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

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

Justice

VAN ZILE, DENNIS

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY, et al.,

Defendants.

INDEX NO. 101332/07

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1
Answering Affidavits– Exhibits	2+4
Replying Affidavits	3

CROSS-MOTION: _____ YES ✓ NO

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

DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM

DECISION.

FILED
JUL 09 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/1/08

J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

DONNA M. MILLS, J.S.C.

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

DENNIS C. VAN ZILE,

Plaintiff,

- against -

NEW YORK CITY, et al.

Defendants,

INDEX NO.
101332/07

DECISION/ORDER

DONNA M. MILLS, J:

BACKGROUND

In this action for personal injuries, plaintiff Dennis C. Van Zile seeks damages allegedly resulting from a slip and fall on the public sidewalk located in front of 790-806 Eighth Avenue in the city and county of New York. Plaintiff alleges that on March 8, 2006, as he was walking in front of the property owned by defendants CRP/HH 48TH STREET II, L.P. and THE DOVER CONDOMINIUM (hereinafter "Dover"), he was caused to trip and fall over an angular piece of metal protruding upwards and through a metal plate. Defendant Dover now moves for summary judgment dismissing the complaint and all cross-claims against it on the grounds that as owner of the premises, it owed no duty of care to the plaintiff as it was not in exclusive control of the subway grating nor did not own, inspect or maintain the subway grating. In addition, Dover contends that it did not create the alleged defective condition. The plaintiff opposes the summary judgment motion.

APPLICABLE LAW & DISCUSSION

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). "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." Andre v. Pomeroy, 35 N.Y.2d 361 (1974). "To demonstrate its entitlement to summary judgment in a slip-and-fall case, a defendant must establish, prima facie, that it did not create the condition that allegedly caused the fall and did not have actual or constructive notice of that condition for a sufficient length of time to remedy it. Gregg v. Key Food Supermarket, --- N.Y.S.2d ---, 2008 WL 1903784 (N.Y.A.D. 2 Dept.), 2008 N.Y. Slip Op. 04055 (citation omitted).

In support of its motion, Dover argues that it did not own, control, inspect or maintain the subway grating in front of the subject location where plaintiff was caused to fall. Dover submits Mr. Bheda's Affidavit that defendant did not own the metal plating in front of the subject premises in an effort to establish that it had no duty to maintain the area in front of the garage. Dover contends that plaintiff must show that the landowner either created the defective condition or had actual or constructive notice of the defective condition for sufficient time as to warrant repair in the exercise of reasonable care in order for liability to be imposed on the landowner. McKeon v. Town of Oyster Bay, 292 AD2d 574 (2nd Dept 2002). Dover also contends that the subway grating cannot properly be considered a "sidewalk" as it is property of the New York City Transit

Authority. It relies on Roselli v. City of New York, 201 AD2d 417 (1st Dept 1994), which found that the abutting property owner was not responsible for broken sidewalk adjacent to the frame of a metal sidewalk grate because they did not own the grate.

In opposition, plaintiff contends that pursuant to § 7-210 of the Administrative Code of the City of New York, which applies to accidents occurring subsequent to September 14, 2003, owners of property abutting the public sidewalk have the affirmative duty to maintain the sidewalk and are liable in tort for injuries arising out of its breach of this duty.

Manning v. City of New York, 16 Misc.3d 1132a (NY Sup 2007), found that "[t]he legislative documents underlying the passage of § 7-210 of Administrative Code reveal an express intent on the part of the City Council to place an adjacent property owner's liability to respond in damages on an equal footing with his or her 'duties and obligations of . . . sidewalk [maintenance as] set forth in Administrative Code section 19-152.'" (Report of Committee on Transportation, 2003 New York City, NY Local Law Report No. 49 Int. 193). Therefore § 7-210 should be read in tandem with title 19 of the Administrative Code.

Title 19 of the Administrative Code, "Streets and Sidewalks," defines "sidewalk" as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb, intended for the use of pedestrians." (see Administrative Code § 19-101 [d]). What plaintiff alleges caused his injury is the grating that lies on the sidewalk level "intended for the use of pedestrians."

Dover contends that the subway grating cannot properly be considered a "sidewalk." Vucetovic v. Epsom Downs, Inc., 45 A.D.3d 28 (2007), held that a tree well is not part of the sidewalk. However, King v. Alltom Props., Inc., 16 Misc.3d 1125a (Kings Sup. 2007), found that "things such as signposts, fire hydrants, and lightposts are intended to protrude from the sidewalk and do not fall within the ambit of section 19-

152. The fact that any one of these things can be broken off from their base and cause a tripping hazard does not thereby cause a metamorphosis to occur, converting the signpost at issue here into street hardware." As the grating here is not intended to protrude from the sidewalk and is intended for the use of pedestrains, it does not fall within the exception established here. Accordingly, the grating at issue is typical "street hardware," which can appropriately be considered part of the sidewalk.

Even though the accident occurred within 12 inches of the grate which is within defendant New York City Transit Authority's "zone of responsibility," this does not absolve it from possible culpability. Administrative Code § 7-210 is clear that an abutting real property owner is charged with the responsibility of maintaining the sidewalk and is liable for personal injuries proximately caused by his or her failure to maintain said sidewalks, notwithstanding any other provision of law.

Viewing the submission in the light most favorable to plaintiff, this court finds that the defendant has failed to make a prima facie showing that it is entitled to summary judgment as a matter of law. Since the owner of the adjoining property is responsible for maintaining the sidewalk, Dover's motion for summary judgment should be denied.

Accordingly, it is

ORDERED that the co-defendant Dover's motion for summary judgment is denied.

This constitutes the decision and order of the court.

Dated: 7/1/08

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.