[* 1]

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

PRESENT : DONNA M. MILLS **PART 21**

Justice

ARDEN, MARY DAWNE

Plaintiff,

-v-

NEW YORK CITY TRANSIT AUTHORITY, et al.,
Defendants.

INDEX NO. 100704/05

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL NO.

The following papers, numbered 1 to _____ were read on this motion for Summary Judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	
Answering Affidavits– Exhibits	
Replying Affidavits	

CROSS-MOTION: _____ YES ✓ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 1-4-08

J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

----------x

MARY DAWNE ARDEN,

Plaintiff,

-against-

Index No. 100704/05

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY and YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF THE CITY OF NEW YORK,

Defendants.

DONNA MILLS, J.

Defendant Young Women's Christian Association of the City of New York (YWCA) moves for summary judgment dismissing all claims and cross claims brought against it.

This is a personal injury action. On December 15, 2003, at approximately 12:00 p.m., plaintiff fell over an emergency subway escape hatch cover located over the Lexington Avenue subway line on Lexington Avenue between 52nd and 53rd Streets. Plaintiff is suing the City of New York (City), the New York City Transit Authority (NYCTA) and YWCA, which, at the time of this accident, owned the building adjacent to the escape hatch cover on the sidewalk.

YWCA contends that it should be granted summary judgment on the grounds that it is not liable to plaintiff in any way. YWCA states that the hatch was owned by City and maintained by NYCTA. YWCA relies on deposition testimony from Vincent Moschello, an employee of NYCTA, who identified the hatch and claimed that his employer was responsible for maintaining the hatch. YWCA asserts that it does not own, maintain or use the hatch.

YWCA cites section 7-120 of the New York Administrative Code (Code), which became effective on September 14, 2003. It provides the following:

> a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.
>
> b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other materials from the sidewalk.

YWCA states that, in the present case, it is not liable for the condition of the hatch cover, because the hatch cover is not part of the sidewalk. YWCA argues that its liability is limited to the condition of the sidewalk itself.

In opposition, plaintiff contends that the Code provision extends YWCA's liability to the condition of the hatch cover and that the accident occurred three months after the effective date of the provision. Although section 7-210 does not define the term "sidewalk," plaintiff cites section 19-101(d) of the Code, which also deals with sidewalk maintenance, defining sidewalk as "that portion of the street between the curb line and the adjacent property lines, but not including the curb, intended for the use of pedestrians."

Plaintiff, relying on photographs of the hatch cover on the sidewalk, argues that the hatch cover was clearly in the middle of the sidewalk area. Plaintiff asserts that since pedestrians commonly walk in that area, the hatch is plainly within the definition of a "sidewalk."

The City is generally liable for accidents caused by sidewalk defects that occurred prior to September 14, 2003. Rodriquez v City of New York, 12 AD3d 282 (1st Dept 2004). Where a sidewalk accident occurred prior to that date, the abutting property owner was not liable unless

the owner either caused the defect to occur because of some special use, or actually created the defect. Zektser v City of New York, 18 AD3d 869 (2d Dept 2005). Since September 14, 2003, liability has shifted from City to the owner.

In previous decisions, the courts have construed this provision to exclude liability for defective curbstones, which were specifically excluded from the definition of "sidewalk" under section 19-101. See Irizarry v The Rose Bloch 107 University Place Partnership, 12 Misc3d 733 (Sup Ct Kings County 2006). One of the few such cases to reach the Appellate Division, Vucetovic v Epsom Downs, Inc., 45 AD3d 28 (1st Dept 2007), held that a tree well is not part of the sidewalk and remains the responsibility of the City. In dismissing the case against the abutting property owner, the court emphasized that a sidewalk is defined in section 19-101 as that portion of the street between the curb lines but not including the curb, intended for pedestrians. The court noted that neither trees nor tree wells were intended for the use of pedestrians and thus were not part of the sidewalk. It is noted that this was a 3-2 decision.

The lower courts have addressed liability arising from defects arising from city equipment. In Manning v City of New York, 16 Misc3d 1132(A) (Sup Ct Richmond County 2007), plaintiff stepped into an unguarded metal hole created by City's removal of a damaged fire hydrant before a replacement could be installed. The court dismissed the action against the abutting owner, rejecting plaintiff's contention that the duty imposed upon abutting owners has no exceptions for holes created by missing hydrants. Liability was squarely upon City.

In King v Alltom Properties, Inc., 16 Misc3d 1125(A) (Sup Ct Kings County 2007), where plaintiff tripped and fell over a broken protruding City metal signpost which was repaired by City after the accident, the court rejected City's assertion that the abutting owner was

responsible for the accident under Section 7-210. It is apparent that objects such as signposts, fire hydrants and light posts are intended to protrude from the sidewalk and do not fall within the owner's responsibility.

This court finds that the hatch and hatch cover are not the responsibility of YWCA. Such entities are exempt from the Code provision. It would not be fair to require YWCA to repair and maintain an escape hatch cover that has traditionally been repaired or maintained by NYCTA. Thus, the escape hatch cover is outside the scope of YWCA's authority.

Accordingly, it is

ORDERED that YWCA's motion for summary judgment is granted and the complaint is severed and dismissed as against YWCA, and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 1-11-08

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.