

**Hanan v 346 W. 87th St. Assocs.**

2010 NY Slip Op 33614(U)

December 29, 2010

Supreme Court, New York County

Docket Number: 115120/07

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.  
Justice

PART 5

Index Number : 115120/2007  
HANAN, HELEN  
vs.  
346 WEST 87TH STREET  
SEQUENCE NUMBER : 002  
SUMMARY JUDGEMENT  
CAL # 35

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

this motion to/for \_\_\_\_\_  
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PAPERS NUMBERED  
1  
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ilbts ...

+ motion  
Answering Affidavits Exhibits  
app  
Replying Affidavits

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

FILED

JAN 04 2011

NEW YORK COUNTY CLERK'S OFFICE  
DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

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

Dated: 12/29/10

BJ  
BARBARA JAFFE J.S.C.  
J.S.C.

DEC 29 2010  
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

HELEN HANAN,

Plaintiff,

-against-

346 WEST 87<sup>TH</sup> STREET ASSOCIATES and  
THE CITY OF NEW YORK,

Defendants.

-----X

BARBARA JAFFE, JSC:

Index No. 115120/07  
Motion Date: 11/9/10  
Motion Seq. No.: 002  
Calendar No.: 35

**DECISION & ORDER**

**FILED**

**JAN 04 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

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By notice of motion dated June 21, 2010, defendant 346 West 87<sup>th</sup> Street Associates, LLC (87<sup>th</sup> Street Associates) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes. By notice of cross-motion dated June 30, 2010, defendant City moves pursuant to CPLR 3211(a)(7) for an order dismissing the complaint, or pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes.

I. FACTS

Plaintiff alleges that on September 1, 2007, at approximately 10 pm while walking her dog on the south sidewalk in front of 346 West 87<sup>th</sup> Street, she fell after tripping on a cobblestone brick which had been part of the tree well there. The building is owned by 87<sup>th</sup> Street Associates. (Affirmation of Marc D. Citrin, Esq., dated Oct. 18, 2010 [Citrin Aff.]; Affirmation of William J.

Pisarello, Esq., dated June 23, 2010 [Pisarello Aff.], Exh. G at 18, 29).

At a deposition held on November 13, 2009, plaintiff testified that while she had probably stopped at the location before, she had not made any observations about the tree or the area surrounding it (*id.* at 25), nor had she seen the brick or any debris on the sidewalk at any time prior to her fall (*id.* at 33, 38, 48). Photographs taken after the accident depict a brick on the sidewalk, approximately one foot from the tree well. (Citrin Aff., Exh. A). In an affidavit submitted in opposition to 87<sup>th</sup> Street Associates’s motion, plaintiff alleges that she specifically recalls that the night before her accident, she saw the brick on the sidewalk near tree well. (Affidavit in Opposition of Helen Hanan, dated Oct. 19, 2010). In an affidavit submitted in opposition to 87<sup>th</sup> Street Associates’s motion, a witness alleges that he saw plaintiff trip and fall on the brick and that he had previously seen cobblestones from the tree well on the sidewalk. (Affidavit of Sonny Greenwald, dated Oct. 19, 2010).

John Brusco, manager of the building and the limited liability company that manages it, testified at a deposition held on November 12, 2009 that he visits the building every day and every week he cleans its interior and exterior, including the tree well and area around it, but never noticed any loose bricks around the tree well. (Pisarello Aff., Exh. H at 10, 17, 20-22).

Sherry Johnson-O’Neal, principal administrative associate for the Department of Transportation (DOT), testified at deposition held on May 13, 2010, as to the results of a record search conducted by record searcher Stacy Williams of 346 West 87<sup>th</sup> Street for a two-year period prior to and including the accident date. (Affirmation of Peter C. Lucas, dated July 30, 2010 [Lucas Aff.], Exh. C). The search yielded no permits, corrective action requests, notices of violation pertaining to permits, applications for permits, repair orders, sidewalk violations,

contracts or complaints. (*Id.* at 8). William Steyer, director of forestry for the Department of Parks, testified at a deposition held on May 13, 2010, as to the results of a search for records in his department; no complaints were found relating to City-owned sidewalk trees. (Pisarello Aff., Exh. I).

