

Rodriguez-Cedeno v City of New York

2009 NY Slip Op 31813(U)

August 10, 2009

Supreme Court, New York County

Docket Number: 111643/07

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER

PART 5

Index Number : 111643/2007
RODRIGUEZ-CEDENO, REYNA
 VS.
CITY OF NEW YORK
 SEQUENCE NUMBER : 001
 DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1
2, 3
4

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

FILED

AUG 13 2009

COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 8/10/09

[Signature]

HON. EILEEN A. RAKOWER^{C.}

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

REYNA RODRIGUEZ-CEDENO and MANUEL CEDENO,
Plaintiffs, Index No.
111643/07

- against -

Decision and Order

THE CITY OF NEW YORK and HENSEN'S 96TH CORP.,
Defendants. Mot. Seq.: 001

-----X

HON. EILEEN A. RAKOWER

Plaintiffs bring this action for injuries allegedly sustained when plaintiff Reyna Rodriguez-Cedeno tripped and fell on the sidewalk in front of the premises known as 202 West 96th Street in the County and State of New York on August 11, 2006. Manuel Cedeno brings a derivative action. Defendant the City of New York ("City") moves for summary judgment pursuant to CPLR 3211 to dismiss all claims and cross claims as against it. Plaintiff and defendant Hensen's 96th Corp. ("Hensen") oppose.

City, in support of its motion, submits: the notice of claim; the pleadings; plaintiffs bill of particulars; an affirmation by David C. Atik, employee of the Department of Finance; the deposition transcript of Leslie Smalls, record searcher for the New York City Department of Transportation; a response sheet dated November 9, 2007; and accompanying big apple map.

CPLR §3211 states, in relevant part:

- (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
 - (1) A defense is founded upon documentary evidence; or
 - (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply

whether the facts alleged fit within any cognizable legal theory.” (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]). On a motion to dismiss pursuant to CPLR §3211(a)(1) “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted).

Prior to the enactment of Administrative Code § 7-210, effective September 14, 2003, the municipality, not the abutting landowner, was responsible for the maintenance of the sidewalk. The exception to this was where the abutting landowner either created the defect or derived a special benefit from the sidewalk unrelated to public use. (*Spangel v. City of New York*, 285 A.D.2d 425[1st Dept. 2001]). However, with the passing of § 7-210, the abutting sidewalk became not just the responsibility, but the liability of the landowner. 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 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.”

§ 7-210. Liability of real property owner for failure to maintain sidewalk in a reasonably safe condition.

- a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.
- b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective

- sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.
- c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.
- d. Nothing in this section shall in any way affect the provisions of this chapter or of any other law or rule governing the manner in which an action or proceeding against the city is commenced, including any provisions requiring prior notice to the city of defective conditions.

City demonstrates that it does not own the premises located at 202 West 96th Street, and that the premises do not fall within the exemptions set forth in §7-210. The property is classified as Building Class C7 (Walk-up apartments, over 6 families, with stores), and not as a one-,two-, or three-family solely residential property. Further, a record search fails to reveal any permits, complaints/repair orders, violations or contracts for the subject location. There is no indication City caused or created any defect in the subject sidewalk. A record search yielded no evidence that City performed any work on the subject sidewalk for two years prior to the date of the alleged accident.

Plaintiff, in opposition, provides the case scheduling order, a notice of discovery and inspection, a compliance conference stipulation dated December 2, 2008, a compliance conference stipulation dated January 27, 2009, a compliance conference stipulation dated March 24, 2009, a supplemental verified bill of particulars, and the examination before trial of Reyna Rodriguez-Cedeno dated September 11, 2008.

Plaintiff described her fall: “as I was walking I felt my right foot – when I placed my right foot on the ground, I felt my ankle giving way to the right side, and I felt a lot of pain.” She explained that “the middle part of the sidewalk was

misleveled . . . misleveled and broken.”

Plaintiff asserts that because City had notice of the broken condition of the sidewalk before the change in the law in September 2003, it is a proper party to this lawsuit. Hensen relies on plaintiff’s opposition to support its retention of cross claims as against City.

There is no reading of the law whereby it is an exception to § 7-210 that City retains liability if it had notice of a cracked sidewalk at a location prior to September 2003, where liability otherwise transferred to the adjoining landowner. Here, the accident is alleged to have occurred on August 11, 2006. Plaintiff has asserted no claim whereby City is a proper party to this lawsuit, and the motion to dismiss is granted.

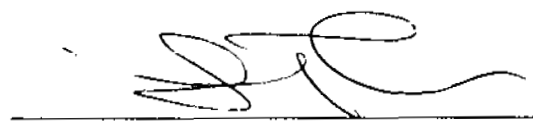
Wherefore, it is hereby

ORDERED that the motion to dismiss is granted, and the Clerk is directed to enter judgment in favor of the City of New York dismissing all claims and cross claims; and it is further

ORDERED the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Plaintiff shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158. Any compliance conferences currently scheduled are hereby cancelled.

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

Dated: August 10, 2009



Eileen A. Rakower, J.S.C.

FILED
AUG 13 2009
COUNTY CLERK'S OFFICE
NEW YORK