

<b>Amar v 121 St. Nicholas Ave. Hous. Dev. Fund Corp.</b>
2010 NY Slip Op 32548(U)
September 10, 2010
Supreme Court, New York County
Docket Number: 109860/07
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA

PART 19

Justice

Index Number : 109860/2007

**AMAR, ANTA**

VS.

**121 ST. NICHOLAS AVENUE**

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

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

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

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

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

in this motion to/for summary judgment

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

motion and ~~cross motion~~ <sup>is</sup> decided in accordance with accompanying memorandum decision.

*This constitutes decision and order of the court.*

**FILED**  
SEP 14 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 9/13/10

Saliann Scarpulla  
**SALIANN SCARPULLA** 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: CIVIL TERM: PART 19

-----X

ANTA AMAR and DAME BABOU,

Plaintiffs,

-against-

121 ST. NICHOLAS AVENUE HOUSING  
DEVELOPMENT FUND CORPORATION and  
DENOSO MANAGEMENT and SANT SERGINE  
FALLOU 99 CENT PLUS CORP,

Defendants.

-----X

**Appearances: For Plaintiff :**  
Sonkin & Fifer  
By Howard Fifer, Esq.  
1350 Broadway, Suite 2500  
New York, New York 10018  
212-594-9190

**For Defendants 121 St. Nicholas and Denoso Mgmt.:**  
Callan, Koster, Brady & Brennan, LLP  
By Keren Z. Rivlin, Esq.  
One Whitehall Street, 10<sup>th</sup> Floor  
New York, New York 10004  
212-248-8800

**For Defendant 99 Cent Store:**  
No appearance

Papers considered in review of this motion for summary judgment:

Pl.'s Affirm in Supp with Exhib. Attached.....	<u>1</u>
GA's Notice of Cross-Mot. and Affirm. in Supp and Opp with Exhib. Attached.....	<u>2</u>
City's Notice of Cross-Mot. and Affirm. in Supp and Opp with Exhib. Attached .....	<u>3</u>
Pl.'s Reply Affirm. in Further Supp.....	<u>4</u>

**HON SALIANN SCARPULLA, J.:**

In this action to recover damages from plaintiff Anta Amar's trip and fall on a sidewalk in front of defendant Sant Sergine Fallou 99 Cent Plus Corp.'s store ("99 Cent Store"), defendants 121 St. Nicholas Avenue Housing Development Fund Corporation and Denoso Management, its managing agent, (collectively herein "121 St. Nicholas") move under CPLR 3212 for summary judgment dismissing plaintiffs' complaint. 121 St.

Nicholas, the landlord of the property abutting the sidewalk where Amar fell, argues that with respect to the portion of the sidewalk outside of 99 Cent Store, 121 St. Nicholas is not subject to New York City Administrative Code § 7-210 ("Administrative Code § 7-210"), because it had fully delegated its responsibility to maintain the subject portion of the sidewalk to 99 Cent Store under its lease agreement with 99 Cent Store. Pursuant to paragraphs 50 and 68 of the lease, 99 Cent Store obligates itself to maintain and repair, among other things, the subject portion of the abutting sidewalk. In case of any injury occurring as a result of 99 Cent Store's failure to comply with any provision of the lease agreement, paragraph 8 contains an indemnification clause in favor of 121 St. Nicholas.

In the alternative, 121 St. Nicholas argues that the record lacks any evidence that 121 St. Nicholas had any notice of the defective condition on the sidewalk outside 99 Cent Store. 121 St. Nicholas does not otherwise dispute the occurrence and location of the accident and the existence of a defect on the sidewalk abutting its property.

Juan Rivera, superintendent at 121 St. Nicholas, testified that part of his job duties involved oversight and maintenance of the sidewalk perimeter around 121 St. Nicholas. However, 121 St. Nicholas specifically instructed him not to examine, maintain or repair the portion of the sidewalk in front of 99 Cent Store, an instruction with which Rivera fully complied. Rivera had no personal knowledge of the subject defect on the sidewalk before the accident. Jose Alicea of Deroso Management, the property manager, managing agent and the general manager at 121 St. Nicholas, corroborated Rivera's

testimony that it was 121 St. Nicholas' policy not to conduct any inspections and necessary repairs in front of any commercial property store fronts, including the subject portion in front of 99 Cent Store. 121 St. Nicholas argues that Rivera's and Alicea's testimony establishes that 121 St. Nicholas could not have either actual or constructive notice of the defect.

In opposition, plaintiffs argue that the summary judgment motion is defective, because the evidence 121 St. Nicholas offered is not in an admissible form. The deposition transcripts are unsigned by deponents, and there is no affidavit certifying the accuracy and authenticity of the subject lease agreement. In the alternative, plaintiffs argue that Administrative Code § 7-210 imposes on 121 St. Nicholas a non-delegable duty to maintain sidewalk perimeter abutting its property in a reasonably safe condition.

