

<b>Brno v City of New York</b>
2008 NY Slip Op 30854(U)
March 21, 2008
Supreme Court, New York County
Docket Number: 0120982/2003
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. PAUL G. FEINMAN

PRESENT:

PART 52

ustice

Index Number : 120982/2003

BRNO, PAUL

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : # 006

SUMMARY JUDGMENT

INDEX NO. 120982-03

MOTION DATE

MOTION SEQ. NO. #006

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

read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

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

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

1  
2, 5  
3, 6  
4

Cross-Motion:  Yes ~~NO~~ No *Cross Motion*

Upon the foregoing papers, It is ordered that this motion

**FILED**

MAR 26 2008

NEW YORK  
COUNTY CLERK'S OFFICE

MOTION AND CROSS MOTION(S) ARE DECIDED  
IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

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

Dated: 3/21/08

*[Signature]*

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X

PAUL BRNO, and FRANCESCA BRNO, his wife,  
Plaintiff,  
against

Index Number 120982/2003  
Mot. Seq. No. 006

THE CITY OF NEW YORK, TURTLE BAY  
ASSOCIATION, INC., JOSEPH SOFIELD CITY-  
SCAPE, INC., THE DOE FUND, INC., BREMEN  
HOUSE, INC., Z & L 52, INC., REMEDY BAR  
GROUP, LLC, ABC CORPORATIONS, fictitious  
Corporate Defendants, and JOHN DOES 105,  
fictitious individual defendants,

**DECISION AND ORDER**

Defendants.

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Papers considered in review of this motion and cross-motion for summary judgment:

Papers	Numbered
City-Scape's Notice of Motion and Affidavits Annexed	<u>1</u>
Plaintiff's Affirmation in Opposition	<u>2</u>
City-Scape's Reply to Opposition of Motion	<u>3</u>
Turtle Bay's Notice of Cross-Motion and Affidavits	<u>4</u>
Plaintiff's Affirmation in Opposition to Cross-Motion	<u>5</u>
Turtle Bay's Reply to Opposition of Cross-Motion	<u>6</u>

**FILED**  
MAR 26 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

**PAUL G. FEINMAN, J.:**

The motion and cross-motion are consolidated for purposes of decision.

Defendant Joseph Sofield City-Scape, Inc. moves pursuant for summary judgment in its favor. Defendant Turtle Bay Association, Inc. cross-moves for summary judgment in its favor. Plaintiff opposes both the motion and cross-motion. The City of New York has not opposed the

motion or cross-motion.<sup>1</sup> For the reasons set forth below, defendant City-Scape's motion and Turtle Bay's cross-motion for summary judgment are granted in the entirety and the complaint and any cross claims dismissed as against them.

### ***Factual Background***

Plaintiff Paul Brno allegedly was injured on May 10, 2003, when he tripped and fell over a loose cobblestone on the sidewalk while walking south in front of 972 Second Avenue between 51<sup>st</sup> and 52<sup>nd</sup> Streets (Not. of Mot. Ex. A, Ver. Compl. ¶¶16, 18, 19). Plaintiff commenced this suit for personal injuries on or about December 2003 (Not. of Mot. Ex. A, Ver. Compl.).

According to the plaintiff's testimony at his Gen. Mun. Law 50-h hearing, at the time of the accident, he was walking in the middle of the sidewalk in the morning between 1:00 am and 1:30 am when he observed people gathered on the sidewalk, smoking and drinking, in front of Fu's Restaurant and Remedy Bar (Not. of Mot. Ex. E, EBT of Paul Brno [hereinafter Brno EBT] 7). He states that he attempted to walk through the people but they were not moving, so he had to walk around a tree planter near the curb (Brno EBT 24, 25). He further states that upon coming into contact with the cobblestones, he fell face down to the ground, and was rendered unconscious (Brno EBT 46).

According to plaintiff, he has no personal recollection of what caused his accident (Brno EBT 13, 119). He states that he does not know what caused him to fall, but does remember falling (Brno EBT 119). He also states that, one week after the accident, he learned from Mr.

