

**Ellner v City of New York**

2010 NY Slip Op 32785(U)

October 4, 2010

Supreme Court, New York County

Docket Number: 112294/08

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5  
Justice

Index Number : 112294/2008  
ELLNER, HILLARY  
VS.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 001  
DISMISS  
CAL # 42

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for dismiss

PAPERS NUMBERED  
1  
2  
3

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

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

FILED  
OCT 07 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 10/4/10  
OCT 04 2010

[Signature]  
J.S.C.  
BARBARA JAFFE

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  
HILLARY ELLNER,

Index No. 112294/08

Plaintiff,

Motion Date: 8/17/10

-against-

Motion Seq. No.: 001

**DECISION AND ORDER**

THE CITY OF NEW YORK,

Defendant.

-----X  
BARBARA JAFFE, JSC:

**For plaintiff:**  
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**FILED**  
**OCT 07 2010**  
NEW YORK  
COUNTY CLERK'S OFFICE

**For defendant:**  
Andrew Lucas, ACC  
Michael A. Cardozo  
Corporation Counsel  
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By notice of motion dated June 23, 2010, defendant City moves pursuant to CPLR 3211(a)(7) for an order dismissing the complaint against it or, in the alternative, pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes the motion.

As City offers 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).

I. PERTINENT BACKGROUND

On June 23, 2007, plaintiff was riding her bicycle on the Manhattan Greenway path/roadway adjacent to the west side of the Henry Hudson Parkway at or around 200<sup>th</sup> Street when she was allegedly propelled off of the bicycle and onto the path due to a defect on the path/roadway. (Affirmation of Andrew Lucas, ACC, dated June 23, 2010 [Lucas Aff.], Exh. A).

On November 8, 2007, plaintiff testified at a 50-h hearing, as pertinent here, that on the

day of her accident, she was riding her bicycle on the Greenway bicycle path along the Hudson River, that her accident occurred at the entrance of a bridge overpass near 200<sup>th</sup> Street which, to her knowledge, is part of the path, and that her bicycle wheel went into a hole in the path, causing her to fall over the handlebars and onto the ground. (*Id.*, Exh. B).

On or about September 24, 2007, plaintiff served her notice of claim on City, and on or about September 5, 2008, her summons and complaint. (*Id.*, Exhs. A, C). On or about January 16, 2009, City served its answer. (*Id.*, Exh. D).

On May 6, 2010, Clinton Johnson, an employee of City's Department of Parks and Recreation (Parks), testified at an examination before trial (EBT) that he did not believe that the bridge overpass on which plaintiff fell is within Parks' auspices, that it was his understanding that the area that Parks maintains is south of the expansion joint at the entrance of the bridge overpass, that he does not know who or what entity is responsible for maintaining the overpass, and that to his knowledge, Parks would not and does not inspect it. (*Id.*, Exh. F). Johnson's EBT transcript is neither signed nor notarized, although it was certified.

## II. CONTENTIONS

City denies owning or maintaining the bridge overpass on which plaintiff fell, relying on Johnson's deposition testimony and the affidavit of Sherry Johnson-O'Neal, an employee of City's Department of Transportation (DOT), who states that she searched for "any documents regarding ownership, repair, maintenance and control" of the bridge overpass for two years prior to and including the date of plaintiff's accident, that her search included inspection reports, contracts, insurance certificates, records of identified problems, and complaints, and that she found no relevant documents. (Lucas Aff., Exh. I). She also states that the overpass is owned by

the Triborough Bridge and Tunnel Authority (TBTA), not by City, and that DOT maintains no records for the overpass and performed no work on it during the search period. (*Id.*).

In opposition, plaintiff argues that City failed to prove, *prima facie*, that it does not own the bridge overpass, as Johnson's transcript is unexecuted and thus inadmissible, and that in any event, Johnson testified that he does not know who owns or maintains it, and that Johnson-O'Neal's opinion regarding its ownership is conclusory and unsupported by documentary evidence. (Affirmation in Opposition of Jonathan R. Ratchik, Esq., dated July 16, 2010). She also contends that even if City satisfied its burden here, other documents may reflect that City owns or maintains the bridge overpass, including documents that she requested from City which have not yet been produced. (*Id.*, Exhs. A, B, C).

### III. 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]). 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 which must 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). The opposing party must "lay bare" its evidence (*Silbertstein, Awad & Miklos v Carson*, 304 AD2d 817, 818 [1<sup>st</sup> Dept 2003]); "unsubstantiated allegations or

assertions are insufficient.” (*Zuckerman*, 49 NY2d 557, 562).

As Johnson’s EBT transcript is neither signed nor notarized, it is inadmissible. (*See Rosa v City of New York*, Sup Ct, New York County, May 3, 2010, Jaffe, J., index No. 113359/2005). Even if considered, Johnson’s opinion or statement that Parks does not own or maintain the bridge overpass is not probative absent any evidence as to the basis of his opinion or statement. For the same reason, Johnson-O’Neal’s statement that TBTA owns the overpass is not probative.

Moreover, that no records relating to the location were found among the records maintained by DOT does not prove, as a matter of law, that City does not own or maintain the overpass absent testimony or evidence that DOT would have exclusive custody of such records. (*See Faulk v City of New York*, 16 Misc 3d 1108[A], 2007 NY Slip Op 51346[U] [statements as to City’s lack of activity is insufficient unless person asserting it shows “sufficient knowledge to say that the fact would have necessarily been reflected in the search.”]).


City has thus failed to prove, *prima facie*, that it did not own or maintain the bridge overpass on which plaintiff fell. Given this result, plaintiff’s arguments need not be considered.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that City’s motion for summary judgment is denied.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC  
**BARBARA JAFFE**  
J.S.C.

**FILED**  
OCT 07 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

DATED: October 4, 2010  
New York, New York

**OCT 04 2010**