Acerra v City of New York
2007 NY Slip Op 31099(U)
April 30, 2007
Supreme Court, New York County
Docket Number: 0102754/2005
Judge: Eileen A. Rakower
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SCANNED ON 5/8/2007

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

PRESENT: RAKOWER J.S.C. PART 5

Index Number : 102754/2005

ACERRA, ELIZABETH

vs

CITY OF NEW YORK

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

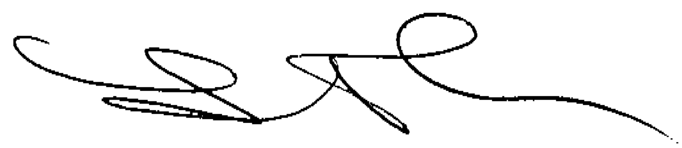
Upon the foregoing papers, it is ordered that this motion

FILED
MAY 08 2007
NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 4/30/07



J.S.C.

EILEEN A. RAKOWER

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

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

---X

ELIZABETH ACERRA and LOUIS ACERRA,

Plaintiffs,

Index No. 102754/05

- against -

Decision and Order

THE CITY OF NEW YORK,

Defendant.

FILED
MAY 08 2007
COUNTY CLERK'S OFFICE
NEW YORK

---X

HON. EILEEN A. RAKOWER

Plaintiffs brings this action for personal injuries allegedly sustained when plaintiff Elizabeth Acerra slipped and fell on the sidewalk on the North side of East 90th Street in the County and State of New York on July 18, 2004. Defendant Asphalt Green, Inc. ("Asphalt"), lessee of the adjoining property, moves for summary judgment pursuant to CPLR 3212. Neither plaintiff nor defendant the City of New York ("City"), lessor of the adjoining property, submit papers.

Asphalt, in support of its motion, argues that City owns and controls the property adjacent to the sidewalk where plaintiff fell. Further, Asphalt had no responsibility to repair any defect in the sidewalk, and owed no duty to plaintiff. Thus, Asphalt asserts it is not liable for plaintiff's injuries. Asphalt provides a response to a Notice to Admit it served upon the City[1], a copy of the Lease Agreement between it and the City dated May 26, 1981 and a copy of the Management Agreement between the parties dated January 28, 1991. Additionally,

[1] Asphalt served a Notice to Admit on the City on February 1, 2007. The City served a response on February 9, 2007 stating "Admit to 1." However, the response was to "Damon Perry's" Notice to Admit, a party not connected to this case. Asphalt re-served the Notice to Admit on February 12, 2007 and, to date, City has not provided a "corrected version." While Asphalt holds out this response to the Notice to Admit as evidence that the City owned and controlled the adjoining property, the response without the corresponding Notice to Admit is proof of nothing.

Asphalt submits deposition testimony of City, plaintiff Elizabeth Acerra, and Asphalt.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. 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). In addition, bald, conclusory allegations, even if believable, are not enough. *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890 (1970).

Section 20.01 of the Lease Agreement between the City of New York and The Neighborhood Committee for the Asphalt Green, Inc. reads:

> Lessee (Asphalt), at its sole cost and expense shall take good care of the Demised Premises and shall put, keep and maintain the Demised Premises and every part thereof in good and sufficient repair and condition.

Section 20.03 of the Lease Agreement reads:

> Lessee, at its sole cost and expense shall put, keep and maintain the Demised Premises and the sidewalks, curbs and passageways adjoining and/or appurtenant to the Demised Premises in a clean and orderly condition, free of dirt, rubbish, garbage, snow, ice and all obstructions.

Section (6) of the Agreement between The City of New York Department of Parks and Recreation and Asphalt Green, Inc. reads, in relevant part:

> (6) Repairs. AG shall, throughout the term of this Agreement, maintain and take good care of the Property, including the Improvements, and the fixtures and appurtenances therein and, at AG's sole cost and expense, make all repairs thereto as and when needed to preserve them in working order and good condition so as not to violate any applicable health or

safety law or regulation.

The section of the lease agreement between Asphalt and the City as it relates to maintenance and repairs states that Asphalt has the duty to maintain and repair the premises and to maintain the sidewalk "in a clean and orderly condition, free of dirt, rubbish, garbage, snow, ice and all obstructions." Similarly, the maintenance agreement calls for Asphalt to maintain and make repairs to the "property."

Asphalt has established that as the lessee of the premises, it has no duty to repair the sidewalk, and maintenance is limited to keeping it clean and free of snow and ice. Plaintiffs allege in their summons and complaint that Elizabeth Acerra fell as a result of a defect in the sidewalk of which the City had notice, evidenced by certain maps filed with the City of New York. Neither City nor plaintiffs raise an issue of fact opposing Asphalt's position.

Wherefore it is hereby

ORDERED that defendant Asphalt Green, Inc.'s motion for summary judgment is granted.

The case in all other respects continues.

DATED: April 30, 2007

EILEEN A. RAKOWER, J.S.C.

FILED
MAY 08 2007
NEW YORK
COUNTY CLERK'S OFFICE