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

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

Index Number : 109396/2008

SISLER, HAMPSON A.

INDEX NO. _____

VS

CITY OF NEW YORK

MOTION DATE _____

Sequence Number : 002

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

CAL # 114

The following papers, numbered 1 to 4 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	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED

DEC 07 2010

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

Dated: 12/3/10
DEC 03 2010

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.

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

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HAMPSON SISLER,

Plaintiff,

-against-

THE CITY OF NEW YORK, JACQUELINE SCHNABEL, and BANDOW COMPANY, INC.,

Defendants.

----------x

Index No. 109396/08

Motion Date: 10/5/10
Motion Seq. Nos.: 02,
Calendar Nos.: 114,

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiff:
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For defendant Bandow Company, Inc.:
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By notice of motion dated July 30, 2010, defendant City moves pursuant to CPLR 3212 for an order granting summary dismissal of the complaint and cross-claims against it. Defendant Schnabel opposes the motion, and plaintiff opposes only on the ground of prior written notice.

By notice of motion dated August 18, 2010, defendant Schnabel moves pursuant to CPLR 3212 for an order granting summary dismissal of the complaint and cross-claims against her. Plaintiff and City oppose the motion.

By notice of motion dated August 31, 2010, defendant Bandow Company, Inc. (Bandow) moves pursuant to CPLR 3212 for an order granting summary dismissal of the complaint and

cross-claims against it. Defendant Schnabel opposes the motion.

I. BACKGROUND

On December 18, 2007, plaintiff was injured after stumbling on a defective sidewalk flag in front of 132 West 11th Street in Manhattan (the premises), which are owned by Schnabel. (Affirmation of Andrew Lucas, ACC, dated July 30, 2010 [Lucas Aff.]).

In 2001, Schnabel and her neighbor at 130 West 11th Street had received notices from City to repair the sidewalk in front of their premises. (*Id.*, Exh. K). Schnabel entered into an agreement with the managing agent for the adjoining property, Marsam Realty (Marsam), to effect the repair, and Marsam hired Bandow to do so. (Affirmation of Thomas F. O'Connell, Esq., dated Aug. 31, 2010 [O'Connell Aff.], Exh. J). Bandow charged Marsam for the repair, although Schnabel paid for it. Between October and November 2001, Bandow repointed, reset or replaced the flags in the sidewalk. (*Id.*, Exh. H). Between November 2001 and the date of plaintiff's accident, Schnabel neither notified nor complained to Bandow or Marsam about the condition of the flags. (Lucas Aff., Exh. K).

On October 8, 2004, Schnabel filed with the New York Department of State her corporation, Jacqueline Schnabel LLC (LLC), a shoe design business, listing the premises address as the location for receipt of process. (Lucas Aff., Exh. M). On her 2004-2007 tax returns, Schnabel listed the address of the premises as LLC's business address. (*Id.*, Exh. L). In 2004, the LLC had gross receipts or sales in the amount of $318,125, in 2005 of $517,974, in 2006 of $553,384, and in 2007 of $403,560. (*Id.*).

On February 1, 2008, plaintiff served City with a notice of claim. (*Id.*, Exh. A). On or about July 24, 2008, he served City and the other defendants with a summons and complaint.

(*Id.*, Exh. D). On August 11, 2008, City served its answer, on or about October 21, 2008 Schnabel served her answer, and on or about December 22, 2008 Bandow served its answer. (*Id.*, Exh. E).

On August 18, 2009, Schnabel testified at an examination before trial, as pertinent here, that in 2007, she had two employees, one of whom worked out of Schnabel's living room at the premises three days a week, paying invoices, ordering leather, and helping with design, and the other worked out of her living room a few days every few months. Schnabel also worked there, designing, making drawings, receiving and organizing orders, and talking to her factory. Store orders are placed at her showroom at another location, which is also where her merchandise is displayed. (Lucas Aff., Exh. K).

II. BANDOW MOTION

Bandow alleges that it may not be held liable for plaintiff's injuries absent contractual privity between it and Schnabel or any evidence that its 2001 repairs were unsatisfactory. It contends that it did not warranty its work and received no notice of any defects. Bandow also asserts that it had no contractual duty to maintain or inspect the sidewalk after it completed its work, and that, in any event, any contract claims or cross-claims against it are time-barred. (O'Connell Aff.).

