Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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RONALD BASSO,

Plaintiffs,

- against -

THE CITY OF NEW YORK, RAWLE BANWARIE, SANTEE BANWARIE AND DOMENICA GALLO FERNANDEZ,

Defendants.

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Index Number: 12818/05

Motion Date: July 10, 2007

Motion Cal. Number: 4

Motion Seq. No. 1

The following papers numbered 1 to 18 read on this motion by defendants Rawle Banwarie and Santee Banwarie (hereinafter "Banwarie"), cross-motion by defendant Domenica Gallo Fernandez and cross-motion by defendant City of New York for summary judgment dismissing the complaint.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Notice of Cross-Motion-Affirmation-Exhibits.....	5-8
Notice of Cross-Motion-Affirmation-Exhibits.....	9-12
Affirmation in Opposition to Motion-Exhibits.....	13-16
Reply Affirmation.....	17-18

Upon the foregoing papers it is ordered that the motion and cross-motions are decided as follows:

Motion by Banwarie for summary judgment dismissing the complaint as against them is denied. Cross-motion by Fernandez for summary judgment is denied. Cross-motion by the City for summary judgment is granted.

Plaintiff allegedly sustained injuries as a result of tripping and falling upon a raised portion of a sidewalk flag between 95-11 and 95-15 104th Street, Ozone Park in Queens County on January 6, 2005.

Santee Banwarie testified in her deposition that she and her

husband, Rawle Banwarie, were the owners of the premises 95-15 104th Street. She testified that she and her husband reside in Florida and only come to New York for vacations. She also testified that on the date of the accident her daughter resided at the premises and a tenant who rented the upstairs. Approximately six years ago Banwarie repaired the sidewalk. Subsequently, the curbside tree caused the sidewalk flag to become raised again.

Banwarie contends that the complaint as against them should be dismissed on the grounds that the alleged defect was open and obvious and that it was trivial.

Plaintiff, in his deposition, testified that he resided at 95-17 104 th Street - next door to Banwarie's premises, that he occasionally walked on said sidewalk and that he had observed for seven years that the subject sidewalk was broken. Therefore, counsel for Banwarie contends, since the condition was open and obvious, they are entitled to summary judgment as a matter of law. Counsel's contention is without merit.

"[P]roof that a dangerous condition is open and obvious does not preclude a finding of liability against a landowner for the failure to maintain the property in a safe condition but is relevant to the issue of the plaintiff's comparative negligence" (Cupo v.Karfunkel, 1 AD 3d 48 [2nd Dept 2003] [explicitly overruling the line of Second Department cases which had held that negligence does not attach where the allegedly dangerous condition is open and obvious]; see DiVietro v. Gould Palisades Corp., 4 AD 3d 324[2nd Dept 2004]; see also, Power v. Garden World, Inc., 2007 NY Slip Op 50801 [U] [Supreme Court, Queens County]). Therefore, whether the condition was open and obvious to plaintiff is not dispositive of the issue of liability, but merely raises an issue of plaintiff's comparative negligence to be determined at trial.

Counsel for Banwarie also contends that the defect was too trivial to be actionable.

The issue of whether a defective or dangerous condition exists depends upon the particular facts of each case and is generally a question for the jury (see Trincere v. County of Suffolk, 90 NY 2d 976 [1997]). Although a property owner may not be held liable in damages for trivial defects not constituting a trap or nuisance, and the Court may determine by examining the photographic and other evidence that the alleged defect is trivial and grant summary judgment to defendant(see Hymanson v. A.L.L. Assocs., 300 AD 2d 358, 358 [2nd Dept 2002]), the determination of whether a condition is trivial does not rest exclusively upon the dimension or depth of the sidewalk defect in inches, but must be made upon an examination of all of "the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the

'time, place and circumstance' of the injury (Trincere v. County of Suffolk, supra).

Other than her conclusory statement that the condition was trivial, counsel sets forth no proof of the extent of the defect. She annexes to the moving papers a photocopy of two photographs of the sidewalk, but said photocopy is of such poor quality that the Court is unable to determine by an examination of it whether the defect was of a trivial or inconsequential nature.

Accordingly, the motion must be denied.

For the same reasons, cross-motion by Fernandez for summary judgment on the grounds that the alleged defect was open and obvious and too trivial to be actionable is likewise denied.

Cross-motion by the City for summary judgment dismissing the complaint and any cross-claims as against it is granted.

Property owners in the City of New York are required to repair and maintain at their own expense the public sidewalks abutting their premises, pursuant to §19-152 of the Administrative Code of the City of New York. However, a violation of that section, prior to September 14, 2003, could not form the basis of liability against them for injuries sustained by pedestrians. In the absence of any statute making property owners liable for injuries to pedestrians, liability remained exclusively upon the City.

The Administrative Code was amended in 2003 to add §7-210, which transferred liability from the City to property owners, except owners of one to three-family homes that are either wholly or partially owner-occupied and used exclusively for residential purposes.

Section 7-210 was enacted to absolve the City of any tort liability for personal injury or property damage and to shift that liability from the City to the property owner who breaches the duty to repair imposed by §19-152 (see Report of Committee on Transportation, supra; Puello v. City of New York, 35 AD 3d 294 [1st Dept 2006]). Section 7-210 (c) provides, "Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks . . . in a reasonably safe condition." The only exceptions stated in that section are where the adjacent or abutting property is an owner-occupied one to three-family residential home and where the City is the property owner. Neither of these exceptions applies in the instant case. Banwarie admittedly does not reside at 95-15 104th Street. Moreover, Fernandez, in her deposition, testified that although she owned the

premises 95-11 104th Street, she has not resided at said premises since 1976. Therefore, pursuant to Administrative Code §7-210, the City is not liable for plaintiff's injuries resulting from the defective sidewalk abutting Banwarie's and/or Fernandez' premises, as a matter of law.

This Court does not consider plaintiff's affirmation "in response to defendant's reply affirmation," being in the nature of a sur-reply, as such is not authorized by CPLR 3011.

Accordingly, the cross-motion must be granted and the complaint and any cross-claims insofar as asserted against the City are dismissed.

Dated: July 18, 2007

KEVIN J. KERRIGAN, J.S.C.