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

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Index Number : 100588/2006

ALMONTE, ELSA

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 005

SUMMARY JUDGMENT

INDEX NO. 100588/06

MOTION DATE

MOTION SEQ. NO. 005

MOTION CAL. NO.

~~this motion to/for~~

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-D	1
Notice of Cross-Motion by P.A.-L. Eastmond	
Answering Affidavits — Exhibits A-I	2
Notice of Cross-Motion by TT - Affs. - Exhs. 1-5	3
~~Replying~~ Affidavits - Answering Cross-motion by A.L. Eastmond - Exh.	4
Replying Aff. + Opp. to TT's cross-motion - Exh. A 1-5	5
Replying Aff. of P.A.-L. Eastmond - Exh. A	6
Replying Aff. of TT	7

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion and cross-motions are decided in accordance with the attached decision and order.

FILED
MAY 18 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: MAY 13 2006

MARTIN SHULMAN J.S.C.

J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST

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

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 1

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ELSA ALMONTE,

Plaintiff,

Index No.: 100588/06

-against-

DECISION

CITY OF NEW YORK, MARLBORO BUILDING ASSOCIATES, L.L.C., A. L. EASTMOND & SONS, INC., and WESTMORELAND CONSTRUCTION,

Defendants.

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SHULMAN, J.:

Defendant Marlboro Building Associates, L.L.C. ("Marlboro") moves, pursuant to CPLR 3212, for summary judgment to dismiss the complaint against it. Defendant A.L. Eastmond & Sons, Inc. ("Eastmond") similarly cross-moves, pursuant to CPLR 3212, to dismiss the claims against it. Plaintiff also cross-moves, pursuant to CPLR 3212, for summary judgment against Marlboro.

On January 18, 2005, plaintiff allegedly fell while walking south on Broadway between 37th and 36th Streets, in Manhattan, and suffered resulting injuries. There was no snow or ice on the ground, and plaintiff testified that she had no trouble seeing the area around her foot. According to her deposition, plaintiff felt her foot go into something, which grabbed her and then she fell (EBT at 18). Two weeks later, plaintiff returned to the area and saw what she referred to as a hole, which she states is what caused her to fall. Plaintiff could not describe the hole, but when a photograph of the area was shown to her, she indicated what appears to be a slight crack in the sidewalk (Marlboro Ex. C). Plaintiff further testified that she had never noticed the hole before (EBT at 20), and did not see the hole immediately prior to the accident (EBT at 71).

Plaintiff also stated that she was unaware of anyone else who ever fell in that same sidewalk area (EBT at 22).

Marlboro is the owner and manager of the building known as 1359 Broadway, which is adjacent to the place where the accident occurred. According to the affidavit of Daniela T. Zustovich, the building manager for the subject premises, Marlboro did not perform any maintenance or repair work to the subject sidewalk prior to January 18, 2005, nor had it received any complaints or notice of any defect regarding the subject sidewalk prior to January 18, 2005. Marlboro Ex. D.

Eastmond is a construction company that was under contract with the other defendants to perform certain construction work in the area. According to Neil Tomasetti, Eastmond's project manager, the only work Eastmond performed in the general area in which the accident took place was performed in July, 2004, and consisted of replacing a fill port on 36th Street, approximately 50 to 75 feet away from where the accident took place, and on 36th Street itself, not Broadway. Eastmond Ex. G. Mr. Tomasetti further testified that Eastmond received no complaints regarding the sidewalk condition prior to the accident.

Plaintiff asserts that the use of the word "hole" to describe the area may be a mistranslation of her exact words. Plaintiff speaks Spanish, and the deposition was taken with the assistance of an interpreter. However, the photograph of the area is an exhibit attached to Marlboro's papers, and the picture was marked in red by plaintiff during the deposition to indicate the depression in the sidewalk to which she was referring.

Previously, summary judgment was granted in favor of co-defendants City of New York and Westmoreland Construction, Inc.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

In order to establish a prima facie case for negligence and to recover damages, plaintiff must demonstrate that Marlboro and/or Eastmond created or had actual or constructive notice of the alleged hazardous condition that caused the accident and resultant injuries. *Perez v Bronx Park South Assocs.*, 285 AD2d 402 (1st Dept 2001). In the instant matter, there is no evidence that Marlboro or Eastmond either created the condition in the sidewalk or had any notice of the condition of which plaintiff complains. "The mere happening of an accident does not establish liability on the part of the defendant[s]." *Deblinger v New York Racing Ass'n, Inc.*, 203 AD2d 169, 170 (1st Dept 1994). While plaintiff's cross-motion relies in part on Administrative Law § 7-210 (Local Law 49 [2003]), which requires landowners to maintain and repair abutting sidewalks, to

indicate Marlboro's liability, there is no evidence that the sidewalk in question was not properly maintained or repaired.

Plaintiff states that she did not notice the condition at the time she fell, but only saw the alleged defect two weeks later when she returned to the area. Plaintiff's assertions that the crack in the sidewalk caused her to fall consist of no more than mere conjecture and guesswork, which are insufficient to withstand a motion for summary judgment. *Pena v Santana*, 5 AD3d 649 (2d Dept 2004).

The two cases plaintiff cites in support of her cross-motion for summary judgment are distinguishable from the case at bar. In *Vucetovic v Epsom Downs, Inc.* (10 NY3d 517 [2008]), the court upheld a summary judgment dismissing a complaint because the building owner was held not to be responsible for maintaining city-owned property, and in *Cook v Consolidated Edison Co. of N.Y., Inc.* (51 AD3d 447 [1st Dept 2008]), the accident occurred while construction was ongoing, and was caused by the actual negligent placement of building materials. None of those factors appears in the instant case.

Plaintiff's argument that her reference to the sidewalk as having a "hole" may be a mistranslation of the words she actually used is also without merit. The photographs of the sidewalk, with plaintiff's mark indicating the exact spot on the street where she fell, have been provided for the court to view. Plaintiff herself testified that she did not notice the condition at the time of the occurrence, and only noticed the "hole" when she returned to the scene two weeks later. There is only speculation that the condition existed on January 18, 2005. Moreover, according to the photographs, the condition appears to be no more than a crack in the sidewalk, does not appear to present a

tripping hazard, and is trivial. *Trincere v County of Suffolk,* 90 NY2d 976 (1997). Based on the foregoing, it is hereby

ORDERED that plaintiff's cross-motion for summary judgment is denied; and it is further

ORDERED that Marlboro Building Associates, L.L.C.'s motion and A. L. Eastmond & Sons, Inc.'s cross-motion for summary judgment are granted, with costs and disbursements to said defendants as taxed by the Clerk of the Court upon the submission of appropriate bills of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been sent to counsel for the parties.

Dated: May 13, 2009

Martin Shulman, J.S.C.