

<b>Moy v City of New York</b>
2010 NY Slip Op 30101(U)
January 14, 2010
Supreme Court, New York County
Docket Number: 115204/08
Judge: Lottie E. Wilkins
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOTTIE E. WILKINS  
*Justice*

PART 18

SO NGOR MOY,

Plaintiff,

- v -

THE CITY OF NEW YORK et al.

Defendants.

INDEX NO. 115204/08

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

MOTION SEQ. NO. 001

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

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

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

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

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

PAPERS NUMBERED

1, 2

3-5

Cross-Motion: Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
JAN 20 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

**Motion by defendant, New York City Transit Authority, for summary judgment dismissing the complaint and all cross-claims is granted in accordance with the attached decision and order.**

Dated: January 14, 2010

[Signature]

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

-----X  
SO NGOR MOY,

Plaintiff,

- against -

**DECISION AND ORDER**

Index No. 115204/08

THE CITY OF NEW YORK, NEW YORK TRANSIT  
AUTHORITY, WING WONG REALTY CORP., THE  
DINING ROOM MANAGEMENT GROUP, INC. and  
HESTER PARKING CORP.,

Defendants.  
-----X

Lottie E. Wilkins, J.:

**FILED**  
JAN 20 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Defendant New York City Transit Authority moves pursuant to CPLR 3212 and/or 3212 to dismiss plaintiff's complaint and the cross-claims asserted against it. Defendants Wing Wong Realty Corp., The Dining Room Management Group, Inc. and Hester Park Corp. have each submitted opposition to the motion. This is a personal injury action arising from a trip and fall on a Lower Manhattan sidewalk adjacent to a metal grating. As summarized in the notice of claim served upon the Transit Authority, plaintiff So Ngor Moy claims that he sustained "personal injuries" when he tripped over a raised and uneven "sidewalk and/or grate area located on 106 Mott Street, in the County, City and State of New York." Plaintiff named the City of New York, the Transit Authority, Wing Wong Realty, The Dining Room Management Group, Inc. and Hester Parking Corp. as defendants in a summons and complaint filed on November 12, 2008.

Defendants City of New York, Wing Wong Realty and Hester Parking each answered the complaint and asserted cross-claims against the Transit Authority. In the papers now before the Court, the Transit Authority claims that it was never served with an answer from defendant Dining Room Management Group and, for that reason, the Transit Authority's papers do not refer to any cross-claims asserted by that defendant. For its part, The Dining Room Management Group claims that it was not properly served with instant motion but that nonetheless its cross-claims against the Transit Authority state a valid cause of action. The Dining Room Management Group's has not annexed a copy of its answer and cross-claims to its opposition papers nor is it found among the exhibits of any other party.

Although the Transit Authority has requested relief based either on the provisions of CPLR 3211 or CPLR 3212, the essential justification for this motion is that the facts, as opposed the legal sufficiency of the claims and defenses, require dismissal of the complaint and cross-claims at this juncture. Thus the Court will treat this motion as one for summary judgment under CPLR 3212.

Summary judgment is a drastic remedy that should be granted only when no genuine issue of fact requiring trial exists (see, Andre v Pomeroy, 35 NY2d 361 [1974]). Indeed, the Court's role on a motion for summary judgment is issue-finding, not issue-solving, and all competent evidence must be viewed in the light most

favorable to the non-moving party (see, Bush v St. Claire's Hosp., 82 NY2d 738 [1993]); Weingrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). For these reasons the standard for summary judgment is high: The movant must present evidence, in admissible form, which demonstrates the absence of any material issue of fact (see, Weingrad, supra, 64 NY2d at 853). The failure to make the required showing will result in denial of the motion regardless of the sufficiency of the opposing papers. As for evidentiary proof in admissible form, the motion must be supported by an affidavit from a person having knowledge of the facts and based upon all the papers and proof submitted (see, CPLR 3121[b]).

When the required *prima facie* showing is made, however, it is then up to the party opposing summary judgment to adduce facts sufficient to raise an issue requiring trial or provide some explanation for why such contrary facts have not been provided (see, Vermette v Kenworth Truck Co., 68 NY2d 714 [1986]; Zuckerman v City of New York, supra). As with the summary judgment movant, the party opposing the motion must set forth proof in admissible form. This shifting burden calls upon the summary judgment opponent to "assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist" and that the issues are "real, not feigned, since a sham or frivolous issue will not preclude summary relief" (Kornfeld v NRX Technologies, Inc., 93 AD2d 772, 773 [1<sup>st</sup> Dept. 1983]).

