

**Bigman v City of New York**

2009 NY Slip Op 31493(U)

July 6, 2009

Supreme Court, New York County

Docket Number: 116044/07

Judge: Eileen A. Rakower

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: **HON. EILEEN A. RAKOWER**

PART **Part 5**

Justice

Index Number : 116044/2007

**BIGMAN, MARLENE**

vs.

**CITY OF NEW YORK**

SEQUENCE NUMBER : 002

DISMISS

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

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

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

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

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

PAPERS NUMBERED

1

2

3

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

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

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

**FILED**

JUL 09 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 7/6/09

**HON. EILEEN A. RAKOWER**

Check one:  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 STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
MARLENE BIGMAN,

Plaintiff,

Index. No.  
116044/07

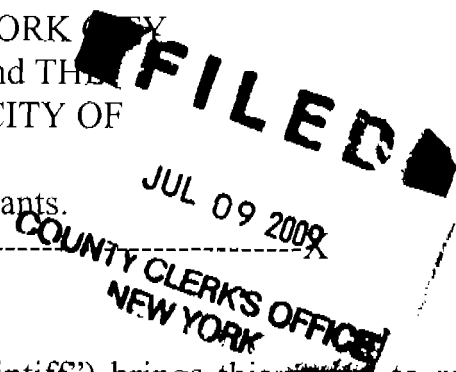
-against-

DECISION  
and ORDER

THE CITY OF NEW YORK, NEW YORK CITY  
DEPARTMENT OF EDUCATION, and THE  
BOARD OF EDUCATION OF THE CITY OF  
NEW YORK,

Mot. Seq. No.:  
002

Defendants.



-----  
HON. EILEEN A. RAKOWER

Plaintiff Marlene Bigman ("Plaintiff") brings this ~~action~~ to recover for personal injuries allegedly sustained when she tripped and fell on the sidewalk in front of 225 East 23<sup>rd</sup> Street in the County, and State of New York on June 25, 2007. 225 East 23<sup>rd</sup> Street is occupied by the JHS 47 School, which is property owned and operated by Defendants ("City"). Plaintiff alleges that she was injured when she tripped and fell due to a raised sidewalk flag.

The City has moved for dismissal pursuant to CPLR §3211(a)(7), or alternatively, for summary judgment pursuant to CPLR §3212. The City argues that it is entitled to dismissal because it had neither prior written notice of the alleged defect upon which Plaintiff tripped and fell, nor caused or created the alleged defect. The City has submitted an Affirmation in Support of its motion. Annexed to the Affirmation as exhibits are Plaintiff's Notice of Claim; Plaintiff's Summons and Complaint; the City's Answer; a Big Apple Map of the location of the accident; and a transcript of the deposition testimony of Leslie Smalls, witness for the City.

Plaintiff, in opposition, alleges that the City did in fact have prior written notice of the alleged defect upon which Plaintiff tripped; and that the City caused and created the allegedly defective condition by negligently replacing six sidewalk flags, such that a height differential of one inch or greater between adjacent flags resulted. Annexed to Plaintiff's Affirmation as exhibits are two color photographs of the alleged sidewalk defect; Plaintiff's Summons and Complaint; Plaintiff's Verified Bill of Particulars; a printout of a property search indicating that 225 East 23<sup>rd</sup> Street was owned by the New York City Board of Education; a transcript of testimony taken of Plaintiff pursuant to General Municipal Law §50-h; the Affidavit of Allison Bigman; the Affidavit of Scott Silberman, Professional Engineer; and several notices of claim obtained by Plaintiff's counsel pursuant to a request made under the State Freedom of Information Law which

involve prior claims of trip and fall accidents on the sidewalk in front of 225 East 23<sup>rd</sup> Street.

