

<b>Borg v City of New York</b>
2007 NY Slip Op 31161(U)
May 3, 2007
Supreme Court, New York County
Docket Number: 0120784/2003
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN  
*Justice*

PART 52

Index Number : 120784/2003  
BORG, DORIS  
vs  
CITY OF NEW YORK  
Sequence Number : 003  
DISMISS

INDEX NO. 120784/2003  
MOTION DATE 2/14/07  
MOTION SEQ. NO. 003  
MOTION CAL. NO. 13  
this motion to/for D

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

1  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *is granted in accordance with the annexed decision & order.*

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

**FILED**  
MAY 10 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 5/3/07

[Signature]  
J.S.C.

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: CIVIL TERM PART 52

-----X  
DORIS BORG,

Plaintiff,  
  
-against-

Index Number 120784/2003  
Submission Date 2/14/07  
Mot. Seq. No. 003  
Cal. No. 13

THE CITY OF NEW YORK, THE NEW YORK CITY  
DEPARTMENT OF TRANSPORTATION, CON EDISON,  
PADILLA CONSTRUCTION SERVICES, and  
PASCO PLUMBING,

**DECISION AND ORDER**

Defendants.

-----X

Papers considered in review of this motion for default :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>

**FILED**  
MAY 10 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**PAUL G. FEINMAN, J.<sup>1</sup>:**

Defendant, Padilla Construction Services, Inc., moves pursuant to CPLR 3212 for summary judgment and dismissal of the complaint as against it. The motion, which is unopposed, is granted.

Plaintiff, Doris Borg, was injured on November 3, 2002, and claims that her right toe got stuck in a hole in a City sidewalk, causing her to fall and fracture her left ankle. Thereafter, plaintiff commenced this lawsuit against the City of New York, the Department of Transportation, Con Edison, Padilla Construction Services and Pasco Plumbing, alleging that repair work or construction was performed on the sidewalk at the location where the injury was

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<sup>1</sup> The Court acknowledges the assistance of second year law student intern Mark Radi in the preparation of this decision.

sustained and that the parties were negligent in performing this work (Notice of Motion Ex. C, Amended Verified Complaint).

Plaintiff's fall occurred outside of Socrates Restaurant on the "sidewalk on Franklin Street between Greenwich and Hudson, closer to Hudson" on the south side of the street ten feet from Hudson while she was walking east on Franklin Street (Notice of Motion Ex. E, Deposition Testimony of Doris Borg [hereinafter Borg EBT] 13, 45). Socrates Restaurant is located at 101 Hudson Street and 101 Franklin Street (the corner of Franklin and Hudson streets). Plaintiff described the area of the fall as a "larry spot" surrounding a grating in the sidewalk, which then turned into concrete (Borg EBT 56-60). She did not notice any evidence of construction taking place at the time or in the vicinity of the accident (Borg EBT 56).

Defendant Padilla relies on the testimony of the witnesses to support its claim that it did not perform any work on the area where the fall occurred. Padilla asserts that if any work was performed at the location of the accident, it was performed by another entity. According to the deposition of the witness on behalf of the City, a record search was requested and performed for 101 Franklin Street for the period of November 3, 2000 through November 3, 2002.<sup>2</sup> The search did not locate any permits, repair orders, contracts, complaints or sidewalk violations for that area at that time (Notice of Motion Ex. G, Deposition Testimony of Cynthia Howard 4-5).

The witness for Con Edison testified that a search conducted for opening tickets,

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<sup>2</sup> The record indicates that the search was conducted on "1/13 of 2000 to 1/13 of 2002." However, because the accident occurred on 11/3 of 2002 and record searches conducted by other defendants used the date of 11/3 as a reference point, this Court assumes that 1/13 was a typographical error and that 11/3 rather than 1/13 was meant to be recorded as the time period of the search. Additionally, the DCM orders in New York County typically provide for record searches for work done two years prior to the accident.

emergency tickets, paving orders and permits for the period of November 3, 2000 through November 3, 2002 found that several work orders and permits were "called in" for that area, however, none of the work performed by Con Edison was in the vicinity of the fall at 101 Franklin Street, but rather was performed in the vicinity of 167 through 175 Franklin Street (Notice of Motion Ex. H, Deposition Testimony of Mario Smith 11-15, 17-19, 20-24).

