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

PRESENT: HON. EILEEN A. RAKOWER PART 5

Index Number : 115344/2005
SMITH, JEANETTE
VS.
421 SEVENTH LLC
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 115344/05
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

this motion to/for

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

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
MAY 12 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/7/09

J.S.C.
HON. EILEEN A. RAKOWER

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

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JEANETTE SMITH,

Plaintiff,

Index No.
115344/05

- against -

Decision and Order

421 SEVENTH AVENUE, LLC, AAG MANAGEMENT, INC., and THE CITY OF NEW YORK,

Defendants.

Seq. No.: 001

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421 SEVENTH AVENUE and LLC, AAG MANAGEMENT, INC.,

Third-Party Plaintiffs,

Index No.
590161/08

- against -

SBARRO'S GOURMET, INC.,

Third-Party Defendants.

----------X

HON. EILEEN A. RAKOWER

Plaintiff brings this action for injuries allegedly sustained when she tripped and fell "while walking upon the eastern sidewalk of 7th Avenue north of its intersection of West 33rd Street" in the County and State of New York on April 22, 2005. Third-Party defendant, Sbarro's Gourmet, Inc. ("Sbarro's") originally moved to dismiss plaintiff's complaint and to strike defendant the City of New York's ("City") answer pursuant to CPLR §3126. Subsequently, Sbarro's withdrew its motion per a stipulation dated April 6, 2009. City cross-moves for summary judgment pursuant to CPLR 3212. Plaintiff opposes City's cross-motion. Defendants 421 Seventh Avenue, LLC ("421 Seventh") and AAG Management, Inc. ("AAG") do not submit papers.

City, in support of its cross-motion, submits: the notice of claim; its answer;

a certification by David C. Atik, employee of the Department of Finance; a response sheet for a Department of Transportation ("DOT") record search conducted between the dates of April 22, 2003 and April 22, 2005; and the deposition transcript of Nalik Zeigler, a DOT records searcher. City argues that it is not liable for plaintiff's injuries as her accident occurred after the date in which liability shifted from City to the landowner abutting the sidewalk on which she fell. Further, City claims that the subject property does not fall under any exception to the applicable law and that it did not cause or create the alleged defect.

Plaintiff, in opposition, submits only an attorney affirmation and argues that, as three complaints were uncovered in City's search, there is a question of fact as to whether City caused or created the subject defect. Specifically, plaintiff points to the fact that Ms. Zeigler acknowledged that the three complaints were "referred to maintenance," and that she did not know what actions were taken thereafter except that a violation was issued to the abutting landowner. Further, plaintiff argues that City's motion is premature because neither Sbarro nor 421 Seventh have produced witnesses for deposition yet.

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]).

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.

City has established that it bears no liability under §7-210(c). Mr. 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. It is well settled that "mere conclusions, speculation and unsupported allegations are insufficient to defeat a motion for summary [judgment]." (*Castro v. New York University*, 5 AD3d 135[1st Dept. 2004]). The three complaints uncovered in the search do not serve to raise an issue of fact as to whether City caused or created the subject defect. Plaintiff merely speculates that City *may* have performed repairs in response to the complaints. However, there are no records of any such repairs. Indeed, a search for "gang sheets" was performed for the subject location but the DOT record searcher noted that ". . . these defects are for sidewalks. No gang sheets generated for sidewalk defects."

Finally, pursuant to CPLR 3212(f), the court may deny a motion for summary judgement "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated." However "it is well settled that the mere hope by the party opposing summary judgment that it will uncover evidence that will prove its case is insufficient under CPLR 3212(f) to postpone a decision on a summary judgment motion.(*Casey v. Clemente*, 31 AD3d 361[2nd Dept. 2006]). Further, "CPLR 3212(f) should not be employed as a means of embarking on a fishing expedition to explore the possibility of fashioning a defense." (*Oates v. Marino*, 106 AD2d 289[1sr Dept. 1984])(internal citations omitted).

Here, there is no merit to plaintiff's claim that City's summary judgment motion is premature because neither 421 Seventh or Sbarro have produced witnesses for deposition. Plaintiff's mere speculation that such witnesses "may well have knowledge of what the City did or did not do with respect to this sidewalk," is insufficient under CPLR 3212(f) to postpone City's motion.

Wherefore, it is hereby

ORDERED that the motion to dismiss plaintiff's complaint and to strike defendant the City of New York's answer returnable February 6, 2009, is hereby withdrawn; and it is further

ORDERED, that the cross-motion is granted and the complaint is hereby severed and dismissed as against defendant the City of New York, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory and all previously scheduled compliance conferences are hereby cancelled; and it is further

ORDERED that a copy of this order shall be served on the Trial Support Office, 60 Centre Street, Room 158.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: May 7, 2009

Eileen A. Rakower, J.S.C.