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

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

PART 5

Index Number : 109503/2009
WHITE, SOYINA
vs.
NEW YORK CITY HOUSING
SEQUENCE NUMBER : 002
DISMISS
CAL # 118

INDEX NO. 109503/09
MOTION DATE 8/2/11
MOTION SEQ. NO. 002
MOTION CAL. NO. 118

this motion to/for _____

PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	4, 5

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

OCT 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/12/11
OCT 19 2011

BARBARA JAFFE 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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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SOYINA WHITE,

Plaintiff,

- against -

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

Defendants.

----------x

Index No. 109503/09

Argued: 8/2/11
Motion Seq. No.: 002

DECISION AND ORDER

BARBARA JAFFE, JSC:

For City:
Eric C. Burger, ACC
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Corporation Counsel
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For NYCHA:
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By notice of motion dated March 24, 2011, City moves pursuant to CPLR 3211(a)(7) and/or CPLR 3212 for an order dismissing the complaint and all cross-claims against it. Defendant New York City Housing Authority (NYCHA) opposes, at oral argument, plaintiff withdrew her opposition to City's motion.

I. BACKGROUND

On February 1, 2009, at approximately 8:15 p.m., plaintiff slipped and fell on ice on or near the north side of East 104th Street between Park and Lexington Avenues in Manhattan. (Affirmation of Eric C. Burger, ACC, dated March 24, 2011 [Burger Aff.], Exh. A).

She was then transported by ambulance to New York Methodist Hospital and admitted to the emergency room. (Supplemental Affirmation in Opposition of William J. Gordon, Esq., dated

July 28, 2011 [Gordan Supp. Opp. Aff.], Exh. K). An Emergency Room Physician Record signed by Claire Y. Holekamp, M.D., reflects that plaintiff had reported having fallen on the "street" when she "slipped on ice while closing [her] car door." (*Id.*).

On or about March 3, 2009, plaintiff served City with a notice of claim, wherein she indicated that the accident occurred:

> on the sidewalk on the north side of East 104th Street between Park Avenue and Lexington Avenue in front of the DeWitt Clinton Houses near the side entrance to the property identified as 1405 Park Avenue near a small playground area, and directly across East 104th Street from the entrance to 114 East 104th Street, New York, NY.

(Burger Aff., Exh. A).

At her June 5, 2009 examination pursuant to General Municipal Law (GML) § 50-h, plaintiff testified that the accident occurred on the sidewalk after she parked her car on East 104th Street, locked her car door, and "proceed[ed] to walk away from the car," slipping after she took "a step and a half." (Affirmation of James P. Tenney, Esq., in Opposition [Tenney Opp. Aff.], Exh. C). A photograph of the block was identified by plaintiff as accurately depicting the location of her accident which she also indicated by circling and initialing on it a portion of the sidewalk approximately halfway from the curb to the other side of the sidewalk. (*Id.*, Exhs. C, F).

On or about June 26, 2009, plaintiff served City with a summons and verified complaint, alleging that City and NYCHA were negligent in their ownership, operation, control, and maintenance of the sidewalk on which she fell. (Burger Aff., Exh. B). On July 24, 2009, City joined issue with service of its answer. (*Id.*, Exh. C).

On or about November 10, 2009, plaintiff served City with a verified bill of particulars, wherein she described the accident location consistent with the description set forth in her notice

of claim. (*Id.*, Exh. D).

At a deposition held on May 24, 2010, plaintiff testified that the accident occurred after she parked her car on 104th Street, that the driver's side was next to the sidewalk, that she exited the car on to the sidewalk, locked the car door, and walked two or three steps along the sidewalk toward the front of the car when she slipped and fell on ice on the sidewalk. (*Id.*, Exh. F).

At an examination before trial (EBT) held on May 27, 2010, Michael Smiley, a New York City Department of Sanitation (DOS) employee, testified that he supervises the Manhattan East 11 zone, in which the DeWitt Clinton Houses are located, and that the only sidewalk areas from which DOS clears snow and ice are "catch basins," "corner caps, fire hydrants, [and] bus stops." (*Id.*, Exh. G).

