

**Smith v City of New York**

2010 NY Slip Op 31139(U)

May 4, 2010

Supreme Court, New York County

Docket Number: 111178/05

Judge: Karen Smith

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

PRESENT: **HON. KAREN SMITH**  
Index Number : 111178/2005

PART 62

SMITH, MELISSA

vs

CITY OF NEW YORK

Sequence Number : 005

SUMMARY JUDGMENT

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

MOTION DATE

4/29/10

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

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

The following papers, numbered 1 to \_\_\_\_\_ were read on 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 and cross-motion are decided in accordance with the accompanying memorandum.

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

**FILED**

MAY 12 2010

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: \_\_\_\_\_

5/4/10

**HON. KAREN SMITH**

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

*KSS*

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 62

-----X  
MELISSA SMITH,

Plaintiff,

-against-

Index No.: 111178/05  
Motion Seq.: 005 and 006  
Motion Date: April 29, 2010

THE CITY OF NEW YORK, DAG HAMMARSKJOLD  
TOWER, N.V., and THE BOARD OF MANAGERS  
OF DAG HAMMARSKJOLD TOWER, N.V.,  
Defendants.

DECISION AND ORDER

-----X

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

**FILED**  
MAY 12 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Motion Sequence Numbers 005 and 006 are hereby consolidated for disposition.

The motion by defendants Dag Hammarskjold Condominium Tower and Board Managers of Dag Hammarskjold Condominium Tower for summary judgment dismissing plaintiff's complaint and all cross-claims against them pursuant to CPLR § 3212, is granted for the reasons stated below. The motion by defendant City of New York for summary judgment dismissing plaintiff's complaint and all cross-claims against it pursuant to CPLR § 3212, is granted for the reasons stated below. The cross-motion by plaintiff, Melissa Smith, for summary judgment against defendants pursuant to CPLR § 3212 on this issue of liability, is denied for the reasons stated below.

Plaintiff commenced this action to recover for injuries she alleges she sustained on September 11, 2002 when she was caused to trip and fall by a defect in the public sidewalk on the west side of Second Avenue, between East 47<sup>th</sup> Street and East 46<sup>th</sup> Street, New York, New York, abutting Dag Hammarskjold Park. Plaintiff filed her Note of Issue and Certificate of Readiness on or about September 4, 2009. Defendants Dag Hammarskjold Condominium Tower

and Board Managers of Dag Hammarskjold Condominium Tower (hereinafter "Dag" or "Dag defendants") now move for summary judgment pursuant to CPLR § 3212 dismissing plaintiff's complaint and any cross-claims as against it, contending that 1) it had no duty to maintain the sidewalk, 2) it made no special use of the sidewalk, 3) it did not cause or create the defect, and 4) plaintiff is unable to identify the alleged defect that caused her to fall, and thus unable to prove the cause of her accident. Defendant City of New York ("City") also moves for summary judgment pursuant to CPLR § 3212<sup>1</sup> dismissing plaintiff's complaint and any cross-claims as against it, arguing that 1) the defect plaintiff alleges caused her accident is trivial in nature, 2) the City did not cause or create the defect, and 3) the alleged defect was not the proximate cause of the accident. Plaintiff cross-moves for summary judgment pursuant to CPLR § 3212 on the issue of liability against all defendants and/or dismissing each of the affirmative defenses, on the basis that each of the defendants have breached a duty to inspect, maintain and repair defects in the subject sidewalk, and that the affirmative defenses are without merit.

In support of its motion, the Dag defendants submit the following: 1) plaintiff's Verified Bill of Particulars; 2) the affidavit of John P. Maguire sworn December 30, 2010; 3) the EBT of plaintiff dated April 15, 2008; 4) the EBT of Dag by John P. Maguire dated April 17, 2008; 5) the EBT of the City by Sherry Johnson-O'Neal dated September 18, 2008; and 6) a series of black and white photocopied photographs of the subject sidewalk area. The City submits the following documents in support of its motion: 1) plaintiff's Verified Bill of Particulars; 2) a

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<sup>1</sup> The Court notes that the City's Notice of Motion seeks dismissal pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, and in the alternative, summary judgment pursuant to CPLR § 3212. However, this relief is inappropriate, as issue was joined by the City on or about March 13, 2003, making summary judgment the appropriate relief. The City does not make any substantive arguments relating to the relief provided for in CPLR § 3211(a)(7).

