[* 1]

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

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

Index Number : 103843/2007

EVANS, VIVIAN

VS

CITY OF NEW YORK

Sequence Number : 001

SUMMARY JUDGMENT

CAL # 29

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 2 were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

APR 13 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/12/11
APR 12 2011

BARBARA JAFFE 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 5

----------x

VIVIAN EVANS,

Plaintiff,

-against-

THE CITY OF NEW YORK,

Defendant.

----------x

Index No. 103843/07

Motion Date: 10/29/10
Motion Seq. No.: 001
Calendar No.: 29

DECISION & ORDER

BARBARA JAFFE, JSC:

For plaintiff:
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For defendant City:
Andrew Lucas, ACC
Michael A. Cardozo
Corporation Counsel
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New York, NY 10007
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By notice of motion dated October 29, 2010, City moves pursuant to CPLR 3211(a)(7) for an order dismissing the complaint, or pursuant to CPLR 3212 summarily dismissing the complaint. Plaintiff opposes.

I. FACTS

On December 27, 2005, plaintiff was injured when she tripped and fell on a defect in the sidewalk at West 135th Street between St. Nicholas Avenue and Frederick Douglas Boulevard, in Manhattan. (Affirmation of Eliot S. Bickoff, Esq., dated Nov. 18, 2010 [Bickoff Aff.]).

II. PERTINENT PROCEDURAL BACKGROUND

On March 20, 2006, plaintiff served a notice of claim on City, with photographs of the defective sidewalk annexed. (Affirmation of Andrew Lucas, ACC, dated October 29, 2010 [Lucas Aff.], Exh. A). In the notice of claim, it is stated that the place of the accident was "the

south sidewalk of West 135th Street, Bronx, New York, approximately 65 feet east of St Nicholas Avenue and approximately 10 feet from the curb line of West 135th Street." (*Id.*). It is also alleged that City had "prior notice" of this condition, and that it caused and/or permitted it to exist. (*Id.*). On March 20, 2007, plaintiff commenced this action by serving a summons and complaint on City, wherein she alleged that she fell on a broken portion of the "south sidewalk of West 135th Street, in the County of New York." (*Id.*, Exh. B). Issue was joined when City served its answer on April 24, 2007. (*Id.*, Exh. C). On May 18, 2009, plaintiff served a verified bill of particulars, which identified the location as the "south sidewalk of West 135th Street, Bronx, New York approximately 65 feet east of St. Nicholas Avenue and approximately 10 feet from the curb line of West 135th Street." (*Id.*, Exh. D). Plaintiff filed her note of issue and certificate of readiness on September 24, 2010.

III. CONTENTIONS

City argues that plaintiff has failed to comply with General Municipal Law § 50-e(2) as it did not sufficiently describe the location of her accident. It maintains that because her pleadings designate the location of her accident in Manhattan and in the Bronx, it was unable to conduct a proper investigation, and yet it concedes that the address designated in the notice of claim does not exist in the Bronx. City also disclaims liability for plaintiff's injuries on the grounds that New York City Administrative Code § 7-210 relieves it of responsibility for the sidewalk, and that it neither caused or created a defective condition nor enjoyed a special use of the sidewalk. (Lucas Aff.). It submits the affirmation of David Atik, attorney for New York City Department of Finance, who conducted a search and concludes that City does not own the property abutting 318 West 135th Street, New York, New York. (*Id.*, Exh. I).

In opposition, plaintiff maintains that the notice of claim identifies the location of her accident with the required specificity, and that City's search for the location reveals that the address was located in Manhattan and not the Bronx. (Bickoff Aff.). Plaintiff relies on Atik's affidavit as evidence that City was aware of the accident location. (Lucas Aff., Exh. I). Plaintiff also asserts that City may be held liable for the dangerous condition on the sidewalk as it received written notice of it or, alternatively, it argues that written notice was not required because City had actual knowledge of a dangerous condition. (Bickoff Aff.). It relies on the deposition testimony of City witness, Abraham Lopez, who searched for records of the accident location yielding, *inter alia*, 37 permits, two corrective actions, and four notices of violations. (*Id.*, Lucas Aff., Exh. G).

IV. ANALYSIS

A. Notice of claim

Prior to commencement of an action against City for personal injury, a notice of claim must be served on it within 90 days of the accident, setting forth the nature of the claim and the time, place and manner in which it arose. (GML § 50-e[2], 50-i).

"The purpose of the notice of claim is to give a municipal authority the opportunity to investigate." (*Goodwin v New York City Hous. Auth.*, 42 AD3d 63, 67 [1st Dept 2007]). Its requirement is not designed to be "a sword to cut down honest claims." (*Id.* at 66). Rather, it "is to be applied flexibly . . . so as to balance two countervailing interests: on one hand protecting defendants from stale or frivolous claims, and on the other hand, ensuring that a meritorious case is not dismissed for a ministerial error." (*Id.*).

Although plaintiff's notice of claim does not accurately reflect the county where she fell,

there is no indication that City was unable to determine the correct county based on the cross-streets, which are precisely stated. Moreover, City does not explain how it would have responded differently had the notice of claim correctly designated the county, nor does it allege that it has conducted an investigation which has been stymied by the misinformation (*see Goodwin*, 42 AD3d at 68 [no prejudice where there is no evidence that public authority attempted to conduct an investigation]; *Baez v New York City Hous. Auth.*, 182 AD2d 554, 555-56 [1st Dept 1992] [notwithstanding inadequacy of notice of claim, no allegation of investigation prior to hearings]; *Miles v City of New York*, 173 AD2d 298, 300 [1st Dept 1999] [no indication that investigation was "stymied by a lack of specifics"]), or that it unsuccessfully sought clarification at or before plaintiff's deposition (*cf Goodwin*, 42 AD3d at 69 [municipal authorities often ask for information from claimants]; *Reyes v City of New York*, 281 AD2d 235 [plaintiff failed to respond to City's request for more information]). There is also no allegation of bad faith. Rather, the mistake appears to have been inadvertent, rather than one "calculated to mislead or confuse" (*Dillon v Manhattan and Bronx Surface Trans. Operating Auth.*, 182 AD2d 553 [1st Dept 1992]).

B. Administrative Code § 7-210

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 must 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 that there exists a triable issue of fact.

Pursuant to Administrative Code § 7-210, the owner of real property abutting any sidewalk, and not City, has the duty of maintaining it in a reasonably safe condition, and is liable for injury proximately caused by its failure to maintain the sidewalk. (*Vucetovic v Epson Downs, Inc.*, 10 NY3d 517 [2008]). Absent any dispute that plaintiff's fall occurred on a public sidewalk, and that City does not own the abutting property, City may not be liable for the failure to maintain the sidewalk here. To the extent plaintiff argues that Administrative Code § 7-201(c) imposes on City an independent obligation to correct sidewalks notwithstanding the statutory exemption set forth in section 7-210, no such implication arises therefrom. Rather, City is not liable for the sidewalk regardless of whether it had notice of the defect or whether it authorized repairs.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that City's motion for summary judgment is granted, and the claims dismissed against it with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs.

This constitutes the decision and order of the court.

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

FILED
APR 13 2011
COUNTY CLERK'S OFFICE
NEW YORK

DATED: April 12, 2011
New York, New York

APR 12 2011