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<sup>1</sup>This court previously granted summary judgment in favor of defendants The Doe Fund, Inc., Remedy Bar Group and Bremen House, Inc. and dismissed the complaint and any cross claims as against these (See, Dec. & Order, Mot. Seq. 004, dated Jan.10, 2007, entered Jan. 12, 2007 and Dec. & Order, Mot. Seq. 005, dated Nov. 7, 2007, entered Nov. 9, 2007).

Alongi, a police officer, that witnesses reported that a loose cobblestone caused plaintiff's accident (Brno EBT 47). Brno explained that but for the officer's telling him, he did not know that the stones were there on the date of the accident (Brno EBT 119).

Plaintiff submits photographs of the tree well at 972 Second Avenue, however, he testified that the photographs were taken a week or two and maybe even a month after the accident occurred (Not. in Opp. to Cross-Mot., Ex. B; Brno EBT 44). He also testified that the condition of the tree well at the time of his accident was *not* the way it is seen in the photographs (Brno EBT 16-18). According to plaintiff's testimony, he does not recall when he first noticed loose cobblestones from the tree planter at the site of the accident (Brno EBT 102). He did not report the condition of the cobblestones along the tree well at any time prior to the accident (Brno EBT 86).

Officer Alongi testified that he did not witness plaintiff's accident, and any information that he obtained was the result of information provided by others at the scene of the accident (Not. of Cross-Motion, Ex. E, EBT of Emanuele Alongi [hereinafter Alongi EBT], 55). He testified that, according to his records, a person at the scene, whose identity he does not recall, told him that plaintiff was walking, tripped, and fell (Alongi EBT 62, 63). The officer did *not* testify that loose cobblestones caused plaintiff to fall or that such was conveyed to him by the witnesses present (Alongi EBT 63).

Defendant Joseph Sofield City-Scape, Inc. (City-Scape) produced Vincent Sofield, Secretary of the corporation, for deposition testimony (Not. of Mot., Ex. F, EBT of Vincent Sofield [hereinafter Sofield EBT]). Mr. Sofield testified that, City-Scape originally built the tree planters that are situated along Second Avenue, at the request of and according to the

specifications of Turtle Bay Association, Inc. (Turtle Bay) (Sofield EBT 44, 45). According to City-Scape's records, it made repairs to the tree beds along Second Avenue in October 2002 as requested by Turtle Bay (Sofield EBT 9; Not. of Mot., Ex. G). Mr. Sofield states that Turtle Bay is the only entity that would request City-Scape to make repairs to the tree beds (Sofield EBT 9; Not. of Mot., Ex. G). City-Scape also states that it did not receive any requests or orders to make repairs to the tree beds from Turtle Bay between January 2003 and May 2003, nor did it perform any inspections on the tree beds along Second Avenue (Sofield EBT, 34, 35, 51).

### *Contentions*

City-Scape now moves for summary judgment on the ground that plaintiff cannot produce evidence in admissible form to show negligence on its part (Not. of Mot., ¶ 10). City-Scape argues that it owed no duty to plaintiff (Not. of Mot., ¶ 8). It states that, if it owed a duty with respect to the tree planters, the duty would be owed to the co-defendant, Turtle Bay, the party with whom it entered into a contract (Not. of Mot., ¶ 8). City-Scape also argues that it was not on notice of any defective cobblestones, since it had not been made aware of the alleged broken cobblestones (Not. of Mot., ¶ 9).

Defendant Turtle Bay cross-moves for summary judgment arguing that, plaintiff's own testimony acknowledges that plaintiff has no actual knowledge of what caused his accident (Not. of Cross-Mot., ¶¶ 6, 7). Turtle Bay also contends that it did not create the alleged defect, nor did it have knowledge of the alleged defect (Not. of Cross-Mot., ¶¶ 11, 12). According to the deposition of Mr. Curtis, Turtle Bay's President, the company's records indicate that it had never received any complaints regarding the condition of the tree beds on Second Avenue between 51<sup>st</sup> and 52<sup>nd</sup> Streets prior to the plaintiff's accident (Not. of Cross-Mot., Ex. C, EBT of William

Curtis, 1 2).

