

**Pines v City of N.Y.**

2013 NY Slip Op 30167(U)

January 23, 2013

Supreme Court, New York County

Docket Number: 104791/2008

Judge: Kathryn E. Freed

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

HON. KATHRYN FREED

PRESENT: ~~JUSTICE OF SUPREME COURT~~ \_\_\_\_\_  
Justice

PART 5

Index Number : 104791/2008  
PINES, ROCHELLE  
vs.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 001  
DISMISS COL: # 89

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_


Upon the foregoing papers, it is ordered that this motion is

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

**FILED**  
JAN 30 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 1-23-13  
JAN 23 2013

  
HON. KATHRYN FREED, J.S.C.  
JUSTICE OF SUPREME COURT

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
  - 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
  - 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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

-----X  
ROCHELLE PINES,

Plaintiff,

-against-

THE CITY OF NEW YORK, CONSOLIDATED  
EDISON COMPANY OF NEW YORK, INC. AND  
MAIOGLIO ESTATES, INC.,

Defendants.

DECISION/ORDER  
Index No.: 104791/2008  
Seq. No.: 001

PRESENT:  
Hon. Kathryn E. Freed  
J.S.C.

-----X  
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF  
THIS MOTION.

PAPERS

- NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....
- ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
- ANSWERING AFFIDAVITS.....
- REPLYING AFFIDAVITS.....
- EXHIBITS.....
- STIPULATIONS.....
- OTHER.....

NUMBERED  
**FILED**  
 .....  
 .....  
 ..... JAN 30 2013  
 ..... 3-4.....  
**NEW YORK**  
**COUNTY CLERK'S OFFICE**

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Defendant City moves for an Order pursuant to CPLR§3211, dismissing plaintiff's complaint against it; or in the alternative, for an Order pursuant to CPLR§ 3212 granting it summary judgment dismissing the complaint and all cross-claims as against it. No opposition has been submitted.

After a review of the instant motion, all relevant statutes and caselaw, the Court grants the motion.

Factual and procedural background:

Plaintiff commenced the instant action to recover damages for personal injuries she sustained on February 7, 2007, when as she was walking on the sidewalk located on West 46<sup>th</sup> Street between Eight and Ninth Avenues, her foot allegedly got caught at the edge of a raised metal gas cap cover on the sidewalk in front of 325 West 46<sup>th</sup> Street in New York. Plaintiff subsequently served a Summons and Complaint on April 8, 2008. Defendant Con Ed joined issue with service of its Answer on June 2, 2008. Additionally, Con Ed admitted that it owned and maintained said gas cap. Defendant Maioglio has defaulted, failing to appear in the instant action.

Defendant City asserts that Fatima Rosas, an employee at the Department of Transportation of the City of New York, and also a member of the Office of Litigation Services and Records Management, conducted a search for “records of permits, applications for permits, corrective action requests and notices of violations, inspections, maintenance and repair records, sidewalk violations, contracts, complaints and Big Apple Maps for the sidewalk at the subject location, the front of 325 West 46<sup>th</sup> Street. Ms. Rosa’s search encompassed a period of two years prior to and including the date of the accident, February 7, 2007.

Her search revealed 4 permits, two hard copy permits, no applications, no corrective action requests, no notices of violations, two inspections, no maintenance and repair records, no sidewalk violations, no contracts, and no complaints. Said permits and inspections all pertain to defendant Con Ed.

On July 26, 2012, David Atik, Esq., an attorney with the New York City Department of Finance, provided an affidavit which is annexed to the instant motion as Exhibit “I.” In his affidavit, Mr. Atik avers that his duties include responding to Freedom of Information Law requests, (FOIL),

and complying with and responding to subpoenas and other demands for information regarding Finance's property records. He also avers that Finance maintains and operates a "Property Assessment Database," which includes property ownership information and building classification information. Mr. Atik further avers that at the request of defendant City, he conducted a search of the aforementioned database with reference to records relating to 325 West 46<sup>th</sup> Street. Said search revealed that the City of New York was not the owner of said property and that said property was classified as "Building Class K9 (Miscellaneous Store Building), and not as a one, two or three family solely residential property.

The City argues that pursuant to § 7-210 of the Administrative Code of the City of New York, it is not liable for plaintiff's alleged injuries because this section shifts liability for injuries arising from a defective sidewalk to the owner of the real property abutting the sidewalk.

Conclusions of law:

It is well settled that a proponent for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by demonstrating that there are no material issues of fact ( see *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985] ). Once the proponent has made the prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact ( see *Zuckerman v. City of NY*, 49 N.Y.2d 557 [1980] ). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation" ( *Morgan v. New York Telephone*, 220 A.D.2d 728, 729 [2d Dept. 1985] ).

Effective September 14, 2003, the "New York Sidewalk Law," now imposes upon the owner of real property abutting any sidewalk "the duty....to maintain such sidewalk in a reasonably safe

condition,” and provides that the owner “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” ( *see* Administrative Code of the City of New York § 7-210[a],[b] ). There is an exception to owner liability for “one-, two-, or three family residential property that is...in whole or in part, owner occupied, and ...used exclusively for residential premises” ( *see* Administrative Code of the City of New York 7-210 [b] ). The City “shall not be liable for any injury to property or personal injury...proximately caused by the failure to maintain sidewalks,” except for sidewalks abutting owner-occupied residential properties with three or fewer units, or where the City itself is the owner of the abutting property ( *see* Administrative code of the City of New York § 7-210[c] ).

However, there is nothing in this Law that suggests that the City would not be liable where its liability would not be based on a failure to maintain, but rather a breach of its duty not to create a dangerous condition on a sidewalk, whether it creates the condition with its own employees or a contractor ( *see* Tumminia v. Cruz Constr. Corp., 41 A.D.3d 585, 586 [2d Dept. 2007]; *see also* Harakidas v. City of New York, 86 A.D.3d 624, 627 [2d Dept. 2011] ). A lease provision placing a duty on the tenant to maintain the premises does not affect the landowner’s statutory nondelegable duty and does not provide a defense to the claim based on section § 7-210 ( *see* James, James & Blackman, 58 A.D.3d 808 [2d Dept. 2009]; Reyderan v. Meyer Berfond Trust No. 1, 90 A.D.3d 633 [2d Dept. 2011] ).

In the case at bar, the Court finds that plaintiff failed to establish, prima facie, that the subject property located at 325 West 46<sup>th</sup> Street, does not fall within any of the exemptions set forth in § 7-210. Indeed, Mr. Atik’s affidavit reveals that on the day of the incident, defendant City was not the

owner of the property and that the property was classified as "K9 Miscellaneous Store Building," and not a one-, two-, or three- family residential property that is in whole or in part, owner occupied and used exclusively for residential purposes.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendant City's motion for summary judgment is granted and the complaint and any cross claims are hereby severed and dismissed as against defendant City of New York, and the Clerk is directed to enter judgment in favor of said defendant; 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. Defendant City shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158. Any compliance conferences currently scheduled are hereby cancelled.

ENTER,

DATED: January 23, 2013

JAN 23 2013

**FILED**  
JAN 30 2013  
Hon. Kathryn E. Freed  
NEW YORK COUNTY CLERK'S OFFICE  
MON. KATHRYN FREED  
JUSTICE OF SUPREME COURT