

Hatzinikolaou v City of New York

2010 NY Slip Op 33152(U)

November 1, 2010

Supreme Court, New York County

Docket Number: 102935/09

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 : 102935/2009
HATZINIKOLAOU, SANDRA
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 102935/09
MOTION DATE _____
MOTION SEQ. NO. 01
MOTION CAL. NO. _____

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. This case is hereby transferred to a non-city part.

FILED

NOV 09 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/11/10

CYNTHIA S. KERN
J.S.C. *CSK* J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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
SANDRA HATZINIKOLAOU,

Plaintiff,

Index No. 102935/09

-against-

DECISION/ORDER

THE CITY OF NEW YORK, 88 BROAD STREET, LLC,
80 BROAD STREET HOLDING LLC, 80 BROAD, LLC,
and GIULIANO GOURMET PIZZA & DELI,

Defendants.

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-----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.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	_____
Affirmations in Opposition to the Cross-Motion.....	_____
Replying Affidavits.....	<u>2</u>
Exhibits.....	<u>3</u>

Plaintiff commenced the instant action to recover damages for personal injuries she allegedly sustained when she tripped and fell on the sidewalk on Stone Street in front of 80 Broad Street on March 14, 2008. The City does not own the premises adjacent to the location where plaintiff tripped and those premises are not a one-, two- or three-family home. Defendant the City of New York (the "City") now moves for summary judgment dismissing the complaint 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. §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.

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, it is the plaintiff's burden to submit evidence to that effect. *See Roman v City of New York*, 38 A.D.3d 442 (1st Dept 2007); *Koehler v Incorporated Village of Lindenhurst*, 42 A.D.3d 438 (2nd Dept 2007); *Shannon v Village of Rockville Centre*, 39 A.D.3d 528 (2nd Dept 2007). Moreover, the 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 City makes out its prima facie case that the abutting property did not fall into one of the exceptions enumerated by §7-210. 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 80 Broad Street revealed that the City was not the owner of the property on the date of the accident and that the building was classified as a Building Class O3 (Office Building), not as a one-, two- or three-family solely residential property.

Co-defendant Giuliano Gourmet Pizza & Deli’s argument (which is joined by plaintiff) that additional discovery is needed to determine whether the accident took place on the sidewalk or on the curb is without merit. At plaintiff’s 50-h hearing, after she was asked whether her accident occurred on the sidewalk, curb or street, plaintiff testified that it took place on the sidewalk. Moreover, co-defendant Giuliano Gourmet Pizza & Deli’s argument that David Atik’s affirmation showing that the subject property is zoned for commercial use does not show that the building is not owner occupied is without merit because it misapprehends §7-210. For the City to be held liable under §7-210, the property must be owner occupied *and* a one-, two- or three-family residential dwelling *and* used exclusively for residential purposes. Whether the building is owner occupied is not relevant to the City’s potential liability unless the building is also a one-, two- or three-family home. Furthermore, there is no evidence to show that the City may have caused or created the alleged defect or that the City employed the sidewalk for a “special use.”

Accordingly, defendant City’s motion for summary judgment is granted and plaintiff’s complaint is dismissed as against the City only. This constitutes the decision and order of the

court.

Dated: 11/1/10

Enter: CSK
J.S.C.

CYNTHIA S. KERN
J.S.C.

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