Plaintiff opposes both the motion and cross-motion.

### *Legal Analysis*

Summary judgment is proper when there is no genuine issue of material fact upon which the court could find as a matter of law for the non-moving party (*Di Menna & Sons, Inc., v New York*, 301 NY 118, 121 [1950]). It is a drastic remedy that should not be granted if the issue is arguable or if there is doubt as to whether a triable issue exists (*Rotuba Extruders, Inc. v Ceppos et al*, 46 NY2d 223, 231 [1978]; *Krupp v Aetna Life & Casualty Co.*, 103 AD2d 252, 261 [2d Dept. 1984]). Issue finding as opposed to issue determination is essential to summary judgment (*Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

To prevail on a summary judgment motion, the moving party must produce evidence in admissible form to conclude that summary judgment should be granted in her favor (*Shaw v Time-Life Records*, 38 NY2d 201, 207 [1975]). The evidence will be construed in the light most favorable to the moving party (*Makaj v Metro. Transp. Auth.*, 18 AD3d 625, 626 [2d Dept. 2005]). Once the moving party has met its burden, and demonstrates its entitlement to summary judgment, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring trial (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

Bare allegations are insufficient to create a genuine issue of fact, and thus, defeat summary judgment (*S.J. Capelin Assoc., Inc. v Globe Mfg Corp.*, NY2d 338, 342 [1974]). A party will not succeed in defeating summary judgment where it offers only surmises, suspicions or conjectures that are unsupported by evidence (*Izzo v Lynn*, 271 AD2d 801, 802 [3<sup>rd</sup> Dept.

2000]; *Zuckerman* 49 AD2d at 562).

Generally, liability for a dangerous or defective condition on property is predicated upon establishing ownership, control or special use of the property (*Turrisi v Ponderosa, Inc.*, 179 AD2d 956, 957 [3<sup>rd</sup> Dept. 1992]; *see also, Kiselis v Speculator Chamber of Commerce*, 234 AD2d 677, 678 [3<sup>rd</sup> Dept. 1996]). The law in New York at the time of plaintiff's injury, May 10, 2003, was that the City had a duty to maintain all sidewalks in a reasonably safe condition, and was generally responsible for accidents that occur on the public sidewalks if it had prior written notice of the defective condition at issue<sup>2</sup> (*see, Weiskopf v City of New York*, 5 AD3d 202, 203 [1<sup>st</sup> Dept. 2004]; *see also, D'Ambrosia v New York* 55 NY2d 454, 457 [1982]). It is well settled that under the then-existing sidewalk law, landowners or occupiers did not owe a duty to pedestrians injured on the sidewalk (*Lattanzi v Richmond Bagels, Inc.*, 291 AD2d 434 [2d Dept. 2002]). Liability could only be imposed on the abutting landowner where the landowner either (a) created the defective condition, (b) voluntarily but negligently made repairs, (c) created the defect through special use, or (d) violated a statute or ordinance which expressly imposes liability on the abutting landowner for failure to repair (*Loforese v Cadillac Fairview Shopping Ctrs.* 235 AD2d 399, 399-400 [2d Dept. 1997]).

