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

PRESENT: HON. PAUL GEORGE FEINMAN PART 52

Justice

RALEIGH

- v -

BROADWAY 48TH 49TH STREET, LLC, et al.

INDEX NO. 101733/06

MOTION DATE 4/28/08

MOTION SEQ. NO. 002

MOTION CAL. NO. 87

The following papers, numbered 1 to 3 were read on this motion to/for SJ.

	PAPERS NUMBERED
Notice of Motion/Petition — Affidavits — Exhibits	1, 2
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is

ORDERED that this motion (~~petition~~) is ~~granted~~ (denied) (~~granted in part and denied in part~~) in accordance with the annexed decision and order (~~decision, order and judgment~~); and it is further

(☑ ORDERED that the parties shall appear by counsel on 10/15/08 at 2PM for: ☑ a Compliance Conference in the DCM Courtroom, Room 103, 80 Centre Street; ☐ a Compliance Conference in the Part 52 Courtroom, Room 289, 80 Centre Street; ☐ Early Settlement Conference, Room 103, 80 Centre Street; ☐ Mediation I, Room 106, 80 Centre Street; ☐ for trial in Part 40, Room 242, 60 Centre Street; and it is further)

ORDERED that the movant shall serve a copy of this decision and order [~~decision, order and judgment~~] on all parties with notice of its entry and upon ☐ the Clerk of the Court, 60 Centre St., Basement; ☐ the Trial Support, 60 Centre St., Room 158; ☑ and the DCM Clerk, 80 Centre Street, Room 102.

Dated: 6/17/08

MH

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

☐ DO NOT POST ☐ REFERENCE

☐ TRANSFER TO NON-CITY PART; CITY NO LONGER A PARTY OR NOT REPRESENTED BY CORPORATION COUNSEL

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: J.S.C.

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

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ROBERT RALEIGH and SUZANNE RALEIGH,
Plaintiffs,

against

BROADWAY 48TH-49TH STREET LLC, CROWNE PLAZA HOTEL, KG CROWNE CORP., RIESE ORGANIZATION CORPORATE GROUP, KG LAND NEW YORK CORPORATION, WALBER BROADWAY CO. and CITY IF NEW YORK,
Defendants.

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Index Number	101733/2006
Submission Date	April 28, 2008
Mot. Seq. No.	002
Cal. No.	87

DECISION AND ORDER

For the Plaintiffs:
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Newburgh, NY 12550
1-800-890-3090

For the Hotel Defendants:
Cartafalsa, Slattery, Turpin & Lenoff
By: Michael J. Lenoff, Esq.
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Papers considered in review of this motion to :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3

PAUL G. FEINMAN, J.:

Broadway 48th-49th Street LLC, Crowne Plaza Hotel, KG Crowne Corp., and KG Land New York Corporation ("the hotel defendants") move for summary judgment pursuant to CPLR 3212 seeking to dismiss, with prejudice, plaintiffs' claims and the City's cross-claims. Neither the City nor Riese Organization Corporate Group oppose this motion. Walber Broadway Co. has not answered the complaint. For the reasons which follow, the motion is denied without prejudice to renewal upon the completion of discovery.

Factual and Procedural Background

Plaintiffs bring an action to recover damages for personal injury resulting from a fall. Plaintiff Robert Raleigh alleges that on August 20, 2005, he tripped over a sign stump on the sidewalk that abuts the defendants' hotel, which is located at 1605 Broadway, as he was heading to Penn Station after leaving work. He did not see the sign stump before he fell. According to his testimony, he called the City about the signpost stump and "tracked it down to what department it was" and reported the broken sign is "dangerous" (Not. of Mot. Exh. E, EBT of Robert Raleigh 50: 5–10). He further testified that the signpost stump has recently been "repaired," and there is now a "bus sign or no parking sign" at the location (*id.* 50: 12; 51: 5–6).

