SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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LINDA KAPLAN and STUART KAPLAN **Part C-2**

Plaintiff, **Present:**

HON. THOMAS P. ALIOTTA

-against-

DECISION AND ORDER

Index No. 102800/2006

ROLLING ESTATES HOMEOWNERS ASSOCIATION, INC., ROLLING HILLS ESTATES CORP., ROLLING HILL GREEN HOUSING DEVELOPMENT, PARK VILLAGE ASSOCIATION, WENTWORTH PROPERTY MANAGEMENT, THE CITY OF NEW YORK, ROLLING HILL GREEN CONDOMINIUM III, ROLLING HILL GREEN CONDOMINIUM I, ROLLING HILL CONDOMINIUM I and JALEN REAL ESTATE CORP., s/h/a JALEN MANAGEMENT

Motion Nos. 640-016
1274-017

Defendants.

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The following papers numbered 1 to 5 were fully submitted on this motion the 15TH day of June, 2011.

	Papers Numbered
Notice of Motion for Summary Judgment by Defendant, Jalen Real Estate Corp. with Supporting Papers and Exhibits (dated March 4, 2011)	1
Notice of Cross Motion by Defendant The City of New York, with Supporting Papers and Exhibits (dated March 29, 2011)	2
Affirmation In Opposition to Motion and Cross Motion by Plaintiff, with Supporting Papers and Exhibits (dated May 16, 2011)	3

Upon the foregoing papers, the motion to dismiss the complaint and all cross claims or, in the alternative for summary judgment dismissing the complaint and all cross claims, as against defendant Jalen Real Estate Corp. s/h/a Jalen Management (hereinafter "Jalen") is granted, as is the like cross motion of defendant The City of New York (hereinafter the "City").

In the complaint, plaintiff Linda Kaplan (hereinafter "plaintiff") claims to have fallen on April 6, 2006 due to a defect in the sidewalk on the northeastern side of Vespa Avenue, across from its intersection with Jefferson Boulevard, in Staten Island, New York, in an area adjacent to a wall bordering an outdoor swimming pool located on the property of Rolling Hills Estates Homeowners Association Incorporated. In moving, *inter alia*, to dismiss, defendant Jalen alleges that it had no responsibility for the area where plaintiff claims to have been injured. More specifically, Jalen claims that at the time of the incident it was employed as the managing agent for a separate legal entity, Rolling Hill Green Condominium III, which did not border or abut the area where plaintiff purportedly fell. Indeed, Jalen argues that, at its closest point, the area encompassed by Rolling Hill Green Condominium III was hundreds of feet away from the area plaintiff describes . As such, Jalen maintains that it had no control over the sidewalk in question, and, therefore, was not responsible for any defect which may have led to plaintiff's accident.

Defendant City agrees with Jalen that the area which abuts the sidewalk where plaintiff

allegedly fell was owned by Rolling Hills Estates Homeowners Association. As a result, the City argues that under Section 7-210 of its Administrative Code (Administrative Code of the City of New York Sec. 2-710), it was not responsible for the maintenance of said sidewalk and, therefore, cannot be held liable for any injuries attributable to defects in its condition.

In opposition, plaintiff argues that Jalen has failed to "lay bare its proof" demonstrating (1) that it was not the managing agent for the area in question, and (2) that it did not control or assume an obligation to maintain that sidewalk[1]. As for the City, plaintiff argues that it has failed to show that the abutting property did not fall within one of the exceptions of Section 7-210 of the Administrative Code which would allow the City to be held responsible for any injuries resulting from defects in the sidewalk on which she fell.[2]

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[1] Plaintiff also argues that the motion and cross motion are defective since each fails to attach all of the pleadings. Specifically, plaintiff argues that neither movant has attached a copy of either plaintiff's second amended summons and second amended verified complaint or their answers thereto. Jalen has attached those pleadings to its reply affirmation, and the City has stated in its reply that it "incorporated the pleadings of the original motion, so all of the pleadings are accounted for". The cited omission being attributed to clerical oversight in the office of Jalen's attorneys, the court will accept counsel's attachment of the missing pleadings to its reply affirmation as satisfying the pleadings requirement of CPLR 3212 (b)(see Home Ins. Co. v. Leprino Foods Co., 7 AD3d 471, 472 [1st Dept 2004]; see also, CPLR 2005). So, too, will the City's cross motion be deemed sufficient in view of its incorporation by reference of the pleadings submitted by Jalen in support of its motion.