The law with respect to liability for persons injured on public sidewalks pertain primarily to municipalities and owners and lessees of the abutting property (*see NYC Admin. Code* §§7-201, 7-210). However, liability may also be imposed under a general theory of negligence

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<sup>2</sup> Section §7-210 of New York's Administrative Code, which became effective on September 14, 2003, shifted the duty to maintain and repair sidewalks from the City to abutting landowners.

against persons not falling within the category of municipality, owner or lessee. A *prima facie* case of negligence requires plaintiff to show that defendant owed a duty of care to the plaintiff, breach of that duty, and that the defendant's actions proximately caused plaintiff's injury (*see Boltax v Joy Day Camp*, 67 NY2d 617 [1986]). A duty of care may be established based on contract or by operation of law (*see, Palka v Servicemaster Management Svcs, Corp.* 83 NY2d 579, 586 [1994]). A duty may also arise by the creation of a special relationship requiring defendant to protect against the risk of harm to plaintiff (*Eiseman v State of New York*, 70 NY 2d 175, 187-188 [1987]). Thus, liability may be imposed where a public sidewalk is repaired in a negligent manner, creating a dangerous condition, resulting in injury to pedestrians (*see, Mendoza v City of New York*, 205 AD2d 741, 742 [2d Dept. 1994]).

In order to establish liability on the part of a defendant, plaintiff must prove that the defendant created the defect at issue or negligently repaired the sidewalk (*see, e.g., Elmy v City of Amsterdam*, 25 AD3d 1038, 1040 [3<sup>rd</sup> Dept.], *lv denied*, 6 NY3d 713 [2006]; *see also* [*Shatzman v New York*, 31 NY2d 690, [1972]). Expert testimony may be used to support plaintiff's claim that the defendant negligently repaired a sidewalk or other structure (*see Xenakis v Vorilas*, 166 AD2d 586, 587 [2d Dept. 1990] [finding that the evidence produced by plaintiff in conjunction with expert testimony was sufficient to defeat defendant's motion for summary judgment]; *see also, Palazzo v City of New Rochelle*, 236 AD2d 528, 529 [2d Dept. 1997]).

In this case, City-Scape is a landscaping company that contracted with Turtle Bay to construct the tree well on Second Avenue. It did not have an on-going duty to maintain or repair the tree well. City-Scape's records show that it made repairs to the tree well at issue in October 2002, at the request of Turtle Bay. A duty of care to the plaintiff would have been created if it

was negligent in its repair of the tree well in October 2002. Here, City-Scape's moving papers sufficiently make a *prima facie* showing that it did not negligently repair the tree well and the burden shifted to plaintiff as the party opposing a motion for summary judgment to put forth evidentiary facts creating a material question of fact to be resolved at trial. In reviewing the evidence, the court has afforded plaintiff every favorable inference and with respect to defendant City-Scape, plaintiff's opposition is based solely on speculation and surmise.

Assuming, however, the cobblestones were indeed loose as plaintiff contends (a fact not actually established by admissible evidence), this condition in and of itself is insufficient to attribute the defect of the tree well to the alleged negligent repair by defendant City-Scape. There is no evidence, expert or other, establishing that City-Scape's repair caused the cobblestone to become loose as opposed to the use of the tree as an impromptu bicycle rack (Brno EBT 86 [employees of Fu Restaurant parked bicycles by tree]). Furthermore, there is no evidence that City-Scape received notice to repair the sidewalk in more than six months prior to plaintiff's accident.

As such, plaintiff has not produced evidence in admissible form, expert or otherwise, to show that City-Scape negligently repaired the tree well or caused or created the defect (see *Ovisinak v Town of Southold*, 277 AD2d 295, 296 [2d Dept. 2000] [holding that the "plaintiff's unsubstantiated allegations that the defendant negligently constructed the sidewalk, made in the affirmation of their attorney, who had no personal knowledge of the facts was insufficient to defeat the defendant's motion"]; see also, *Meyer v Guinta*, 262 AD2d 463 [2d Dept. 1999] [granting summary judgment where plaintiff failed to produce evidence to support allegations that defendant made special use of the sidewalk, breached statutory duty to maintain sidewalk or

that defendant negligently repaired the sidewalk]). Since plaintiff has failed to raise a triable issue of fact, summary judgment must be granted as to defendant City-Scape.