Schnabel argues that as she and her neighbor hired Bandow to repair the sidewalk, and as it was the last entity to do so before December 2007, it is solely responsible for any defective condition. (Affirmation of Sara R. David, Esq., dated Sept. 15, 2010).

Absent any opposition by plaintiff, the complaint is dismissed against Bandow. Moreover, based on the evidence, Bandow has established, *prima facie*, that its contract to repair

the sidewalk was solely with Marsam. Schnabel's counsel's assertion that Schnabel retained Bandow is unsupported by any evidence, and thus, absent privity of contract between Bandow and Schnabel, Bandow may not be held liable for breach of a contract to repair the sidewalk. (*Hamlet at Willow Creek Dev. Co., LLC v Northeast Land Dev. Corp.*, 64 AD3d 85 [2d Dept 2009], *lv dismissed* 13 NY3d 900 [subcontractor is generally in privity with contractor only, not owner, even if owner benefitted from subcontractor's work]; *Lambert Houses Redev. Co. v HRH Equity Corp.*, 117 AD2d 227 [1st Dept 1986] [owner cannot recover from subcontractor for breach of contract absent privity]).

Additionally, there is no allegation that Schnabel was an intended third-party beneficiary of the contract between Bandow and Marsam. (*Cf Staten Island New York CVS, Inc. v Gordon Retail Dev., LLC*, 57 AD3d 760 [2d Dept 2008] [although contractor showed there was no contract between it and owner, owner raised triable issue as to whether it was intended third-party beneficiary of contract between contractor and other defendants]).

In any event, as it is undisputed that Bandow completed its work in November 2001, any breach of contract claims against it are time-barred. (*Gap, Inc. v Fisher Dev., Inc.*, 27 AD3d 209 [1st Dept 2006] [three-year statute of limitations on owner's breach of contract claim against subcontractor began to run upon completion of work]; *Amedeo Hotels Ltd. Partnership v Zwicker Elec. Co., Inc.*, 291 AD2d 322 [1st Dept 2002] [owner's claim against contractor for defective work governed by six-year statute of limitations]).

III. MOTIONS BY CITY AND SCHNABEL

A. Applicable law

The party seeking summary judgment must demonstrate *prima facie* entitlement to

judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence, demonstrating the existence of factual issues that requires a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d at 853).

Pursuant to New York City Administrative Code § 7-210, the owner of real property abutting any sidewalk has the duty of maintaining it in a reasonably safe condition, and is liable for any personal or property injury proximately caused by its failure to so maintain the sidewalk. Therefore, after September 14, 2003, the abutting property owner, not City, is generally liable for accidents caused by sidewalk defects (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520-21 [2008]), unless the property is a "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." (Admin. Code § 7-210[b]).

Where an property owner's use of his or her premises for commercial purposes is limited or occasional, such use has been held to be incidental to the owner's residential use, thereby entitling the owner to the statutory exemption. (*See Coogan v City of New York*, 73 AD3d 613 [1st Dept 2010] [occasional use of laptop for research held incidental to residential use and owner denied using premises as home office or claiming tax deduction for such use]; *cf Matter of Town of New Castle v Kaufmann*, 72 NY2d 684 [1988] [term "used exclusively for residential purposes" in context of Real Property Tax Law permitted occasional or incidental use for

nonresidential purposes; owners used home for business for 10 hours within seven-month period]).

B. Contentions

The parties agree that the premises are an owner-occupied one, two or three-family residential property, and that the issue is whether the premises were used exclusively for residential purposes. City relies on the Schnabel's testimony, tax returns, and DOS filing to argue that the LLC-related activity at the premises of Schnabel and her employees demonstrates that the premises were not used exclusively for residential purposes, and that Schnabel's property does not come within the statutory exemption. (Lucas Aff.).

In opposition to City's motion and in support of her motion, Schnabel argues, based on her deposition testimony, that the exemption applies even if she used the premises for some of her business activity, and that her business use of the premises was merely incidental to her residential use. She observes that most of her business was conducted elsewhere, that the general public was not invited into the premises, that all orders were placed in the showroom, and that she never claimed a tax deduction for the business use of her home, characterizing her work at the premises as merely administrative. (Affirmation of Matthew A. Cuomo, Esq., dated Aug. 18, 2010; Affirmation of Sara R. David, Esq., dated Aug. 18, 2010).

