

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

-----X  
ANA GARCIA,

Plaintiff,

Index No.  
115912/05

- against -

Decision and  
Order

THE CITY OF NEW YORK, BROADSIDE REALTY  
CORPORATION, BROADWAY HARDWARE &  
LOCKSMITH, INC. and ANDRADE SHOE REPAIR,

Defendants.

-----X  
HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries allegedly sustained when she was caused to fall due to a defective condition on the sidewalk at or near the boundary between 2748 and 2750 Broadway in the County and State of New York on March 31, 2005. Defendant Broadside Realty Corporation ("Broadside") is the owner of the properties known as 2748 Broadway and 2750 Broadway. Defendant Broadway Hardware & Locksmith, Inc. ("Broadway") was the lessee of the premises located at 2748 Broadway at the time of the alleged accident. Andrade Shoe Repair ("Andrade") was the lessee of the premises located at 2750 Broadway at the time of the alleged accident. Plaintiff filed a timely notice of claim with the City of New York ("City"), commenced this action thereafter. City now moves to dismiss, asserting that pursuant to §7-210 of the Administrative Code of the City of New York, it has no liability for the sidewalk area at issue here. Broadside, Broadway and plaintiff oppose City's motion. Broadway cross moves to dismiss all claims and cross claims as against it only on the basis that it did not cause or create the alleged defect, it derived no benefit by a special use with regard to the sidewalk area at issue, and it was not responsible by statute to maintain the "City" sidewalk. Broadside and plaintiff oppose Broadway's motion. Andrade makes a cross motion and serves an

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MAR 12 2007  
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amended notice of cross motion also asserting that it did not cause or create the alleged defect, that it made no special use of the sidewalk area, nor did it have notice, actual or constructive, of the alleged defect. Further, Andrade asserts it had no responsibility for repairing the sidewalk. Plaintiff and Broadside oppose Andrade's motion to dismiss.

Turning first to the City's motion to dismiss, the City establishes a prima facie case for summary judgment as a matter of law. Pursuant to Administrative Code of the City of New York § 7-210 (c), effective as of September 14, 2003 (and applying to accidents occurring on or after such date), the City of New York is not liable for personal injuries proximately caused by the failure to maintain sidewalks in a reasonably safe condition, except for sidewalks abutting one, two, or three-family residences which are used exclusively for residential purposes, or except where the City is the abutting property owner. The City has no liability, even though, as plaintiff broadly alleges in her notice of claim, her injuries were caused "by reason of the negligence, recklessness and carelessness of THE CITY OF NEW YORK in its ownership, operation, maintenance and control of said sidewalk."

The City has shown that it does not own the properties (Broadside Realty Corporation is listed as the owner of the properties), and the abutting buildings are classified as "K2 Store buildings\_\_ TWO STORY STORE OR STOR/OFFICE" with respect to 2748 Broadway, and "C7 Walk-up apartments\_\_ OVER SIX FAMILIES WITH STORES" with respect to 2750. Thus, neither building is a one, two, or three family residence.

Broadside and Broadway urge that the City's motion is premature in that plaintiff "has not yet provided a Verified Bill of Particulars and the deposition of plaintiff has not yet been conducted. Indeed, Broadside speculates the alleged defect might be the curb. Plaintiff opposes the City's motion, but provides photographs of the alleged defect, clearly demonstrating it is not the curb. Additionally, Broadway, in its cross motion, provides plaintiff's verified bill of particulars responding to the demands of Andrade, City, Broadside and Broadway.

Absent any evidence that City caused or created the alleged defective condition, the City has met its burden of showing that the City owed no duty to plaintiff.

Broadway moves to dismiss based on its assertion that it had no duty to maintain or repair the defective condition that existed in the sidewalk flags. It neither caused or created such defect, did not retain, hire or employ any entities to repair or maintain the sidewalk where plaintiff fell, and has not derived any benefit from a special use of the sidewalk. Broadway provides the affidavit of its president, Mr. Joozer Ali, in support of its motion.

Broadside and plaintiff oppose Broadway's cross motion stating that the same is premature. Broadside claims that it is not in possession of the lease between Broadway and the owner of the premises, but points to the lease it has with Andrade as demonstrating that the tenant was responsible for maintaining the sidewalks adjacent to the premises.

