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

PRESENT: HON. KAREN SMITH PART 62

Index Number : 112027/2006

DEDIO, HARRY C.

vs

CITY OF NE YORK

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 8/20/2009

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

....s motion to/for _____

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

Cross-Motion: Yes √ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the attached memorandum decision and order.

Dated: 8/7/09

HON. KAREN SMITH J.S.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 62

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HARRY DEDIO,

Plaintiff,

-against-

THE CITY OF NEW YORK and 690 TENTH AVE. REALTY CORP.,

Defendants.

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690 TENTH AVE. REALTY CORP.,

Third-party Plaintiff,

-against-

RINCON MUSICAL INC. d/b/a MUSIC HUT and ALI FAZAL d/b/a F&A PRINTING,

Third-Party Defendants.

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Index no.: 112027/06
Motion seq.: 003
Motion date: 4/6/09

DECISION AND ORDER

PRESENT: KAREN S. SMITH, J.S.C.:

This motion for summary judgment pursuant to CPLR § 3212, dismissing plaintiff's complaint and all cross-claims as against co-defendant, the City of New York ("the City"), is granted for reasons enumerated below.

Plaintiff Harry Dedio sues to recover for injuries he sustained on September 10, 2005, after falling on a sidewalk abutting real property located at 690 Tenth Avenue, New York, New York. Mr. Dedio alleges that he was caused to trip and fall by a dangerous condition in the sidewalk, namely, a depression immediately before the steel lip of a sidewalk vault.

The City now moves for summary judgment pursuant to CPLR § 3212, dismissing plaintiff's complaint and all cross-claims against it, contending that it is not liable for Mr. Dedio's injuries under Administrative Code of City of NY § 7-210 (c) ("Sidewalk Law"), since it is not the abutting landowner, and no exception is applicable. Plaintiff does not oppose the City's

motion for summary judgment. Instead, co-defendant 690 Tenth Avenue Realty Corp. ("690 Tenth Avenue"), which has standing based on its cross-claim against the City for indemnification, opposes, arguing that there remains a question as to whether the City affirmatively created the allegedly dangerous and defective condition.

In support of its opposition, 690 Tenth Avenue offers the deposition testimony of John Parpis, whose identity is somewhat unclear because only a portion of his testimony was submitted, but who appears to be a principal of 690 Tenth Avenue. Mr. Parpis testified to his lack of knowledge about any involvement the City may have had in creating the defect. According to 690 Tenth Avenue, Mr. Parpis's EBT testimony is sufficient to raise an issue of fact to defeat the City's motion.

The City argues as an initial matter that it need not respond to this claim, since Mr. Dedio did not allege in his Notice of Claim that the City caused and created the alleged sidewalk defect, and "may not now, more than one year and ninety days from the date of his alleged accident, assert a theory of affirmative negligence on the part of the City." 690 Tenth Avenue responds to this argument by noting that the plaintiff, in the Notice of Claim, brought his action due to the City's negligence in the "construction of the sidewalk," a phrase, they contend, whose plain meaning implies affirmative negligence.

In spite of its contention that it need not do so, the City offers as evidence that it did not create the defect: 1) the deposition of Leslie Smalls, a City employee, and 2) a Department of Transportation "response sheet," which memorialized record searches undertaken by the City to determine whether any work on the City's part caused the defect. 690 Tenth Avenue argues that the City's motion should be denied as the evidence submitted is inadmissible, as Smalls' deposition is unsigned, and the response sheet because it is "unexecuted," "uncertified," and "not made in the regular course of business."

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1987]). Once the movant has made such a showing, the burden then shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any material issues

of fact requiring a trial of the action (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

New York City real property owners have long carried a statutory duty to "install, construct, repave, reconstruct, and repair the sidewalk flags in front of or abutting such property" (Administrative Code of City of NY § 19-152). Prior to the City's adoption of the Sidewalk Law, failure to meet this duty resulted in fines or an obligation to reimburse the City for its expenses (*see* Administrative Code of City of NY § 19-152[e]; § 16-123[e],[h]). Under the old framework, the City remained liable for injuries caused by defective sidewalk flags, subject to the prior written notice requirement (*see* Administrative Code of City of NY § 7-201[c][2]).