The hotel defendants produced two witnesses. A doorman who had worked at the hotel since 1990, testified that he never noticed a protrusion from the sidewalk, and did not recognize it when shown a photograph of the area in which it was visible (Not. of Mot. Exh. G, EBT of Kasem Bajku 23: 9–23; 24: 8-13). The hotel's director of safety and security testified that the hotel staff did not make regular inspections of the sidewalk, that he was never aware of the metal protrusion in the sidewalk, that he knew nothing about the removal of any signs in front of the hotel by the City, and that he would not have been informed by the City if it was going to install or move a sign (Not. of Mot. Exh. F, EBT of Scott Shaw 14: 5–9; 15: 23–25 – 16: 1–8; 17: 2–25; 18: 2–7). In addition, defendants submitted an unsigned copy of their response to plaintiffs' notice to produce, indicating that they had no records of any complaints regarding the removal or repair "of any sign in the vicinity of the main entrance" (Reply Aff. Exh. A, Response to Pl. Not to Produce ¶ 3). Curiously absent from the record is any evidence from a hotel employee with

knowledge that the sign that was in front of its premises before the accident was a DOT or other City agency sign as opposed to a sign placed by the hotel or for the hotel's benefit.

The hotel defendants now move for summary judgment to dismiss plaintiff's claims and the City's cross-claims pursuant to CPLR 3212. They argue that the evidence establishes that the City, and not the hotel, owns the signpost. They further argue that they had no duty of care to repair the post, nor a duty to report the matter to the City. They therefore argue that summary judgment should be granted and they should be dismissed from the action.

Plaintiffs argue that there are issues of fact concerning who owns the sign and whether it was installed for the hotel's benefit. They argue that if the City did not own the signpost, there is a question of fact concerning whether the hotel was responsible for the sign. They note that discovery is outstanding, particularly concerning the issue of ownership of the signpost in question (Shuttleworth Aff. in Opp. ¶ 6; Exh. A), and argue that the motion must be denied pursuant to CPLR 3212(f). A note of issue has not yet been filed in this case.

Discussion

A "motion [for summary judgment] shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. . . . [T]he motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact" (CPLR 3212(b)). However, "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just" (CPLR 3212[f]).

"Because 'summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue' [this court must scrutinize] the affidavits carefully, in the light most favorable to" the plaintiff (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978] [quoting *Moskowitz v Garlock*, 23 AD2d 943, 944 [3d Dept. 1965]]). "But when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated. Negligence cases, supplying the bulk of the Trial Calendar, are not exempt from this general policy" (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "The [moving party] has the burden to produce evidence as upon a trial" (*Oxford Paper Co. v S. M. Liquidation Co.*, 45 Misc. 2d 612, 614 [Sup. Ct., Special Term, New York County 1965]). In order for this court "[t]o grant summary judgment it must clearly appear that no material and triable issue of fact is presented" (*Nicholas Di Menna & Sons, Inc. v City of New York*, 301 NY 118, 120 [1950]).

To establish a prima facie case of negligence, plaintiff must demonstrate (1) that defendant owed him a duty of reasonable care, (2) a breach of that duty, and (3) a resulting injury proximately caused by the breach (*see, Boltax v Joy Day Camp*, 67 NY2d 617 [1986]). The threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]).

Prior to 2003, under common law, municipalities had the duty to maintain sidewalks and liability for failure to do so (*see, King v Alltom Props., Inc.*, 16 Misc 3d 1125[A], 2007 NY Slip Op 51570[U], *2–4 [Sup Ct, Kings County 2007]), and thus the City, and not the abutting real

property owner,[1] was found liable for injuries where a pedestrian tripped over a broken signpost (*see, Hand v Stanper Food Corp.*, 250 AD2d 812, 812 [2d Dept. 1998]).

This liability shifted when the City Counsel passed section 7-210 of the Administrative Code of the City of New York. Section 7-210(a) states that "[i]t 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" (*see also* Administrative Code 19-152 ["The owner of any real property, at his or her own cost and expense, shall (1) install, construct, repave, reconstruct and repair the sidewalk flags in front of or abutting such property, including but not limited to the intersection quadrant for corner property."]). Under section 7-210(b), "the owner of real property abutting any sidewalk . . . 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." The Court of Appeals has explained that, "[t]he City Council enacted section 7-210 in an effort to transfer tort liability from the City to adjoining property owners as a cost-saving measure, reasoning that it was appropriate 'to place liability with the party whose legal obligation it is to maintain and repair sidewalks that abut them -- the property owners'"[2] (*Vucetovic v Epsom Downs, Inc.*, ___ NY3d ___, 2008 NY Slip Op 04901, *3–4 [2008]; *see* Administrative Code § 7-210[b]).

