

**James v New York City Tr. Auth.**

2007 NY Slip Op 32312(U)

July 19, 2007

Supreme Court, New York County

Docket Number: 0105093/2005

Judge: Donna Marie Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 21

JAMES, ELAINE

INDEX NO. 105093/05

Plaintiff,

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

-v-

MOTION SEQ. NO. 001

THE NEW YORK CITY TRANSIT AUTHORITY,  
THE CITY OF NEW YORK

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

Defendant.

The following papers, numbered 1 to 3 were read on this motion for summary judgment..

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits- Exhibits....	<u>1</u>
Answering Affidavits- Exhibits _____	<u>2</u>
Replying Affidavits _____	<u>3</u>

CROSS-MOTION: \_\_\_\_\_ YES  NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

**FILED**  
JUL 27 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 7-19-07

*[Signature]*  
J.S.C.

Check one: \_\_\_\_\_ FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 21

-----X  
ELAINE JAMES,

Plaintiff,

-against-

Index No. 105093/05

THE NEW YORK CITY TRANSIT AUTHORITY,  
THE CITY OF NEW YORK

Defendant.

-----X

**FILED**  
JUL 27 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**DONNA M. MILLS, J.:**

The co-defendant, the New York City Transit Authority (hereinafter "Transit") moves, pursuant to CPLR 3211 and 3212, for an order granting summary judgment dismissing plaintiff's complaint. Plaintiff opposes the motion and the co-defendant, the City of New York, does not oppose the motion.

This is an action to recover damages for personal injuries plaintiff sustained in a slip and fall accident on March 16, 2004. The accident occurred at approximately 5:45 PM at the snow-covered sidewalk that plaintiff testified at deposition is approximately 3 to 4 feet adjacent to the steps of the subway entrance to the Park Place station in the County, City, and State of New York. Plaintiff alleges that at the time of the accident, it was snowing, icy, and raining, and there was already snow and ice on the ground. A report from the National Climatic Data Center for the day of March 16, 2004 confirm that there had been rain, freezing rain, and snow falling steadily from 11:00 AM through the time of plaintiff's alleged accident. Plaintiff's alleged injuries include a fractured wrist that required surgery.

construction of the Park Place subway entrance and for negligent maintenance of the said subway entrance. Transit now moves for summary judgment and to dismiss plaintiff's complaint on two grounds. The first ground is that the plaintiff has failed to show that Transit had actual or constructive notice of the alleged wetness that may have caused plaintiff's accident. The second ground is that Transit is not responsible for snow and ice removal on the sidewalks outside the subway stations, and thus even if Transit had actual or constructive notice of the alleged wetness, Transit had no duty to clear the sidewalk of the snow and ice.

Plaintiff opposes this motion, saying the area adjacent to the subway entrance is under Transit's maintenance and control due to its special use of the sidewalk.

#### APPLICABLE LAW & DISCUSSION

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (Rotuba Extruders v. Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved, however, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the trial calendar and thus deny to other litigants the right to have their claims promptly adjudicated (Andre v Pomeroy, 35 NY2d 361 [1974]).

Additionally, it is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212[b]), and must do so by tender of evidentiary proof in admissible form. Once this showing has been made, the burden shifts to the party opposing the motion of summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

With regards to Transit's first ground for summary judgment, plaintiff here has failed to show that Transit had actual or constructive notice of the alleged wetness of the ground adjacent to the subway station. In order to impose liability on Transit, plaintiff must show through competent evidence that Transit had notice of the dangerous or defective condition prior to the accident and had a reasonable time within which to correct the condition (Lewis v. Metropolitan Transportation Authority, 99 AD2d 246[1st Dept. 1984]).