[2] Plaintiff is the only party to have submitted opposition papers to the instant motions. In addition plaintiff has been granted default judgments against defendants Rolling Estates Homeowners Association, Rolling Hills Estates Corporation, and Rolling Hills Green Housing Development by order of this Court dated December 7, 2007. Thereafter, summary judgment and dismissal of the complaint against defendant Park Village Residents Association Inc., was granted by order of this Court dated February 15, 2008; summary judgment and dismissal of the complaint against defendant Rolling Hills Green Condominium III was granted, without opposition, by order of this Court dated November 18, 2009; and summary judgment and dismissal of the complaint against defendant Wentworth Property Management was granted, without opposition, by order of this Court dated March 10, 2010.

A proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, advancing sufficient evidence to demonstrate the absence of any material issues of fact (see *Silverman v. Perlbinder*, 307 AD2d 230 [1st Dept. 2003]).

Plaintiff alleges that her fall took place on the sidewalk on the northeasterly side of Vespa Avenue approximately 835 feet from the corner of Arden Avenue and 395 feet from the corner of Manchester Drive, which is the area on Vespa Drive directly across from the "T" intersection formed with Jefferson Boulevard. It is undisputed that the sidewalk where plaintiff fell is abutted by a wall which helps to partially enclose an outdoor swimming pool located on property owned by defendant Rolling Hills Estates Homeowners Association. In fact, the tax map for the property (see,City's Exhibit D) indicates that this area was deeded to the Rolling Hills Estates Homeowners Association on August 16, 1978 from Rolling Hill Estates Corporation. It further appears that there are three distinct condominium entities located in that general vicinity: Rolling Hill Green Condominium I, Rolling Hill Green Condominium II, and Rolling Hill Green Condominium III.

Pursuant to a copy of an agreement dated July 28, 2001 (Jalen's Exhibit B), Jalen was employed as the managing agent by Rolling Hill Green Condominium III, and remained in that capacity through the time of the underlying incident. Contrariwise, there is no evidence before the Court that Jalen was employed as a managing agent or in any other capacity by either of the other two condominium developments, or the Homeowners Association. In addition, the Court has before it the affidavit of Paula Zacharakos, the chief executive officer of Jalen, as well as a copy of the deposition testimony of Varon Ovechka, the president of Rolling Hill Green Condominium III, both of which state that the area encompassed by that development does not border or abut the area where the plaintiff fell, and that, at its nearest point, Rolling Hill Green Condominium III is still hundreds

of feet away from the area where plaintiff fell.

Accordingly, defendant Jalen has submitted sufficient evidence to demonstrate *prima facie* the absence of any material issue of fact regarding its responsibility for the area where plaintiff claims to have fallen. In response, plaintiff has submitted mere argumentation, and has failed to come forward with any evidence to rebut Jalen's proof or raise a triable issue. As a result, defendant Jalen's motion must be granted.

In cross-moving *inter alia* to dismiss, defendant City argues that under New York City Administrative Code §7-210 it is no longer responsible for the maintenance of sidewalks except in certain delineated circumstances, none of which are applicable in this case. That section provides:

> § 7-210. Liability of real property owner for failure to maintain sidewalk in a reasonably safe condition.
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> 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.
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> 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. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to 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.
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> 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. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.
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> d. Nothing in this section shall in any way affect the provisions of this chapter or of any

> other law or rule governing the manner in which an action or proceeding against the city is commenced, including any provisions requiring prior notice to the city of defective conditions.

In support of its claim, the City has supplied the tax map for the area, as well as an affirmation of an attorney employed by the City's Department of Finance, both of which indicate that the City was not the owner of the abutting property on the day in question, and that the property was classified as "Building Class Q3" i.e., property on which an outdoor pool may be located. Manifestly, therefore, the abutting property is not a one, two, or three family residence. In response, plaintiff has failed to rebut this *prima facie* evidence that the City is not responsible for the sidewalk in question under § 7-210 of the Administrative Code. Since plaintiff has failed to come forward with any proof in admissible form to counter the City's contentions, the latter's cross motion must be granted.

Accordingly, it is

ORDERED that the motion, *inter alia*, for summary judgment dismissing the complaint and cross claims against Jalen Real Estate Corp., s/h/a Jalen Management, is granted; and it is further

ORDERED that the cross motion for like relief by defendant the City of New York is also granted; and it is further

ORDERED that the complaint and any cross claims as against each of said defendants are severed and dismissed; and it is further

ORDERED that the clerk enter judgment and mark his records accordingly.

DATED: July 15, 2011

ENTER,

/s/
Hon. Thomas P. Aliotta
J.S.C.