Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Anna K. Tom,

Plaintiff,

- against -

Maria Carboni, Maria Carboni as Administrator of the Estate of Giovanna Carboni, Elvio Carboni, Romeo Y. Lim, Maria C.W. Lim, Lenora Y. Lim and the City of New York,

Defendants.

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Index Number: 16651/07

Motion Date: 5/3/11

Motion Cal. No: 23-26

Motion Seq. No.: 3-6

The following papers numbered 1 to 41 read on this motion by defendant, Lenora Y. Lim for summary judgment; motion by defendant, Elvio Carboni, for summary judgment; motion by defendants, Maria Carboni and Maria Carboni as Administrator of the Estate of Giovanna Carboni, for summary judgment; motion by defendant, the City of New York, for summary judgment; and cross-motion by plaintiff for summary judgment.

	Papers Numbered
Notice of Motion(Lim) (#23)-Affirmation-Exhibits...	1-4
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City's Reply.....	10-11
Notice of Cross-Motion-Affirmation-Exhibits.....	12-15
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Lim's Affirmation in Opposition to Pltf-Exhibits...	19-21
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Notice of Motion(E.Carboni) (#24)-Aff-Exhibits.....	24-27
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Motions by Lim(Calendar No. 23), Elvio Carboni (Calendar No. 24), Maria Carboni and Maria Carboni as administrator of the estate of Giovanna Carboni (collectively Maria Carboni) (Calendar No. 25)

and the City (Calendar No. 26) for summary judgment are consolidated for disposition.

Upon the foregoing papers it is ordered that the motions and cross-motion are decided as follows:

Motion by Lim for summary judgment dismissing the complaint and all cross-claims against them is denied.

Plaintiff allegedly sustained injuries as a result of tripping and falling upon a raised sidewalk flag abutting the premises 55-14 31st Avenue in Queens County on May 25, 2006. Said abutting premises are owned by Lim. Lim moves for summary judgment upon the grounds that she did not create the condition and that she is absolved of liability pursuant to §7-210 of the New York City Administrative Code.

An abutting homeowner is not liable for injuries sustained by a pedestrian as a result of a defective condition of a public sidewalk unless the homeowner created the defective condition or caused it through some special use, or unless a statute charges the homeowner with the responsibility to repair and maintain the sidewalk and specifically imposes liability upon the homeowner for injuries resulting from a violation of the statute (see Solarte v. DiPalmero, 262 AD 2d 477 [2nd Dept 1999]).

Lim has submitted unrebutted evidence that she did not create the upraised condition of the sidewalk through her deposition testimony in which she asserted that she never made any repairs to the sidewalk prior to the date of the accident. Moreover, no issue of special use has been raised in this matter. However, the record on this motion raises an issue of fact as to whether Lim is statutorily liable for the maintenance of the sidewalk abutting her premises pursuant to §7-210 of the Administrative Code.

Property owners in the City of New York are required to repair and maintain at their own expense the public sidewalks abutting their premises, pursuant to §19-152 of the Administrative Code of the City of New York. However, a violation of that section, prior to September 14, 2003, could not form the basis of liability against them for injuries sustained by pedestrians. In the absence of any statute making property owners liable for injuries to pedestrians, liability remained exclusively upon the City, which owns the public sidewalks.

The Administrative Code was amended in 2003 to add §7-210, which transferred liability from the City to property owners, except owners of one to three-family homes that are either wholly

or partially owner-occupied and used exclusively for residential purposes.

Section 7-210 was enacted to absolve the City of any tort liability for personal injury or property damage and to shift that liability from the City to the property owner who breaches the duty to repair imposed by §19-152 (see Report of Committee on Transportation, supra; Puello v. City of New York, 35 AD 3d 294 [1st Dept 2006]). Section 7-210(b) provides that the owner of abutting property "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." The statute provides one exception: "This subdivision shall not apply to 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."

Lim contends that she falls within the exception to §7-210, based upon her affidavit in support of the motion and her deposition testimony that her property is a three-family home in which she resides. In opposition, plaintiff submits a computer print-out from the New York City Department of Finance indicating that the subject premises is a four-family home consisting of four apartments. The print-out indicates that the information contained therein reflects a last descriptive change that occurred as of December 7, 1992. The foundation for the print-out's admission into evidence was provided by an affirmation of one David C. Atik, an attorney employed by the Department of Finance, which affirmation was annexed to the print-out.

It is the position of plaintiff that since Lim's premises is a four-family house, she does not fall under the exception to §7-210 and, therefore, she has no defense to plaintiff's action against her. Plaintiff cross-moves for summary judgment on the issue of liability against Lim upon this ground.

In opposition to the cross-motion, Lim submits a certified copy of the certificate of occupancy for the premises authorizing its use as a two-family home. The certificate of occupancy, which only permits the premises to be used as a two-family home, and which indicates a garage, laundry room and play room on the ground floor and a dwelling unit on the second and third floors, thus conflicts with the records of the Department of Finance that indicate that the premises is a four-family home containing four units.

Lim's argument that the Department of Finance building classification is not probative because it merely shows the

building's tax status and not the legal use of the structure, which is shown by the certificate of occupancy, is without merit. The issue presented herein is whether the premises is, in fact, a building containing more than three residential units, not what the legally permissible use and occupancy of the premises is. Section 7-210 merely excepts "one-, two- or three-family residential real property". There is no basis to conclude by this language that the exception applies only to properties whose certificate of occupancy restricts their use to a one to three-family residence and not to properties that actually contain more than three units, notwithstanding the use restriction in the certificate of occupancy.

