

**Georges v City of New York**

2011 NY Slip Op 32098(U)

July 27, 2011

Supreme Court, New York County

Docket Number: 104995/10

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE *Jaffe*  
*J.S.C.* *Justice*

PART 5

Index Number : 104995/2010
GEORGES, CLEMENT
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT
<i>CAL # 55</i>

INDEX NO. 104995/110  
MOTION DATE 5/24/10  
MOTION SEQ. NO. 002  
MOTION CAL. NO. 55

this motion to/for summary judgment

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

AUG 01 2011

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 7/27/11  
*JUL 27 2011*

*[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  
CLEMENT GEORGES

Plaintiff,

-against-

Index No. 104995/10

Motion Date: 5/24/11  
Motion Seq. No.: 002  
Motion Cal. No.: 55

**DECISION AND ORDER**

THE CITY OF NEW YORK, LENNY'S BAGELS, and  
243 W. 98<sup>th</sup> STREET REALTY LLC,

Defendants.  
-----X

**FILED**

**AUG 01 2011**

BARBARA JAFFE, J.S.C.:

**For plaintiff:**  
Samuel Katz, Esq.  
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212-683-6290

NEW YORK  
COUNTY CLERK'S OFFICE  
Colin Marville, ACC  
Michael A. Cardozo  
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By notice of motion dated December 30, 2010, City moves pursuant to CPLR 3212 for an order dismissing plaintiff's claims and all cross-claims against it. Plaintiff opposes.

I. BACKGROUND

On January 19, 2009, plaintiff slipped and fell on ice and snow that had accumulated on the sidewalk adjacent to Lenny's Bagels at 2601 Broadway in Manhattan (the premises). (Affirmation of Colin Marville, ACC, dated Dec. 30, 2010 [Marville Aff.], Exhs. A, B). On April 10, 2009, plaintiff served City with a notice of claim in which the location of the accident is described as "that portion of walkway in front of the premises known as and by Lenny's Bagels, 2601 Broadway, New York, N.Y." (*Id.*, Exh. A).

On June 12, 2009, plaintiff was examined pursuant to General Municipal Law (GML)

§ 50-h, testifying that the he had slipped on ice on “[t]he part [of the sidewalk] that goes into the roadway” as he was walking south past the premises, attempting to cross west 98<sup>th</sup> Street (Affirmation of Colin Marville, ACC in Reply, dated April 5, 2011 [Marville Aff. in Reply], Exh. A).

On May 12, 2010, plaintiff served City with a summons and complaint asserting negligence claims. (Marville Aff., Exh. B). More specifically, he alleges in his complaint that “defendants . . . suffered or allowed the sidewalk nearest the premises 2601 Broadway, New York, New York to become and remain in an unsafe and dangerous condition and/or maintained same improperly in that large accumulations of snow and ice were caused or permitted to remain upon the abutting sidewalk,” containing no reference to a pedestrian ramp. (*Id.*). On June 2, 2010, City joined issue with service of its answer. (*Id.*, Exh. C).

By affidavit dated October 18, 2010, Juan A. Roman, a New York City Department of Sanitation Supervisor for Sanitation District Manhattan West 7, stated that he conducted a fruitless search of the District Operations Log and the District Snow Operations Log for materials relating to 2601 Broadway and “indicat[ing] all snow removal work performed by or on behalf of the Department of Sanitation.” (*Id.*, Exh. F).

By affirmation dated November 10, 2010, David C. Atik, Esq., an employee of the New York City Department of Finance, stated that he conducted a search of the Property Assessment Roll Database, which includes ownership and building classification information, and determined that City did not own 2601 Broadway the day of the accident and that the property is classified as a condominium with 37 units, some of which are commercial. (*Id.*, Exh. D).

By affidavit dated February 15, 2011, plaintiff stated that he tripped on the “pedestrian

rampway” leading from the sidewalk adjacent to 2601 Broadway to 98<sup>th</sup> Street as he was attempting to cross the street, that the ramp had been “chronically” wet for over a decade, and that an unauthenticated photograph annexed thereto, which shows Lenny’s Bagels and the adjacent sidewalk, including that portion of the sidewalk that slopes toward the street, depicts the accident site. (Affirmation of Samuel Katz, Esq. in Opposition [Katz Aff. in Opp.], Exh. 1).

## II. CONTENTIONS

City disclaims liability for plaintiff’s injuries, as he slipped and fell on a sidewalk adjacent to property it does not own, the property is not an owner-occupied one-, two-, or three-family home, and there is no evidence that it caused or created the snow and ice defect, had prior written notice thereof, or put the sidewalk to a special use. (Marville Aff.).