At an EBT held on August 20, 2010, Michael Johnson, a NYCHA Supervisor of Housing Grounds Keepers, testified that during the winter of 2009, his crew plowed, sanded, and salted the sidewalks around the perimeter of the DeWitt Clinton Houses and, when presented with a snow and ice removal log for the property, acknowledged that it reflects that the last time the sidewalks were salted and sanded before February 1, 2009 was the morning of January 29th. (*Id.*, Exh. H).

On January 25, 2011, plaintiff filed her note of issue. (*Id.*, Exh. E).

By affirmation dated March 3, 2011, David C. Atik, Esq., an employee of the New York City Department of Finance, states that he conducted a search of the Real Property Assessment Division database, which includes ownership and building classification information, and determined that NYCHA owned 1405 Park Avenue on the date of the accident and that the building is classified as an elevator apartment building with 139 units. (*Id.*, Exh. N).

On March 24, 2011, City served plaintiff and NYCHA with the instant motion, annexing thereto, *inter alia*, plaintiff's notice of claim, summons and complaint, bill of particulars, and deposition transcript, an unexecuted copy of Smiley's EBT transcript, and Atik's affirmation. (*Id.*, Exhs. A, B, D, F, G, N).

On March 28, 2011, plaintiff served defendants with an expert disclosure for Dr. Jeffrey Kaplan, an orthopedic surgeon and her treating physician. (Tenney Opp. Aff., Exh. A). Annexed thereto was an uncertified copy of Dr. Kaplan's treatment notes, wherein he stated that "Mrs. White slipped on an icy sidewalk. She was shutting her car door at the time and as she closed the door, her foot slipped from under her causing her to fall forcibly, twisting her right lower leg." (*Id.*).

On June 3, 2011, NYCHA served plaintiff and City with its opposition papers, annexing thereto, *inter alia*, plaintiff's expert disclosure for Dr. Kaplan, an uncertified copy of plaintiff's emergency room record, the transcript of plaintiff's GML § 50-h hearing, the transcript of plaintiff's deposition, unauthenticated photographs depicting cars parked along the side of the street on the subject block, and the photograph on which plaintiff identified her accident location. (Tenney Opp. Aff.).

On June 20, 2011, City served plaintiff and NYCHA with its reply to NYCHA's opposition. (Affirmation of Eric C. Burger, ACC, in Reply, dated June 20, 2011 [Burger Reply. Aff. 2]).

At an EBT held on July 19, 2011, Dr. Holekamp testified that she "doesn't known exactly where [plaintiff] slipped," that it is her custom and practice to write in the location of the accident on the blank line beneath the accident location categories on the Emergency Room

Physician Record if the location described by the patient is not listed, and that she would have written "sidewalk" on plaintiff's record if plaintiff had identified the sidewalk as the location of her accident. (Gordan Supp. Opp. Aff., Exh. G).

On July 28, 2011, NYCHA served plaintiff and City with a supplemental affirmation in opposition, annexing thereto, *inter alia*, an unexecuted copy of Holekamp's deposition transcript and a letter dated July 26, 2011 reflecting that NYCHA had sent the transcript to her for review and an opportunity to indicate any changes, sign it, and return it within 60 days or it would be deemed duly signed. (*Id.*, Exhs. G, L).

II. CONTENTIONS

City disclaims liability for plaintiff's injuries, as she 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 ice defect. (Burger Aff.).

In opposition, NYCHA asserts that there exist genuine issues of material fact as to whether plaintiff slipped on the sidewalk or on the street, as she testified at her GML § 50-h hearing that she slipped after taking "a step and a half" from her car, whereas during her deposition she testified that she slipped after taking two or three steps; her emergency room record reflects that the accident occurred on the street while she was closing her car door; Dr. Kaplan noted that she slipped as she was closing her car door; photographs of the block reflect that the driver must step onto the sidewalk upon exiting the car; and she identified the location of her accident as a portion of sidewalk a "significant distance" from where she would have been standing while closing her car door. (Tenney Opp. Aff.).

In reply to NYCHA's opposition, City claims that neither Dr. Kaplan's treatment notes nor plaintiff's emergency room record is admissible, and that in any event, the emergency room

record does not demonstrate the existence of triable factual issues as to the location of plaintiff's accident, absent any indication that the accident did not happen on the sidewalk. (Burger Reply Aff. 2). Moreover, it argues that plaintiff's GML § 50-h hearing testimony is consistent with her deposition, as she testified both times that the accident occurred on the sidewalk. (*Id.*).

