

**DeJesus v New York City Hous. Auth.**

2011 NY Slip Op 30798(U)

March 31, 2011

Supreme Court, New York County

Docket Number: 106302/07

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE  
J.S.C.

PART 5

Index Number : 106302/2007

DEJESUS, IRIS

vs  
NYC HOUSING AUTHORITY

Sequence Number : 002

SUMMARY JUDGMENT

*CA 4 # 40*

INDEX NO. \_\_\_\_\_

MOTION DATE 2/1/11

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. 40

The following papers, numbered 1 to \_\_\_\_\_ were read on 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

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

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**FILED**

APR 05 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4/4/11  
APR 04 2011

BARBARA JAFFE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 5

-----X  
IRIS DEJESUS,

Plaintiff,

-against-

NEW YORK CITY HOUSING AUTHORITY, CITY  
OF NEW YORK, GKC INDUSTRIES, INC., MDF  
CONTRACTING CORP., and R. LAPOINTE  
CONCRETE AND CONSTRUCTION CORP.,

Defendants.  
-----X

BARBARA JAFFE, JSC:

**For plaintiff:**  
Robert Goldhaber, Esq.  
Goldhaber, Weber, *et al.*  
305 Broadway, Suite 202  
New York, NY 10007  
212-226-6624

**For NYCHA:**  
Abraham A. Friedman, Esq.  
Newman Myers Kreines, et al.  
14 Wall Street - 22<sup>nd</sup> Floor  
New York, NY 10005  
212-619-4350

**For defendant City:**  
Jessica Wisniewski, ACC  
Michael A. Cardozo  
Corporation Counsel  
100 Church Street  
New York, NY 10007  
212-788-0609

**For MDF:**  
Magdalene F. Skountzos, Esq.  
Brody O'Connor, et al.  
111 John Street - Suite 900  
New York, NY 10038  
212-233-2505

**For GKC:**  
Wendy Garfield, Esq.  
Rubin, Fiorella & Friedman, LLP  
292 Madison Avenue  
New York, NY 10017  
212-953-2381

By notice of motion dated October 12, 2010, defendant New York City Housing Authority (NYCHA) moves pursuant to CPLR 3212 for an order summarily dismissing the claims against it. Plaintiff opposes.

By notice of motion dated September 21, 2010, defendant MDF Contracting Corp. (MDF) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint and, by notice of cross motion dated October 14, 2010, defendant GKC Industries, Inc. (GKC) cross moves pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff and

Index No. 106302/07

Motion Date: 2/1/10  
Motion Seq. Nos: 002,  
Calendar Nos: , 40

**DECISION & ORDER**

**FILED**

**APR 05 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

NYCHA oppose. By stipulations dated November 15, 2010, MDF and NYCHA withdrew those portions of their motions seeking sanctions. For the reasons that follow, all motions are denied.

### I. FACTS

NYCHA contracted with GKC for a grounds improvement project at the Alfred E. Smith Houses, a NYCHA housing project. (Affirmation of Magdalene P. Skountzos, Esq., dated Sept. 23, 2010 [Skountzos Aff.], Exh. M). On December 28, 2005, GKC entered into a subcontract agreement with MDF for concrete work. (*Id.*, Exh. N).

On the morning of March 21, 2006, while walking with her husband and his healthcare attendant on the sidewalk in front of the Smith Houses, on Pearl Street near St. James Place in Manhattan, the toes of plaintiff's right foot became stuck in a hole between two sidewalk flags, approximately 35 feet to the left of a supermarket and 20 feet from the curb, causing her to trip and fall forward. (Affirmation of Abraham A. Friedman, Esq., dated Nov. 10, 2010 [Friedman Aff.], Exh. F). It was sunny and the ground was dry. (*Id.*, Exh. H). After she got up, plaintiff saw the hole. (*Id.*). At a deposition held on April 22, 2009, plaintiff identified the hole, which she had never before seen, and described it as four to six inches long, ten inches wide, and three inches deep. (*Id.*).