In opposition, plaintiff argues that he fell on a pedestrian ramp from the sidewalk to the street, and thus, that City may be held liable for his injuries. (Katz Aff. in Opp.). He also contends that triable issues of fact exist as to whether City satisfied its duty to maintain the ramp in a reasonably safe condition, as Roman’s affidavit provides that City had not removed snow and ice from the site during the 12 days preceding the accident, and his affidavit stated that the ramp had been “chronically” wet for more than ten years. (*Id.*). Finally, he asserts that City’s motion is premature, as no discovery has been conducted, and he has not had an opportunity to determine whether it had prior written notice of the defect or whether the chronic wetness resulted from City’s negligence in maintaining pipes or providing proper drainage. (*Id.*).

In reply, City contends that plaintiff fell on the sidewalk, not on a pedestrian ramp, as he made no reference to a pedestrian ramp in his notice of claim or complaint or during his § 50-h hearing, and that his February 15, 2011 affidavit providing to the contrary is self-serving and

does not raise triable issues of fact. (Marville Aff. in Reply). It also argues that plaintiff may not now amend his notice of claim to include negligence claims related to the pedestrian ramp's chronic wetness, as the accident occurred more than one year and 90 days ago. (*Id.*).

### 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 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]). 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 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 (*Silberstein, Awad & Miklos v Carson*, 304 AD2d 817, 818 [1<sup>st</sup> Dept 2003]); “unsubstantiated allegations or assertions are insufficient” (*Zuckerman*, 49 NY2d 557, 562), as are self-serving affidavits clearly created to contradict previous testimony and create issues of fact (*Harty v Lenci*, 294 AD2d 296 [1<sup>st</sup> Dept 2002]; *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318 [1<sup>st</sup> Dept 2000]). Unauthenticated photographs, while inadmissible hearsay, may be offered in opposition to a summary judgment motion as long as they are not the only evidence submitted. (*Rivera v GT Acquisition I Corp.*, 72 AD3d 525, 526 [1<sup>st</sup> Dept 2010]).

Moreover, “as a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the

merit of its claim or defense.” (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004], quoting *George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 185 AD2d 614, 615 [4<sup>th</sup> Dept 1992]).

Pursuant to section 7-210 of the New York City Administrative Code, the owner of real property abutting a sidewalk, and not City, has the duty to “maintain such sidewalk in a reasonably safe condition” and is liable for injuries arising from his failure to do so. (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 520-21 [2008]). As this section is strictly construed against City (*id.* at 521), a pedestrian ramp, “the portion of the corner of the sidewalk that slopes down to the level of the roadway” (*Baez v City of New York*, 278 AD2d 83, 84 n 1 [1<sup>st</sup> Dept 2000]), is not considered part of the sidewalk for its purposes (*Vidakovic v City of New York*, 84 AD3d 1357 [2d Dept 2011]; *Ortiz v City of New York*, 67 AD3d 21 [1<sup>st</sup> Dept 2009], *revd on other grounds* 14 NY3d 779 [2010]).

Here, although plaintiff’s notice of claim and complaint refer only to the sidewalk, he testified that the 50-h hearing that he had slipped on ice that had accumulated on the portion of the sidewalk that “goes into the roadway,” and he swore by affidavit that he had slipped on a “pedestrian rampway.” The affidavit is not so inconsistent with his hearing testimony as to warrant a finding that it was tailored. (*Cf Ruffin v Chase Manhattan Bank, N.A.*, 66 AD3d 549 [1<sup>st</sup> Dept 2009] [where plaintiff testified during deposition that she did not know what caused her fall, subsequent affidavit wherein she listed specific debris on which she fell created feigned issue of fact]; *Pippo v City of New York*, 43 AD3d 303 [1<sup>st</sup> Dept 2007] [same]).

Moreover, the photograph of the accident site annexed to his affidavit shows a portion of the sidewalk that slopes down to street level, which plaintiff identifies as the portion of the sidewalk on which he slipped. As City provides no evidence that the portion of the sidewalk on

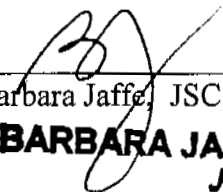
which plaintiff fell was not part of a pedestrian ramp, triable issues of fact exist as to the exact location of plaintiff's accident. (See *Crandell v New York City Tr. Auth.*, 81 AD3d 407 [1<sup>st</sup> Dept 2011] [where plaintiff injured herself stepping off bus onto sidewalk, issues of fact as to precise accident location, either at or near a bus stop, precluded determination of whether defendants could be held liable pursuant to section 7-210]; *Takebe v New York City Hous. Auth.*, 2009 NY Slip Op 50194[U], 22 Misc 3d 1120[A] [Sup Ct, New York County 2009] [where evidence conflicted as to whether portion of concrete on which plaintiff fell constituted sidewalk or curb, triable issues of fact existed precluding summary judgment in City's favor]). In light of this determination, the parties' remaining contentions need not be addressed.

IV. CONCLUSION

Accordingly, it is hereby

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

ENTER:

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

DATED: July 27, 2011  
New York, New York  
JUL 27 2011

**FILED**

**AUG 01 2011**

NEW YORK  
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