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

PRESENT: EILEEN A. RAKOWER J.S.C. Justice PART 5

Index Number : 105573/2007

BLACKBURN, OMAR

vs

CITY OF NEW YORK

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. 105573/0

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, ... motion to/for

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
DEC 08 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: 12/4/08

EILEEN A. RAKOWER 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

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OMAR BLACKBURN,

Plaintiff,

Index No.
105573/07

- against -

Decision and Order

THE CITY OF NEW YORK,

Defendant.

Seq. No.: 001

----------X

HON. EILEEN A. RAKOWER

Plaintiff brings this action for injuries allegedly sustained when he slipped and fell on a defective pedestrian ramp in front of the premises known as 222 Amsterdam Avenue in the County and State of New York on August 17, 2006. Defendant the City of New York ("City") moves to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)[7]), or in the alternative, for summary judgment pursuant to CPLR §3212. Plaintiff opposes the motion.

City, in support of its motion, submits: (1) the notice of claim; (2) the complaint; (3) a certification by David C. Atik ("Atik"), employee of the Department of Finance; (4) a response sheet for a Department of Transportation ("DOT") record search conducted between the dates of August 17, 2004 and August 17, 2006; and (5) the deposition transcript of Leslie Smalls, record searcher for the DOT.

Plaintiff, in opposition to City's motion, submits the following: (1) two black and white photographs of the alleged defect, (2) a correction sheet, dated August 7, 2008; and (3) a copy of a Big Apple map and its corresponding key.

Plaintiff contends that, when he fell, he was on both the sidewalk and a handicapped ramp and further asserts that City is responsible for the maintenance of the area where the defect occurred. Based on the photographs submitted by plaintiff, it appears that the alleged defect is located in an area between the level portion of the sidewalk and that portion which grades downward in what is referred to as a "pedestrian ramp" or a "handicapped ramp."

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 further 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." While the Administrative Code is silent as to liability for injuries sustained specifically on "pedestrian" or "handicapped" ramps, case law and statutory history suggest that the area at issue in this case constitutes part of the "sidewalk."

In the mid 1960s, the city began a "carriage ramp program" requiring that curb ramps be installed whenever a new street was constructed or an old one reconstructed. (*Lancer, Persons with Disabilities: Two City Efforts: Curb Ramps and Preferred Sources* 3 City Law 125 [Center for New York City Law 1997].) Initially, this program was "...not particularly concerned with persons with disabilities..." but rather, "...was meant to assist all persons who needed help with curbs: those pushing grocery carts and baby carriages; businesses that moved garments and equipment; the elderly, etc." (*Id.*) In 1973, federal law required that municipalities make their programs and services available to persons with disabilities, and in 1975, the New York City Council codified the City's curb ramp responsibilities, requiring two ramps at each intersection corner and one ramp at each end of pedestrian crosswalks whenever new curbs were constructed or older curbs reconstructed (*Id.*).

It appears that City is generally responsible for the construction of pedestrian or handicapped ramps. In *Baez v. City of New York* (278 A.D.2d 83, 88-89 [First Dept. 2000]), the First Department noted that City was most likely the party responsible for the design and construction of a pedestrian ramp (and that, in any event, City would possess construction records for that ramp). The court further noted that the existence of the pedestrian ramp at the curb probably reflected that it was constructed after the enactment of the 1975 New York City rule. (*Id.* at 588; *see also* New York City Rules and Regulations, Title 34 §2-09[1]; *see also* Highway Law

[1] Title 34 §2-09(f)(4)(iv)(C)(xiv) states "Pedestrian ramps: Any person constructing, reconstructing or repairing a corner shall install pedestrian ramps in accordance with the specifications and in accordance with the latest revision of Standard Drawing H-1011."

§330 [enacted in 1975].)[2]

In *Vucetovic v. Epsom Downs* (10 N.Y.3d 517 [2008]), the Court of Appeals addressed the issue of whether any exception to the definition of "sidewalk" might exist within the area defined by the boundaries in Title 19 of the Administrative Code. The court ultimately held that, despite their inclusion in the physical boundaries articulated in Title 19, tree wells are not part of the "sidewalk" for purposes of Administrative Code §7-210, which imposes tort liability on property owners who fail to maintain city-owned sidewalks. (*Id.* at 518-519) The lower court, affirmed by the Court of Appeals relied on the premise that "[n]either trees nor tree wells are 'intended for the use of pedestrians.'" (45 A.D.3d 28 [First Dept. 2007] at 29.) (*See also, LoCurto v. City of New York* (1 A.D.3d 277, 277 [First Dept. 2003]) which held that "...a grassy area between a curb and a paved sidewalk is part of the sidewalk as defined in Vehicle and Traffic Law §144." The court further noted that, although plaintiff claimed City's special use of this area because City installed parking meters nearby, "...[c]ertainly the grassy strip may have been traversed by pedestrians for reasons completely unrelated to the meters." [*Id.* at 278]) Clearly, the same distinction cannot be made regarding the "pedestrian ramps," which, by definition, are intended for the use of pedestrians. Moreover, the Court of Appeals Decision in *Vucetovic* examines the legislative history of §7-210, noting 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]" *Vucetovic*, at 521.

While City may install or supervise the installation of pedestrian ramps pursuant to municipal and federal law, these ramps fall under the Title 19 definition of sidewalk because they are located in the area between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, but not including the curb and

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[2] Highway Law §330 requires that "No public street, sidewalk adjacent to a curb, sidewalk adjacent to a parking lot, sidewalk adjacent to a private road open to public motor vehicle traffic or highway shall be constructed or reconstructed unless the curbing thereof is designed and constructed so as to allow reasonable access to pedestrian crosswalks for persons with disabilities, in accordance with accessibility guidelines mandated pursuant to the federal Americans with Disabilities act of 1990, as amended."

"intended for pedestrians." In fact, the legislative history discussed above indicates that the ramps are created to facilitate access to a greater range of pedestrians. Consequently, the defect alleged to have caused plaintiff's injury occurred on the "sidewalk" as defined in the Administrative Code.

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]).

Atik affirms that, upon researching the subject property, he discovered that it is neither a one, - two,- or three- family residence, nor is it owned by City. Further, City has shown that it did not cause or create the defect which caused plaintiff's accident. To this end, City submits the results of a search for applications, permits, cut forms, complaints/repair orders, violations, contracts and milling/resurfacing records, which shows that no such documents were found. City has met its burden of establishing a *prima facie* entitlement to summary judgment. Plaintiff fails to present evidence demonstrating that a triable issue of fact remains.

Wherefore, it is hereby

ORDERED that defendant the City of New York's motion is granted and the complaint is hereby dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of said defendant.

Dated: December 4, 2008

Eileen A. Rakower, J.S.C.