During his deposition, Luis Ramirez, Project Engineer for Padilla, testified that Padilla had not performed any work in the area of 101 Hudson Street in 2002 or within the two years prior. Padilla did, however, install a water main, roadways and sidewalks on Greenwich between Hubert and Chambers from March of 2000 until June of 2001. Padilla was issued a permit from the D.O.T. to open a roadway and sidewalk on Franklin Street between Greenwich and Hudson. The repairs were performed at the intersection of Greenwich and Franklin and included 150 feet of Greenwich running west to east (Notice of Motion Ex. I, Deposition Testimony of Luis Ramirez [hereinafter Ramirez EBT] 8-14). The length of Franklin is approximately 850 to 900 feet between Greenwich and Hudson (Ramirez EBT 27). The work done by Padilla began on Greenwich between Hubert and Chambers and included a portion of the roadway and sidewalk on the northeast corner of Franklin Street and the roadway and sidewalk on the west side of Greenwich (Ramirez EBT 15-19). The work was begun approximately one year prior to 2002 and was "straight sidewalk" that did not include any gratings or tar (Ramirez EBT 20-21). Though the papers submitted do not provide the visual support of the blueprints or diagrams that were referred to in the record, a careful reading of the deposition testimony supports the conclusion that all work performed by Padilla on Franklin Street was at the northeast corner of Greenwich and Franklin, whereas the injury suffered by the

plaintiff occurred at the southern end of Franklin Street near Hudson, in other words at the other end of the block.

According to CPLR 3212 (b), a motion for summary judgment shall be granted where, “upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party . . . [a] motion for summary judgment shall be supported by . . . depositions and written admissions.” The Court has held that “[i]ssue-finding, rather than issue-determination is the key to the procedure. If and when the court reaches the conclusion that a genuine and substantial issue of fact is presented, such determination requires the denial of the application for summary judgment,” *Esteve v Abad*, 271 AD 725, 727 (1st Dept. 1947).

Where a plaintiff alleges negligence, “it must be shown that the defendant owes a duty to the plaintiff. In the absence of a duty, there is no breach and without a breach there is no liability,” *Pulka v Edelman*, 40 NY2d 781, 782 (1976). “Liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property . . . . Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property,” *Soto v City of New York*, 244 AD2d 544, 545 (2d Dept. 1997). Additionally, in *Lewis v Metropolitan Transp. Auth.*, 99 AD2d 246, 249 (1st Dept. 1984), the Court held that a plaintiff must prove that the defendant had actual or constructive notice of the dangerous or defective condition in order to establish that the defendant owed the plaintiff a duty.

Padilla argues that it owed no duty to the plaintiff because it did not own the site or perform any repair work where the fall occurred, did not create a dangerous or defective

condition, did not make special use of the area in question and did not have actual or constructive notice of a dangerous or defective condition. It is not disputed that the City of New York, rather than Padilla, is the owner of the sidewalk where the accident occurred. Thus, no duty is established by ownership. The plaintiff has not presented any evidence that Padilla occupied the property, made special use of the property or had actual or constructive notice of a dangerous or defective condition where the accident occurred. Although Padilla admittedly performed work on Greenwich Street, that work encompassed only 150 feet of Franklin Street at most, while the entire length of Franklin is approximately 850 to 900 feet between Greenwich and Hudson. Therefore, plaintiff suffered her injury approximately 700 feet from where Padilla's work ended. Consequently, it can be adduced that Padilla did not perform any work where the fall occurred and so did not create a dangerous or defective condition. Thus, Padilla owed no duty to the plaintiff. (*See Perriconi v St. John's Preparatory High School*, 290 AD2d 546 [2d Dept. 2002], [holding that the defendant was entitled to summary judgment based on deposition testimony which established that although it performed work on the block where the plaintiff fell, it did not perform work on the same area where the plaintiff fell]).

Even viewing the facts in a light most favorable to the plaintiff, because the motion is unopposed the statements set forth by Padilla are deemed to be admitted by the plaintiff, (*see Laye v Shepard*, 25 AD2d 498 [1st Dept. 1966], *affg* 48 Misc2d 478, 480 [1965]). Based on the record before the Court, Padilla has made a prima facie showing that it owed no duty to the plaintiff, and Padilla is entitled to summary judgment as a matter of law. Accordingly, it is


ORDERED that the defendant, Padilla Construction Services' motion for summary judgment is granted on default, and that the complaint and any cross claims are dismissed as

against Padilla Construction Services only; and it is further

ORDERED that the action is severed and continued as against the remaining parties under this index number.

This constitutes the decision and order of the court.

Dated: May 3, 2007  
New York, New York



J.S.C.

**HON. PAUL G. FERRANTI**



**FILED**  
MAY 10 2007  
NEW YORK  
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