

**Scupp v City of New York**

2008 NY Slip Op 30941(U)

March 31, 2008

Supreme Court, New York County

Docket Number: 0110461/2005

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 : 110461/2005

SCUPP, KATHLEEN

vs

CITY OF NEW YORK

Sequence Number : 002

DISMISS COMPLAINT

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

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

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

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

The following papers, numbered 1 to \_\_\_\_\_ were filed in his motion to/for \_\_\_\_\_

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

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

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

PAPERS NUMBERED

1  
2,3,4  
5

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

APR 02 2008

COUNTY CLERK'S OFFICE  
NEW YORK

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

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

Dated: 3/31/08

  
**EILEEN A. RAKOWER**  
*J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION *J.S.C.*

Check if appropriate  DO NOT POST  REFERENCE

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

-----X  
KATHLEEN SCUPP,

Plaintiff,

- against -

Index No.  
110461/05  
Mot. Seq. No.: 002

THE CITY OF NEW YORK, THE NEW YORK CITY  
DEPARTMENT OF TRANSPORTATION, IRVING  
PLACE REALTY, LLC., IRVING PLACE ASSOC.,  
JOS-SAN REALTY CORP. and IRVING CLEANERS, INC.

Defendants.

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

DECISION/ORDER

**FILED**

APR 02 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Plaintiff brings this action for personal injuries allegedly sustained when she tripped and fell on the sidewalk in front of Irving Cleaners located at 77 Irving Place New York, New York on May 29, 2004. Defendant Irving Cleaners, Inc. ("Cleaners") moves for summary judgment pursuant to CPLR 3212. Defendants Irving Place Associates LLC, Irving Place Realty LLC, s/h/a Irving Place Assoc. And Jo-San Realty Corp. ("Irving Place") and plaintiff oppose. Defendants the City of New York and the New York City Department of Transportation ("City") adopt Irving Place's opposition.

Cleaners, in support of its motion, submits the following: the pleadings; the deposition transcript of plaintiff; three black and white photocopies of photographs taken of the alleged defect; the lease between Ditmas Management Corp. and Cleaners; the deposition transcript of Michael Kuen Lee, husband of the owner of Cleaners; and the deposition transcript of Ross Epstein, Managing Agent of Ditmas Management Corp. Plaintiff submits: a portion of Mr. Epstein's deposition transcript; the deposition transcript of Cynthia Howard, Record Searcher for the Department of Transportation; a complaint form dated February 28, 2003; and a notice of violation issued to Irving Place on October 20, 1999. Irving Place submits the lease and City does not submit any exhibits.

Cleaners leases the store on the ground level adjacent to where plaintiff fell. Irving Place is the owner of the building which leases the space to Cleaners. Ditmas Management Corp., a non-party, manages Irving Places' properties. Plaintiff alleges that she tripped over an elevation in the sidewalk. Specifically, plaintiff describes the area in her bill of particulars as "a crack in the center that was elevated, uneven and jagged." Cleaners argues that the defect was "structural" and, pursuant to the lease agreement, it was only responsible for non-structural repairs. The relevant portion of the lease agreement states:

Repairs: Tenant shall, throughout the term of this lease, take good care of the demised premises . . . and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition . .

Irving Place, City and plaintiff, in opposition, argue that a Rider to the lease agreement placed the duty to maintain and repair the sidewalk with Cleaners. Section 63 of the Rider to the Lease states, in relevant part:

Sidewalks: . . . It is agreed by and between the parties that Tenant shall be specifically liable and responsible for the care, maintenance, improvements at the Owner's discretion, of the sidewalk in front of the premises which is presently in good condition but may have surface cracks and scars.

The introduction to the Rider states:

If there shall be any *conflict* (emphasis added) between the provisions of this rider and the provisions contained in the printed form to which this rider is annexed, the provisions of this rider shall govern.

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]).

Initially, a lease and a rider must be read together and all parts must be given effect unless the language of the rider is "irreconcilable with the language of the provision given in the standard form." If the provisions of the lease and the rider are found to conflict, the rider controls. (*Hukle v. Great Am. Ins. Co.* 230 A.D. 477[1st Dept. 1930]). Here, the clause of the standard lease and the clause of the rider governing sidewalks are not wholly inconsistent. When read together, the lease requires Cleaners to make non-structural repairs and improvements to the sidewalk at the owner's discretion.

Generally, the court determines the rights and obligations of parties under a contract if the language of the contract is unambiguous. If, however, the language of the contract is susceptible to "two reasonable interpretations," the resolution of the ambiguity is for the trier of fact. (*State of New York v. Home Indemnity Company*, 66 N.Y.2d 669[1985]). The rider, unlike the standard lease, does not specifically omit structural repairs, while shifting the liability to Cleaners. Even if the rider was interpreted to shift to cleaners the responsibility for the structural repairs, the owner maintained control over such with the language "at the owner's discretion."

Significantly, Irving Place was issued a violation on October 20, 1999 which refers to a "trip hazard" in front of its building. City ordered Irving Place to cure the hazard by replacing "24 square feet of sidewalk." On February 28, 2003, a complaint was received which stated that the "sidewalk is not level creating a trip hazard."

Prior to the enactment of Administrative Code § 7-210, effective September 14, 2003, the municipality, not the abutting landowner, was responsible for the maintenance of the sidewalk. The exception to this was where the abutting landowner either created the defect or derived a special benefit from the sidewalk unrelated to public use. (*Spangel v. City of New York*, 285 A.D.2d 425[1st Dept. 2001]). Pursuant to Administrative Code of the City of New York § 7-210 (c), effective as of September 14, 2003 (and applying to accidents occurring on or after such date), the City of New York is not liable for personal injuries proximately caused by the failure to maintain sidewalks in a reasonably safe condition, except for sidewalks abutting

one, two, or three-family residences which are used exclusively for residential purposes, or except where the City is the abutting property owner.


The parties entered into the agreement containing the rider to the lease on October 27, 2003, after the shift in responsibility for the maintenance of the sidewalk from the City to the abutting property owner. The rider describes the subject sidewalk as being "presently in good condition but may have surface cracks and scars." Pursuant to that rider, Cleaners accepted that it was "specifically liable and responsible for the care, maintenance, improvements at the Owner's discretion, of the sidewalk" in that condition.

While all parties to the rider may have agreed that the sidewalk was in good condition, and presumably they agreed it was not in need of structural repairs at the time of the signing, the surface cracks and scars may well have presented a tripping hazard. A jury may find that allowing the sidewalk to remain in that condition constituted negligence. Indeed, whether the specific defect in question, which is barely visible in the photographs supplied with the motion, was structural or non-structural in nature will also be considered by a trier of fact in assigning responsibility among the parties.

Wherefore it is hereby

ORDERED that defendant Irving Cleaners, Inc's motion for summary judgment is denied.

DATED: March 31, 2008

  
 \_\_\_\_\_  
 EILEEN A. RAKOWER, **FILED**  
 APR 02 2008  
 COUNTY CLERK'S OFFICE  
 NEW YORK