series of black and white photocopied photographs of the subject sidewalk area; 3) the EBT of plaintiff; 4) a series of black and white photocopied photographs of shoes alleged to be similar in height and style to those worn by plaintiff on the date of the accident; 5) the EBT of the Dag defendants; 6) the EBT of the City; and 7) the results of a search of the Department of Transportation's record for two years prior to and also including the date of the accident, for applications, permits, cut forms, complaints, repair orders, violations and contracts for the subject sidewalk area. In support of her cross-motion, plaintiff submits the following: 1) her own Verified Bill of Particulars; 2) an affidavit by plaintiff sworn January 19, 2010; 3) portions of her own EBT testimony; 4) portions of Dag's EBT testimony; 5) the results of a records request from the Department of Transportation, pursuant to the Freedom of Information Law ("FOIL"); 6) a color photograph of a porter sweeping a sidewalk; and 7) a series of color photographs depicting the subject sidewalk area.

The material facts have been taken from the parties' moving papers and are not in serious dispute unless otherwise noted. On September 11, 2002, plaintiff was walking on the sidewalk on the west side of Second Avenue between East 47<sup>th</sup> and 46<sup>th</sup> Streets between 7:00 and 8:00 p.m., heading to a yogurt shop where she intended to meet a friend. As she was walking toward 46<sup>th</sup> Street but when she was still closer to 47<sup>th</sup> Street, plaintiff testified that she tripped. The Dag defendants installed the sidewalk on which plaintiff's accident occurred in or about 1982, own and operate the abutting property, and employ, through a managing agent, porters and workers who keep the abutting sidewalk free from debris. There appears to be no dispute there are several sidewalk flagstones which are raised or uneven on the sidewalk on the west side of Second Avenue between 46<sup>th</sup> and 47<sup>th</sup> Streets. Plaintiff testified as to several photographs which

show different raised sidewalk flags and described them as “examples” of the type of defect that she saw at the sidewalk in question when she went back to the site of the accident approximately one month later. Plaintiff did not, however, see what caused her accident at the time of the accident, either before or after she tripped.

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]). However, where the moving party fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing party’s papers. (See *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Both the Dag defendants and the City have made a *prima facie* showing of entitlement to judgment as a matter of law based on plaintiff’s inability to identify the defect which caused her accident. While the moving defendants present other arguments regarding plaintiffs’ ability to prove their respective involvement with the situs of plaintiff’s accident or any negligence on their respective parts, the Court need not reach those questions, as plaintiff’s inability to identify the cause of her fall is fatal to her case. (See *Reed v Piran Realty Corp.*, 2006 NYSlipOp 5136, 30 AD3d 319 [1st Dept 2006], *appeal denied*, 2006 NYAppDiv LEXIS 12109 [Oct 5, 2006] and 8 NY3d 801 [Jan 9, 2007]).

Plaintiff's deposition testimony makes it clear that she cannot say from her personal knowledge and observations what caused her to fall. She states that she tripped, but when asked to describe how that happened, she testified, "I have no idea." Plaintiff was pressed further to explain how her accident occurred:

Q. When you say the right foot went, what do you mean?"

A. I can't tell you. All I know is once it happened, it started to turn right and left and I began to do an acrobatic act from the velocity of the trip in the sidewalk and the next minute I'm truly doing an acrobatic act up the street.

Q. Before you did the acrobatic act, we will go through it one by one, did you feel any part of the right foot or shoe hit something?

A. To this day I don't know. I took a step on the sidewalk and the next minute--

Q. I am going to ask you a series of questions. Did you feel the right foot go into some sort of whole [*sic*] or depression before it twist or turned?

A. It happened so fast, honest to God, and it was such velocity of whatever, my foot. I am walking on a hard sidewalk, whatever my foot stepped on or whatever the velocity of it, the foot started to turn right and left. I tried to maintain my balance.

Q. Did you feel the foot or your shoe become caught on anything before your foot twisted and turned?

A. No, you know.

Q. Just yes or--?

A. No, to the best of my recollection I stepped on the sidewalk. I was walking up the sidewalk and the step with the right foot and then next minute it's, wherever that foot landed in the sidewalk, it turned right and left and began turning right and left and I began going into an acrobatic act to try to stay up because the velocity of whatever I stepped into on the sidewalk, again dusk, I don't know what I stepped into.

Q. Did you feel your foot slide or slip on anything before it started to twist or turn?

A. No, I did not slide or slip. I took a solid step on the sidewalk.

Later, plaintiff was asked again, "Did you feel either of your feet strike something immediately before you fell over to the right?" Her answer was, "Again I don't recall. I just remember I couldn't stay up anymore." When asked if her foot caught on something, plaintiff testified, "Again, no, not that stands out in my mind. I could not stay up anymore."