## II. 87<sup>th</sup> STREET ASSOCIATES'S MOTION

### A. Contentions

87<sup>th</sup> Street Associates contends that it owed no duty to plaintiff because it is not liable for the tree well and, assuming it had such a duty, it had no actual or constructive notice of a dangerous condition there. (Pisarello Aff.). In support, it relies on plaintiff's pleadings and bill of particulars, the depositions of plaintiff, Brusco, and Steyer, photographs of the accident location, and an affidavit in which Brusco swears that he visited the building daily to maintain it and never saw cobblestones from the tree well on the sidewalk. (*Id.*, Exh. A-K).

In opposition, plaintiff maintains that, pursuant to New York City Administrative Code § 7-210, 87<sup>th</sup> Street Associates is responsible for the sidewalk and that there exist issues of fact as to whether it had actual or constructive notice thereof. (Citrin Aff.). In support, she relies on the statute and Brusco's testimony, and annexes an errata sheet accompanying her deposition transcript stating that she had seen bricks on the sidewalk on prior occasions, her affidavit stating she had previously seen bricks from the tree well on the sidewalk, and an affidavit from Sonny Greenwald, a previously undisclosed witness, who states that he lives in the area and remembers seeing a brick approximately one foot from the tree well the night before plaintiff's accident. (Citrin Aff., Exhs. A- C).

### B. 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.” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs, Inc.*, 46 NY2d 1065, 1067 [1979]). 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 to 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 and assertions are insufficient” (*Zuckerman*, 49 NY2d 557, 562).

On a defendant’s motion for summary judgment in a trip and fall case where written notice is not a statutory requirement, the defendant has the burden of establishing, *prima facie*, that it had no actual or constructive notice of a dangerous condition. (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). “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 the defendant’s employees to discover and remedy it.” (*Id.*).

Pursuant to Administrative Code § 7-210(b), the owner of real property abutting any sidewalk has the duty of maintaining it in a reasonably safe condition, and is liable for injury

proximately caused by its failure to so maintain the sidewalk, including the removal of snow, ice, dirt or other material. However, in *Vucetovic v Epson Downs, Inc.*, 10 NY3d 517, 521 (2008), the Court of Appeals held that, for purposes of Administrative Code § 7-210, which must be strictly construed, a tree well is not part of the sidewalk and the abutting landowner is not obligated to maintain it. (*Id.* [“Section 7-210 does not impose civil liability on property owners for injuries that occur in city-owned tree wells.”]).

Here, however, the issue is not whether 87<sup>th</sup> Street Associates failed to maintain the tree well in a safe condition but whether it complied with its duty to maintain the sidewalk in a safe condition regardless of City’s failure to maintain the tree well. In *Faulk v City of New York*, 16 Misc 3d 1108(A), 2007 NY Slip Op 51346, \*5 (Sup Ct, Kings County 2007), the court observed that given the legislative history of the Code provision, it is reasonable to impose liability on an abutting landowner for failing to correct a dangerous sidewalk condition, “even where the City solely caused the condition . . .” And in analogous circumstances, the court in *Satram v City of New York*, 24 Misc 3d 1233(A), 2009 NY Slip Op 51713(U) (Sup Ct, Kings County 2009), held that given the strict construction necessarily accorded the Code, the property owner is liable for a sidewalk raised by a tree root growing from a tree well. (*See also eg Seplow v Solil Mgmt.*, 15 Misc 3d 1138[A], 2007 NY Slip Op 51033[U], \* 4 [Sup Ct, New York County]).

Thus, even if the brick on which plaintiff tripped had migrated to the sidewalk from the tree well as a result of City’s negligence, once it reached the sidewalk, it became the responsibility of 87<sup>th</sup> Street Associates to remove it.

