[* 1]

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

PRESENT: JAFFE BARBARA JAFFE Justice PART 5

Index Number : 110471/2007
POUNDS, RODESIA
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
DISMISS
CAL #75

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for summ judgmt

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

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
SEP 14 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/23/10
AUG 23 2010

BARBARA JAFFE 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 5

----------x

RODESIA POUNDS,

Plaintiff,

-against-

THE CITY OF NEW YORK and THE DEPARTMENT OF EDUCATION OF THE CITY OF NEW YORK,

Defendants.

----------x

Index No. 110471/07
Motion Date: 7/27/10
Motion Seq. No.: 001
Calendar No.: 75

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiff:
Andrew J. Spinnell, Esq.
Law Offices of Andrew J. Spinnell, LLC
286 Madison Avenue, Suite 2100
212-684-0317

For defendant City:
Peter C. Lucas, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-442-6851

By notice of motion dated March 12, 2010, defendants City of New York (City) and the Department of Education of the City of New York (DOE) move pursuant to CPLR 3211(a)(7) for an order dismissing the claims against it, or alternatively, pursuant to CPLR 3212, for an order summarily dismissing the complaint. For the reasons that follow, the motion for summary dismissal is granted.

I. UNDISPUTED FACTUAL BACKGROUND

On December 1, 2006, plaintiff, a teacher at P.S. 206, a public school owned by City and operated by DOE, slipped and fell on an allegedly sticky substance on the sidewalk outside the school's entrance at 508 East 120th Street in Manhattan. (Affirmation in Support of Peter C. Lucas, Esq, dated March 12, 2010 [Lucas Aff.], Exhs. C, D ¶ 5, G at 27, I; Affirmation in

Opposition of Andrew J. Spinnell, Esq., dated June 7, 2010 [Spinnell Aff.], Exh. C at 8). Approximately two weeks before her accident, plaintiff saw a black, slippery substance in front of the 119th Street entrance to P.S. 112 which shares space with P.S. 206. (Lucas Aff., Exh. F at 11-13; Spinnell Aff., Exh. D).

John Brennan, the custodial engineer at P.S. 112, testified at a deposition that he and his employees sweep the sidewalk outside the school every day, beginning at approximately 6:00 a.m., and shovel the area when it snows. (Lucas Aff., Exh. F at 14-15). On the day of plaintiff's accident, having heard the news, he went outside to assist plaintiff, observing that the area was slippery. (*Id.* at 13, 22).

II. PERTINENT PROCEDURAL BACKGROUND

Plaintiff timely served a notice of claim on defendants on January 11, 2007, alleging negligence in their failure to maintain the sidewalk and to "remove the foreign substance from the surface of the sidewalk, and cure the dangerous condition and trap that was created; and by failing to warn pedestrians . . . notwithstanding prior notice." (Lucas Aff., Exh. A).

III. CONTENTIONS

City contends that it cannot be held liable for plaintiff's injuries absent prior written notice of the condition, and denies that it either caused or created the condition. (Lucas Aff.). In support, it annexes the testimony of plaintiff and Brennan (*id.*, Exhs. F, G), the results of a records search by the Department of Transportation (*id.*, Exh. H), and an affidavit from a senior title examiner of the New York City Law Department stating that the property abutting the sidewalk is owned by City (*id.*, Exh. I).

DOE argues that it owes no duty to plaintiff for an accident on the sidewalk abutting the

school, as it has no duty to repair, inspect, or maintain the sidewalk, and that it did not cause or create the defective condition. (Lucas Aff.).

In opposition, plaintiff argues that written notice is not required because City is responsible for the sidewalk as an abutting property owner pursuant to New York City Administrative Code § 7-210, and because City affirmatively caused and created the dangerous condition by failing to clean the sidewalk properly and remove the sticky substance. (Spinnell Aff.). In support, she relies on her testimony as well as Brennan's (*id.*, Exhs. B, C), photographs of the substance (*id.*, Exh. D), and the unnotarized statement of a witness who saw the sticky substance a week before the accident (*id.*, Exh. E).

