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

PRESENT: JAFFE BARBARA JAFFE J.S.C. Justice

PART 5

Walker, Ellen

- v -

City of N.Y.

INDEX NO. 111878/07

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO. 120

The following papers, numbered 1 to 3 were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motio

FILED
AUG 23 2010
NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 8/18/10

AUG 18 2010

BARBARA JAFFE J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

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

----------x

ELLEN WALKER,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF SANITATION, PARKDALE REALTY COMPANY, UNIQUE RESTORATION COMPANY, PARKDALE REALTY CORPORATION, and PARKDALE REALTY COMPANY, INC.,

Defendants.

----------x

Index No. 111878/07
Motion Date: 7/20/10
Motion Seq. No.: 001

DECISION & ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Richard Borrelli, Esq.
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For defendant City:
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By notice of motion dated February 24, 2010, defendants City of New York and City of New York s/h/a New York City Department of Sanitation move pursuant to CPLR 3211(a)(7) and 3212 for an order summarily dismissing the complaint. As defendants assert no factual or legal basis for a dismissal pursuant to CPLR 3211(a)(7), only the motion pursuant to CPLR 3212 is addressed. (*See Kane v City of New York*, Sup Ct, New York County, May 14, 2010, Jaffe, J., Index No. 103963/07).

By order dated June 10, 2010, defendants' motion was erroneously granted on default, the return date of the motion having been adjourned to June 18, 2010 pursuant to the parties' so-ordered stipulation. As the June 10 order was never entered, it need not be vacated, and thus I

now consider the motion and opposition thereto.

I. FACTS

Plaintiff alleges that on June 9, 2009, she fell in the middle of the sidewalk on 316 West 81st Street, upon stepping on what she believes was a leveling leg which had fallen or been removed from a refrigerator being worked on at the curb by defendants' employee. (Affirmation of Richard Borrelli, Esq. dated June 17, 2010 [Borrelli Aff.]).

At a deposition held on February 9, 2009, Segundo More, head of maintenance for co-defendants Parkdale Realty Company, Unique Restoration Company, Parkdale Realty Corporation, and Parkdale Realty Company, Inc., testified that he had removed a refrigerator from the building at 316 West 81st Street for disposal by City, pursuant to the following procedure: Before removing the refrigerator from an apartment, he removes the refrigerator door, takes it outside, and places it in the garbage area, against the building. (Affirmation of Andrew Lucas, Esq, dated March 26, 2010 [Lucas Aff.], Exh. L at 8, 10, 13, 30). The day before plaintiff's accident, after placing the refrigerator against the building, More inspected and swept the sidewalk area in front of the building He saw no refrigerator parts. (*Id.* at 32-33). More also testified that he has seen defendants' employees move refrigerators from the sides of buildings to the curb in order to remove the chlorofluorocarbons (CFCs) from the refrigerators. (*Id.* at 24).

At a deposition held on April 2, 2009, City sanitation worker Domineck Mandella testified that on the day of plaintiff's accident, he was removing CFCs from appliances left outside on West 81st Street. (Lucas Aff., Exh. M at 7, 29). He did not recall whether he moved any of the appliances before working on them that day, although he does not work on an appliance unless it is at the curb, nor did he recall seeing anything fall off of any of the

appliances that day, and he did not notice any debris or pieces of metal on the sidewalk before he began working on the refrigerator. (*Id.* at 35, 42, 71). Ordinarily, he removes CFCs by connecting the refrigerator, which was usually at the curb, to his van. (*Id.* at 24-28, 30, 62).

At depositions held on November 24, 2008 and February 9, 2009, plaintiff testified that she first saw the refrigerator the day before her accident, that it stood against the building, and that she saw no parts on the sidewalk. (Lucas Aff., Exhs. G at 39-40, K at 4-5). The next day, as she walked down West 81st Street with her sister, she saw the same refrigerator, doorless, at the curb, and being worked on by Mandella. (*Id.*, Exhs. G at 45-47, K at 7-8). As she walked past him, she lost her footing on something uneven and fell, striking her knee, wrist, foot and hip on the sidewalk. (Lucas Aff., Exhs. G at 47, K at 9). She then saw a "bolt" or "leveling bolt" in a puddle of water which "smelled like a refrigerator," and which she assumed came from the refrigerator being worked on by Mandella.. (*Id.*, Exhs. G at 49, 52, K at 8-9). Mandella asked her, using an obscenity, how she had fallen when there was only water on the street. Plaintiff's sister, having picked up the bolt, showed it to Mandella and responded in kind, indicating that the bolt had caused her sister's fall. Plaintiff described the bolt as a hexagonal plate with a diameter of close to four inches, and a screw in it measuring approximately two and one-half inches long. (*Id.*, Exhs.G at 48-50, K at 11).