At a deposition held on June 10, 2009, plaintiff's husband testified that after his wife fell, he looked at the sidewalk and noticed a crack, which he described as approximately eight inches long, six to seven inches wide, and two to three inches deep. (Friedman Aff., Exh. I).

At a deposition held on June 10, 2009, Patria De La Cruz, plaintiff's husband's healthcare attendant, testified that she was walking with plaintiff and plaintiff's husband at the time of the accident, and that she had seen the hole in the sidewalk before, that it had been there for at least

five to six years, and that it was approximately two to three inches deep. (*Id.*, Exh. J).

Jose Crespo, a NYCHA employee and the supervisor of groundskeepers, stated by affidavit dated October 7, 2010, that on that day he measured the hole at the sidewalk with a ruler, and it measured approximately three-quarters of an inch deep. (*Id.*, Exh. O).

## II. PERTINENT PROCEDURAL BACKGROUND

On May 24, 2007, plaintiff commenced this action by serving a summons and complaint on all parties. (*Id.*, Exh. A). On June 8, 2007, NYCHA served its answer, with cross-claims against all defendants. (Skountzos Aff., Exh. C). In June 2007, City served its answer, with cross-claims against GKC, MDF, and LaPointe Concrete and Construction (LaPointe). (*Id.*). On June 21, 2007, MDF served its answer, with cross-claims against all co-defendants. (*Id.*, Exh. B). On July 3, 2007, GKC served its answer, with cross-claims against all co-defendants. (*Id.*, Exh. C). In August 2010, GKC and MDF settled with plaintiff, and they remain in this action as cross-claimants. (Skountzos Aff., Exh. F; Affirmation of Robert Goldhaber, Esq., dated Nov. 4, 2010 [Goldhaber Aff.]). Co-defendant LaPointe has not appeared. (Friedman Aff.). Plaintiff filed her note of issue and certificate of readiness on August 12, 2010. (Skountzos Aff., Exh. F).

## III. NYCHA's motion

### A. Contentions

NYCHA contends that it cannot be held liable for a trivial defect (NYCHA's Memorandum of Law in Support of its Motion for Summary Judgment, dated Oct. 11, 2010 [NYCHA Mem.]), and that plaintiff cannot establish a *prima facie* case because she speculates that the alleged defect caused her fall (Affirmation of Abraham A. Friedman, Esq., dated Oct. 12, 2010 [Friedman Aff.]). In support, it annexes the pleadings; photographs of the accident

location; the deposition transcripts of plaintiff, her husband, and De La Cruz, and Crespo's affidavit that he measured the crack at the spot where plaintiff alleged she fell, that it measured three-quarters of an inch deep, and that it was a fair and accurate representation of how the sidewalk appeared in March 2006. (*Id.*, Exhs. A, E, F, G, H, I, J, O).

In opposition, plaintiff contends that there is there is no minimal measurement for determining whether a defect is trivial as a matter of law, and that the testimony and photographs raise a triable issue of fact. (Affirmation of Robert Goldhaber, Esq., dated Nov. 4, 2010 [Goldhaber Aff.]).

### B. Analysis

It is well-settled that “[t]he 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]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *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). Accordingly, it is City's burden here, as movant, to demonstrate its entitlement to judgment, and negate, *prima facie*, an essential element of the plaintiff's cause of action. (*Rosabella v Metro. Trans. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]). If shown, the burden shifts to plaintiff to establish a triable issue of fact.

It is also well-settled that the party responsible for “a public passageway may not be cast in damages for negligent maintenance by reason of trivial defects on a walkway, not constituting

a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes, or trip over a raised projection.” (*Morales v Riverbay Corp.*, 226 AD2d 271 [1<sup>st</sup> Dept 1996]).

