Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

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BARBARA T. LIGHTSY and MICHAEL LIGHTSY,

Plaintiffs,

- against -

CITY OF NEW YORK, MARION SCOTT REAL ESTATE, INC., and ROCHDALE VILLAGE, INC.,

Defendants.

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Index Number: 4469/06

Motion Date: OCT. 16, 2007

Motion Cal. Number: 17
Motion Seq. No. 1

The following papers numbered1 to 11 read on this motion by defendants Marion Scott Real Estate, Inc. and Rochdale Village, Inc. for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition to Motion-Exhibits.....	5-7
Affirmation in Opposition to Motion.....	8-9
Reply Affirmation.....	10-11

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

Motion by Marion Scott and Rochdale Village for summary judgment, pursuant to CPLR 3212, is denied.

In order to obtain summary judgment, movant must make a prima facie showing that she 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]). Movants have failed to meet their burden.

Barbara Lightsy allegedly sustained injuries as a result of tripping and falling upon a broken, uneven and depressed area of the public sidewalk surrounding an electrical vault cover located on 127th Avenue between Building No. 5 of Rochdale Village and

Bedell Street in Queens County adjacent to the premises owned by Rochdale Village on December 30, 2004.

Rochdale and Marion (the registered managing agent of Rochdale) move for summary judgment dismissing the complaint as against them upon the ground that they did not create the condition of the sidewalk or cause it through a special use of the electrical vault.

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 property owner created the defective condition or caused it through some special use, or unless a statute charges the owner with the responsibility to repair and maintain the sidewalk and specifically imposes liability upon the owner for injuries resulting from a violation of the statute (see Solarte v. DiPalmero, 262 AD 2d 477 [2nd Dept 1999]).

Movants have annexed to their moving papers an affidavit of Corey Jones, employed by Rochdale as its director of maintenance whose duties include conducting searches of Rochdale records. He averred that Rochdale neither installed nor uses the subject electrical vault. The photographs annexed to the moving papers show the electrical vault cover in question. Said cover has stamped upon it, "N.Y.C. Electrical."

Movants contend that the vault/vault cover was neither installed by them nor did it constitute a special use benefitting their property, and therefore, it was the owner of the vault cover (which movants contend is the City) that bore responsibility for the condition of the sidewalk surrounding the cover. In this regard, plaintiffs and the City fail to rebut movants' prima facie showing, through the affidavit of Jones, that Rochdale neither installed the cover nor made any use of the vault and, therefore, neither created the defective condition of the sidewalk nor made a special use thereof.

However, even though movants have shown that they neither created the condition nor cause it through a special use, they have failed to demonstrate that they were not responsible for the repair and maintenance of the sidewalk pursuant to § 7-210 of the Administrative Code. That section imposes liability upon property owners for failing to repair and maintain the public sidewalks abutting their property, except owners of one to three-family homes that are either wholly or partially owner-occupied and used exclusively for residential purposes. It is uncontested that Rochdale is a large apartment complex that does not fall within the exception to §7-210.

Movants argue that since the electrical vault cover belongs to

the City, the City is responsible for maintaining the sidewalk perimeter adjacent to the cover and that Rochdale bears no responsibility as a matter of law. The City, in its opposition papers, does not deny that the cover belongs to the City and does not rebut movants' demonstrative evidence to this effect. Indeed, the City concedes that "Rochdale's duty does not arise out of a special use or cause and create theory." Instead, the City contends that liability is imposed upon Rochdale by §7-210.

The Highway Rules governing underground street access covers, transformer vault covers and gratings (34 RCNY §2-07[b][1]) provides, "The owners of covers or gratings on a street are responsible for monitoring the condition of the covers and gratings and the area extending twelve inches outward from the perimeter of the hardware." Therefore, if the defective sidewalk area upon which plaintiff tripped was within 12 inches of the electrical vault cover, responsibility therefor would belong to the owner of the cover, which plaintiffs allege, and the demonstrative evidence indicates, is the City (see Cruz v. New York City Transit Authority, 19 AD 3d 130 [1st Dept 2005]). Conversely, it follows that if the defective area of the sidewalk upon which plaintiff tripped was outside the 12-inch zone of responsibility of the owner of the cover, liability would remain upon the abutting property owner, pursuant to §7-210.

Movants fail either to allege or to demonstrate that the area of the sidewalk upon which plaintiff tripped was within 12 inches of the vault cover. Moreover, this Court is unable to ascertain from an examination of the photographs annexed to the moving and opposition papers whether all portions of the depressed and/or defective area surrounding the cover were within 12 inches of the cover. The record on this motion fails to establish the precise location where plaintiff tripped and, therefore, the Court cannot determine whether Rochdale was responsible for that area of the defective perimeter around the cover.

In addition, an area of the sidewalk bordering the vault cover appears to be grass and dirt and part of that area of sidewalk appears to have been constructed specifically in that manner to accommodate the vault cover. Thus, even if the location where plaintiff tripped was further than 12 inches from the vault cover, there is also a question of fact whether the condition which caused plaintiff to trip was part of the design of the sidewalk created by the City and not merely a broken or deteriorated flag which Rochdale and Marion failed to repair or maintain.

Therefore, issues of fact remain as to the liability of Rochdale, Rochdale's managing agent Marion, and the City.

Accordingly, the motion is denied.

Dated: October 30, 2007

KEVIN J. KERRIGAN, J.S.C.