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SCANNED ON 8/15/2008

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

PRESENT: RAKOWER PART 5

Index Number : 111163/2004

ASNIS, MARTIN

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

I on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
AUG 15 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: 8/12/08

EILEEN A. RAKOWER J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

----------X

MARTIN ASNIS and MURIEL ASNIS,

Plaintiffs,

Index No. 111163/04

- against -

Decision and Order

THE CITY OF NEW YORK and EAST 72 TENANTS CORP.,

Mot. Seq. No.: 001

Defendants.

----------X

HON. EILEEN A. RAKOWER

Plaintiff Martin Asnis brings this action for personal injuries allegedly sustained when he tripped and fell over a protrusion from the sidewalk in front of 31 East 72nd Street (alternatively known as 897 Madison Avenue) ("the building"), in the County and State of New York on November 18, 2003. Muriel Asnis brings a derivative action. East 72 Tenants Corp. ("East 72") owns the building adjacent to the alleged defect in the sidewalk. East 72 moves for summary judgment pursuant to CPLR 3212 seeking dismissal of the action as against it. Plaintiffs oppose the motion. The City of New York does not appear.

East 72, in support of its motion, submits the following: (1) the pleadings; (2) plaintiffs' verified bill of particulars; (3) photographs of the subject defect; and (4) an incomplete copy of the deposition transcript of Martin Asnis; (5) the deposition transcript of Thomas Dowd, employee of the building's managing agent; and (6) the deposition transcript of Jason Brennan, employee of the Department of Transportation.

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]).

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]). However, with the passing of § 7-210, the abutting sidewalk became not just the responsibility, but the liability of the landowner. 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. Title 19 of the Administrative Code 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."

> § 7-210. Liability of real property owner for failure to maintain sidewalk in a reasonably safe condition.
>
> a. It 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.
>
> b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, 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. Failure to maintain such sidewalk in a reasonably safe

> condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. 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.
> c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting 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) in a reasonably safe condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.
> d. Nothing in this section shall in any way affect the provisions of this chapter or of any other law or rule governing the manner in which an action or proceeding against the city is commenced, including any provisions requiring prior notice to the city of defective conditions.

East 72 argues that it is not responsible for the protrusion from the sidewalk, as that protrusion appears to be the result of a broken sign post. Thus, the defect was an appurtenance exclusively within the possession and purview of the City of New York and the adjoining landowner had no duty with respect to it.

Mr. Dowd, who was the superintendent of the building for 15 to 20 years, noticed a sign, which he stated was a bus sign. At some point, he noticed that a larger blue sign was installed down the street; and some time later, the previous sign was no longer there. He did not, however, notice a protrusion where the previous sign had been. Nevertheless, once advised about the lawsuit, he examined the protrusion and described it as extending out of the sidewalk by approximately a quarter of an inch.

Mr. Brennan, with the Department of Transportation, testified that his department was responsible for the installation and removal of signs. However, bus signs are handled by The Bus Stop Management Division. He viewed photographs of the alleged defect, and stated that it was not a "sign-post," but is called a "drive-rail." A drive-rail, he confirmed, was a type of sign post. He stated that a drive-rail goes 8-12 inches into the cement. Mr. Brennan related the different ways to remove

a sign, and reviewed procedure which required bringing the drive-rail one inch below the surface of the concrete. When asked if a landowner or superintendent of a building can remove a pole, he stated "he really has no rights to it, no. . . . Their job as superintendent of a building should be to call 311 and have 311 relay it to us."

Plaintiff, in opposition, provides the full transcript of the deposition of Martin Asnis; the deposition transcript of Thomas Dowd; the deposition transcript of Jason Brennan; and guidelines for the removal of sign posts.

Plaintiff argues that moving defendant had constructive notice of the alleged defect. Further, plaintiff urges that it is not clear from Administrative Code § 7-210 whether East 72 had responsibility for repairing the improperly removed sign stanchion.

Recently, the Court of Appeals, in *Vucetovic v. Epsom Downs, Inc.*, 10 NY3d 517 (2008), found that a tree well is not part of the "sidewalk" for purposes of section 7-210 of the Administrative Code . The Court examined the history of the legislation, and noted that

> The 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. [citations omitted]" *Id.*, at 521.

The Court found guidance in "the principle that 'legislative enactments in derogation of common law, and especially those creating liability where none previously existed,' must be strictly construed." *Id.* Further, it found that while the statute recites the extent of the duties regarding the sidewalk, and "while section 7-210 employs the phrase 'shall include but not be limited to,' this clause applies to the types of maintenance work to be performed, not the specific features of what constitutes a sidewalk." *Id.*, at 522. It concludes that the City Council's silence as to tree wells meant that it did not consider the issue of liability for tree wells in drafting the legislation.

Importantly, the Court also noted that "the City's department of Parks and Recreation is vested with exclusive jurisdiction over the 'planting, care and cultivation of all trees and other forms of vegetation in streets.' [citation omitted]" *Id.*, at

footnote 4. It pointed out that "an individual or entity is guilty of a misdemeanor if convicted of cutting, removing or in any way destroying a tree or other form of vegetation without first obtaining the Department's permission. [citation omitted]" *Id.*

The Court of Appeals focused on the dilemma one faces when one is liable for conditions it cannot control. East 72 has shown that, while the drive-rail was in the sidewalk it was responsible to maintain, it was not free to remove the drive-rail; it's recourse was only to report it to 311 and await the action of an authorized agency. Indeed, Section 2903(a)(2) of the New York City Charter provides:

> Powers and duties of the commissioner. Except as otherwise provided by law, the commissioner shall have control over and be responsible for all those functions and operations of the city relating to transportation including, without limitation, the following:
> a. Parking and traffic operations. The commissioner shall:
> (2) establish, determine, **control, install and maintain the design, type, size and location of any and all signs**, signals, marking, and similar devices indicating the names of the streets and other public places and for guiding, directing or otherwise regulating and controlling vehicular and pedestrian traffic in the streets, squares, parks, parkways, highways, roads, alleys, marginal streets, bridges and other public ways of the city;

The City Council could not have intended for the private landowner to coopt those activities which are within the exclusive control of City agencies.

Plaintiff testified that he fell on an obstacle; "it was a cut off sign post like one of those green sign post and it was raised off the sidewalk." He described it as a U shape protruding from the sidewalk somewhere between half-inch and an inch. Plaintiff has not raised an issue of fact which would controvert East 72's showing that it was not free to remove this drive-rail in the city sidewalk. Rather, as Mr. Brennan stated, East 72 "really has no rights to it." Thus, East 72's responsibility for the sidewalk did not extend to the drive-rail's protrusion from the sidewalk. (*See, King v. Alltom Properties, Inc.*, 16 Misc3d 1125(A) [NY Sup., 2007])

Wherefore it is hereby

ORDERED that the motion is granted and the complaint is hereby severed and

judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue.

DATED: August 12, 2008

EILEEN A. RAKOWER, J.S.C