Plaintiff argues that regardless of Schnabel's alleged entitlement to the statutory exemption, there exist triable issues of fact as to whether she caused or created the defective condition on the sidewalk, observing that Schnabel did not address this issue in her papers, and maintains that Schnabel did not meet her burden of establishing that her property is exempt. (Affirmation of John P. Sipp, Jr., Esq., dated Aug. 23, 2010).

City argues that Schnabel's testimony establishes that commercial activity took place on the premises, that whether or not the public was invited onto the premises is irrelevant, and that the premises constituted the sole office and design space for the LLC, with the showroom used for store orders only. (Affirmation of Andrew Lucas, Esq., dated Sept. 10, 2010).

In reply, Schnabel denies liability for Bandow's defective repairs, and observes that there is no evidence that she personally made or supervised any repairs to the sidewalk. (Reply Affirmation, dated Sept. 16, 2010). She also argues that she used the premises both for residential purposes and as a "space to sketch and do paperwork for her business," and that her use entitles her to the benefit of the statutory exemption. (Reply Affirmation, dated Sept. 16, 2010).

C. Analysis

While it is undisputed that Schnabel, like the plaintiff in *Coogan*, did not take a tax deduction for using the premises for LLC's business, she concededly performed LLC's administrative and creative work there. Consequently, the premises were used as LLC's office, its only office, and no evidence was offered that Schnabel herself performed any work related to the LLC elsewhere; the showroom was used solely to display goods and to receive store orders.

On the premises, Schnabel designed her products, received orders, coordinated the orders and manufacturing with her factory, and did all other paperwork related to the LLC. She also had an employee on the premises three days a week paying invoices, placing orders, and helping with design. As the evidence demonstrates that Schnabel was running the LLC from the premises, the commercial activity on the premises was neither occasional nor incidental. Moreover, during the relevant period, the LLC produced substantial revenues, and Schnabel listed the premises as the

LLC's address with the Department of State and on her tax returns.

The cases relied on by Schnabel are inapposite or factually distinguishable. (*Story v City of New York*, 24 Misc 3d 325 [Sup Ct, Kings County 2009] [attorney-owner used premises as business's mail drop and listed address for attorney registration but conducted no business there]; *Vargas v Rodriguez*, 2007 WL 2814539 [Sup Ct, Queens County 2007] [owner ran internet-based business from premises but engaged in less than 10 transactions in three-year period and earned less than $500]).

I thus find that Schnabel has failed to show that the premises were used exclusively for residential purposes, and as she is not exempt from liability pursuant to Administrative Code § 7-210, City may not be held liable for plaintiff's injuries. (Admin. Code § 7-210[b], [c]). It is thus irrelevant whether City had prior written notice of the defective condition of the sidewalk. (*See eg Adler v City of NY*, 52 AD3d 549 [2d Dept 2008] [while abutting property owner not exempt, discovery remained as to whether City created defect or made special use of sidewalk]; *Faulk v City of New York*, 16 Misc 3d 1108[A], 2007 NY Slip Op 51346[U] [Sup Ct, Kings County 2007] [City may be held liable only if it caused or created condition or made special use of sidewalk]).

In light of this result, I need not consider plaintiff's argument that Schnabel may be held liable, even if she is an exempt owner, on the ground that she caused or created the defective condition on the sidewalk.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Bandow Company, Inc.'s motion for summary judgment is

granted, and the complaint and all cross-claims are dismissed against defendant Bandow Company, Inc. with costs and disbursements to defendant as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly; it is further

ORDERED, that defendant City of New York's motion for summary judgment is granted, and the complaint and all cross-claims are dismissed against defendant City of New York with costs and disbursements to defendant as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly; it is further

ORDERED, that defendant Jacqueline Schnabel's motion for summary judgment is denied; it is further

ORDERED, that the remainder of the action shall continue; and it is further

ORDERED, that the Trial Support Office is directed to reassign this case to a non-City trial waiting list and remove it from the Part 5 inventory. Plaintiff is directed to serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158.

ENTER:

Barbara Jaffe, JSC

DATED: December 3, 2010
New York, New York
DEC 0 3 2010

BARBARA JAFFE J.S.C.

FILED

DEC 07 2010

NEW YORK
COUNTY CLERK'S OFFICE