The Transit Authority's motion is premised on its contention that it cannot be liable for plaintiff's accident or injuries because it does not own, maintain, operate or control either the sidewalk or the grating where plaintiff's accident is alleged to have occurred. In support, the Transit Authority has submitted an affidavit from Carmelite Cadet, a civil engineer employed by the TA, who avers that she has reviewed and is familiar with the allegations made in this matter and has conducted a search for plans and blueprints for sidewalk gratings located at 106 Mott Street within the Transit Authority's relevant documents and grating drawings. Cadet reports finding no records pertaining to a sidewalk or grating located on 106 Mott Street in Manhattan. Referring to a New York City Map Portal, Cadet further avers that there is no subway line running underneath 106 Mott Street and that the nearest subway is located on Canal Street. Turning to plaintiff's photographs of the subject grating, Cadet states that the grating involved in this accident is not of the kind used by the Transit Authority in its sidewalk gratings. For one thing, the subject grating has a diamond-shaped grid pattern, such as that found on gratings owned by the Consolidated Edison Company, whereas gratings owned by the Transit Authority have a rectangular grid pattern. Moreover, Cadet avers that Transit Authority gratings do not have hinges, such as those that might be found on a Consolidated Edison transformer vault. Finally, Cadet states that Transit Authority gratings are positioned near the curb where they provide

ventilation to train passengers on the platforms below. Implicit in this statement is her observation that the grating depicted in plaintiff's photographs appears to be located in the middle of the sidewalk, or slightly closer to the building line.

The opposition submitted by the responding defendants does not directly challenge the factual averments of the Cadet affidavit. Instead, defendants' focus on the fact that critical outstanding discovery has yet to be completed in this case, such as the exchange of bills of particulars, discovery and inspection responses and the conducting of depositions, all of which make the instant motion premature. Defendants contend that, given the paucity of discovery exchanged to date, a genuine issue of fact remains as to ownership of the grating and that the Transit Authority's motion should be denied as premature. In support of this argument, defendant Wing Wong Realty cites to several cases standing for the proposition that granting summary judgment at a point before relevant discovery has been exchanged is generally viewed as premature (see e.g., Sportiello v City of New York, 6 AD3d 421 [2nd Dept. 2004]; 181 South Franklin Assocs. v Y & R Associates, Inc., 6 AD3d 594 [2nd Dept. 2004]).

The situation presented here is somewhat different from the precedents cited, however, because the issue in dispute is ownership of the property (both the sidewalk and the grating) where plaintiff claims to have been injured. Unlike many other factual issues that arise in negligence actions, the fundamental question of

ownership is not one that is typically open to interpretation and thus better left for review upon a fully developed record in discovery. Whereas it was understandably premature for the trial court in Sportiello to conclude before discovery was completed that the condition alleged to have caused plaintiff's accident was "open and obvious" and that fact negated any potential liability based on defendants' own negligence, that issue is quite different than the one raised on this motion (see, Sportiello, *supra*, 6 AD3d at 422). Similarly, the question of whether the plaintiff could "pierce the corporate veil" in 181 South Franklin Assocs. understandably required the completion of discovery before such an issue could be decided as a matter of law (see, 181 South Franklin Assocs., *supra*, 6 AD3d at 594). Ownership, however, is not a nuanced factual question like the ones presented in these cases. In the appropriate circumstances, the question of property ownership can lend itself particularly well to resolution by a motion for accelerated judgment based upon legally sufficient facts (see, Wali v City of New York, 22 Misc.3d 478 [Sup. Ct., Kings County 2008]; Gray v City of New York, 20 Misc.3d 1125A [Sup. Ct., NY County 2008]).

Before making this motion, the Transit Authority searched its files and determined, from the lack of map and drawing records among several other indications, that it did not own or control the grating in question. This evidence was then presented to the Court in admissible form. Given the elemental nature of the factual question in

dispute – either the Transit Authority owns the grating or it does not -- the affidavit submitted in support of the motion is sufficient to establish the Transit Authority's *prima facie* entitlement to dismissal of the complaint and all cross claims. The opposing co-defendants cannot defeat this motion simply by pointing out that discovery is not yet complete. Even though the law permits a summary judgment opponent to provide an excuse for the absence of contrary evidence, at this point it is incumbent on the opposition to demonstrate how further discovery might reveal additional information on this issue sufficient to create an issue of fact (see Gray, supra, at 3, citing Cooper v 6 West 20<sup>th</sup> Street Tenants Corp., 258 AD2d 362 (1<sup>st</sup> Dept. 1999)). There is no suggestion in the opposition papers that further discovery might reveal that the Transit Authority does in fact own the grating. Thus the opposition is insufficient to overcome the Transit Authority's entitlement to summary judgment.

While this Court is cognizant of the fact that summary judgment at such an early stage of litigation is often ill advised, the nature of the factual dispute in this case and the absence of any opposing evidence or a valid excuse for the lack thereof warrants granting the Transit Authority's motion under these circumstances.

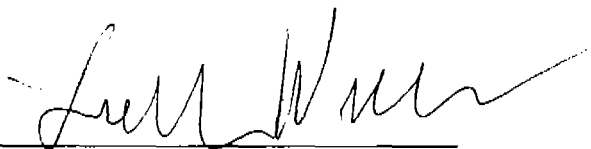
Accordingly, it is

ORDERED that the motion by the New York City Transit Authority for summary judgment is granted and the complaint and all cross-claims are dismissed as to that defendant and severed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated:

  
\_\_\_\_\_  
Lottie E. Wilkins, J.S.C.

**FILED**  
JAN 20 2010  
NEW YORK  
COUNTY CLERK'S OFFICE