Plaintiffs also argue that an affidavit of plaintiff Dame Babou raises an issue of fact as to the existence of constructive notice of the subject defect. In his affidavit, Dame Babou states that from June 7, 2005 onward, his organization, Association Des Senagal a Amerique ASA Inc., was a tenant at 121 St. Nicholas and 99 Cent Store's next-door neighbor. Dame Babou attests that the subject defect was continuously present from the time his organization moved in to at least the day of his wife's accident of January 4, 2007.

## Discussion

Under CPLR 3212(b), summary judgment “shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” The motion must be supported by (1) an affidavit, (2) by a copy of the pleadings and (3) by other available proof, such as depositions and written admissions, submitted in an admissible form. CPLR 3212 (b). To warrant a court’s directing judgment as a matter of law, it must clearly appear that no material issue is presented for trial. *Epstein v Scally*, 99 A.D.2d 713 (1<sup>st</sup> Dep’t 1984). When a party has made a prima facie showing to entitle it to summary judgment, the burden shifts to the opposing party to show by evidentiary facts that the defense is real and can be established at trial. *Indig v Finkelstein*, 23 N.Y.2d 728 (1968); see also *Vogel v Blade Contr. Inc.*, 293 A.D.2d 376, 377 (1<sup>st</sup> Dep’t 2002). Conclusory allegations or denials are insufficient to either warrant or defeat summary judgment. *McGahee v Kennedy*, 48 N.Y.2d 832, 834 (1979).

Here, the summary judgment motion suffers from numerous faults. The transcripts and a copy of the lease submitted were not properly certified, and 121 St. Nicholas omitted any explanation for this deficiency. Furthermore, irrespective of admissibility, 121 St. Nicholas’ argument that the lease agreement relieves it of any liability under Administrative Code § 7-210 is meritless. Administrative Code § 7-210, with a few exceptions not relevant here, imposes on owners of real property located within the City

of New York a duty to maintain abutting sidewalk in a reasonably safe condition. 121 St. Nicholas may not avoid liability for defects by simply contracting with 99 Cent Store to perform sidewalk maintenance, albeit it may be entitled to indemnification from 99 Cent Store. *See Cucinotta v the City of New York*, 68 A.D.3d 682, 684 (1<sup>st</sup> Dep't 2009).

However, Administrative Code § 7-210 does not subject 121 St. Nicholas to strict liability for plaintiff Anta Amar's injury. Plaintiffs must demonstrate that 121 St. Nicholas either created the alleged hazardous condition or had actual or constructive notice of the defective condition and failed to correct it. *See Mitchell v. City of New York*, 29 A.D.3d 372 (1st Dept. 2006). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it. *See Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 (1986). 121 St. Nicholas has the burden in the first instance to establish, as a matter of law, that either it did not create the dangerous condition which caused the accident or that it did not have actual or constructive notice of the condition. *See Giuffrida v. Metro North Commuter R.R. Co.*, 279 A.D.2d 403 (1st Dept. 2001).

While 121 St. Nicholas established that because of its "hands-off" policy over the portion of the sidewalk in front 99 Cent Store, it did not cause or receive actual notice of subject defect, it entirely failed to address the issue of constructive notice, offering no evidence regarding visibility and duration of the subject defect. In contrast, plaintiffs

submitted an affidavit of Dame Babou, who provided a first-hand account that he had personally observed the defect for almost sixteen months leading up to his wife's accident. 121 St. Nicholas has not met its burden to establish a prima facie entitlement to summary judgment, whereas plaintiffs have raised an issue of fact regarding constructive notice. *See Lebron v Napa Realty Corp.*, 65 A.D.3d 436, 437 (1<sup>st</sup> Dep't 2009). Therefore, 121 St. Nicholas' summary judgment motion is denied.

In accordance with the foregoing, it is

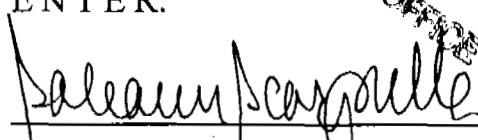
ORDERED that the summary judgment motion by defendants 121 St. Nicholas Avenue Housing Development Fund Corporation and Denoso Management is denied in its entirety; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this decision and order upon all parties and upon the Clerk of Trial Support (60 Centre St., Rm. 158) who shall schedule this matter forthwith for jury selection and a trial.

This constitutes the decision and order of the Court.

Dated: September 10, 2010  
New York, New York

ENTER:

  
Hon. Saliann Scarpulla, J.S.C.

**FILED**  
SEP 14 2010  
NEW YORK  
COUNTY CLERK'S OFFICE