Turning to Turtle Bay's cross-motion, it argues that summary judgement is appropriate because plaintiff cannot establish what caused his accident. Turtle Bay, a neighborhood beautification association, hired City-Scape to construct the tree well that allegedly caused plaintiff's injury. While plaintiff opposes the cross-motion for summary judgment primarily on the ground that Turtle Bay had notice, constructive or otherwise, of the loose cobblestones, and failed to remedy the condition, this court need not reach this issue (*see Christopher v N.Y. City Transit Auth.*, 300 AD2d 336 [2d Dept. 2002]), based on Turtle Bay's argument that plaintiff's deposition testimony revealed that he does not know and has no independent recollection of whether a loose cobblestone caused his accident.

On a motion for summary judgment, proof that the defendant proximately caused plaintiff's accident must be sufficient to draw logical inferences from the evidence, and not based upon speculation (*Robinson v City of New York*, 18 AD3d 255, 256 [1<sup>st</sup> Dept. 2005]). Where an injured plaintiff does not know or cannot recall what caused her injury, defendant is entitled to judgment as a matter of law (*Fishelberg v Emmons Ave. Hospitality. Corp.*, 26 AD3d 460, 461 [2d Dept. 2006]; *Fishman v Westminster House Owners, Inc.*, 24 AD3d 294 [1<sup>st</sup> Dept. 2005]; *Burnstein v Mandalay Caterers*, 306 AD2d 428 [2d Dept. 2003]; *Sanchez v City of New York*, 305 AD2d 487 [2d Dept. 2003]).

While it is not the role of the court to determine the credibility of the evidence, its job is to determine whether triable issues of fact exists (*see S.J. Capelin Assoc. v Globe Mfg. Corp.*, NY2d 338 at 341). Here, the plaintiff's deposition testimony that he did not know what caused

the accident is fatal to his complaint (*Golba v City of New York*, 27 AD3d 524 [2d Dept. 2006], citing *Curran v Esposito*, 308 AD2d 428, 429 [2d Dept. 2003]). Plaintiff's affidavits do not raise a triable issue of fact, since they would require a jury to speculate as to the existence of the alleged defective tree well at the time of the accident and as to the cause of plaintiff's fall (*see, e.g., Rudner v New York Presbyt. Hosp.* 42 NY3d 257, 258 [1<sup>st</sup> Dept. 2007]; *Jones v City of New York*, 289 AD2d 452, 453 [2d Dept. 2001]; *Robinson v Lupo*, 261 AD2d 525, 525-526 [2d Dept. 1999]). Thus, summary judgment and dismissal of the complaint is granted as to defendant Turtle Bay. It is therefore

ORDERED that the motion by City-Scape for summary judgment is granted and the complaint and all cross-claims and counterclaims against it are dismissed with costs and disbursements to the defendant City-Scape as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the cross-motion by Turtle Bay for summary judgment is granted and the complaint and all cross-claims and counterclaims against it are dismissed with costs and disbursements to the defendant Turtle Bay as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the action is severed and continued as against the remaining defendants (City of New York, Z&L 52, Inc., ABC Corporation [fictitious corporate defendants], and John Does 105, [fictitious individual defendants]); and it is further

ORDERED that the caption shall be amended to reflect the dismissal of the complaint as against defendants City-Scape and Turtle Bay, and also as against defendants dismissed by prior order of the court (The Doe Fund, Remedy Bar Group, and Bremen House, Inc.); and it is further

ORDERED that the movant shall serve a copy of this decision and order on all parties, and on the Clerk of the Court (60 Centre, Bsmt), who shall amend the caption and enter judgment accordingly, and upon the Trial Support Office (60 Centre, Rm. 158), which shall amend the caption accordingly; and it is further

ORDERED that the remaining parties are to appear at the previously scheduled settlement conference on June 9, 2008, at 9:30 a.m. before J.H.O. William Leibovitz, 80 Centre Street, Room 103.

This constitutes the decision and order of the court.

Dated: March 21, 2008  
New York, New York

  
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J.S.C.

**FILED**  
MAR 26 2008  
NEW YORK  
COUNTY CLERK'S OFFICE