

Fleming v 300 W. 48th St. Assoc.
2007 NY Slip Op 32316(U)
July 17, 2007
Supreme Court, New York County
Docket Number: 0111633/2005
Judge: Karen Smith
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. KAREN SMITH
Justice

PART 62

Index Number : 111633/2005
FLEMING, MICHAEL
vs
300 WEST 48TH ST. ASSOCIATES
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 7/19/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

is motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits -- Exhibits ...
Answering Affidavits -- Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

1
2-3
4-5

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is granted in part and denied in part in accordance with the attached memorandum decision and order

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

F I L L E D

JUL 30 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/17/07

KSS
HON. KAREN SMITH J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

-----X
MICHAEL FLEMING,

Plaintiff,
-against-

Index no.: 111633/2005
Motion seq.: 003
Motion date: 07/19/2007

300 WEST 48TH STREET ASSOCIATES, P.R.D. REALTY CORPORATION, DOMANSKY DEVELOPMENT GROUP, LLC, PRD REALTY MANAGEMENT, INC., EMPIRE SEWER CLEANING COMPANY, INC., PROSPECT TREE AND LANDSCAPING, INC., TIMES SQUARE DISTRICT MANAGEMENT ASSOCIATION, INCORPORATED,

Defendants.

DECISION AND ORDER

FILED

JUL 30 2007,

NEW YORK
COUNTY CLERK'S OFFICE

-----X
PRESENT: KAREN S. SMITH, J.S.C.:

The branch of the defendants', Times Square Alliance's and Times Square District Management Association, Inc.'s motion for summary judgment dismissing the complaint herein as against them is granted and the branch of the same defendants' motion for summary judgment dismissing all cross-claims asserted against them herein is denied.

Plaintiff (hereafter referred to as "Fleming") brought this action to recover for personal injuries he allegedly sustained on September 27, 2002 when he tripped and fell on an alleged height difference of approximately 2" where the dirt surface of a tree well joined the paved portion of the sidewalk abutting the premises known as 306 West 48th. Street, New York, New York.

Defendants, Times Square Alliance and Times Square District Management Association, Inc. (hereafter collectively referred to as "Times Square"), now move for summary judgment

dismissing the complaint and all cross-claims asserted against them in this action. Times Square contends that its only obligations with respect to the area in which Fleming had his accident consist of providing sidewalk sweeping and debris removal as well as a security personnel presence and that Times Square has no obligations whatsoever with respect to tree-wells or sidewalk repair and maintenance and, therefore, no duty to the public or the plaintiff upon which liability against Times Square may be premised. In support of their motion, Times Square has submitted copies of; 1) the deposition transcripts of one of their officers and the plaintiff, 2) the contract with the City of New York which describes Times Square's obligations and 3) the complaint and Times Square's answer with affirmative defenses and cross-claims. The motion papers present a *prima facie* showing of Times Square's entitlement to judgment dismissing Fleming's complaint herein as against Times Square because the motion papers offer evidence demonstrating that Times Square had no duty to maintain the tree-well where Fleming's accident occurred.

Fleming opposes the motion. In his affirmation in opposition to the motion, Fleming's attorney argues that questions of fact exist as to whether Times Square caused or created the defective condition allegedly involved in Fleming's injury. Fleming's counsel contends that Times Square, over the course of years, regularly swept the dirt in the tree well creating the difference in the elevation between the dirt surface and the sidewalk pavement surface. While causing or creating a condition which results in an accident is a basis for liability even where there is no duty to maintain the area, this unsubstantiated contention of Fleming's counsel is not sufficient to meet Fleming's burden of offering evidence in an admissible form to raise a triable issue of fact.

Co-defendants, 300 West 48th Street Associates, P.R.D. Realty Corp., Domansky Development Group, LLC. and PRD Realty Management, Inc. (hereafter collectively referred to as "300") also oppose the motion contending that the contract between the City of New York, by the Department of Small Business Services, and Times Square "may" create a triable issue of fact because the contract refers to potential capital improvements including; "... exterior lighting on side streets to enhance security..." and "street and sidewalk amenities to improve pedestrian and vehicle circulation..." (see copy of contract attached to Times Square's moving papers as Exhibit D at Page 13). However, the contract specifically provides that the Times Square District Management Association, Inc. (one of the Times Square defendants) "may" provide these items. There has been no evidence offered in admissible form to show that Times Square did or ever became obligated to provide the items. Thus, 300 has not met its burden of raising a triable question of fact by evidence in admissible form.

With respect to the branch of Times Square's motion seeking summary judgment dismissing all cross-claims asserted against it in this action, Times Square's motion papers have failed to include copies of the pleadings asserting the cross-claims or Times Square's answers to those pleadings. Therefore, the court is unable to determine the basis for any cross-claims asserted against Time Square in this action or whether Times Square is entitled to summary judgment dismissing any such cross-claims. Accordingly, it is;


ORDERED that the branch of Times Square's motion seeking summary judgment dismissing the complaint herein as against it is granted but the branch of Times Square's motion seeking summary judgment dismissing all cross-claims against it in this action is denied and it is further;

ORDERED that Times Square shall remain a defendant in this action for purposes of litigating any cross-claims asserted against it herein.

The foregoing constitutes the decision and order of this court.

Dated: July 17, 2007

ENTER:



Hon. Karen S. Smith, J.S.C.

FILED
JUL 30 2007
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