

**Knuckles v City of New York**

2011 NY Slip Op 31657(U)

June 20, 2011

Supreme Court, New York County

Docket Number: 107852/07

Judge: Barbara Jaffe

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

JAFFE BARBARA JAFFE  
J.S.C.

PART 5

Index Number : 107852/2007

KNUCKLES, MIRTA

vs

CITY OF NEW YORK

Sequence Number : 001

DISMISS

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

MOTION DATE \_\_\_\_\_

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

MOTION CAL. NO. \_\_\_\_\_

CAL # 62

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1
2
3

Cross-Motion:  Yes  No

**FILED**

Upon the foregoing papers, It is ordered that this motion

JUN 21 2011

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 6/20/11

[Signature]  
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  
 MIRTA KNUCKLES,

Plaintiff,

-against-

THE CITY OF NEW YORK and  
 NEW YORK CITY HOUSING AUTHORITY,

Defendants.  
 -----X

BARBARA JAFFE, JSC:

**For plaintiff:**

Ismail S. Sekendiz, Esq.  
 The Derek T. Smith Law Group, P.C.  
 30 Broad Street  
 New York, NY 10004  
 212-587-0760

Index No. 107852/07  
 Motion Date: 5/31/11  
 Motion Seq. No.: 001  
 Calendar No.: 62

**DECISION & ORDER**

**FILED**

**JUN 21 2011**

NEW YORK  
 COUNTY CLERK'S OFFICE

**For defendant City:**

Peter C. Lucas, ACC  
 Michael A. Cardozo  
 Corporation Counsel  
 100 Church Street  
 New York, NY 10007  
 212-442-6851

By notice of motion dated February 10, 2011, defendant City moves pursuant to CPLR 3211(a)(7) or 3212 for an order dismissing the complaint against it or granting it summary judgment. Plaintiff opposes the motion.

**I. BACKGROUND**

On October 10, 2006, at approximately 9:05 a.m., plaintiff allegedly tripped on a crack in the sidewalk near the entrance of 154-156 Broome Street. (Affirmation of Peter C. Lucas, ACC, dated Feb. 10, 2011 [Lucas Aff.], Exh. A).

On or about October 24, 2006, plaintiff served City with a notice of claim and a supplemental notice of claim on October 30, 2006, alleging that she was caused to trip and fall due to the defect approximately 10 feet from the entrance of the building at 154-156 Broome Street. (*Id.*, Exh. A).

On or about May 10, 2007, plaintiff served City with a summons and verified complaint, and on or about July 10, 2007, City served its answer. (*Id.*, Exhs. B, C). On or about June 19, 2007, defendant New York City Housing Authority (NYCHA) joined through service of its answer in which it admits owning and maintaining the sidewalk. (*Id.*, Exh. D). On or about September 25, 2007, plaintiff served City with its bill of particulars. (*Id.*, Exh. E).

At a deposition held on December 11, 2009, plaintiff testified that her foot went into a crack in the sidewalk, causing her to fly forward and fall to the ground. (*Id.*, Exh. F).

## II. CONTENTIONS

Relying on NYCHA's admission of owning and maintaining the sidewalk, City denies owing a duty of care to plaintiff because it does not own, operate, manage, maintain, or control the sidewalk on which plaintiff fell and denies being a proper party to this action. (Lucas Aff.).

In opposition, plaintiff concedes that NYCHA admits ownership of the subject sidewalk, but alleges that as **City does not deny** maintaining the sidewalk, it is not entitled to a dismissal. She also alleges that because City does not offer evidence from an individual with personal knowledge that it does not maintain or own the sidewalk, "it is unlikely but possible" that a NYCHA witness may testify at trial that City and NYCHA jointly own or maintain it. (Affirmation of Ismail S. Sekendiz, Esq., dated March 7, 2011).

In reply, City maintains that NYCHA's admission of ownership constitutes *prima facie* evidence that NYCHA alone owes a duty of care to plaintiff, and argues that plaintiff's reliance on the "unlikely but possible" testimony of a NYCHA witness at trial is not probative. (Reply Affirmation, dated March 23, 2011).

## III. ANALYSIS

The proponent of a summary judgment motion must make a *prima facie* showing of

entitlement to judgment as a matter of law, tendering evidence sufficient 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]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of plaintiff's 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, which must 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 [1st Dept 2003]); "unsubstantiated allegations or assertions are insufficient." (*Zuckerman*, 49 NY2d 557, 562).

Given NYCHA's admission that it owns the sidewalk on which plaintiff fell, City cannot be held liable and is not a proper party. (See *Balsam v. Delma Engineering Corp.*, 139 AD2d 292, 296-297 [1<sup>st</sup> Dept 1988] [stating that liability for a hazardous condition is "predicated upon occupancy, ownership, control or a special use of such premises."]; *Gilbert Props., Inc. v. City of New York*, 33 AD2d 175, 178 [1<sup>st</sup> Dept 1969], *affd* 27 NY2d 594 [1970] [as defendants did not exercise ownership or control of premises at time of an accident on said premises, they were not held liable for the damage that resulted from the accident]). The mere possibility that a NYCHA witness will testify that the sidewalk was jointly owned and/or maintained by it and City is too speculative to constitute a basis for denying City summary judgment.

#### IV. CONCLUSION

Accordingly, it is hereby

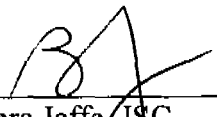
ORDERED, that defendant City of New York's motion for summary judgment is granted

and the complaint and cross-claims are severed and dismissed as against the City of New York,  
and the Clerk is directed to enter judgment in favor of said defendant; it is further

ORDERED, that the remainder of the action shall continue; and it is further

ORDERED, that the Trial Support Office is directed to reassign this case to a non-City  
part and remove it from the Part 5 inventory. Plaintiffs shall serve a copy of this order on all  
other parties and the Trial Support Office, 60 Centre Street, Room 158. Any compliance  
conferences currently scheduled are hereby cancelled.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC  
**BARBARA JAFFE**  
J.S.C.

DATED: June 20, 2011  
New York, New York

JUN 20 2011

**FILED**

JUN 21 2011

NEW YORK  
COUNTY CLERK'S OFFICE