

**Ortega v 514 W. 213th St. Holding, LLC**

2007 NY Slip Op 32380(U)

July 26, 2007

Supreme Court, New York County

Docket Number: 0111905/2006

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
**JUDITH J. GISCHE, J.S.C.**

PRE-INDEXED  
Index Number : 111905/2006

PART \_\_\_\_\_

ORTEGA, JOSE

vs  
514 WEST 213TH STREET HOLDING

Sequence Number : 002

DEFAULT JUDGMENT

FILE NO. \_\_\_\_\_

FILE DATE \_\_\_\_\_

FILE SEQ. NO. \_\_\_\_\_

FILE CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

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

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

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

**FILED**  
JUL 31 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 7/26/07

**JUDITH J. GISCHE, 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 10

-----x  
JOSE ORTEGA,

Plaintiff,

-against-

514 WEST 213<sup>TH</sup> STREET HOLDING, LLC,  
BORDEN REALTY ASSOCIATES, LLC, URBAN  
MANAGEMENT LLC and ZIVIA GUTMAN,

Defendants.  
-----x

**Decision/Order**

Index No.: 111905/06  
Seq. No. : 002

Present:  
Hon. Judith J. Gische  
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

**Papers**

Pltf's motion [df/jg] w/JB affirm in support, exhs

**FILED**  
JUL 31 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**Numbered**

1

*Upon the foregoing papers, the decision and order of the court is as follows:*

This is a personal injury action. Plaintiff now moves for entry of a default judgment against defendants Borden Realty Associates, LLC ("Borden") and Urban Management LLC ("Urban") pursuant to CPLR § 3215 for their failure to answer the complaint or otherwise appear in this action. This motion is unopposed, though proof of service has been filed.

**Background**

On July 7, 2005, plaintiff allegedly fell due to "a broken, cracked and otherwise defective hallway floor" at 514 West 213 Street, New York, New York (the "premises"). This action is against four defendants: 514 West 213<sup>th</sup> Street Holdings LLC ("514 West"),

Urban, Borden and Zivia Gutman ("Gutman"). Defendants 514 West and Urban owned and/or managed the premises on the date of plaintiff's alleged accident. Defendants Borden and Gutman owned and/or managed the premises from November 19, 1999 to July 5, 2004.

This motion seeks a default against Borden and Urban, two domestic limited liability companies. Plaintiff served the summons and verified complaint on Borden by personally delivering the summons and verified complaint to the Secretary of State on October 20, 2006. LLC Law § 303. Plaintiff served the summons and verified complaint on Urban by personally delivering the summons and verified complaint to Steven Jurrist, a managing agent of Urban, on September 11, 2006. CPLR § 311-a.

On April 5<sup>th</sup>, 2007, plaintiff mailed additional copies of the Summons and Verified Complaint to both Borden and Urban, thereby complying with the additional notice requirements of CPLR § 3215. Such additional notice was served at least 20 days prior to entry of a default judgment.

Neither Borden nor Urban have appeared, or answered the complaint within the time provided under the CPLR, nor obtained an order from the court extending their time to do so. Accordingly, Borden and Urban have each defaulted in this action. Defendant 514 West has answered the complaint, but takes no position on the instant motion. Plaintiff was unable to serve defendant Gutman.

### **Discussion**

Plaintiff is entitled to a default judgment in his favor, provided he otherwise demonstrates that he has a *prima facie* cause of action. Gagen v. Kipany Productions Ltd.,

289 AD2d 844 (3<sup>rd</sup> dept. 2001). A default in answering the complaint constitutes an admission of the factual allegations therein and the reasonable inferences which may be made therefrom [Rokina Optical Co., Inc. v. Camera King, Inc., 63 NY2d 728 (1984)].

Based on the Verified Complaint and plaintiff's own affidavit, he alleges that the defendants negligently owned, operated managed and controlled the premises where he "was caused to sustain severe and permanent personal injuries" when he tripped and fell on the hall floor at the premises. In his complaint, plaintiff outlines many theories of negligence, to wit; defendants failed to "provide devices for the proper protection of plaintiff; defendants failed to provide plaintiff "with a safe and proper place to be;" defendants failed to provide plaintiff with "a safe ingress and egress to and from" the premises; defendants created "a dangerous and a defective condition;" defendants improperly repaired the said halls and floors; the defendants "were negligent in "improperly and defectively hiring and supervising others to repair the said halls and floors;" etc.

Besides plaintiff's failure to proceed on a clear theory of negligence in this case, the particular facts of the incident are not clear.

In addition, plaintiff's claims against Borden and Gutman, although not properly served, raise some issues. Plaintiff argues in his moving papers that Borden and Gutman, as prior owner and/or prior managing agents, should be held liable for conditions which caused plaintiff's accident. However, plaintiff has failed to establish that this case falls outside the general rule that liability for dangerous conditions on land does not extend to a prior owner of the premises. Bittrolff v. Ho's Development Corp., 77 N.Y.2d 896 (1991). Specifically, plaintiff has not established that the alleged conditions which led to his fall

existed at the time of the conveyance from Borden and Gutman to 514 West and Urban, or that a period in excess of a year was not a reasonable time for 514 West and Urban to discover and/or remedy the allegedly dangerous condition.

Accordingly, plaintiff has not factually established negligence or causation at this time.


Therefore, plaintiff's motion is granted only to the extent that Borden and Urban's default in appearing is hereby noted. All issues regarding liability and damages are to be decided at an inquest which will be held at the time of trial.

This matter, currently scheduled for a preliminary conference on August 9, 2007, has been rescheduled by the court to **September 10, 2007** at 80 Centre Street, Room 122 at 9:30 a.m. All parties to this action are expected to appear at this time.

This shall constitute the decision and order of the Court.

Dated:           New York, New York  
                  July 26, 2007

So Ordered:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**  
JUL 31 2007  
NEW YORK  
COUNTY CLERK'S OFFICE