In reply, City asserts that Administrative Code § 7-210 does not impose a duty on it, and denies any liability absent written notice of the condition. (Reply Affirmation in Support of Peter C. Lucas, Esq., dated June 14, 2010 [Lucas Reply Aff.]).

IV. ANALYSIS

It is well-settled that "[t]he 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." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *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). Accordingly, it is City's burden here, as movant, to demonstrate its entitlement to judgment, and must negate, *prima facie*, an essential element of the plaintiff's cause of action. (*Rosabella v*

Metro. Trans. Auth., 23 AD3d 365, 366 [2d Dept 2005]). If shown, the burden shifts to plaintiff to establish that there exists a triable issue of fact.

In enacting Administrative Code § 7-210, the Legislature shifted the responsibility of maintaining a sidewalk in a reasonably safe condition from City to the owner of the property abutting the sidewalk, with certain exceptions not pertinent here, and it expressly provided that City retains responsibility if an abutting property owner. (Admin Code § 7-210 [b], [c]). Here, as the conceded owner of the abutting property, City is responsible for maintaining the sidewalk on which plaintiff fell. (*Cf Rodriguez v City of New York*, 70 AD3d 450 [1st Dept 2010] [as City did not own property abutting sidewalk, it is not liable under § 7-210(c)]). The Legislature also provided, pursuant to subdivision d, that "[n]othing in this section shall in any way affect the provisions of this chapter or of any other law or rule governing the manner in which an action or proceeding is commenced, including any provisions requiring prior notice to the city of defective conditions." Consequently, it must be determined whether City may be held liable for a dangerous condition on the sidewalk absent written notice pursuant to Administrative Code § 7-201.

Pursuant to Administrative Code § 7-201(a), no civil action may be maintained against City arising from a dangerous condition on a sidewalk unless the plaintiff demonstrates that City had written notice of the condition. Having also provided in subdivision d of § 7-210 that the requirement of prior written notice is not affected by subdivisions a, b or c, the Legislature appears to have determined that notwithstanding City's status as an ordinary owner of an abutting property, as opposed to its status as municipal caretaker, City may not be held liable for injuries resulting from sidewalk defects abutting its property absent prior written notice of the condition.

(*Cf Fernandez v City of New York*, 19 Misc 3d 1135(A), 2008 NY Slip Op 51012[U] [Sup Ct, Kings County 2008] [if property abutting sidewalk falls within exception to Admin Code § 7-210, prior written notice required]).

Failing to remove a sticky substance from a sidewalk is not equivalent to creating a dangerous condition on the sidewalk, and thus, written notice of the condition is required. (*See Baez v City of New York*, 236 AD2d 305 [1st Dept 1997] [written notice required where plaintiff fell on oily substance]). Constructive notice is insufficient. (*Amabile v City of Buffalo*, 93 NY2d 471 [1999]; *Campisi v Bronx Water & Sewer Serv., Inc.*, 1 AD3d 166, 167 [1st Dept 2003]).

Here, as it is conceded that City received no prior written notice of the oily substance on the sidewalk, it may not be held liable for it.

And, as the liability for such defects rests, pursuant to Administrative Code § 7-210 on the owner of the abutting property and not on the occupying tenant, DOE owes no duty to plaintiff and thus may not be held liable here. (*See Cook v Consolidated Edison Co. of N.Y., Inc.*, 51 AD3d 447 [1st Dept 2008] [owner and tenant may be liable for special use of sidewalk, but only owner liable under § 7-210]; *Castillo v Bangladesh Soc., Inc.*, 12 Misc 3d 1170[A], 2006 NY Slip Op 51130[U] [Sup Ct, Queens County 2006] [out-of-possession owner liable under § 7-210, and cannot delegate liability to tenant]).

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that the defendants The City of New York's and The Department of Education of the City of New York's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the

submission of an appropriate bill of costs; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: August 23, 2010
New York, New York

AUG 23 2010

FILED
SEP 14 2010
NEW YORK
COUNTY CLERK'S OFFICE