By supplemental affirmation in opposition dated July 28, 2011, NYCHA argues that Dr. Holekamp's deposition testimony demonstrates the existence of triable factual issues as to the location of plaintiff's accident, as she testified that she would have indicated on plaintiff's emergency room record that plaintiff had slipped on the sidewalk had plaintiff told her so. (Gordan Supp. Opp. Aff.).

III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie,* entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the *prima facie* showing by submitting evidence demonstrating the existence of factual issues that require trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Inadmissible evidence may be offered in opposition to a motion for summary judgment so long as it is not the sole basis for the opposition (*Zimbler v Resnick 72nd St. Assoc.*, 79 AD3d 620, 621 [1st Dept 2010]). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

Uncertified medical records are inadmissible (CPLR 2106; *Grasso v Angerami*, 79 NY2d 813 [1991]; *Offman v Singh*, 27 AD3d 284 [1st Dept 2006]), as are unauthenticated photographs (*Rivera v GT Acquisition 1 Corp.*, 72 AD3d 525 [1st Dept 2010]). Unsigned depositions are

inadmissible absent a demonstration of compliance with CPLR 3116(a), which requires that in order to be deemed executed by the deponent, it must be submitted to the deponent for review, that the deponent must read it and enter any changes with reasons, and that the deponent must sign the deposition in front of "an officer authorized to administer an oath" and return it within 60 days. (*Ramirez v Willow Ridge Country Club, Inc.*, 84 AD3d 452, 453 [1st Dept 2011]).

City must maintain public roadways in a reasonably safe condition and may be held liable for injuries caused by its failure to do so. (*Kiernan v Thompson*, 73 NY2d 840 [1988]). However, New York City Administrative Code § 7-210(b) provides that

> the owner of real property abutting any sidewalk . . . shall be liable for any injury to property or personal injury . . . proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition[, which] . . . shall include, but not be limited to, . . . the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, tow- or three-family residential real property that is (I) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

And, section 7-210(c) exempts City from liability for injuries caused by failure to maintain a sidewalk unless the property falls within the exception described in subsection b. Thus, although City may be held liable for injuries caused by a sidewalk defect if it caused or created it through an affirmative act of negligence or put the sidewalk to special use (*Adler v City of New York*, 52 AD3d 549 [2d Dept 2008]; *Faulk v City of New York*, 2007 NY Slip Op 51346[U], 16 Misc 3d 1108[A] [Sup Ct, Kings County July 10, 2007, Battaglia, J.]), it need only demonstrate that it did not own the subject property and that the property does not fall within the exception in order to establish *prima facie* entitlement to summary judgment under Administrative Code § 7-210©. (*Rodriguez v City of New York*, 70 AD3d 450 [1st Dept 2010]; *Gordy v City of New York*, 67 AD3d 523 [1st Dept 2009]).

Here, Atik's affirmation reflects that NYCHA owned 1405 Park Avenue on the date of

the accident and that the property is not an owner-occupied one-, two-, or three-family home. Therefore, City has demonstrated, *prima facie*, entitlement to summary judgment under section 7-210.

The transcripts of plaintiff's deposition and GML § 50-h hearing and Dr. Kaplan's treatment notes, although they contain different accounts as to how the accident occurred, do not demonstrate the existence of triable factual issues as to whether plaintiff slipped and fell on the street or the sidewalk, as they all reflect that she fell on the sidewalk. Nor do the photographs, which are in any event, unauthenticated and inadmissible. Likewise, NYCHA's speculations do not raise an issue of fact.

Plaintiff's emergency room record, which reflects that plaintiff slipped and fell on the street, and Holekamp's deposition also prove nothing, as the record is uncertified, and although NYCHA sent the transcript to her for review, only two days elapsed before it offered the unsigned copy. Absent admissible evidence demonstrating the existence of triable issues of fact as to where plaintiff slipped and fell, NYCHA has failed to rebut City's *prima facie* showing.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant City of New York's motion for summary judgment is granted to the extent that the complaint is hereby severed and dismissed in its entirety as against defendant The City of New York with costs and disbursements to The City of New York, as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendant The City of New York; and 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.

ENTER:

Bárbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: October 12, 2011
New York, New York

OCT 12 2011

FILED

OCT 19 2011

NEW YORK
COUNTY CLERK'S OFFICE