In September 2003, the City adopted the Sidewalk Law, which, with narrow exceptions not implicated here, inverted the framework, leaving property owners primarily exposed and itself insulated from liability arising from sidewalk defects and dangers. In relevant parts, it reads,

> the owner of real property abutting any sidwalk....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...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 failure to maintain sidewalks..." (Administrative Code of NY § 7-210[b][c]).

The City makes a prima facie showing of its entitlement to summary judgment under the Sidewalk Law by submitting evidence that, 1) it did not own abutting real property at the time of the accident and 2) the property was not the kind excepted by the Sidewalk Law. The City's evidence demonstrates that the property abutting the stretch of sidewalk where Mr. Dedio fell is owned by 609 Tenth Avenue, and that it is classified as a C7 building, comprised of stores and walk-up apartments (more than six families). 609 Tenth Avenue makes no claim that the City owned the property abutting the sidewalk; nor does it claim that the property fits into one of the exceptions explicitly carved out by the Sidewalk Law.

There is no dispute that the City could be liable if it affirmatively caused or created the condition, so long as the defect was immediately apparent (*see Bielecki v. City of New York*, 14 A.D.3d 301. [1st Dept. 2005]). While the City argues that Mr. Dedio did not allege affirmative

negligence in his Notice of Claim, 690 Tenth Avenue correctly replies that the plaintiff brought his action due to the City's negligence in "construction of the sidewalk," a phrase whose plain meaning implies affirmative negligence. The City, however, submits the results of a record search which failed to produce any evidence that it performed any work in the area of the plaintiff's accident, which is sufficient to meet its burden in this regard.

The City's submissions of evidence as to ownership, building type, and its lack of affirmative negligence constitute a prima facie showing of entitlement to judgment as a matter of law. The burden to provide evidence to show that there is an issue of fact then falls on 690 Tenth Avenue. 690 Tenth Avenue attempts to meet that burden by claiming there is an issue as to whether the city caused or created the condition. To support that claim, 690 presents only portions of the deposition testimony of John Parpis, in which he states, "I'm not sure if the City replaced the sidewalks anytime. Because, if I recall, maybe, they work and they replacing the sidewalks, all the sidewalks on 10th Avenue. I'm not sure if that was before, after. I don't know."

It is well settled that "[c]onclusory statements are not enough to defeat a motion for summary judgment" *(Terwilliger v. Dawes*, 204 A.D.2d 433, 434 [2nd Dept. 1994]; *see also Shapiro v. Health Ins. Plan of Greater New York*, 7 NY2d 56 [1959]). Mr. Parpis's statements are of this category, as they lack substantial content. As such, Mr. Parpis's testimony fails to raise an issue of fact as to whether the city was affirmatively negligent.

Finally, 690 Tenth Avenue's attempts to undermine the City's evidence on this issue are unavailing. 690 Tenth Avenue claims that the deposition testimony of Leslie Smalls is inadmissible because the deposition is unsigned. The City correctly points to CPLR § 3116, as to the issue of unsigned depositions: "[i]f the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed." Nowhere is there a provision that an unsigned deposition cannot be used in support of a motion. Also without merit is 690 Tenth Avenue's contention that the Department of Transportation response sheet is inadmissible, as the document was marked as an exhibit on June 27, 2008, and was the subject of testimony at the deposition of Leslie Smalls, at which 690 Tenth Avenue was present and made no objection.

Accordingly, it is;

ORDERED that the motion for summary judgment is granted and the complaint is hereby severed and dismissed 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 remainder of the action shall continue.

The foregoing constitutes the decision and order of this court. The parties should note that the case is being transferred to a non-city part, and should contact that part for all further matters relating to the case.

Dated: Aug. 7, 2009

ENTER:

Hon. Karen S. Smith, J.S.C.