However, defendant has established, *prima facie*, through the testimony of its manager that it had no constructive notice of the condition, and plaintiff’s affidavit, submitted in

opposition to the motion, does not raise a triable issue of fact. (*See Garcia-Martinez v City of New York*, 68 AD3d 428, 429 [1<sup>st</sup> Dept 2010] [plaintiff's affidavit in opposition, stating that entire path to sidewalk was covered with ice, contradicted her deposition testimony describing a narrower patch of ice in middle of three-foot-wide pathway, thereby creating only feigned issue of fact, insufficient to defeat defendants' motion]; *Pippo v City of New York*, 43 AD3d 303 [1<sup>st</sup> Dept 2007] [party's affidavit that contradicts prior sworn testimony creates only feigned issue of fact, which is insufficient to defeat properly supported motion for summary judgment]; *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318 [1<sup>st</sup> Dept 2000] [while issues of fact and credibility not ordinarily resolved on motion for summary judgment, where self-serving affidavits submitted in opposition clearly contradict plaintiff's own deposition testimony and can only be considered to have been tailored to avoid consequences of earlier testimony, they are insufficient to raise triable issue of fact to defeat defendant's motion for summary judgment]).

I also do not consider plaintiff's errata sheet absent proof that it was served on defendants and, in any event, she does not explain the corrections as required by CPLR 3316(a). (*Compare Garcia v Stickel*, 37 AD3d 368 [1<sup>st</sup> Dept 2007] [errata statements must be rejected due to failure to timely submit reasons for changes], *with Cillo v Resjefal Corp.*, 295 AD2d 257 [1<sup>st</sup> Dept 2002] [witness may make substantive changes to deposition testimony if reasons are provided]).

Likewise, the affidavit of the previously undisclosed notice witness, is not considered. (*See Garcia v Good Home Realty, Inc.*, 67 AD3d 424, 425 [1<sup>st</sup> Dept 2009] affidavit of previously undisclosed notice witness, submitted for first time in opposition to the motion for summary judgment is improper]).

### III. CITY'S MOTION

#### A. Contentions

City maintains that it may not be held liable for a street defect absent written notice, and denies that it caused or created the alleged defect. (Lucas Aff.). In support, it relies on the deposition testimony of Steyer and Johnson-O'Neal, and the results of the record searches. (Id., Exhs. C, D; Pisarello Aff., Exh. I). In opposition, plaintiff argues that written notice is not required for a defective tree well, and that there exist issues of fact as to City's actual or constructive notice. (Citrin Aff.).

#### B. Analysis

Pursuant to Administrative Code § 7-201©, no civil action may be maintained against City arising from a dangerous condition on a street, sidewalk, or "encumbrances thereon or attachments thereto" unless the plaintiff demonstrates that City had prior written notice of the condition. Although the Court of Appeals has held that the tree well is not part of the sidewalk for purposes of Administrative Code § 7-210, thus designating City as the party liable for failure to maintain tree wells, it did not disturb the requirement of written notice as a predicate for finding City liable for defects in a tree well, an encumbrance to the sidewalk. (*O'Reilly v City of New York*, 2010 Slip Op 32240[U] [Sup Ct, New York County 2010] [Jaffe, J.]; *Shulman v House of the Redeemer*, 2010 NY Slip Op 32038[U] [Sup Ct, New York County 2010]).

None of plaintiff's pleadings, bill of particulars, and moving papers contains any allegation that City had written notice of a defect at or around the tree well. Rather, plaintiff asserts that City had actual or constructive notice of the defect. As neither actual nor constructive notice eliminates the requirement that written notice be established before municipal

liability will attach (*Farrell v City of New York*, 49 AD3d 806, 807 [2d Dept 2008]), plaintiff has failed to raise a triable issue of fact for trial.

IV. CONCLUSION

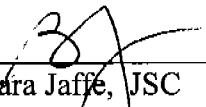
Accordingly, it is hereby

ORDERED, that defendant 346 West 87<sup>th</sup> Street Associates, LLC's motion for summary judgment is granted, and the complaint against it is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; it is further

ORDERED, that defendant City of New York's motion is granted, and the complaint against it is dismissed, with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

  
\_\_\_\_\_  
Barbara Jaffe, JSC

**BARBARA JAFFE**  
**J.S.C.**

DATED: December 29, 2010  
New York, New York

**DEC 29 2010**

**FILED**

**JAN 04 2011**

NEW YORK  
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