Plaintiff cross-moves to amend her Complaint to substitute Allison Bigman as the plaintiff in this matter, in her capacity as executor of the estate of Marlene Bigman, who is now deceased, and to amend the caption in the above action to reflect the substitution. Plaintiff has submitted an Affirmation in Support of her cross-motion. Annexed to the Affirmation as exhibits are Plaintiff's Summons and Complaint; the Certificate of Death of Marlene Bigman; and the Certificate of Letters Testamentary naming Allison Bigman as executor of the estate of Marlene Bigman.

To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Di Menna & Sons v. City of New York*, 301 N.Y. 118, 92 N.E.2d 918 [1950]). This drastic remedy should not be granted where there is any doubt as to the existence of such issues (*Braun v. Carey*, 280 App.Div. 1019, 116 N.Y.S.2d 857 [3rd Dept. 1952]), or where the appeal is "arguable" (*Barrett v. Jacobs*, 255 N.Y. 520, 522, 175 N.E. 275 [1931]); "issue-finding, rather than issue-determination, is the key to the procedure" (*Esteve v. Abad*, 271 App.Div. 725, 727, 68 N.Y.S.2d 322 [1st Dept. 1947]).' (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404, 165 N.Y.S.2d 498, 144 N.E.2d 387 [1957])." (*Ramsammy v. City of New York*, 216 A.D.2d 234, 236-237, 628 N.Y.S.2d 693 [1st Dept. 1995].)

In addition, "[t]he party opposing the [summary judgment] motion must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests." (*Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 967, 525 N.Y.S.2d 793, 520 N.E.2d 512 [1988].) Bald, conclusory allegations, even if believable, are not enough. (*Id.*; *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890 [1970]; *Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252, 538 N.Y.S.2d 249 [1st Dept. 1989]).

New York City Administrative Code §7-201(c)[2] provides:

No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any street, highway, bridge, wharf, culvert, sidewalk or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department

authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous or obstructed condition, and written notice thereof was given to a city agency, or there was written acknowledgement from the city of the defective, unsafe, dangerous or obstructed condition, and there was a failure or neglect within fifteen days after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or the place otherwise made reasonably safe.

Absent prior written notice made upon the City under Admin. Code §7-201, the City may only be held liable for a defect in a City sidewalk if the plaintiff can demonstrate that either (1) that the City affirmatively created the defect through an act of negligence; or (2) that a special use of the sidewalk conferred a special benefit upon the City (*Yarborough v. City of New York*, 10 N.Y.3d 726, 728 [2008]). The affirmative negligence exception is limited to work by the City that immediately results in the existence of a dangerous condition, as opposed to a condition which develops over an extended period of time (*id.*; *Bielecki v. City of New York*, 14 A.D.3d 301 [1st Dept. 2005]).

Here, the City submits the most current Big Apple Map containing the location of the accident, and notes that there is no indication therein which places the City on notice of the alleged defect in the sidewalk. In addition, the City relies upon the deposition testimony of Leslie Smalls of the New York City Department of Transportation (“DOT”) and DOT documentation which both indicate that after a diligent search of DOT records, no documents were found which placed the City on notice of the alleged defect. This is sufficient to “make a prima facie showing of entitlement to judgment as a matter of law;” and thus Plaintiff must provide “evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” in order to withstand summary judgment (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324; 501 N.E.2d 572, 574; 508 N.Y.S.2d 923, 925 [1986]).

In her opposition, Plaintiff submits several notices of claim obtained through a FOIL request, wherein the claimants allege that they sustained personal injuries as a result of tripping and falling due to an uneven sidewalk outside 225 East 23<sup>rd</sup> Street. Courts have held that the filing of a notice of claim may confer prior written notice of a dangerous condition upon a municipality (*see Rubain v. City of New York*, 182 A.D.2d 583 [1st Dept. 1992]; *Ortsman v. Town of Oyster Bay*, 178 A.D.2d 588 [2nd Dept. 1991]).