Moreover, there is no per se rule as to what measurement renders a defect trivial. Rather, “a mechanic disposition of a case based exclusively on the dimension of the . . . defect is unacceptable” (*Trincere v County of Suffolk*, 90 NY2d 976, 977-978 [1997]; *Dominguez v OCG IV, LLC*, \_\_\_ NYS2d \_\_\_, 2011 NY Slip Op 01588 [1<sup>st</sup> Dept 2011]; *Delarosa v City of New York*, 61 AD3d 813, 814 [2d Dept 2009]), and “even a trivial defect may constitute a snare or trap” (*Argenio v Metro. Transp. Auth.*, 277 AD2d 165, 166 [1<sup>st</sup> Dept 2000]; see *Abreu v NYCHA*, 61 AD3d 420, 421 [1<sup>st</sup> Dept 2009 [lengthy irregularity in cement may have been capable of catching plaintiff’s sandal]). Thus, sidewalk defects measuring one inch have been found to be not trivial. (*Cuebas v Buffalo Motor Lodge/Best Value Inn*, 55 AD3d 1361 [4<sup>th</sup> Dept 2008]; *Boxer v Metro. Transp. Auth.*, 52 AD3d 447 [2d Dept 2008]; *Mishaan v Tobias*, 32 AD3d 1000 [2d Dept 2006]).

And, “[w]hile a gradual, shallow depression is generally regarded as trivial . . . the presence of an edge which poses a tripping hazard renders the defect nontrivial.” (*Argenio*, 277 AD2d at 166). Consequently, “whether a dangerous or defective condition exists on the property of another so as to create liability ‘depends on the peculiar facts and circumstances of each case’ and is generally a question of fact for the jury.” (*Trincere*, 90 NY2d 976, 977). It is the movant’s burden to establish that a defect is trivial as a matter of law. (*Boxer*, 52 AD3d 447, 448]).

Here, in addition to the photographs depicting a long crack, the only evidence submitted that tends to support NYCHA’s position is the groundskeeper’s affidavit, although there is no evidence as to how he concluded that he measured the exact spot on which plaintiff caught her

foot, or that the crack is in the same condition it was when plaintiff fell. (*Compare Tese-Milner v 30 East 85<sup>th</sup> St. Co.*, 60 AD3d 458 [1<sup>st</sup> Dept 2009] [expert stated that defect was three-quarters of inch deep and opined it was unsafe; expert's conclusion that defect had existed for long time was based on comparison of condition during inspection and photographs taken immediately after accident], *with Burko v Friedland*, 62 AD3d 462 [1<sup>st</sup> Dept 2009] [opinion of expert based on condition of defect more than three years after accident insufficient to raise factual issue]). Thus, the groundskeeper's opinion does not satisfy NYCHA's *prima facie* burden. (*Compare Dominguez*, \_\_\_ NYS2d \_\_\_, 2011 Slip Op 01588 [appellant did not provide affidavit of one with knowledge of condition], *with Krinsky*, \_\_\_ NYS2d \_\_\_, 2011 NY Slip Op 01524 [1<sup>st</sup> Dept 2011] [defendants established through expert affidavit that crack in sidewalk was trivial]).

Moreover, as plaintiff and another witness testified that they saw the hole immediately after plaintiff fell, at the precise spot where she fell, and the testimony of another witness and photographs reflect the same defect, defendant has not shown that plaintiff merely speculates as to the cause of her accident. (*Tomaino v 209 East 84<sup>th</sup> Street Corp.*, 72 AD3d 460 [1<sup>st</sup> Dept 2010] [plaintiff not required to identify location of fall with precision at time of accident, where testimony and photographs corroborate existence of dangerous condition]). It is thus unnecessary to address plaintiff's opposition papers. (*Delarosa*, 61 AD3d at 814).

#### IV. MDF and GKC's motions

##### A. Contentions

MDF argues that the cross-claims against it should be dismissed because it did not owe plaintiff a duty of care, and that NYCHA is liable for the sidewalk pursuant to Administrative Code § 7-210. (*Skountzos Aff.*). In support, it relies on the pleadings, unsigned, unsworn, and

uncertified deposition transcripts of its witness, GKC's witness, plaintiff, plaintiff's husband, and De La Cruz, Rodriguez's unsigned and unsworn deposition transcript, the contracts between NYCHA and GKC and between GKC and MDF; NYCHA's certificate of final acceptance, and photographs marked by the parties. (*Id.*, Exhs. A-T).

