

<b>Rivera v City of New York</b>
2009 NY Slip Op 31913(U)
August 24, 2009
Supreme Court, New York County
Docket Number: 105285/07
Judge: Karen Smith
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Karen Smith  
Justice

PART 62

Index Number : 105285/2007

RIVERA, RUTH E.

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

vs

CITY OF NEW YORK

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

Sequence Number : 003

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

SUMMARY JUDGMENT

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

§ motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

*defendant Basahl's*  
*is granted in*  
*accordance with the attached memorandum*  
*decision.*

**FILED**  
AUG 26 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 8/24/09

K. S. S.  
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

-----X  
RUTH E. RIVERA,

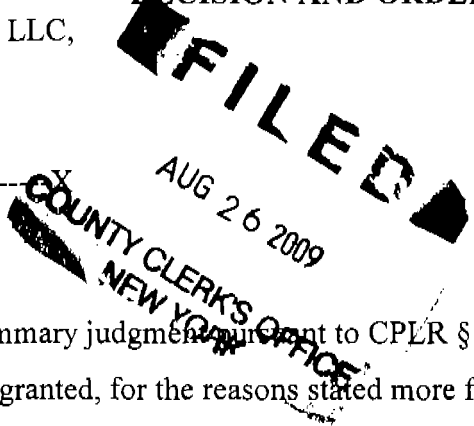
Plaintiff,  
-against-

Index no.: 105285/07  
Motion seq.: 003  
Motion date: 5/27/2009

THE CITY OF NEW YORK, 163/167 EAST 115 LLC,  
163-67 E 115, LLC and HELEN BARAHAL

Defendants.

**DECISION AND ORDER**



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

Defendant Helen Barahal's motion for summary judgment pursuant to CPLR § 3212 dismissing the complaint as against her is hereby granted, for the reasons stated more fully below.

This action arises from an incident on November 1, 2006 in which plaintiff alleges she was caused to trip and fall by a defect in the public sidewalk. Plaintiff sued Ms. Barahal, alleging that, as the owner of the abutting property, at 167½ East 115<sup>th</sup> Street, New York, New York, she was negligent in the ownership, operation, management, maintenance, supervision and control of the sidewalk.

Ms. Barahal argues that she is entitled to summary judgment under CPLR § 3212 because, as the resident-owner of a single family dwelling, she fits into one of the narrow exceptions provided for in the liability framework of Administrative Code § 7-210 ("the Sidewalk Law"), which assigns liability for such sidewalk defects. Plaintiff and co-defendant, the City of New York ("the City") argue that an issue of material fact exists with respect to whether Ms. Barahal actually lived at 167½ East 115<sup>th</sup> Street at the time of the accident, and, as such, whether the subject exception actually applies.

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]).

In September 2003, the City adopted the Sidewalk Law, which, with narrow exceptions, transferred the liability for accidents arising from sidewalk defects from the City to the owners of real property abutting the sidewalk where the accident occurred. The Sidewalk Law provides an exception for one-, two-, or three-family residential real property owners where the property is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.” (Administrative Code of NY § 7-210[b],[c]).

If the owner of abutting real property meets the requirements of this exclusion, she can only be liable for injuries arising from defective sidewalk conditions if she “created the defective condition or caused the defect to occur because of some special use, or...a statute or ordinance placed the obligation to maintain the sidewalk upon [her]” (*Bloch v. Potter*, 204 A.D.2d 672, 673 [2<sup>nd</sup> Dept. 1994]).

In order to establish the fact of her residence at the East 115 Street address, Ms. Barahal submits records from the New York City Department of Finance and her own affidavit. In the affidavit, Ms. Barahal stated that she lived with her young son at the 115<sup>th</sup> East Street address, occupying the whole premises on the date of the accident. The Department of Finance records indicate that in February 2006, the property was listed as a single family home.

In order to raise an issue of fact regarding Ms. Barahal’s residency at the East 115 Street address, plaintiff submits three exhibits, all of which are printouts from the LexisNexis database. Exhibit A purports to show that Ms. Barahal lived at the East 115<sup>th</sup> Street address from December 2006 until April 2007; Exhibit B purports to show vehicle registration forms which do not reflect the East 115 Street address; and Exhibit C, the results of a location search which lists “167 ½ E. 115<sup>th</sup> Street #3F,” purports to show that the property “is and/or was” used as multi-family house. The plaintiff and the City rely exclusively on these exhibits in their opposition papers.

Ms. Barahal responds that the printouts are inadmissible, as they are “inaccurate and unreliable on their face, have not been independently verified by any official source whatsoever.”

The reply points to a disclaimer on each of the computer printouts which states:

The Public Records and commercially available data sources used on reports reports have errors. Data is sometimes entered poorly, processed incorrectly and is generally not free from defect. This system should not be relied upon as definitively accurate. Before relying on any data this system supplies, it should be independently verified.

Along with the Department of Finance records, Ms. Barahal annexes to her reply certified records from the New York City Department of Buildings which classify the East 115<sup>th</sup> Street property as a one family dwelling.

Ms. Barahal has made a *prima facie* showing of her entitlement to summary judgment under the Sidewalk Law by submitting evidence that she resided at the 115<sup>th</sup> East Street address at the time of the time of plaintiff's accident in November 2006, and that the property is a one family dwelling. This evidence qualifies Ms. Barahal for the exception provided for in the Sidewalk Law, and there is no claim that she caused or created the sidewalk defect.

The efforts of the plaintiff and the City to rebut this *prima facie* showing are ineffectual. Both parties rely entirely on database searches, which are not presented in admissible form and which, even if they were, do not clearly establish the factual circumstances they purportedly reflect. Evidence excludable at trial, such as the database searches, "may be considered to deny a motion for summary judgment provided that this evidence does not form the sole basis for the court's determination (*Wertheimer v. N.Y. Prop. Ins. Under. Assoc.*, 85 A.D.2d 540, 541 [1<sup>st</sup> Dept. 1981]). Both the plaintiff and the City rely solely on these database searches as the basis for their opposition to Ms. Barahal's application for summary judgment. As such, the database searches fail to raise an issue of fact as to whether the Ms. Barahal resided at the 115<sup>th</sup> East Street address, or whether the property was a one-, two-, or three-family residential real property.

Accordingly, it is

ORDERED that the motion for summary judgment is granted and the complaint is hereby severed and dismissed against defendant Helen Barahal, and the Clerk is directed to enter judgment in favor of said defendant dismissing all claims and cross-claims against her; and it is

further

ORDERED that the remainder of the action shall continue.

The foregoing constitutes the decision and order of this court.

Dated: August 24, 2009

ENTER:



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

**FILED**  
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COUNTY CLERK'S OFFICE  
NEW YORK