

**Boorman v City of New York**

2009 NY Slip Op 32662(U)

November 6, 2009

Supreme Court, New York County

Docket Number: 108928/2003

Judge: Harold B. Beeler

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
**HAROLD BEELER**

PRESENT: \_\_\_\_\_  
*Justice*

PART 21

Index Number : 108928/2003  
**BOORMAN, JOSEPH**  
VS.  
**CITY OF NEW YORK**  
SEQUENCE NUMBER : 006  
SUMMARY JUDGMENT

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

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

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

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

this 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

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

**FILED**

NOV 16 2009

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11/06/09



**HAROLD BEELER** *J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

At IAS Part 21 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 71 Thomas Street, New York, New York on the 6th of November, 2009.

**PRESENT:     HON. HAROLD B. BEELER,**  
Justice

JOSEPH BOORMAN,  
Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY TRANSIT AUTHORITY, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, TISHMAN REALTY & CONSTRUCTION CO., INC., TISHMAN REALTY CORPORATION, TISHMAN HOTEL CORPORATION and T.S. HOTEL LIMITED PARTNERSHIP,  
Defendants.

INDEX NUMBER 108928/2003  
Motion Sequence 006  
**DECISION & ORDER**

**FILED**  
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NEW YORK  
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Defendants Tishman Construction Corporation of New York, Tishman Realty & Construction Co., Inc., Tishman Realty Corporation and Tishman Hotel Corporation (Tishman) move for summary judgment in their favor dismissing the complaint and all cross-claims against them. The New York City Transit Authority (Transit) opposes. Plaintiff opposes and cross-moves for leave to serve an amended complaint and/or bill of particulars to include allegations that defendants violated General Obligations Law § 11-106 and Industrial Code §§ 23-1.7(e)(1) and 23-1.33(a)(1), (a)(2), (b)(2)(iii) and (d)(1).

Plaintiff, on duty as a New York City Police Department officer on July 16, 2002, was allegedly injured on the sidewalk in front of 680-686 Eighth Avenue between 42<sup>nd</sup> and 43<sup>rd</sup> Streets when he was pursuing a suspect. Tishman was engaged in a construction project at the

location at the time. The accident occurred prior to the September 14, 2003 revision of Administrative Code § 7-210(a) which shifted responsibility to maintain abutting sidewalks “in a reasonably safe condition” from the City to the property owner, 42<sup>nd</sup> St. Development Project, Inc. in this instance. Tishman had no property interest in the site.

Because the top layer of sidewalk pavement had been removed leaving the edge of a subway grate standing approximately two inches above the sidewalk surface, concrete had been poured around the perimeter of the grate to create an inclined ramp between the sidewalk surface and the top of the grate. Plaintiff claims he fell when he “hit the incline.” He testified that he “fell forward and tripped over the raised portion and landed on the grating.” No one was able to establish who built the ramp. Tishman’s witness testified without refutation that it received no citations for permit violations or hazardous conditions at the accident site.

Tishman relies upon *Carter v City of New York*, 272 AD2d 498, 499 (2d Dept 2000) which is based on the common-law firefighter’s rule: “Recovery for damages for common-law negligence is precluded ‘where some act taken in furtherance of a specific police or firefighting function exposed the officer to a heightened risk of sustaining the particular injury.’” In *Carter*, a police officer on duty fell on a defective sidewalk prior to the revision of Administrative Code § 7-210(a). So, while the City was being sued for its alleged negligence as property owner, it was immune under common law as plaintiff’s employer. Plaintiff correctly maintains that General Obligations Law § 11-106 allows a cause of action for common-law negligence against a purported tortfeasor who is not the employer or co-employee of the injured firefighter or police officer. *Cosgriff v City of New York*, 241 AD2d 382 (1st Dept 1997) *affd* 93 NY2d 539 (1999). Tishman, therefore, is subject to a claim of common-law negligence by this police officer allegedly injured acting in furtherance of a specific police function.

Whether Tishman is responsible for creating or maintaining the hazardous condition which caused plaintiff's injury is a question for the jury. Tishman's motion for summary judgment dismissing the complaint and all cross-claims against it is denied.

Plaintiff's cross-motion for leave to amend his complaint and bill of particulars is granted only to the extent of including allegations that defendants violated General Obligations Law § 11-106 as discussed above. Industrial Code § 23-1.7(e)(1) addresses the risk of tripping in a passageway at a construction site. The sidewalk in front of 680-686 Eighth Avenue was a construction site, but the area was not sectioned off as a passageway. Pedestrians could approach it from any direction without being directed in their movement. It would be inappropriate to cite Industrial Code § 23-1.7(e)(1) in the instant complaint. *Smith v. Hines GS Props., Inc.*, 2006 NY Slip Op 3990, 2 (1st Dept 2006) ("The open area between the building under construction and the materials storage trailers was not a 'passageway' or walkway covered by Industrial Code [12 NYCRR] § 23-1.7[e][1]"). Industrial Code § 23-1.33(a)(1) requires "[r]easonable and adequate protection and safety shall be provided for all persons passing by areas, buildings or other structures in which construction, demolition or excavation work is being performed" and § 23-1.33(a)(2) requires that every construction site "shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as not to endanger any person passing by." *Hill v Corning Inc.*, 237 AD2d 881, 882 (4th Dept 1997) held, in denying leave to amend a complaint, that Industrial Code § 23-1.33 "is a general safety standard that does not 'mandat[e] compliance with concrete specifications' [citation omitted]. Thus, the alleged violation of that provision is not a basis for liability under [Labor Law] section 241(6)." Industrial Code § 23-1.33(b)(2) and (d)(1) are somewhat more focused in addressing the condition of temporary walkways and existing walkways respectively. However, the accident site, a public sidewalk, was no more a

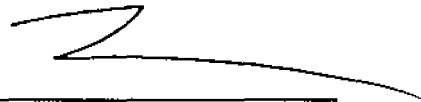
walkway than a passageway. *See Farrell v Blue Circle Cement, Inc.*, 13 AD3d 1178 (4th Dept 2004); *Barnes v DeFoe/Halmar*, 271 AD2d 387 (2d Dept 2000). Accordingly, plaintiff's cross-motion for leave to amend the complaint and bill of particulars to include violations of various sections of the Industrial Code is denied.

Tishman shall serve a copy of this order upon all parties forthwith. Plaintiff shall serve an amended copy of his complaint and bill of particulars upon all parties within 21 days of receipt of this order.

This constitutes the decision and order of the Court. Any other requested relief not expressly granted is denied.

**DATE:**        **November 6, 2009**

**ENTER:**



**HAROLD B. BEELER, J.S.C.**

**HAROLD BEELER**

**FILED**  
NOV 16 2009  
NEW YORK  
COUNTY CLERK'S OFFICE