According to Mandella, he had only asked plaintiff if she was "okay" and did not recall any reply. She did not appear to him to have been injured. (*Id.*, Exh. M at 37-38, 41). Plaintiff's sister gave the bolt to plaintiff, who later gave it to her attorney. (*Id.*, Exh. G at 51-52).

II. PERTINENT PROCEDURAL BACKGROUND

On September 6, 2007, plaintiff commenced this action by serving a summons on

complaint on all defendants. (Lucas Aff., Exh. B). The other defendants settled with plaintiff. (Lucas Aff. ¶ 14).

III. CONTENTIONS

City denies liability for plaintiff's accident absent written notice of a sidewalk defect or evidence that it caused or created the defective condition or that the bolt caused her accident. (Affirmation of Andrew Lucas, Esq, dated Mar. 26, 2010 [Lucas Aff.]). In support, it relies on Mandella's testimony, the results of a Department of Transportation search indicating that it received no notice of the alleged defect (*id.*, Exh. N), and plaintiff's testimony that she only assumed that the bolt had come from the refrigerator (*id.*, Exh. G at 52).

Although plaintiff does not dispute that City had no written notice of the defect, she argues no such notice is required as City affirmatively created the defective condition, which plaintiff alleges is demonstrated by the presence of the bolt on the sidewalk after Mandella began working on the sole refrigerator at the location, the absence of any other debris there, and expert evidence that the bolt and screw constitute a refrigerator leveling leg. (Borrelli Aff. ¶¶ 24-26; Affidavit of Jon Vetter, dated June 17, 2010).

IV. ANALYSIS

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs, Inc.*, 46 NY2d 1065, 1067 [1979]). If this burden is not met, summary judgment must be denied,

regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d 851, 853).

When the moving party has demonstrated entitlement to summary judgment, the burden of proof shifts to the opposing party to demonstrate by admissible evidence the existence of a factual issue requiring trial. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d 557, 562).

Pursuant to New York City Administrative Code § 7-201(c)(2), before an action may proceed against City for a dangerous condition on a sidewalk, the plaintiff must establish that City had written notice of it. Where City establishes that it received no prior written notice, the burden shifts to plaintiff to establish an exception to the rule, such as City's affirmative creation of the defect through an act of negligence which immediately results in a dangerous condition. (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *Bielecki v City of New York*, 14 AD3d 301 [1st Dept 2005]).

Here, there is no dispute that City received no prior written notice of the defect. Consequently, the burden shifts to plaintiff to demonstrate that the defect was caused by defendants' negligence.

In order to establish a *prima facie* case of causation, "it is enough that plaintiff shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred." (*Schneider v Kings Highway Hosp. Center, Inc.*, 67 NY2d 743, 744 [1986]). However, liability must "be based on more than mere speculation or guesswork." (*Bernstein v City of New York*, 69 NY2d 1020, 1021 [1987]).

Here, the evidence permits the reasonable inference that the leveler leg on which plaintiff fell had fallen off the refrigerator worked on by Mandella. Given Mandella's inability to recall

specifically whether or not he had moved the refrigerator to the curb, it is also reasonably inferred that he had done so notwithstanding his assertion that he would not work on an appliance if it were not already at the curb. These inferences are not unduly speculative and are not directly refuted by defendants. (*See Affenito v PJC 90th Street LLC*, 5 AD3d 243 [1st Dept 2004] [reasonable inference of restaurant's negligence arose from evidence that plaintiff bicyclist saw busboy perform task between parked cars and, after falling from bicycle, saw busboy hose down slimy substance in street]). Consequently, plaintiff has raised a triable issue of fact as to whether defendants caused her fall.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that the defendants City of New York and New York City Department of Sanitation's motion for summary judgment is denied.

This constitutes the decision and order of the court.

Barbara Jaffe, JSC

DATED: August 18, 2010
New York, New York

AUG 18 2010

FILED
BARBARA JAFFE
J.S.C.
AUG 23 2010
NEW YORK
COUNTY CLERK'S OFFICE