Although the language of section 7-210 seems to provide that all responsibility for maintaining the sidewalks has passed to the abutting real property owners, there have been

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1 If it could be established that the abutting real property owner created the defective condition then the owner would be liable.

2 "This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes." Administrative Code § 7-210(b). This exception is not applicable to the case at bar because the defendants in this case operate a hotel.

judicially recognized exceptions to this seemingly absolute rule (*see Vucetovic* at *3–5 [holding that the City, and not the abutting real property owner, was responsible for maintaining tree-wells and was liable for personal injuries that resulted from a failure to do so]). Recently in *King v Alltom Properties, Inc.*, the Kings County Supreme Court held t that the new sidewalk law provides a judicially recognized exception for signpost stumps (2007 NY Slip Op 51570[U] at *5). The *King* court held that an abutting real property owner was not subject to section 7-210 and did not owe a duty to a pedestrian to repair a *City owned* signpost stump or to notify the city of its existence (*id.*).

While *King* provides that an abutting real property owner owes no duty to the plaintiff for defects resulting from a City owned broken signpost, it does not support the proposition that the hotel defendants do not owe the plaintiff a duty if a non-City entity owned the sign. Section 7-210 places the duty to maintain a sidewalk and liability for failure to do so squarely on the abutting real property owner (*see* Administrative Code § 19-125[a] [stating that a non-City entity may erect a "[sign]post or pole . . . under a permit or revocable consent of the commissioner"]). The Court of Appeals has clearly stated the legislative intent to place liability for failing to maintain and repair the sidewalk with the abutting property owner and to read *King* otherwise would ignore the mandate of the City Council (*Vucetovic* at *3–4).

Discovery in this case is still ongoing. The hotel defendants have failed to put forth an unequivocal affidavit or other evidence in admissible form of who owned the sign and or pole that was previously atop the stump which caused plaintiff to trip and fall. If a non-City entity, such as the hotel defendants, owns the signpost, as posited by plaintiffs, then the hotel defendants owe pedestrians such as plaintiff a duty to repair the signpost (Administrative Code

§§ 7-210, 19-152). The ownership of the sign is the key issue in determining whether the hotel defendants owe the plaintiff a duty of care.

While it is true that at trial it will be for the plaintiffs to establish in the first instance the ownership of the signpost as part of their *prima facie* case, on this motion for summary judgment is the hotel defendants, as the moving parties who in the first instance, must establish an entitlement to summary judgment as a matter of law. If the hotel defendants cannot establish that they did not own the signposts or otherwise have the benefit of a use of the signpost, the burden to rebut does not shift to the plaintiffs. Here, the hotel defendants have not clearly established that the City owned the signpost (*King* at *5). The hotel defendants rely on plaintiff's vague testimony that the signpost has been "repaired" and is now a "bus sign or no parking sign." Of course, the evidence of post-accident repairs would be inadmissible at trial except to establish custody and control. While plaintiff testified that he "tracked" the sign down to the City department that was responsible for the sign, it is still not clear whether the City owned the sign or simply granted a permit to another entity, such as the hotel, for it erection.

The extant record is simply inconclusive one way or another as as to whether the City owned the signpost that plaintiff allegedly tripped over (*Rotuba Extruders*, 46 NY2d at 223). Even the testimony of two of the hotel's own employees, who essentially say they were unaware that the signpost stump was there, does not "clearly establish" that the City owns the signpost (*Nicholas Di Menna & Sons*, 301 NY at 120). When as here the evidence is unclear as to who owns the sign, it cannot be said that the moving party made a *prima facie* showing that it was not the owner or permitee for the signpost and thus shifed the burden to the plaintiff to create a material issue of fact for trial. Thus, it is premature to dismiss the complaint and cross-claims

against the hotel defendants. Discovery is ongoing and may yet reveal more evidence on these points. Accordingly, it is

ORDERED that the motion for summary judgment is denied; and it is further

ORDERED that the parties are to appear for their previous scheduled compliance conference on October 15, 2008 in Supreme Court, 80 Centre Street, room 103.

This constitutes the decision and order of the court.

Dated: June 17, 2008
New York, New York

J.S.C.

(Pt52 2008_101733_2006_002_KB)