

Regenstein v Manhattan Promenade LLC

2010 NY Slip Op 31837(U)

July 15, 2010

Supreme Court, New York County

Docket Number: 105936/09

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN
J.S.C. Justice

PART 52

Index Number : 105936/2009
REGENSTEIN, KAREN
vs.
MANHATTAN PROMENADE
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 105936/09
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

in 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 is decided in accordance with the attached decision. The action is hereby transferred to a non-city part.

FILED
JUL 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/15/10

CYNTHIA S. KERN 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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----X
KAREN REGENSTEIN and BARRY REGENSTEIN,

Plaintiff,

Index No. 105936/09

-against-

DECISION/ORDER

MANHATTAN PROMENADE LLC, THIRD AND 25
LLC, CORNERSTONE MANAGEMENT SYSTEMS,
INC., ROCKLEDGE SCAFFOLD CORP., BULADO
GENERAL CONTRACTORS CORP. AND THE CITY
OF NEW YORK,

Defendants.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross Motion and Answering Affidavits.....	2
Affirmations in Opposition to the Cross-Motion.....	3
Replying Affidavits.....	
Exhibits.....	

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Plaintiff Karen Regenstein commenced the instant action to recover damages for personal injuries that she allegedly sustained when she tripped and fell on the sidewalk in front of 159-161 East 25th Street and 342-348 Third Avenue on June 27, 2008. The property adjacent to the sidewalk where plaintiff fell is not owned by the City of New York and is not a one-, two- or three-family home. Defendant the City of New York (the "City") now moves for summary

judgment dismissing the complaint and all cross-claims on the ground that the City is not liable pursuant to Administrative Code §7-210. For the reasons set forth below, defendant City's motion is granted.

The City of New York is not liable for injuries arising from defective sidewalk conditions pursuant to §7-210 of the Administrative Code, which shifted liability for sidewalk defects from the City to the adjacent landowner except where the adjacent property is an owner-occupied one-, two- or three-family dwelling. Section 7-210 provides in pertinent part:

b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk... shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition.

c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition.

In the instant case, the City makes out its prima facie case that it is not the owner of the abutting property and that the property was not in whole or in part owner occupied and used exclusively for residential purposes. The affirmation of David C. Atik, an attorney employed by the Department of Finance ("DOF") who is responsible for responding to requests for information relating to DOF's property records, shows that a search of the RPAD database for records relating to 159-161 East 25th Street and 324-348 Third Avenue revealed that the City was not the owner of the properties on the date of the accident and that the buildings were classified as "Walk-up apartment over six families with stores" and "Elevator apartment fireproof with stores" respectively, not as a one-, two- or three-family solely residential property.

However, the City can still be held liable for injuries resulting from a defective sidewalk condition that it “caused or created” or if the sidewalk was used for a “special use” which conferred a benefit upon the City. *See Scavuzzo v City of New York*, 47 A.D.3d 793 (2nd Dept 2008); *Fernandez v City of New York*, 19 Misc.3d 1135(A) (Sup Ct, Kings Cty 2008). If plaintiff claims that the City caused or created the condition, plaintiff must show that the City created the defect through an affirmative act of negligence “that immediately result[ed] in the existence of a dangerous condition.” *Yarborough v City of New York*, 10 N.Y.3d 726 (2008) (citations omitted); *see also Scavuzzo*, 47 A.D.3d 793; 794-95.

In the instant case, the affidavit of Department of Transportation (“DOT”) searcher Abraham Lopez sufficiently demonstrates that the City did not cause or create the alleged defect. Plaintiff and defendant Manhattan Promenade, LLC’s argument that summary judgment is premature because discovery is incomplete is without merit. In order to defeat the motion for summary judgment and allow plaintiff to pursue discovery of facts not found by such a search, there must be a likelihood that such evidence actually exists. *See Frierson v. Concourse Plaza Associates et al.*, 189 A.D.2d 609 (1st Dept. 1993). “The ‘mere hope’ that evidence sufficient to defeat the motion may be uncovered during the discovery process is not enough.” *Id.* at 610; *see also Jones v. Gamera*, 153 A.D.2d 550, 551 (2nd Dept. 1989). There is also no evidence that the City employed the sidewalk for a “special use.”

Accordingly, defendant City’s motion for summary judgment is granted and plaintiff’s complaint and any cross-claims are dismissed as against the City only. This constitutes the

