

**Markowitz v 30-32 LLC**

2013 NY Slip Op 30305(U)

February 4, 2013

Sup Ct, New York County

Docket Number: 100436/2011

Judge: Kathryn E. Freed

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

HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

PRESENT: \_\_\_\_\_  
Justice

PART 5

Index Number : 100436/2011  
MARKOWITZ, RHONDA  
vs.  
30-32 LLC  
SEQUENCE NUMBER : 002  
DISMISS

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

CAL: # 44

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**  
FEB 11 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 2-4-13  
FEB 04 2013

  
\_\_\_\_\_, J.S.C.

HON. KATHRYN FREED  
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  
RHONDA MARKOWITZ,

Plaintiff,

-against-

30-32 LLC, THE CITY OF NEW YORK, 30-32  
LLC, 30-32 WEST 9<sup>th</sup> STREET CONDOMINIUM,

Defendants.

DECISION/ORDER  
Index No.: 100436/2011  
Seq. No.: 002

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	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	<b>FILED</b> .....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	FEB 11 2013.....
REPLYING AFFIDAVITS.....	.....
EXHIBITS.....	NEW YORK... 4-6.....
STIPULATIONS.....	<b>COUNTY CLERK'S OFFICE</b> .....
OTHER.....	.....

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

Defendant City of New York, ( hereinafter, "the City"), moves for an Order pursuant to  
CPLR§ 3211, dismissing the complaint as against it or in the alternative, for an Order pursuant to  
CPLR§ 3212, granting summary judgment, dismissing the complaint and all cross-claims as against  
it. No opposition has been submitted by any of the other parties.

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

Factual and procedural background:

Plaintiff seeks to recover damages for physical injuries she allegedly sustained on November 6, 2009, when she tripped and fell on the sidewalk in front of 30-32 West 9<sup>th</sup> Street, in New York. Subsequently, on February 1, 2010, she served a Notice of Claim upon the City. On March 23, 2010, she appeared for a 50-h hearing. On January 18, 2011, plaintiff served a Summons and Complaint on the City. Issue was joined on February 3, 2011, when the City served its Answer. While plaintiff has filed her Bill of Particulars, she has not filed her Note of Issue.

Plaintiff testified that the incident occurred when one of her feet hit a portion of the raised sidewalk as she was walking west between Fifth and Sixth Avenues, toward Sixth Avenue on the south side of 9<sup>th</sup> Street. She also testified that the sidewalk was broken, cracked and uneven in front of 30-32 West 9<sup>th</sup> Street.

The City asserts that it is clear from plaintiff's testimony that her trip and fall was due to an alleged defect squarely on the sidewalk, and not upon the street or curb. The City appends to its moving papers as its Exhibit "G," an affidavit from Peter Sonderberg, a paralegal with the Department of Transportation of the City of New York. In his affidavit, Mr. Sonderberg avers that he "conducted a search for records including permits, applications for permits, corrective action requests, notices of violation, inspections, maintenance and repair orders, sidewalk violations, contracts, complaints, resurfacing/milling records and Big Apple Maps" (Sonderberg Aff. ¶2).

He also explains the procedures utilized by the DOT to preserve and maintain its records. Mr. Sonderberg also avers that he personally conducted a search for the sidewalk of 30-32 West 9<sup>th</sup> Street, New York, New York, which encompassed a two year period prior to and including November 6, 2009, wherein said search revealed the existence of one complaint.

The City argues that pursuant to 7-210 of the Administrative Code for the City of New York, it is not liable for plaintiff's alleged injuries. Section 7-210 provides in pertinent part that

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.

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.

The City also submits and relies on the affidavit of David C. Atik, Esq., appended to its moving papers as Exhibit 'I.' In his affidavit, Mr. Atik avers that he is employed by the New York City Department of Finance, and handles, *inter alia*, FOIL requests, and responding to subpoenas and other demands for information regarding Finance's property records. Mr. Atik also avers that he conducted a search utilizing the Property Assessment Roll database, for records relating to 30-32 West 9<sup>th</sup> Street, New York New York. He determined that said address is located at Block 572 and Lot 7502 for New York County, and that as of November 6, 2009, the City of New York was not the owner of the property, which is classified as an 18-unit condominium, and not a one-, two- or three

family solely residential property.

Conclusions of law:

“The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” ( Dallas-Stephenson v. Waisman, 39 A.D.3d 303, 306 [1<sup>st</sup> Dept. 1985], citing Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985] ). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shift to the opposing party to present evidence in admissible form raising a triable issue of material fact ( *see* Zuckerman v. City of N.Y., 49 N.Y.2d 557 [1989]; People ex rel Spitzer v. Grasso, 50 A.D.3d 535 [1<sup>st</sup> Dept. 2008] ). “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] ). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied ( Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 [1978]; Grossman v. Amalgamated Hous. Corp., 298 A.D.2d 224 [1<sup>st</sup> Dept. 2002] ).

In the case at bar, the City has sufficiently demonstrated that it may not be held liable pursuant to the express language of § 7-210( c). Moreover, no evidence has been proffered which indicates with any degree of certainty that the City caused or created the alleged defect that caused plaintiff’s injuries or that made special use of the subject sidewalk. Indeed, it has made a prima facie showing of judgment as a matter of law, which remains undisputed.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendant City of New York’s motion for summary judgment is granted and the complaint and any cross-claims are hereby severed and dismissed as against said defendant, 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. Plaintiff 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; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: February 4, 2013

**FEB 04 2013**

ENTER:



Hon. Kathryn E. Freed

**HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT**

**FILED**

FEB 11 2013

**NEW YORK  
COUNTY CLERK'S OFFICE**