[* 1]

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

PRESENT: CYNTHIA S. KERN J.S.C. Justice

PART 52

Index Number : 109055/2007

ISAACS, ANITA

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. 109055/07

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

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

is decided in accordance with the annexed decision. This action is hereby transferred to a Non-CITY Part, as the CITY is no longer a party to this action.

FILED

OCT 05 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/4/11

CYNTHIA S. KERN J.S.C.

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):

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

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ANITA ISAACS,

Plaintiff,

Index No. 109055/07

-against-

DECISION/ORDER

THE CITY OF NEW YORK and FACILITIES DEVELOPMENT CORPORATION,

Defendants.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross Motion and Answering Affidavits.....	
Affirmations in Opposition to the Motion	2
Affirmations in Opposition to the Cross-Motion.....	
Replying Affidavits.....	
Exhibits.....	3

Plaintiff commenced the instant action to recover damages for personal injuries she allegedly sustained when she tripped and fell on the sidewalk in front of 75 Morton Street, New York, New York due to an allegedly broken/raised portion of sidewalk on May 22, 2006. Defendant the City of New York (the "City") now moves for summary judgment dismissing plaintiff's complaint on the ground that it is not liable because it is not an owner of or a tenant in the building adjacent to the sidewalk where plaintiff's accident took place and therefore it has no duty to maintain the sidewalk. For the reasons set forth below, the City's motion is granted.

On a motion for summary judgment, the movant bears the burden of presenting sufficient

evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the instant case, the City has established its prima facie right to summary judgment because it has produced sufficient evidence to show that it did not own or in any other way control the property adjacent to the sidewalk where the accident occurred. Pursuant to § 7-210 of the Administrative Code of the City of New York ("§ 7-210"), effective September 14, 2003, liability for injuries arising from defective sidewalk conditions in front of certain properties shifted from the City to abutting property owners. Specifically, the section provides in part that:

> (a) It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.
>
> (b) Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner 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.
>
> (c) Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting 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) in a reasonably safe condition.

In the instant action, the City has made out its prima facie case that the abutting property did not fall into one of the exceptions enumerated by § 7-210. It is undisputed that the City did not own the abutting property on May 22, 2006, as the property was owned by the New York State Medical Care Facilities Finance Agency. Additionally, the property at issue is neither a one-, two- or three-family residential property that is in whole or in part owner-occupied and used exclusively for residential purposes. In fact, the property was classified as Building Class I9 for hospitals and health facilities.

However, the City can still be held liable for injuries resulting from a defective sidewalk condition that it "caused or created" or if the sidewalk was used for a "special use" which conferred a benefit upon the City. *See Scavuzzo v. City of New York*, 47 A.D.3d 793 (2d Dept 2008); *Fernandez v. City of New York*, 19 Misc.3d 1135(A) (Sup. Ct. Kings Co. 2008). If plaintiff claims that the City caused or created the condition, it is the plaintiff's burden to submit evidence to that effect. *See Roman v. City of New York*, 38 A.D.3d 442 (1st Dept 2007); *Koehler v. Incorporated Village of Lindenhurst*, 42 A.D.3d 438 (2d Dept 2007); *Shannon v. Village of Rockville Centre*, 39 A.D.3d 528 (2d Dept 2007). Moreover, the plaintiff must show that the City created the defect through an affirmative act of negligence "that immediately result[ed] in the existence of a dangerous condition." *Yarborough v. City of New York*, 10 N.Y.3d 726 (2008) (citations omitted); *see also Scavuzzo*, 47 A.D.3d 793, 794-95. In *Yarborough*, the Court of Appeals held that the City should be granted summary judgment because plaintiff failed to establish that the City had negligently performed a pothole repair which immediately resulted in a dangerous condition. *See* 10 N.Y.3d 726. Plaintiff, however, fails to raise an issue of triable

fact as to whether the City caused or created the condition. She also fails to submit any evidence that the City employed the sidewalk for a "special use." Thus, the City is entitled to summary judgment.

Finally, plaintiff's argument that the City must be held liable for her accident because the State of New York, as the abutting landowner, was found not liable in a previous action, is without merit.

Accordingly, the City's motion for summary judgment dismissing plaintiff's complaint is granted. The Clerk is directed to enter judgment in favor of the City and against plaintiff. This constitutes the decision and order of the court.

Dated: 10/4/11

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.