

**Rubolino v City of New York**

2007 NY Slip Op 33187(U)

September 28, 2007

Supreme Court, New York County

Docket Number: 0112231/2005

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER  
*Justice*

PART 5

Index Number : 112231/2005

RUBOLINO, CHRISTOPHER

vs

CITY OF NEW YORK

Sequence Number : 003

VACATE NOTE OF ISSUE/READINESS

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

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

: motion to/for \_\_\_\_\_

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

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

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

PAPERS NUMBERED

1  
2, 3, 4, 5  
6

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

Dated: 9/28/07

EILEEN A. RAKOWER  
J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
CHRISTOPHER RUBOLINO,

INDEX NO. 112231/05  
Motion Seq: 003

Plaintiff,

- v -

THE CITY OF NEW YORK, 63/64TH STREET  
ASSOCIATES, and SHOPWELL, INC., ROYALE  
CONDOMINIUM ASSOCIATION,  
EICHNER PROPERTIES and DOUGLAS ELLIMAN

Defendants.

-----  
63/64TH ASSOCIATES, L.P. s/h/a 63/64TH STREET  
ASSOCIATES,

INDEX NO. 590726/06

Third-Party Plaintiff,

Decision and Order

- v -

ROYALE CONDOMINIUM ASSOCIATION,  
EICHNER PROPERTIES and DOUGLAS ELLIMAN

Third-Party Defendants.

-----  
Plaintiff brings this action for personal injuries allegedly caused by a broken,  
cracked or raised grate around a tree well located north of East 63<sup>rd</sup> Street New York,  
New York on February 15, 2005. None of the parties include the complaint, so the

exact nature of the accident is not known. Defendants Royale Condominium Association and Douglas Elliman ("Royale") move to vacate plaintiff's note of issue; compel plaintiff to respond to Royale's demand dated February 26, 2007; compel defendants 63/64th Street Associates, L.P. s/h/a 63/64th Street Associates ("Associates"), the premises' landlord, and Shopwell, Inc. ("A&P") to respond to a demand dated April 24, 2007; and extend the time to move for summary judgment for one hundred twenty days after all discovery is complete. Plaintiff and Associates oppose the motion. A&P opposes and cross-moves for a protective order; for an order striking moving defendants' answer; or, in the alternative, compelling Royale to respond to its discovery demands. Royale opposes A&P's cross-motion. Defendant the City of New York ("City") does not submit papers.

Royale argues that plaintiff filed his note of issue before all discovery was complete in this action and thus, the note of issue filed on July 10, 2007 should be vacated. Royale served plaintiff with a "supplemental notice for discovery and inspection" dated February 26, 2007 which contained a request for several authorizations. Plaintiff responded but made the authorizations out to Counsel directly, rather than the law firm. Royale sent plaintiff a letter dated June 22, 2007 advising him of the error but plaintiff did not respond. Plaintiff now claims that a courtesy copy of the authorizations made out to the firm "is being provided."

Royale served A&P and Associates with a supplemental notice for discovery and inspection dated April 24, 2007 requesting the following: (1) a copy of the Certificate of Partnership for 63/64th Street Associates; (2) a copy of the lease between 63/64th Street Associates and the Food Emporium, Shopwell, Inc. And/or the Great Atlantic A&P for the premises in question; (3) Copies of written correspondence or complaints regarding the Food Emporium, Shopwell, Inc., and/or the Great Atlantic A&P: storing materials on the sidewalks adjacent to the premises in question, using heavy equipment and/or hand trucks on the sidewalks adjacent to the premises in question, damaging the sidewalks adjacent to the premises in question, and parking and deliveries to the premises in question; (4) copies of maintenance and repair records of the sidewalks adjacent to the premises in question caused by regarding [sic] the Food Emporium, Shopwell, Inc., and/or the Great Atlantic A&P: storing materials on the sidewalks adjacent to the premises in question, using heavy equipment and/or hand trucks on the sidewalks adjacent to the premises in question, damaging the sidewalks adjacent tot he premises in question, and parking and deliveries to the premises in question; and (5) a copy of any accident report

regarding plaintiff, Christopher Rubolino's accident.

