

**O'Donnell v City of New York**

2008 NY Slip Op 32869(U)

October 16, 2008

Supreme Court, New York County

Docket Number: 106696/03

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 : 106696/2003

O'DONNELL, FRANK

vs  
CITY OF NEW YORK

Sequence Number : 005

SUMMARY JUDGMENT

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

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

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

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

this motion to/for \_\_\_\_\_

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

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

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

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
OCT 21 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

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

Dated: 10/16/08

EILEEN A. RAKOWER S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

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

-----X  
FRANK O'DONNELL and ROSEMARY O'DONNELL,

Plaintiffs,

Index No.  
106696/03

- against -

Decision and  
Order

THE CITY OF NEW YORK, N.Y.C. WATER  
MAIN WORKS, INC., and PAUL J. FOLEY

**FILED**  
OCT 21 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Mo. Seq. No.:  
005

Defendants.

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

Plaintiffs bring this action for personal injuries allegedly sustained when plaintiff Frank O'Donnell tripped and fell on the curb/sidewalk on MacDougal Street in the County and State of New York on October 21, 2002. Rosemary O'Donnell brings a derivative action. Defendants N.Y.C. Water Main Works, Inc. and Paul J. Foley ("Water Works"), who is alleged to have done excavation work in connection with the City water main and connecting to 38 MacDougal Street, now move for summary judgment pursuant to CPLR 3212. Plaintiffs oppose and defendant the City of New York ("City") does not submit papers.

Water Works, in support of its motion, submits: the pleadings; an order of consolidation signed by the Honorable Michael D. Stallman and dated January 24, 2006; plaintiffs' bill of particulars; six color photocopies of photographs of the subject site; the deposition transcript of Frank O'Donnell; a "Google" map of the subject area; the deposition transcript of Samuel Foley, President of Water Works; a Water Works invoice dated July 24, 2001; a "Street Opening Permit" issued by the Department of Transportation; a bid proposal by Water Works, submitted to and accepted by, Ideal Plumbing dated July 23, 2001; the deposition transcript of Cynthia Howard, record searcher for City; a Department of Transportation permit renewal request; the deposition transcript of Sherry Johnson, a City record's witness; and a letter from

Water Work's counsel to plaintiffs requesting that plaintiffs discontinue the action as against it.

Water Works argues that, according to Mr. O'Donnell's own deposition and 50-h hearing testimony, the accident actually occurred across the street from where he alleged it happened in his compliant and bill of particulars. Mr. O'Donnell testifies at his 50-h hearing:

Q: Now, looking at that photograph, can you tell us where your accident happened?

A: I was walking down here and I crossed over and my foot caught in this depression . . . it was opposite 38 MacDougal. (O'Donnell 50-h Page 18.)

...

Q: The place where you fell was on the opposite side of the street from 38 MacDougal Street?

A: Yes. I left on MacDougal, I wanted to cross over and I never made it across the street. (Id. at 19).

At his deposition hearing, plaintiff reiterates what he said at the 50-h hearing:

Q: So the defect was near the sidewalk curb area, not in the street?

A: Right.

Q: Do you know any address that that defect was in front of?

A: It was opposite 38 MacDougal. The address behind me when I got up and looked across the street from me was 38 MacDougal.

Q: Was 38 MacDougal actually across the street?

A: No.

Q: The accident didn't happen in front of 38 MacDougal?

A: No.

Q: Was it across the street from where the accident happened?

A: Right.

Q: So the accident didn't happen in front of 38 MacDougal?

A: Right.

Thus, Water Works claims, plaintiff cannot demonstrate that Water Works did any work at the site of the alleged defect.

Plaintiffs, in opposition, challenges the testimony, provided by Water Works, of Mr. Foley. They claim that he made no personal inspection of the subject excavation and is not competent to dispute whether Water Works could have caused the allegedly offending defect.

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]).

Water Works submits testimony by Mr. O'Donnell that conclusively shows that he did not trip in front of 38 MacDougal Street. The marked photographs of the accident site clearly show that it is located on the opposite side of the street from 38 MacDougal Street. Water Works demonstrates that, although it did excavation work in front of 38 MacDougal Street, that excavation did not reach across the street to the area plaintiff himself describes as encompassing the defect which caused his accident. Mr. Foley testifies, upon looking at the invoice for subject excavation work:

Q: Just from looking at the document . . . is there any way to ascertain whether the cut encompassed the sidewalk and the roadway or just the sidewalk or just the roadway?

A: . . . from experience, in order to do this we open the roadway over the city main, approximately a four-by-three, four-by-four opening, get down to the city main, shut the water off for, to the particular premises, which was 38 MacDougal Street. We excavate one approximately five-by-five typical sidewalk flag . . .

...  
Q: Do you know whether or not the excavation extended across the street to the sidewalk opposing 38 MacDougal Street?

A: No, it didn't.

Q: Is there any way to tell that from looking at this invoice?

A: Well, I know that we opened one opening, as I described earlier, over the city water main, and the city water main is approximately ten or 12 feet off the curb in front of 38 MacDougal Street, so our four-by-four cut, which is half the size of this desk, approximately, was ten, 12 feet off the curb of MacDougal Street.

Additionally, the DOT permit issued to Water Works allows for a cut "for a maximum length of 5 feet." There is no indication, either in Mr. Foley's testimony or in the permit issued to Water Works that its excavation work extended across the street and onto the sidewalk on the opposite side of the street.

Plaintiffs' assertions that Mr. Foley's testimony is insufficient because he did not physically inspect the site is without merit. Mr. Foley has been with Water Works, a company started by his father, for fourteen years. Mr. Foley testified from the company's invoices and street opening permits based on his position and experience with the company. Water Works, having met its burden of making a prima facie showing of entitlement to summary judgment, has shifted the burden to plaintiffs. It is plaintiffs' burden to establish by proof in admissible form, that Water Works' excavation did in fact reach the situs of plaintiff's injury. ( *See, Robinson v. City of New York*, 18 A.D.3d 255[1st Dept. 2005]) Absent such a showing, Water Works is entitled to summary judgment.

Wherefore it is hereby

ORDERED that the motion is granted and the complaint is hereby severed and dismissed as against defendants N.Y.C. Water Main Works, Inc. and Paul J. Foley and the clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the remainder of the action shall continue.

DATED: October 16, 2008

**FILED**  
 OCT 21 2008  
 COUNTY CLERK'S OFFICE  
 NEW YORK  
 4

EMILY A. RAKOWER, J.S.C.