

Klein v City of New York
2007 NY Slip Op 32829(U)
September 10, 2007
Supreme Court, Queens County
Docket Number: 0020987/2004
Judge: Kevin Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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ANN KLEIN,

Plaintiffs,

- against -

THE CITY OF NEW YORK and DAYTON
BEACH PARK NO 1 CORP.,

Defendants.

-----X

DAYTON BEACH PARK NO 1 CORP.

Third Party Plaintiff

- against -

KEYSPAN ENERGY CORPORATION,

Third Party Defendant.

-----X

The following papers numbered 1 to 16 read on this motion by defendant Dayton Beach Park No. 1 Corp. for summary judgment and cross-motion by defendant City of New York for summary judgment.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Memorandum of Law in Support of Motion.....	5
Notice of Cross-Motion-Affirmation-Exhibits.....	6-9
Affirmation in Opposition-Exhibits.....	10-12
Reply Affirmation.....	13-14
Affirmation in Further Support.....	15-16

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Dayton for summary judgment, pursuant to CPLR 3212, dismissing the complaint and cross-claim asserted against it by the

City is granted, there appearing no opposition. Cross-motion by the City for summary judgment, pursuant to CPLR 3212, dismissing the complaint and cross-claim asserted against it by Dayton is also granted.

Plaintiff alleges that she sustained injuries as a result of tripping and falling upon a raised manhole cover on the public sidewalk on the West side of Beach 84th Street south of the intersection with Rockaway Beach Boulevard abutting the premises owned by Dayton in Queens County on August 27, 2003.

In order to obtain summary judgment, movant must make a prima facie showing that it is entitled to said relief, by tendering sufficient proof to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 NY 2d 851 [1985]; Zuckerman v. City of New York, 49 NY 2d 557 [1980]). Defendants have met their respective burdens.

An abutting property owner is not liable for injuries sustained by a pedestrian as a result of a defective condition of a public sidewalk unless the homeowner created the defective condition or caused it through some special use, or unless a statute charges the property owner with the responsibility to repair and maintain the sidewalk and specifically imposes liability upon it for injuries resulting from a violation of the statute (see Solarte v. DiPalmero, 262 AD 2d 477 [2nd Dept 1999]).

The only statutory provision imposing liability upon property owners in the City of New York for failing to repair and maintain the public sidewalks abutting their property is section 7-210 of the New York City Administrative Code.

The scope of an adjacent property owner's liability regarding the repair and maintenance of sidewalks imposed by §7-210 "mirrors the duties and obligations of property owners with regard to sidewalks set forth in Administrative Code section[s] 19-152" (Report of Committee on Transportation, 2003 New York City, NY Local Law Report No. 49 Int. 193). Therefore, §7-210 must be read in conjunction with §19-152. The latter section, however, does not impose any obligation upon the abutting property owner to repair defects involving manhole covers or other hardware installed in the sidewalk except such hardware items that are appurtenances, i.e., hardware that is appurtenant to the property and, thus, constitutes a special use of the sidewalk by the property (see §19-152[a][6]).

Dayton has submitted proof, in admissible form, that it neither owned nor installed the manhole, and that it made no repairs or alterations to the subject sidewalk and, thus, did not

create the alleged defective condition. Moreover, there is no issue in this case of a special use of the sidewalk.

Plaintiff offers no evidence to rebut Dayton's prima facie showing and does not oppose the instant motion. In fact, plaintiff's attorney concedes in his affirmation in opposition that summary judgment should be granted in favor of Dayton. Likewise, the City does not oppose Dayton's motion. Therefore, Dayton's motion for summary judgment is granted.

Cross-motion by the City for summary judgment must also be granted. The City has established that it did not receive prior written notice of the defect. Prior written notice is a prerequisite to maintaining an action against the City for damages relating to a street or sidewalk defect (see Katz v. City of New York, 87 NY 2d 241 [1995]).

The City annexes to its cross-motion an affidavit of Cynthia Howard, an employee of the NYC Department of Transportation whose duties include conducting searches for records kept by the DOT. She averred that a search for records for the subject location yielded no applications, permits, complaints, repair orders, violations or contracts for the two-year period prior to the date of the accident. She states that the search only revealed a Big Apple Map for the subject location and annexes a copy of the map. The map does not reveal any defects in the nature of a raised manhole cover or other raised sections of the sidewalk or protruding obstructions. Plaintiff fails to show any proof that the City had prior written or even constructive notice of the condition.

Plaintiff has, thus, failed to demonstrate that prior written notice of the defect was given to the City, pursuant to §7-201 [c] of the New York City Administrative Code.

Plaintiff's contention that the City may have caused or created the defective condition, thereby obviating the requirement of prior notice, is entirely speculative and unsupported by any evidence in admissible form. Plaintiff fails to proffer any evidence that any work was done by the City with respect to the manhole in question.

Plaintiff has thus failed to come forward with any evidence to demonstrate that a material issue of fact exists so as to defeat the granting of summary judgment in favor of the City.

Accordingly, the motion and cross-motion are granted and the complaint is dismissed as against Dayton and the City.

Since the third-party action was not referenced by either

plaintiff or the City and neither annexed a copy of the third-party complaint in their papers, the third-party action, for the present, remains.

Dated: September 10, 2007

KEVIN J. KERRIGAN, J.S.C.