Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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MARGARET PASTORE,

Plaintiff,

- against -

CITY OF NEW YORK, A.J. PANZARELLA REALTY, INC. and GREENPOINT SAVINGS BANK,

Defendants.

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Index Number: 22126/05

Motion Date: 03/06/07

Motion Cal. No. 22

Motion Seq. No. 1

The following papers numbered 1 to 20 read on this motion by defendant A.J. Panzarella Realty, Inc. and cross-motion by defendant Greenpoint Savings Bank for summary judgment dismissing the complaint against said defendants.

	Papers Numbered
Notice of Motion-Exhibits.....	1-4
Affirmation in Opposition-Exhibit.....	5-8
Reply Affirmation.....	9-10
Notice of Cross-Motion.....	11-14
Affirmation in Opposition-Exhibit.....	15-18
Reply Affirmation.....	19-20
Memorandum of Law in Support of Motion.....	21

Upon the foregoing papers it is ordered that the motion and cross- motion are decided as follows:

This Court received by mail the affirmation in opposition to the motion and cross-motion under cover letter of plaintiff's attorney dated February 5, 2007 requesting that the motion be marked submitted on the return date. Plaintiff's counsel failed to appear for oral argument. Counsel is apprized that Part 10 of

this Court is a mandatory appearance part and counsel may not simply mail in his motion papers. Furthermore, the opposition papers are not in proper form, in that counsel annexes a document thereto without marking and tabbing it as an exhibit. Counsel for plaintiff is directed to familiarize himself with this Court's part rules. Submissions violating the guidelines set forth in this Court's part rules will not be considered in the future.

Motion by A.J. for summary judgment dismissing the complaint as against it is granted. Cross-motion by Greenpoint for summary judgment dismissing the complaint as against it is also granted.

Plaintiff allegedly sustained injuries as a result of tripping and falling in a pothole in the street near the curb in front of 156-10 Crossbay Boulevard in Queens County on November 16, 2004. A.J. is the owner of the building 156-10 and Greenpoint is its tenant.

The photographs furnished by plaintiff with her bill of particulars clearly depict a 5-foot by 2 ½-foot cracked, broken and potholed area of the roadway by the curb next to a manhole. Plaintiff testified in her deposition that she fell into a pothole in the street. When asked, "So was the pothole located on the sidewalk or in the street?" she replied, "No, in the street, you know, the curb and the pothole was in the street" (Exhibit "E" to motion and cross-motion, transcript p. 24).

A property owner is not liable for repairing and maintaining abutting public property unless the owner actually created the defective condition or caused it through some special use, or unless an ordinance or statute charges the abutting owner with the responsibility to repair and maintain the public property and specifically imposes liability upon the owner for injuries resulting from a violation of the statute (see Solarte v. DiPalmero, 262 AD 2d 477 [2nd Dept 1999]).

No ordinance or statute is involved in this case that would impose either a duty or liability upon A.J. or Greenpoint with regard to the maintenance and repair of the street. The New York City Administrative Code §§19-152 and 7-210 places the duty to repair sidewalks upon the abutting property owners, and §7-210 specifically imposes liability upon abutting property owners for any injuries resulting from their breach of that duty. However, in the instant case, the defective area upon which plaintiff allegedly tripped was not the sidewalk but the roadway. There is no ordinance or statute that imposes any duty upon property owners in the City of New York to repair or maintain the public roadways.

Both A.J. and Greenpoint have demonstrated by proof in

admissible form that they did not create or cause the defect. Moreover, no issue is raised as to whether they made a special use of the street.

Plaintiff has failed to come forward with any evidence so as to raise a triable issue of fact as to whether A.J. or Greenpoint either created the defect or made a special use of the street (see Pratt v. Villa Roma Country Club, Inc., 277 AD 2d 298 [2nd Dept 2000]).

Plaintiff's attorney opines in his affirmation in opposition that it appears from the photographs annexed to the motion that part of the street appears not to be paved with asphalt but with a different substance. He contends, based upon the appearance of a different color of part of the street, that it seems that the sidewalk had been replaced and extended throughout the street and that the street and sidewalk "look like" they were replaced simultaneously. He also conjectures that the defect may have been the result of a special use to provide services to the building. These contentions amount to pure speculation and fail to raise any issue of fact.

The photographs clearly show that the street where the pothole is located is demarcated from the sidewalk by a raised curb. The photographs also show curbside city parking meters in front of that location. There is no basis whatever for counsel's statement that it appears as though the sidewalk was extended throughout the street. Neither does counsel allege any facts setting forth how A.J. or Greenpoint could have made a special use of the potholed area of the street off the curb in front of municipal parking meters. Counsel is merely attempting to conjure issues of fact where none exist.

The record on this motion is entirely devoid of any indicia of special use. Plaintiff fails to allege special use in his complaint and fails to allege that either A.J. or Greenpoint benefitted from the potholed roadway in any manner different from that of the general public (see Balsam v. Delma Engineering Corp. , 139 AD 2d 292 [1st Dept 1988]). Even had plaintiff set forth evidence of special use, he fails to show evidence establishing that the special use caused the defect (see Yee v. Chang Xin Food Market, Inc., 302 AD 2d 518 [2nd Dept 2003]).

Moreover, even if work had been performed in the street for the building's benefit, resulting in the pothole, there is no allegation or proof that A.J. and Greenpoint requested any work to be done or had control over the street or authority to correct the defect (see, Herzfeld v. Incorporated Village of Cedarhurst, 171 AD 2d 647 [2nd Dept 1991][involving the connection of utility

services to the building]).

The street where the defect is located does not abut the premises of these defendants and plaintiff fails to articulate what connection at all this area of the roadway has to defendants' building.

Finally, there is no merit to plaintiff's contention that the motion and cross-motion are premature because discovery has not been completed. "[P]laintiff may not rely upon mere hope that evidence sufficient to defeat summary judgment may be uncovered during the discovery process" (Baron v. Newman, 300 AD 2d 267, 268 [2nd Dept 2002]).

Accordingly, the motion and cross-motion are granted and the complaint is dismissed as against A.J. and Greenpoint.

Dated: March 15, 2007

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KEVIN J. KERRIGAN, J.S.C.