The Court notes that the City Council expressed its reason for exempting one to three-family residential premises wholly or partially owner-occupied in the Report of the Committee on Transportation that adopted §7-210. The Report stated, "This exception for such properties is out of recognition of the fact that small property owners who reside at such property have limited resources and it would not be appropriate to expose such owners to exclusive liability with respect to sidewalk maintenance and repair" (Report of Committee on Transportation, 2003 New York City, NY Local Law Report No. 49 Int. 193). This purpose would not be advanced by extending the protection of the exemption to and, thus rewarding, property owners who convert their premises into illegal multiple dwellings of greater than three units in violation of the certificate of occupancy.

The DOF records indicating that the premises is a four-family home, based upon information last updated in 1992, at the least raises an issue of fact as to whether the use of the premises was altered since the issuance of the certificate of occupancy in 1965, especially since Lim admitted in her deposition that the actual configuration of the premises does not conform to the certificate of occupancy. Lim admits that the premises is a de-facto multiple dwelling of three units, which would be in violation of the certificate of occupancy and the Multiple Dwelling Law (see Multiple Dwelling Law §301).

Therefore, since there is an issue of fact as to whether Lim's premises falls under the exception to §7-210, her motion for summary judgment must be denied.

Plaintiff's cross-motion for summary judgment on the issue of liability must, for the foregoing reasons, also be denied. Moreover, even if, arguendo, it were conclusively established that Lim's premises did not fall under the exception to §7-210, summary judgment as to liability would be inappropriate, since there would

still remain an issue as to plaintiff's comparative negligence (see Johnson v Flatbush Presbyterian Church, 29 AD 3d 862 [2nd Dept 2006]).

Motion by Elvio Carboni and motion by Maria Carboni for summary judgment are granted, there appearing no opposition to these motions. Plaintiff's bill of particulars alleges that the accident "occurred at or about 55-10 and 55-14 31st Avenue Woodside, New York in the County of Queens in the State of New York." Plaintiff's counsel contends that the raised sidewalk flag upon which plaintiff tripped bordered these two adjacent properties. As heretofore stated, 55-14 is the property owned by Lim. Elvio and Maria Carboni are the owners of 55-10. On the date of the accident, 55-10 was occupied by Maria Carboni and Giovanna Carboni, Maria Carboni's and Elvio Carboni's mother. For reasons unknown to this Court, Elvio and Maria Carboni retained separate counsel in this matter and, thus, moved separately for summary judgment.

Maria Carboni has established a prima facie entitlement to summary judgment by proffering uncontested evidence that the defective sidewalk flag over which plaintiff tripped and fell abutted Lim's premises, 55-14, and not her property at 55-10, and, therefore, she owed no duty of care to plaintiff to maintain the subject area of sidewalk.

Maria Carboni, in her deposition, testified that the subject sidewalk elevation was not adjacent to her property but rather to her neighbor's house (Lim's). Neither Lim nor plaintiff disputes this testimony. Indeed, Lim testified in her deposition that the subject defective sidewalk flag abutted her premises, 55-14. Moreover, plaintiff herself conceded the same in her deposition wherein she testified that the defective sidewalk flag upon which she tripped and fell was in front of 55-14 and not 55-10.

Therefore, Maria Carboni is entitled to summary judgment as a matter of law.

Elvio Carboni moves for summary judgment solely upon the grounds that he neither created the condition nor caused it by a special use of the sidewalk and that he is exempt from liability under §7-210 of the Administrative Code because his property, 55-10, is an owner-occupied three-family residence. However, no evidence to support said contentions is proffered. In support of his contention that Elvio Carboni did not create the condition and that his premises is a three-family owner-occupied residential property, his counsel refers to Exhibits E and J annexed to his moving papers. However, Exhibit contains only a copy of the affidavit of Lim in support of Lim's motion for summary judgment

with respect to Lim's residence at 55-14, and Exhibit J comprises the deposition transcript of Lim with respect to her property, 55-14. However, notwithstanding that Elvio Carboni's motion is completely deficient, since Maria Carboni, the co-owner of 55-10, has shown uncontested proof in her companion motion that the defective condition of the sidewalk did not abut said premises and that the defect was not created by them, and, therefore, that neither she nor Elvio Carboni, the co-owner, owed plaintiff any duty of care, the Court, exercising its authority to search the record, also grants summary judgment to Elvio Carboni upon the ground that the subject sidewalk defect did not abut his premises, 55-10. The Court also notes that neither plaintiff nor co-defendants have opposed the granting of either Maria Carboni's or Elvio Carboni's motion.

Finally, motion by the City for summary judgment dismissing the complaint and all cross-claims against it is denied. The City moves for summary judgment upon the ground that liability for plaintiff's accident must be borne by Lim, the abutting property owner, by virtue of §7-210 of the Administrative Code, since said abutting property is a four-family residence and, thus, is not exempt from liability pursuant to §7-210(b). However, for the reasons heretofore stated, there is an issue of fact as to whether Lim's property is a four-family residence or less than four families and, thus, whether liability was transferred from the City to the abutting property owner pursuant to §7-210 of the Administrative Code.

Accordingly, motion by Lim for summary judgment is denied, motions by Maria Carboni and Elvio Carboni for summary judgment dismissing the complaint and all cross-claims against them are granted and motion by the City for summary judgment is denied.

Dated: May 20, 2011

KEVIN J. KERRIGAN, J.S.C.