

**Chinitz v City of New York**

2009 NY Slip Op 33054(U)

December 21, 2009

Supreme Court, New York County

Docket Number: 110802/05

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

**HON. EILEEN A. RAKOWER**

PRESENT: Rakower

PART 5

Index Number : 110802/2005

CHINITZ, WALLACE

vs

CITY OF NEW YORK

Sequence Number : 003

SUMMARY JUDGMENT

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

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

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

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

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

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

PAPERS NUMBERED

**FILED**

DEC 30 2009

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 12/21/09

  
**HON. EILEEN A. RAKOWER**

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):

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

-----X  
WALLACE CHINITZ AND CAROL CHINITZ,

Plaintiff,  
  
- against -

Index No.110802/05  
**DECISION/ORDER**  
Seq. No.: 003

THE CITY OF NEW YORK, LINCOLN CENTER FOR  
THE PERFORMING ARTS, INC. AND MILLER DRUCK.  
Defendants.

**FILED**  
DEC 30 2009  
X  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
HON. EILEEN A. RAKOWER

Plaintiff, Wallace Chinitz, brings this action for personal injuries allegedly sustained as the result of a trip and fall accident that occurred on September 11, 2004, on the sidewalk at or near the Lincoln Center fountain and Avery Fisher Hall. Carol Chinitz brings a derivative action. Defendant, Miller Druck Contracting, Inc. ("Miller Druck"), was a contractor hired by Lincoln Center for the Performing Arts, Inc. (Lincoln Center) to replace or install new stone pavers. Miller Druck brings a cross-claim for indemnification against the City of New York ("City") and Lincoln Center. Miller Druck brings the instant motion for summary judgment seeking to dismiss all claims as against it. Plaintiff opposes. No other party submits papers.

Miller Druck, in support of its motion, provides plaintiff's notice of claim with photos, the summons and complaint, its answer, plaintiff's verified bill of particulars, a transcript of the examination before trial of Wallace Chinitz dated March 11, 2008, a transcript of the examination before trial of Carol Chinitz dated March 11, 2008, a transcript of the examination before trial of Edwin Devine, senior facility manager for Lincoln Center, dated March 11, 2008, a transcript of the examination before trial of Maria Fernandez, associate director planning and construction for Lincoln Center, dated November 18, 2008, an agreement between Lincoln Center and Miller Druck dated August 27, 2002, an agreement between Lincoln Center and Miller Druck dated October 31, 2003, and a transcript of the examination before trial of Edward Grimes, field supervisor for Miller Druck, dated March 11, 2008. Miller Druck contends it owed no duty of care to non contracting third parties; nor did it cause or create the offending defect.

Plaintiffs, in opposition, provide discovery requests and points out that the motion is premature. Specifically, they requested invoices prepared for work relating to the two contracts, which would be in the possession of the moving defendant. Consequently, plaintiffs urge that the motion be denied pursuant to CPLR 3212(f).

Miller Druck, by way of reply, provides the contract invoices which had already been provided to plaintiffs. Miller Druck reiterates that plaintiff cannot show that Miller Druck owed a duty of care to plaintiff since its contract did not meet the exceptions to the general rule that a contractor does not owe a duty of care to a non-contracting third party such as plaintiff.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). In addition, bald, conclusory allegations, even if believable, are not enough. *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890 (1970).

It is well settled that no duty of care is owed to a non contracting third party except in three limited circumstances. Those circumstances are: first, where one engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others or increases that risk; second, where the plaintiff has suffered injury as a result of reasonable reliance upon defendant's continuing performance of a contractual obligation; and third, where the contracting party has entirely displaced the other party's duty to maintain the premises safely. (*Church v. Callanan Industries, Inc.*, 99 NY2d 104 [2002]).

Miller Druck has shown that none of these exceptions applies here. Miller Druck contracted, by the earlier contract, to

[R]emove and discard damaged/broken Travertine pavers from the Josie Robertson Plaza. Exact locations and quantities are to be determined by personnel from the Lincoln Center General Services Department but a minimum of twelve pavers are to be removed. . . . Contractor shall be

responsible to keep the work area in a clean and orderly fashion. All floors are to be broom swept daily and all debris is to be removed from site.

Miller Druck points out that its work was done in areas other than where plaintiff fell.

The second contract, which encompassed the period of time during which plaintiff fell, required Miller Druck to

[R]eplace a dozen broken/damaged stones on the Josie Robertson Plaza as determined by LCPA personnel. . . . Contractor shall be responsible to keep the work area in a clean and orderly fashion. All debris is to be removed from site daily. All work is to be coordinated with LCPA General Services Department.

Again, Miller Druck points out that there is no evidence it worked in the area where plaintiff fell. Indeed, the only evidence is that it worked "west" of that area.

Where facts essential to justify opposition to a motion for summary judgment are within the exclusive knowledge and possession of the moving party, summary judgment should be denied. ( See CPLR §3212(f)) However, the opposition must offer more than mere hope that it might be able to uncover some evidence during the discovery process which will impeach the facts asserted by movant. *See Pow v. Black*, 182 AD2d 484 (1st Dept. 1992).

Despite plaintiff's protestations, Miller Druck is not the only party in possession of records that might show it worked in the subject area such that it caused or created some defect. Consistently, the evidence shows Miller Druck worked at the direction and in areas designated by Lincoln Center. Lincoln Center does not oppose Miller Druck's motion.

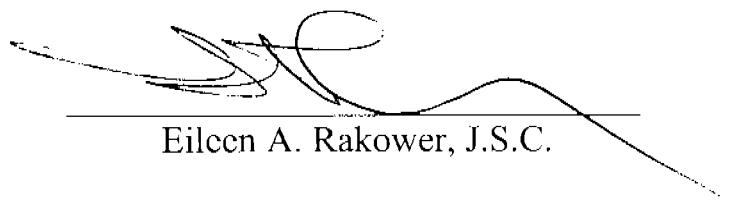
Wherefore, it is hereby

ORDERED that Miller Druck's motion to dismiss all claims as against it is granted and the action is hereby severed and dismissed as against Miller Druck Specialty Contracting, Inc., 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.

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

Dated: December 21, 2009



\_\_\_\_\_

Eilcen A. Rakover, J.S.C.

**FILED**  
DEC 30 2009  
NEW YORK  
COUNTY CLERK'S OFFICE

**FILED**  
DEC 30 2009  
NEW YORK  
COUNTY CLERK'S OFFICE