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Di Menna & Sons v. City of New York*, 301 N.Y. 118 [92 N.E.2d 918] ). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (*Braun v. Carey*, 280 App.Div. 1019 [116 N.Y.S.2d 857] )In addition, "[t]he party opposing the [summary judgment] motion must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests." (*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 967, 525 N.Y.S.2d 793, 520 N.E.2d 512.) Bald, conclusory allegations, even if believable, are not enough. (*Id.*; *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890.) *Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 (1st Dept. 1989). The affirmation of counsel alone is not sufficient to satisfy this requirement. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980)

Where facts essential to justify opposition to a motion for summary judgment are within the exclusive knowledge and possession of the moving party, summary judgment should be denied. ( See CPLR §3212(f) ) However, the opposition must offer more than mere hope that it might be able to uncover some evidence during the discovery process which will impeach the facts asserted by movant. See *Pow v. Black*, 182 AD2d 484 (1st Dept. 1992).

Broadside does not submit anything more than the affirmation of counsel in an effort to oppose Broadway's motion. Broadside attempts to establish Broadway's

responsibility to care for the sidewalk by claiming that its own lease with Andrade is evidence of what provisions are contained in a lease with Broadway. Broadside and plaintiff both speculate that the Andrade lease contains the identical provisions to a lease between Broadside and Broadway. Broadway concedes it leases the subject premises but does not concede a written agreement exists between it and Broadside. Nor does Broadside attempt to establish that a written agreement was executed by affidavit of a party with knowledge or otherwise.

The Court cannot speculate as to the terms and conditions of a lease that may or may not exist. Further, no party demonstrates that a lease governing the tenancy of Broadway is within the exclusive knowledge and possession of Broadway. Rather, Broadside, as the lessor and presumably the other party to such a lease, should have knowledge and possession of that lease as well.

Andrade makes a cross motion for summary judgment dismissing all claims and cross claims as against it, arguing, as Broadway does, that it did not cause or create the defect, and owes no duty to plaintiff. Andrade, in support of its motion, provides the sworn affidavit of Nilda Andrade, one of the owners of Andrade. She states

“ANDRADE did not create the alleged defect upon which the plaintiff alleges she tripped and fell nor did ANDRADE benefit from a special use of the sidewalk where plaintiff claims she fell. ANDRADE never performed repairs on the subject sidewalk and did not change, modify or alter the sidewalk in any manner prior to plaintiff’s alleged accident. Further, I am aware of no statute or ordinance that places any obligation to maintain the area where plaintiff alleges she tripped and fell on ANDRADE, the lessee of 2750 Broadway, New York, New York. Further, ANDRADE never received any complaints from any person as to the alleged defect which caused plaintiff’s injuries at any time.”

Plaintiff opposes Andrade’s motion, which itself provides the lease between Andrade and Broadside. She refers to language in the lease which required the tenant to maintain and repair the sidewalk at its own expense. Additionally, she provides numerous photographs of the sidewalk defect upon which she fell and argues that it is plainly evident that someone undertook to repair the sidewalk at a time prior to the accident and that such repair was performed negligently. Thus, discovery will reveal

who it was that made the repair and consequently caused the condition at issue here.

Broadside reiterates that the lease provisions contained in the lease between it and Andrade squarely place a duty upon Andrade to maintain the sidewalk adjacent to the premises. Andrade responds, in a conclusory fashion, that the lease provision was not valid since Administrative Code §7-210 creates a non delegable duty upon the owner.

Andrade may be correct that Broadside cannot extricate itself from the litigation solely by virtue of the lease provisions which assign responsibility for maintaining and repairing the sidewalk to its lessee. However, Broadside is not seeking dismissal at this juncture. Rather, it has asserted cross claims as against Andrade, Broadway and City, however broadly drafted, founded among other things upon any contract between it and its co defendants. Whether Andrade breached the terms and conditions of its lease agreement in failing to maintain or repair the sidewalk is an open issue. Thus, Andrade has failed to establish that there is no material and triable issue of fact presented.

Wherefore, it is hereby


ORDERED that The City of New York's motion to dismiss plaintiff's claims as against it only is granted; and it is further

ORDERED, that the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Scheduled compliance conferences are cancelled. City shall serve a copy of this order with notice of entry upon all parties and the Trial Support Office, 60 Centre Street, Room 158; and it is further

ORDERED, that Broadway Hardware & Locksmith, Inc.'s motion to dismiss is granted; and it is further

ORDERED, that Andrade's motion to dismiss is denied without prejudice to a new motion upon the completion of discovery.

DATED: March 9, 2007

  
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5  
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STEVEN A. RAKOWER, J.S.C.