It is well settled by the courts, however, that during an ongoing storm it would be unreasonable to require Transit to constantly clear the snow from the sidewalk outside the entrance of the subway station (*see* Hussein v. New York City Transit Authority, 266 AD2d 146 [1st Dept. 1999]; Rosario v. New York City Transit Authority, 215 AD2d 364 [2nd Dept. 1995]; Duncan v. New York City Transit Authority, 260 AD2d 213 [1st Dept. 1999]). In the case at bar, Transit had no duty to clear the sidewalk surrounding the entrance of snow and ice because the snow storm was still in progress and ongoing when the alleged accident occurred. Furthermore, a lull in the storm does not impose a duty on Transit to remove the accumulation of snow or ice before the storm ceases in its entirety (DeStefano v. City of New York, 2007 NY Slip Op. 05215 [2nd Dept. 2007]).

Additionally, Transit cannot be held liable for injuries caused by the dangerous or defective condition of the city sidewalk because it does not own, maintain, operate or control the public streets and sidewalks (New York City Charter § 383). In this case, assuming the snow storm had stopped and Transit had actual or constructive notice of a dangerous condition, Transit is still not responsible for snow removal on sidewalks outside subway stations because it has no duty to maintain the sidewalk. Instead, the sidewalk is the inalienable property of the co-defendant, City of New York.

In a First Department case, the Court held Transit had no duty to exercise reasonable care with respect to the area five feet from the subway entrance where plaintiff conceded she fell (Pantazis v. City of New York, 211 AD2d 427 [1st Dept. 1995]). That same year, the First Department reversed a lower court's denial of summary judgment to Transit (Rubin v. City of New York, 211 AD2d 417 [1st Dept. 1995]). In that case plaintiff fell on a defective sidewalk 2 feet away from a subway emergency exit. The First Department granted Transit summary judgment because Transit did not control, maintain, repair or make special use of that portion of the sidewalk where plaintiff fell (Id.).

This Court finds Pantazis and Rubin apply to the case at bar. Transit station supervisor, William Bonaparte, testified at an Examination Before Trial on August 15, 2006 that Transit is responsible for approximate 1 to 2 feet prior to the entrance of a subway station, not the 3 or 4 feet distance from which plaintiff conceded she slipped and fell. Additionally, Transit has shown it does not control, maintain, repair, or make special use of the part of the sidewalk where plaintiff fell. Thus Transit owed no duty of care to plaintiff who fell more than 2 feet from the subway entrance.

Plaintiff argues Transit had a duty to correct the alleged dangerous condition of the sidewalk because of its special use of the area for its subways. This Court does not, however, find this argument convincing. It is well settled that the owner or lessee of land abutting a public sidewalk owes no duty to the public to keep the sidewalk in a safe condition unless the landowner or lessee creates a defective condition in the sidewalk or uses it for a special purpose (Tortora v. Pearl Foods, Inc., 200 AD2d 471 [1st Dept. 1994]). Here, however, there was no evidence that Transit benefited from this portion of the sidewalk in a manner different from that of the general populace such to impute liability based upon the theory of "special use" (Id.)

Finally, plaintiff also attributes her alleged injuries to Transit's negligent construction of the subway entrance area. Plaintiff mistakenly relies on the case of Reid v. City of New York, 36 AD3d 784 [2nd Dept. 2007]), saying an expert is not necessary to find that Transit was negligent in its construction of the subway entrance. The Reid Court, however, relied on a Transit expert's testimony when it reversed the lower court's grant of summary judgment to the defendant. In the case at bar, however, plaintiff does not rely on any expert testimony. Simply alleging a defect without supporting testimony is insufficient. Plaintiff's contention that her accident was caused by a defect in the sidewalk is based on pure speculation and conjecture (*see* Romero v. ELJ Realty Corp., 38 AD3d 263 [1st Dept. 2007]).

Accordingly, it is hereby

ORDERED that the motion for summary judgment is granted and the complaint and all cross-claims is hereby severed and dismissed against the New York City Transit Authority, and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 7-19-07

ENTER:

  
\_\_\_\_\_  
J.S.C.

**FILED**  
JUL 27 2007  
NEW YORK  
COUNTY CLERK'S OFFICE