

**Bonet v City of New York**

2010 NY Slip Op 30103(U)

January 14, 2010

Supreme Court, New York County

Docket Number: 117028/05

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER  
Justice

PART 15

Bonet, Sara

INDEX NO. 117028105

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

MOTION SEQ. NO. 07

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

- v -

City

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	
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2, 3</u>
Replying Affidavits _____	<u>4</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 1/14/10

[Signature]  
**HON. EILEEN A. RAKOWER** 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):

1-19-10  
[Signature]

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
SARA BONET,

Plaintiff,

Index No.117028/05  
Decision and Order  
Motion Seq. 007

- against -

THE CITY OF NEW YORK, NEW YORK CITY EDUCATIONAL  
CONSTRUCTION FUND, HUDSON-VIEW TERRACE LLC,  
EMPIRE STATE MANAGEMENT INC., CARTEGENA  
ENTERPRISES LTD., CAMMEBY'S INTERNATIONAL, LLC,  
CAMMEBY'S FUNDING LLC, CAMMEBY'S REALTY CORP.,  
CLO INC., HUDSON-VIEW TERRACE, INC., STRUCTURAL  
CONCRETE & MASONRY INC., SCM, INC., WILLIAM McINTYRE  
and INDUSTRY CITY MAINTENANCE CORP.,

Defendants.

-----X  
HUDSON-VIEW TERRACE LLC, EMPIRE STATE  
MANAGEMENT INC., CARTEGENA ENTERPRISES  
LTD., CAMMEBY'S INTERNATIONAL, LLC,  
CAMMEBY'S FUNDING LLC, CAMMEBY'S REALTY  
CORP.,

Third-Party Plaintiffs,

Third-Party Index  
No.590441/06

- against -

CLO, INC.,

Third-Party Defendant.

-----X  
CLO, INC.,

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

Second Third-Party Plaintiff,

Second Third-Party  
Index No. 590346/07

- against -

SMC, INC., WILLIAM McINTYRE, individually, and  
INDUSTRY CITY MAINTENANCE CORP, INC.,

Second Third-Party Defendants.

-----X  
HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action for damages arising out of her trip and fall on the sidewalk in front of 747 Tenth Avenue (the building), in the County and State of New York, on December 15, 2004. Specifically, plaintiff claims that she tripped on a plank of wood. Parties to this action include: Hudson View Terrace LLC, Empire State Management Co. s/h/a Empire State Management, Inc., Cammeby's Intl LLC, Cammeby's Funding LLC and Cammeby's Realty Corp. (Hudson View), representing the owner and managing agent of the building; Structural Concrete & Masonry Inc. and William McIntyre (SCM), who subcontracted to do construction work at the building; CLO, Inc. (CLO) which contracted with owner to do construction and renovation work at the building, and which defendant is in default; Industry City Maintenance, Corp. and Cartegena Enterprises LTD. are defendants in default; the case was discontinued as against the City of New York. Defendant the New York City Educational Construction Fund (NYCEF), brings the instant motion for summary judgment, dismissing the complaint as against it and for judgment as against co- defendant Hudson View for breach of contract and failure to defend and indemnify NYCEF.

NYCEF asserts that the building is divided into two sections, a school with an entrance on 50<sup>th</sup> Street, and a residential section which fronts onto Tenth Avenue. It maintains that Hudson View stands in the place of the owner with respect to the residential portion of the building. NYCEF, in support of its motion, provides the summons and complaint, its answer with cross claims, plaintiff's verified bill of particulars, the lease between NYCEF as lessor and Hudson View as lessee pertaining

to the building, the examination before trial of NYCEF employee Juanita Rosillo, the examination before trial of Sara Bonet, the examination before trial of Hudson View's Ephraim Fruchthandler, NYCEF's response to discovery demands dated January 20, 2009, and correspondence between insurer CNA and Hudson View, tendering the instant lawsuit to Hudson View for defense and indemnification.

Plaintiff, in opposition, points out that it has brought claims pursuant to provisions of the Labor Law, which, she maintains, obligate the owner of premises to protect pedestrians traversing the sidewalk where such construction is under way. Plaintiff refers to the deposition of Mr. Fruchthandler and the plaintiff's verified bill of particulars to support her contention that construction was indeed under way at the time of her accident, and that the premises were not kept in a safe condition.

Hudson View, in its opposition, asserts that NYCEF is not entitled to summary judgment on the indemnification issue because the indemnity clause has not been triggered. Specifically, Hudson View claims that NYCEF has not shown that Hudson View was negligent or in breach of the lease and that the indemnity clause is void pursuant to GML §5-321 because "it does not exclude construction fund's passive negligence." Hudson View points out that no proof is offered which conclusively establishes "where the plank was located, who placed it in that location or how long it was in that position." Hudson View argues that "without such proof Construction Fund has not shown that the accident occurred on the demised premises or on the sidewalk, and that it resulted from the tenant's breach of the lease."

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 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Labor Law §241(8) states:

The commissioner, as deemed necessary, shall promulgate rules designed for the purpose of providing for the reasonable and adequate protection and safety of persons passing by all areas, buildings or structures in which construction, excavation or demolition work is being performed, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith. *The provisions of this subdivision shall not apply to cities having a population of one million or more.*

The Court takes judicial notice of the fact that in December 2004, New York City had a population of more than one million people. Thus, Labor Law §241(8) does not apply. Nor is there evidence that NYCEF caused or created a defective condition at the location of plaintiff's accident. There is no evidence in the record that NYCEF was involved with the ongoing construction at the site. Indeed, Ms. Rosillo, Director of Finance for NYCEF, testifies that NYCEF has not hired any contractors to perform work at the subject premises since the lease went into effect, that no NYCEF employees did work at the subject building prior to the date of the accident, and that NYCEF employees did not have anything to do with day to day operations at the building.

NYCEF has established its entitlement to judgment as a matter of law. Neither plaintiff nor Hudson View present evidence in admissible form which raises issues of fact in opposition. As the complaint is dismissed as to NYCEF, NYCEF's cross-claims for indemnification and breach of contract are rendered moot.

Wherefore it is hereby

ORDERED that the motion for summary judgment is granted to the extent that the complaint is hereby severed and dismissed as against defendant the New York City Educational Construction Fund, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that any and all cross-claims as against defendant the New York City Educational Construction Fund are hereby dismissed; 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 January 14, 2010

  
EILEEN A. RAKOWER

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