Nor did plaintiff see the alleged defect on the date of the accident. Plaintiff testified that within a month of the accident, she returned to the sidewalk in question and only then did she see that there were "rises and cracks and crevices" in the sidewalk. When asked, "Were you able to identify the condition of the sidewalk that actually caused your right foot to twist back and forth?", plaintiff testified, "I could try to piece together in my mind as to why I could never get my footing." Asked whether she was ever able to identify the "specific condition" that caused her accident, plaintiff responded, "No, I was not able to because the whole sidewalk between the whole block of 46<sup>th</sup> and 47<sup>th</sup> Street . . . is marked with cracks, crevices and rises."

Plaintiff returned at some point, either a month after the accident as she states in her annexed affidavit or in January 2003 as she testifies in her deposition, at which point photographs were taken of the subject location. The photographs depict several different areas where the sidewalk flags are uneven or raised. There is no evidence in the photographs submitted by plaintiff of "cracks" or "crevices" as described by plaintiff in her deposition testimony. Additionally, plaintiff could not identify any of the sidewalk flags in the photographs as the defect that caused her accident. In fact, although she uses the word "tripped" at one point

in her deposition, when asked if her foot came into contact with anything, as stated above, she answers in the negative.

Nor does plaintiff's self-serving affidavit serve to correct this absence of actual knowledge on her part. In her affidavit, plaintiff still cannot state that she knows what defect caused her accident. Rather, plaintiff refers to the "numerous and substantial rises and declivities in the Sidewalk," and in opposition to the portion of defendants' respective motions in which the defects are alleged to be trivial in nature, plaintiff states that "the rises are not trivial defects, but range from 2" to 4" in height. . . ."<sup>2</sup> Plaintiff also states that when she returned to the location, she found it "to be still in substantially the same condition that it was on the day of [her] accident on September 11, 2002," but does not explain how she can make that affirmative statement when she testified in her deposition that at no time on the day of her accident did she see the alleged defects she later described nor did she see what caused her to trip and fall.

On this evidence, asking a jury to make a determination as to liability would be impermissibly speculative. "Since it is just as likely that the accident could have been caused by some other factor, such as a misstep or loss of balance, any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation." (*Teplitskaya v 3096 Owners Corp.*, 289 AD2d 477, 478 [2d Dept 2001]; see also *Bernstein v New York*, 69 NY2d 1020, 1021-2 [1987]).

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<sup>2</sup> Because the Court finds against plaintiff on other grounds, it is not necessary to discuss in detail the statement contained in plaintiff's affidavit which are explicitly not based on her personal knowledge or supported by evidence in the record. In addition, the Court rejects the evidence submitted by plaintiff in her March 28, 2010 Affirmation in Reply, as affirmative evidence must be submitted with the motion or opposition papers, and not in reply at which point the opposing parties have no opportunity to challenge it.

Although the Court is granting summary judgment to all defendants on other grounds, it should also be noted that plaintiff has failed to identify any legal duty that the Dag defendants owed her to maintain the sidewalk. The fact that porters swept leaves and debris on a regular basis does not change the fact that prior to September 13, 2003 (and applying to accidents occurring on or after that date), the effective date of Administrative Code § 7-210, abutting land owners were not liable for maintaining the public sidewalk unless they caused or created a defective condition or made a special use thereof, of which there is no evidence in this case.

Accordingly, it is;

ORDERED that the motion by Dag Hammarskjold Condominium Tower and Board Managers of Dag Hammarskjold Condominium Tower for summary judgment dismissing plaintiff's complaint and all cross-claims against them pursuant to CPLR § 3212, is granted; it is further

ORDERED that the motion by the City of New York for summary judgment dismissing plaintiff's complaint and all cross-claims against them pursuant to CPLR § 3212, is granted; it is further

ORDERED that movant Dag Hammarskjold Condominium Tower and Board Managers of Dag Hammarskjold Condominium Tower serve a copy of this decision and order with notice of entry hereof upon all parties and upon all parties and upon the Clerk of the Court (60 Centre Street) within 20 days of entry hereof; it is further

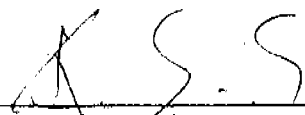
ORDERED that the cross-motion by plaintiff for summary judgment on liability, pursuant to CPLR § 3212, is denied; it is further

ORDERED that upon service of a copy of this decision and order with notice of entry hereof, the Clerk of the Court is directed to enter judgment dismissing plaintiff's complaint in its entirety.

The foregoing constitutes the decision and order of this court.

Dated: May 4, 2010

ENTER:



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

**FILED**  
MAY 12 2010  
NEW YORK  
COUNTY CLERK'S OFFICE