GKC denies that it is contractually required to indemnify NYCHA, arguing that plaintiff's fall was not a result of its work under the contract or failure to perform work, that it cannot be held liable for common law indemnification absent a showing that it was negligent, but rather, that NYCHA and City were negligent, and that City's cross-claims for contractual indemnification fail because it has no contract with City. (Affirmation of Wendy Garfield, Esq., dated Oct. 14, 2010). GKC relies on the exhibits annexed to MDF's motion.

In opposition, NYCHA argues that GKC and MDF have not established that they are not responsible the sidewalk defect as they contracted to work at the sidewalk, GKC is contractually obligated to indemnify it, and that GKC and MDF have not submitted evidence in admissible form as the depositions are not signed, sworn, or certified. (Affirmation of Abraham A. Friedman, Esq., in Opposition to GKC's Summary Judgment Motion, dated Oct. 27, 2010).

In reply, GKC maintains that its witness testified that it did not work at the spot where plaintiff fell. (Reply Affirmation of Wendy Garfield, Esq., dated Nov. 10, 2010). In reply, MDF denies that it performed any repairs to the sidewalk where plaintiff fell. (Reply Affirmation of Magdalene P. Skountzos, Esq., dated Nov. 22, 2010).

B. Analysis

Absent any dispute that MDF did not contract with City, MDF cannot be held liable to it for contractual indemnification.

A breach of a contractual obligation, in and of itself, does not give rise to a duty toward a non-party injured as a result of the breach. (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]). Thus, where a plaintiff seeks a remedy based on a breach of a contractual obligation between two other parties, there is no duty unless the plaintiff can establish, *inter alia*, that the contractor affirmatively created the dangerous condition. (*Id.*, *Timmins v Tishman Constr. Corp.*, 9 AD3d 627 [1<sup>st</sup> Dept 2004]).

Here, however, GKC does not seek summary judgment against plaintiff, but against the party with whom it contracted and the property owner for whom it worked.

MDF and GKC rely primarily on the depositions of their witnesses, which they allege establishes that they did not perform work where plaintiff fell. However, the deposition transcripts are not signed, sworn, or certified, and movants do not show that they were forwarded to the deponents for review. Consequently, they are inadmissible (CPLR 3116[a]; *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47AD3d 901, 902 [2d Dept 2008] [unsigned deposition transcripts inadmissible]; *McDonald v Mauss*, 38 AD3d 727, 728 [2d Dept 2007] [unsigned, unsworn transcripts should not be considered on motion for summary judgment]), notwithstanding NYCHA's attachment of the same transcripts. At most, NYCHA's use of the transcripts confirms that NYCHA submitted them to the witnesses for signature and is thereby authorized to use them, but there is no indication that MDF and GKC returned them. Having failed to comply with CPLR 3116(a), MDF and GKC may not affirmatively use the unexecuted transcripts. (*See Siegel*, NY Prac § 357 [3d ed] [improper practice for party required to execute deposition to submit in motion before doing so]; *Rosa v City of New York*, 27 Misc 3d 1234[A]; 2010 NY Slip Op 51029[U] [Sup Ct, New York County [Jaffe, J.]). The remaining admissible

evidence establishes that the parties had contracted to perform work on the sidewalk at and around the area of the Smith Houses, and thus does not establish as a matter of law that they did not create or exacerbate a dangerous condition or that they are not contractually liable to indemnify other parties.

V. CONCLUSION

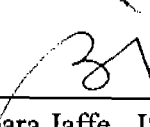
Accordingly, it is hereby

ORDERED, that New York City Housing Authority's motion for summary judgment is denied; it is further

ORDERED, that GKC Industries, Inc.'s motion for summary judgment is denied; and it is further

ORDERED, that MDF Contracting Corp.'s motion for summary judgment against City is granted to the extent that City seeks a remedy based on contractual indemnification, and is otherwise denied.

This constitutes the decision and order of the court.

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

DATED: March 31, 2011  
New York, New York

**BARBARA JAEFFE**  
J.S.C.

**FILED**

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