

Saretsky v City of New York

2010 NY Slip Op 33450(U)

December 14, 2010

Supreme Court, New York County

Docket Number: 103540/08

Judge: Cynthia S. Kern

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

CYNTHIA S. KERN

PRESENT: _____
J.S.C. Justice

PART 52

Index Number : 103540/2008
SARETSKY, LORELLE
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 103540/08
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.

FILED

DEC 16 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/14/10

CK
CYNTHIA S. KERN 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
LORELLE SARETSKY AND TED SARETSKY,

Plaintiffs,

Index No. 103540/08

-against-

DECISION/JUDGMENT

FILED

THE CITY OF NEW YORK,

DEC 16 2010

Defendant.
-----X

NEW YORK
COUNTY CLERKS OFFICE

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.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action to recover damages for personal injuries she allegedly sustained on May 21, 2007 when she tripped and fell on the sidewalk in front of 197 Mulberry Street. She alleges that she tripped on a step which was on the sidewalk. The only evidence before the Court as to when the step was installed is the affidavit from the president of the current owner of the premises adjacent to the property, who states that the step was present when his company purchased the property in 1973. Defendant City of New York (the "City") now moves for summary judgment on the grounds that the City is not liable pursuant to

Administrative Code §7-210 and that the Court has already determined as a matter of law that plaintiff fell due to her own negligence in its decision dismissing the case as against the other defendants. 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. Section 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.

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 197 Mulberry 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 C7 (Walk-Up Apt. Over Six Families with Stores), not as a one-, two- or three-family solely residential property.

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. Furthermore, a plaintiff cannot defeat a motion for summary judgment based on mere speculation that additional discovery would uncover facts showing that the City caused or created the condition. *Davila v. New York City Transit Auth.*, 66 A.D.3d 952, 953-54 (2nd Dept 2009); *see also Brown v. Bauman*, 42 A.D.3d 390, 392-93 (1st Dept 2007).

In the instant case, plaintiff has failed to provide any evidence establishing a prima facie case that the City did any work on the sidewalk that immediately caused or created a dangerous condition. The Department of Transportation (“DOT”) search results and accompanying affidavit of Cynthia Howard, the DOT searcher, sufficiently demonstrate that the City did not perform work at the subject location in the two years prior to the accident. Moreover, plaintiff’s argument that she is entitled to discovery to determine whether the step on which she tripped may have been negligently constructed by the City many years ago is without merit. There is no evidence in admissible form before the Court that would establish that the City built the step. Plaintiff’s

