

**Raimondi v City of New York**

2007 NY Slip Op 31434(U)

May 25, 2007

Supreme Court, New York County

Docket Number: 0109746/2002

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 : 109746/2002  
RAIMONDI, NICHOLAS  
vs  
CITY OF NEW YORK  
Sequence Number : 006  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1, 2  
~~2~~ 3  
4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
JUN 01 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: 5/25/07

  
**EILEEN A. RAKOWER**  
J.S.C.  
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: PART 5

-----X  
NICHOLAS RAIMONDI and CARRIE RAIMONDI,

Plaintiffs,

Index No.  
109746/02

- against -

Decision and Order

THE CITY OF NEW YORK, ANGLO AMERICAN FUR  
MERCHANTS, CARLANA DESIGN, INC., BERNSTEIN  
REAL ESTATE, INC., TRADERS CORP., AST SPORTSWEAR,  
INC.,

Defendants.

-----X  
AST SPORTSWEAR INC.

Third-Party Plaintiff,

Index No.  
590908/04

-against-

LEATHERWEAVES, INC.,

Third-Party Defendant.

**FILED**  
JUN 01 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

HON. EILEEN A. RAKOWER

Plaintiffs commenced this personal injury action alleging that plaintiff Nicholas Raimondi sustained injuries when he stepped in a small pothole in the sidewalk located near vault doors in front of 135 West 30<sup>th</sup> Street in Manhattan on June 21, 2001. Defendant AST Sportswear, Inc. ("AST") previously moved for summary judgment, which motion was granted without the opposition of City of New York ("City") and without the opposition of Bernstein Real Estate, Inc. ("Bernstein"). Bernstein and Anglo American Fur Merchants ("Anglo") now move for summary judgment. Plaintiff concedes the motion of Anglo, but opposes the motion by Bernstein. The City of New York does not file papers.

In support of its motion for summary judgment, Bernstein submits the deposition testimony of plaintiff Nicholas Raimondi, the deposition testimony of Carmine J. Casale, managing agent of Bernstein, the deposition testimony of Peichen Ying, the owner of AST Sportswear, Bernstein's management contract for premises known as 135 West 30<sup>th</sup> Street, the lease agreement between Traders Company and AST for a portion of the premises known as 135 West 30<sup>th</sup> Street, and a supplemental affidavit of Mr. Casale.

Initially, there is no evidence that Anglo owned, leased or controlled any portion of the premises adjacent to the sidewalk where plaintiff fell at the time of the accident. There is no opposition to Anglo's motion that all claims and cross claims as against it be dismissed.

Bernstein asserts that all claims and cross claims as against it should also be dismissed. It claims that the owner of the building adjacent to the site of plaintiff's fall was Traders Company and that while Bernstein managed the property for Traders Company, it had no responsibility for the sidewalk in question.

Plaintiff, in opposition to Bernstein's motion, provides the expert affidavit of Arthur Phineas Weber, an engineer, as well as photographs of the site of the accident including the alleged defective repair in the sidewalk. Plaintiff asserts that the repair would not have cost more than \$1200 dollars, and the undertaking of the repair was minimal enough so as not to require Bernstein to have the special permission of Traders Company pursuant to the agreement between them. Plaintiff concludes that because Bernstein, as the managing agent, had the authority to make repairs to the sidewalk, that it must have done so.

Bernstein points to the affidavit of its own employee, Carmine J. Casale, who swears that before the date of the alleged accident, Bernstein "did not do any repair, nor did they hire anyone to repair the sidewalk in front of the building at 135 West 30<sup>th</sup> Street, New York, New York." Plaintiff must demonstrate, by proof in admissible form, that there is an issue of fact regarding whether Bernstein did in fact perform the alleged sidewalk repair.

Plaintiff speculates that Bernstein could have made the alleged repair, without any proof that Bernstein had knowledge of the defect, undertook to repair it, and did so negligently. Plaintiff fails to show that Bernstein made special use of the sidewalk

area. Indeed, the City bore the ultimate responsibility to repair the sidewalk at the time of this accident, not Bernstein.

Prior to the enactment of Administrative Code § 7-210, effective September 14, 2003, the municipality, not the abutting landowner, was responsible for the maintenance of the sidewalk. The exception to this was where the abutting landowner either created the defect or derived a special benefit from the sidewalk unrelated to public use. Here, there is no evidence that Bernstein either created the defect or derived a special benefit from the sidewalk.

“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)

Bernstein has established that it did not create the offending condition. Plaintiff’s engineer concludes that “the repair evidenced in the photo prints was not made in a neat and workmanlike manner and was a defective repair.” While it is true that a landowner who negligently repairs a sidewalk is liable to a person who is injured as a result of such repairs being faulty (*Fraser v Fertig*, 251 AD2d 621 [2<sup>nd</sup> Dept, 1998]) plaintiff must submit some evidence in admissible form indicating that Bernstein made the repair (*Ritts v. Teslenko*, 276 AD2d 768 [2<sup>nd</sup> Dept, 2000]).

While plaintiff asserts that the management agreement between Bernstein and Traders Company, the owner of the building adjacent to the allegedly faulty sidewalk, gave Bernstein the authority to make such a repair, it did not place upon Bernstein the duty to repair the sidewalk. Despite having the authority to make the repair, there is no proof, in the face of Casale stating unequivocally that Bernstein did not repair the sidewalk or create the alleged defect, that raises an issue of fact.

Wherefore, it is hereby

ORDERED that defendant Anglo American Fur Merchants' motion for summary judgment dismissing all claims and cross claims as against it is granted without opposition and the Clerk of the court is to enter judgment accordingly; and it is further

ORDERED that Bernstein Real Estate, Inc.'s motion for summary judgment dismissing all claims and cross claims as against it is granted and the Clerk of the court is to enter judgment accordingly; and it is further

ORDERED that this case continues in all other respects.

DATED: May 25, 2007



\_\_\_\_\_  
EILEEN A. RAKOWER, J.S.C.

**FILED**  
JUN 01 2007  
NEW YORK  
COUNTY CLERK'S OFFICE