The notices of claim submitted by Plaintiff all specify that the claimants therein were caused to trip and sustain injuries as a result of an uneven portion of the sidewalk in front of 225 East 23<sup>rd</sup> Street. Consultation with a map indicates that the length of the sidewalk abutting the premises is approximately 315 feet, and Plaintiff's Bill of Particulars indicates that the defect was situated "approximately 45 - 50 feet west of the curb at the Northwest corner of 23<sup>rd</sup> Street and 2<sup>nd</sup> Avenue, and approximately in the middle of the sidewalk." The notices of claim complain of defects which are similar to the alleged defect in the case at bar and appear to be in the same general vicinity. These include:

- A Notice of Claim, marked as received by the City Comptroller's Office ("Comptroller") on March 21, 1996, wherein the claimant alleges to have tripped and fallen due to "an uneven sidewalk which resulted in a raised crack at or about a location approximately 65 feet west of the entrance" at 225 East 23<sup>rd</sup> Street;
- A Notice of Claim, marked as received by the Comptroller on May 26, 1999, wherein the claimant "was caused to trip and fall due to a raised portion of the sidewalk area described about 1-2 inches high and 2 feet in length" "in front of 225 East 23<sup>rd</sup> Street... about 10 feet west of [the] door entrance... and about 6 feet from [the] curblin;" and
- A Notice of Claim dated December 4, 1998 (marked received by the Comptroller but the stamp is illegible as to the date), wherein the claimant alleges to have sustained injuries when she tripped and fell in front of the bus stop on the sidewalk in front of 225 East 23<sup>rd</sup> Street when her foot came into contact the pavement, which was "very uneven."

These notices of claim are sufficient to create an issue of fact as to whether the City had notice of the alleged defect herein (*see Brooks v. City of Binghamton*, 55 A.D.2d 482, 484 [3rd Dept. 1977]) ("The characterization of the sidewalk as defective in an area which reasonably encompasses the particular patent defect alleged herein is sufficient to meet the requirement of particularization of the condition of the sidewalk for the purposes of resisting a motion for summary judgment. The question remains one of fact to be determined at trial.") (*see also Jones v. Town of Brookhaven*, 227 A.D.2d 530 [2nd Dept. 1996]).

Finally, the Affidavit of Silberman, a professional engineer, presents an issue of material fact as to whether the City actually created the condition which caused Plaintiff to trip and fall. Silberman opines that the approximately one-inch height differential in the sidewalk flags was caused when six sidewalk flags were replaced. Specifically, Silberman states that the condition was caused by the failure to make the new sidewalk flags flush with the existing sidewalk flags adjacent to the repair area when the concrete was poured, in contravention of various laws and regulations, and contrary to accepted engineering practices (*compare with Bielecki* at 301-02) (plaintiff unable to withstand

summary judgment where “plaintiff’s expert did not opine that the subject defect existed immediately upon the completion of the City’s repair work,” but rather “opined that the defect developed over time...”).

Wherefore it is hereby

ORDERED, that the City’s motion for summary judgment is denied; and it is further

ORDERED that Plaintiff’s motion to substitute Allison Bigman as Plaintiff, in her capacity as executor of the estate of Marlene Bigman, and to amend the caption to reflect the substitution is granted without opposition; and it is further

ORDERED that the caption shall read as follows:

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

-----X

ALLISON BIGMAN, as Executor of the Estate of  
MARLENE BIGMAN, Deceased,

Plaintiff,

Index. No.  
116044/07

-against-

THE CITY OF NEW YORK, NEW YORK CITY  
DEPARTMENT OF EDUCATION, and THE  
BOARD OF EDUCATION OF THE CITY OF  
NEW YORK,

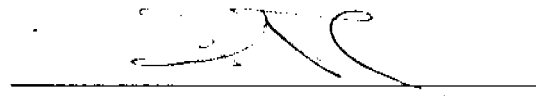
Defendants.

-----X

**FILED**  
JUL 09 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

This constitutes the Decision and Order of the court. All other relief requested is denied.

Dated: July 6, 2009



EILEEN A. RAKOWER, J.S.C.