

**Hancock v City of New York**

2008 NY Slip Op 30763(U)

March 17, 2008

Supreme Court, New York County

Docket Number: 0117316/2005

Judge: Eileen A. Rakower

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

EILEEN A. RAKOWER

PRESENT: \_\_\_\_\_ Justice J.S.C.

PART S

Index Number : 117316/2005

HANCOCK, FRED A ROSS

vs  
CITY OF NEW YORK

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. 117316/05

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

MOTION SEQ. NO. 004

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

this motion to/for \_\_\_\_\_

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

**FILED**

MAR 18 2008

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 3/17/08

**EILEEN A. RAKOWER**  
[Signature]  
J.S.C.

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  
FREDA ROSS HANCOCK,

Plaintiff,

Index No.  
117316/05

- against -

Seq No.: 004

Decision and  
Order

THE CITY OF NEW YORK, VERIZON,  
EMPIRE CITY SUBWAY LIMITED and  
CONSOLIDATED EDISON COMPANY  
OF NEW YORK, INC.,

Defendants.

-----X  
CONSOLIDATED EDISON COMPANY  
OF NEW YORK., INC.,

Third-Party Plaintiff

Third-Party  
Index No.:  
590613/06

-against-

NICO ASPHALT, INC. AND TRIUMPH  
CONSTRUCTION CORP.,

Third-Party Defendants.

-----X  
HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries she allegedly sustained when

she tripped and fell over a metal spike in the crosswalk located at West 52<sup>nd</sup> Street and 5<sup>th</sup> Avenue, in the County and State of New York on April 22, 2005. Defendant the City of New York ("City") moves for summary judgment pursuant to CPLR 3212. No party opposes the motion.

City, in support of its motion, argues that it did not have prior written notice of the subject defect as is required by New York City Administrative Code §7-210(c)(2). City submits: (1) plaintiff's notice of claim; (2) the pleadings; (3) a copy of the "response sheet" produced pursuant to a search request and annexed to the response sheet are copies of seven street opening permits and one complaint; (4) a Big Apple Pothole and Sidewalk Map for the subject location; and (5) the deposition transcript of Sherry Johnson, Record Searcher for the Department of Transportation ("DOT").

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

New York City Administrative Code §7-210(c)(2) states, in relevant part:

No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any . . . sidewalk . . . being out of repair, unsafe, dangerous, or obstructed, unless it appears that written notice . . . was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice.

City submits the deposition testimony of a DOT record searcher who testifies that no complaints, repair orders, or violations existed regarding the specific defect

which allegedly caused plaintiff's injuries. Although the search revealed that seven permits were issued, none of them showed that the City did any work in the area of the defect. It is well settled that the City's issuance of a work permit does not constitute evidence of prior written notice. (*Levbarg v. City of New York*, 282 A.D.2d 239[1st Dept. 2001]). The single complaint discovered in the search was for the existence of a "pot hole" in the area. The defect complained of here is a "metal spike." In any event, City submits a record which shows that the pot hole was repaired on March 14, 2004.

City also submits a copy of the Big Apple map which does not show any markings for the subject defect. Further, plaintiff does not come forward with evidence that City caused or created the defect. Where the movant has established a prima facie showing of entitlement, a summary judgment motion unopposed on the merits shall be granted. (*Crawford v. Liz Claiborne, Inc.*, 844 N.Y.S.2d 273, N.Y.A.D [1st Dept.2007]).

Wherefore it is hereby

ORDERED that defendant's motion is granted without opposition and the complaint is hereby severed and dismissed as against defendant the City of New York and the clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Plaintiff shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158. Any compliance conferences currently scheduled are hereby cancelled; and it is further

**FILED**

ORDERED that the remainder of the action shall continue. MAR 18 2008

DATED: MARCH 17, 2008

  
NEW YORK  
CLERK'S OFFICE  
EILEEN A. RAKOWER, J.S.C