Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

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Jane Shnayder, Infant by Father and Natural Guardian, Yafim Shnayder,

Plaintiff,

- against -

The City of New York, The Department of Transportation and Juliana Mantay, as Administratrix of the Estate of Adela Mantay,

Defendants.

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Index Number: 15202/09

Motion Date: 8/30/11

Motion Cal. Number: 30

Motion Seq. No.: 1

The following papers numbered 1 to 9 read on this motion by defendant Mantay for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply.....	8-9

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Mantay for summary judgment dismissing the complaint and all cross-claims against her, as administratrix of the estate of her deceased mother Adela Mantay, is granted.

Plaintiff allegedly sustained injuries as a result of tripping and falling upon a raised sidewalk flag abutting 66-54 Saunders Street in Queens County on December 5, 2008. Said abutting premises was owned by Adela Mantay on the date of the accident.

In order to obtain summary judgment, movant must make a prima facie showing that she is entitled to said relief, by tendering sufficient proof to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 NY 2d 851 [1985]; Zuckerman v. City of New York, 49 NY 2d 557 [1980]). Mantay has met her burden. Plaintiff's opposition papers fail to raise an issue of

fact.

In the first instance, contrary to the contention of plaintiff's counsel, the instant motion is timely.

Pursuant to CPLR 3212(a), motions for summary judgment must be made no later than 120 days after the note of issue is filed, unless a different date is ordered by the Court, except with leave of court on good cause shown.

The note of issue herein was filed on January 14, 2011. Therefore, movant had until May 16, 2011 to move for summary judgment, that date being the first business day following the 120th day, which fell on Saturday, May 14th (see General Construction Law §25-a).

A summary judgment motion is "made" for purposes of calculating the time period under CPLR 3212(a) when the notice of motion is served (see Russo v. Eveco Development Corp., 256 AD 2d 566 [2nd Dept 1998]). The instant motion was admittedly served upon plaintiff's counsel on May 16, 2011 and is, therefore, timely. Contrary to the contention of plaintiff's counsel, there is no requirement that the motion be filed with the court within 120 days.

With respect to the merits of the motion, Mantay moves for summary judgment upon the grounds that her deceased mother did not create the defective sidewalk condition and that she was not statutorily liable for any injuries sustained by plaintiff as a result of tripping and falling upon the sidewalk.

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]).

Section 7-210 of the New York City Administrative Code is the only statute that imposes liability upon property owners for injuries resulting from their failure to maintain the public sidewalks abutting their properties. That section, however, specifically excludes owner-occupied residential premises of less than four families (see Admin. Code §7-210 [b]).

Juliana Mantay testified in her deposition that the subject

premises is a two-family exclusively residential home that was occupied by Adela Mantay on the date of the accident, that the raised sidewalk flag was the result of tree roots, that said condition existed as long as she could remember and nothing was done about it. Therefore, Mantay has established her prima facie entitlement to summary judgment by proffering unrebutted evidence that her mother did not create the defective condition of the sidewalk (see Nilsen v. City of New York, 28 AD 3d 625 [2nd Dept 2006]; Bachman v. Town of North Hempstead, 245 AD 2d 327 [2nd Dept 1997]) Moreover, there is no issue in this case regarding special use of the sidewalk (id).

Plaintiff fails to raise an issue of fact in opposition. Plaintiff's counsel argues that §7-210 of the Administrative Code does not apply to this case because plaintiff is not alleging that Mantay was negligent in failing to repair the raised sidewalk flag but in failing to clear the sidewalk of leaves which concealed the raised sidewalk flag. He contends that there is an issue of fact as to whether Mantay contributed to the dangerous condition of the sidewalk because she failed to clean the sidewalk of an accumulation of leaves that obstructed the raised sidewalk flag and increased the slipperiness of the sidewalk even though she had notice of said condition.