A&P, in opposition, argues that the third and fourth demands are improper, overly broad and unduly vague. A&P submits the deposition testimony of Norman Feinberg, Managing Partner with Associates. Mr. Feinberg states that he never received any complaints about the subject tree grates, and that he would be the person who would receive such complaints. Mr. Feinberg also testifies about activities involving the sidewalk in front of A&P:

Q: Did you ever observe or did you ever receive complaints about A&P storing the cartons or pallets on the frontage on 3<sup>rd</sup> Avenue?

A: No, I did not.

Q: On your visit to the property, did you ever see deliveries being made to the Food Emporium?

A: Sure.

Q: Did you ever see the trucks that were making the deliveries mount the sidewalks?

A: No.

Q: Did you ever observe anyone parking on the sidewalk on your trips to the building?

A: No. (Feinberg Deposition Page 44, Lines 2-19)

A&P also submits the deposition testimony of Sean Rafferty, Store Manager. Mr. Rafferty testifies that he never received any complaints about the tree well but that he had received complaints about the sidewalk regarding "dirtiness, rodents" but that those complaints were not directed to the area of the tree well. (Rafferty Deposition, Page 31 Lines 13-18). Additionally, Mr. Rafferty testifies that it is not the responsibility of A&P to clean or maintain the sidewalk. Rather, Royale would send someone to do it. (Rafferty Deposition, Page 31 Lines 19-25, Page 32 Line 1-9). Based on the testimony of both Mr. Feinberg and Mr. Rafferty, A&P argues that it should not be compelled to produce demands numbered three and four. Moreover, A&P argues that it served Royale with timely objections to such demands. Finally, A&P, in support of its cross-motion, argues that Royale has not complied with several court orders or with its demands for discovery and inspection.

Royale opposes the cross-motion and provides the following items: a response to A&P's combined demands dated November 1, 2006; an insurance policy;

plaintiff's worker's compensation claim report; plaintiff's medical report by Dr. Richard S. Obedian, plaintiff's medical report by Dr. Steven A. Simonsen; plaintiff's physical therapy report; a "response to compliance conference order"; a copy of two shipping labels from plaintiff counsel's office to both City and A&P; a response to A&P's demands dated April 9, 2007; a response to A&P's demands dated April 11, 2007; a copy of the Minutes of the Meeting of the Board of Managers; and a response to A&P's demands dated September 7, 2007. Royale claims that, in addition to the aforementioned items, they have sent A&P five-hundred and forty pages of exhibits that were too voluminous to attach here.

22 NYCRR 202.21(e) states:

Within 20 days after service of a note of issue and certificate of readiness, any party to the action. . . may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial . . .

CPLR §3103 states, in relevant part:

The court may at any time on its own initiative, or on motion of any party . . . make a protective order denying, limiting, conditioning or regulating the use of any disclosure device . . .

A&P has attempted to show, through deposition testimony, that it does not maintain or repair the sidewalk or tree well in question. However, it does not specifically respond to the request for copies of any written correspondence or complaints it might have received. Nor does it provide maintenance or repair records it might possess. Certainly, if none are in its possession, it should so state.

Wherefore it is hereby

ORDERED that defendants Royale Condominium Association and Douglas Elliman motion to vacate plaintiff's note of issue is denied without prejudice to renew if plaintiff does not serve defendants Royale Condominium Association and Douglas Elliman with the requested authorizations before the next compliance conference date of November 20, 2007, and it is further

ORDERED that defendant Shopwell, Inc.'s cross-motion is denied and it is directed to provide those items requested in the third and fourth enumerated demands of the April 24, 2007 Supplemental Notice for Discovery & Inspection of defendants/third-party defendants Royale Condominium Association and Douglas Elliman within 30 days of receipt of this order with notice of entry.

All other relief requested is denied.

This constitutes the decision and order of the court.

DATED: September 28, 2007

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EILEEN A. RAKOWER, J.S.C.