Counsel reasons that §7-210 only deals with sidewalk defects and not accumulations of dirt or other materials because it mirrors the duties and obligations of property owners set forth in §19-152 of the Administrative Code which only deals with the repair of sidewalk flags. He argues that §16-123 of the Administrative Code requires the abutting homeowner to remove snow, ice, dirt or other material from the sidewalk and that section does not provide any exemption from liability. Therefore, argues counsel, liability may be premised upon a violation of §16-123 for failure of Mantay to remove the leaves from the sidewalk. Counsel's arguments are without merit.

In the first instance, plaintiff alleges in her bill of particulars that the condition which caused her injuries was the broken and uneven sidewalk and that Mantay's negligence consisted of allowing said hazardous condition to exist despite having notice of it. No allegation is made of a dangerous and slippery condition caused by the accumulation of leaves. Moreover, although plaintiff was asked in her deposition whether there were any leaves on the sidewalk and she answered in the affirmative, no testimony was elicited from her and she did not testify that she fell because the raised sidewalk was concealed by leaves or because she slipped on leaves. The attempt by plaintiff's counsel to sidestep the instant motion by arguing, for the first time, that plaintiff is not

alleging that her injuries were caused by the raised sidewalk flag but by the accumulation of slippery and obscuring leaves borders upon the frivolous and is not to be countenanced.

Even had plaintiff alleged that her fall was caused by the presence of leaves on the sidewalk, liability for failing to maintain the sidewalk under §7-210 of the Administrative Code, and the exemption from liability thereunder, includes "the negligent failure to remove snow, ice, dirt or other material from the sidewalk" (§7-210[b]). Therefore, Mantay may not be held liable for failing to clean the sidewalk of fallen leaves, as a matter of law.

The Court notes that where the condition complained of is a defective or damaged sidewalk flag itself, the scope of an adjacent property owner's liability regarding the repair and maintenance of the sidewalk flag imposed by §7-210 "mirrors the duties and obligations of property owners with regard to sidewalks set forth in Administrative Code section[s] 19-152" (Report of Committee on Transportation, 2003 New York City, NY Local Law Report No. 49 Int. 193). Therefore, §7-210 must be read in conjunction with §19-152 but only insofar as the condition that allegedly caused the plaintiff's injury was a damaged or defective sidewalk flag. Section 7-210 is not limited only to sidewalk conditions enumerated in §19-152. As heretofore mentioned, liability for failing to maintain the sidewalk under §7-210 of the Administrative Code, and the exemption from liability thereunder, includes "the negligent failure to remove snow, ice, dirt or other material from the sidewalk." That language mirrors the duty imposed by §16-123 of the Administrative Code to "remove the snow, ice, dirt, or other material from the sidewalk and gutter" (§16-123[a]).

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 and 16-123 of the Administrative Code of the City of New York and §2904 of the New York City Charter. However, a violation of these sections, prior to September 14, 2003, could not form the basis of liability against homeowners 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.

The Administrative Code was amended in 2003 to add §7-210, which transferred liability from the City to abutting property owners. Only §7-210 imposes liability upon property owners for injuries resulting from their failure to maintain and repair the public sidewalks abutting their properties, including the clearing of snow, ice, dirt and other materials and debris, and Mantay is exempted from liability under that section.

Since Mantay is not statutorily liable for failing to maintain the sidewalk, whether it be to repair the sidewalk or rake the

leaves from the sidewalk, and since it is uncontested that she did not create the condition that allegedly caused plaintiff to trip and fall, whether or not she had notice of the condition is irrelevant. Counsel's speculative assertion that perhaps Mantay placed the leaves on the sidewalk is unsupported by any evidence, on this record.

Therefore, the opposition papers fail to rebut movants' prima facie showing of entitlement to summary judgment, as a matter of law.

Accordingly, the motion is granted and the complaint and all cross-claims are dismissed against Mantay.

Dated: September 8, 2011

KEVIN J. KERRIGAN, J.S.C.