

Rodriguez v American Youth Hostels, Inc.

2013 NY Slip Op 30568(U)

March 19, 2013

Sup Ct, New York County

Docket Number: 104738/11

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 : 104738/2011
RODRIGUEZ, MARITZA
vs.
AMERICAN YOUTH HOSTELS, INC.
SEQUENCE NUMBER : 001
DISMISS CAL # 68

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

FILED

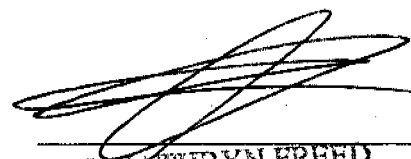
MAR 25 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

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

Dated: 3-19-13
MAR 19 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
MARITZA RODRIGUEZ,

Plaintiff,

-against-

AMERICAN YOUTH HOSTELS, INC. AND
THE CITY OF NEW YORK,

Defendants.

DECISION/ORDER
Index No.: 104738/11
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
 MAR 25 2013
 3-4
 NEW YORK
 COUNTY CLERK'S OFFICE

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

Defendant moves for an Order pursuant to CPLR§ 3211(a)(7) dismissing the complaint against it, or in the alternative, pursuant to CPLR§3212, granting it summary judgment. No opposition has been submitted.

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

Factual and procedural background:

Plaintiff brings the instant action to recover for physical injuries she allegedly sustained on

May 7, 2010, when she tripped and fell on a defective portion of the sidewalk in front of 891 Amsterdam Avenue, New York, New York. Plaintiff subsequently commenced the instant action via service of a Summons and Complaint on April 20, 2011. Defendant City joined issue by service of an Answer on May 24, 2011.

The City argues that based on the location of plaintiff's accident, it is not liable pursuant to 7-210 of the Administrative Code of the City of New York, which became effective September 14, 2003. This section specifically shifts liability from the City to abutting property owners for injuries arising from defective sidewalk conditions in front of certain properties. It provides in pertinent part:

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.

Annexed to the City's motion as Exhibit "F," is the affidavit of David C. Atik, an attorney employed by the New York City Department of Finance. In said affidavit, Mr. Atik avers that his duties and responsibilities include responding to demands for information concerning Finance's

various property records. He also avers that Finance maintains and operates a "Property Assessment Roll Database," which includes ownership information and building classification information.

Mr. Atik further avers that he personally conducted a search of the said database for records relating to 891 Amsterdam Avenue, New York, New York, and that said search reveals that on May 7, 2012, the date of the incident, the City of New York was not the owner of this property.

In reliance on this affidavit, the City argues that it is undisputable that it did and does not own the subject premises and thus, has no duty of care towards the premises, because such a duty would derive from ownership. Therefore, as a matter of law, it cannot be held legally liable for plaintiff's alleged injuries.

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 [1st Dept. 2007], 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 shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (*see* Zuckerman v. City of New York, 49 N.Y.2d 557 [1989]; People ex rel Spitzer v. Grasso, 50 A.D.3d 535 [1st 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 [1st Dept. 2002]).

In the case at bar, the City has demonstrated their prima facie entitlement to judgment as a matter of law by presenting evidence that they did not own, operate or control the subject premises. Thus, they cannot be held responsible for the alleged condition which caused plaintiff's injuries (see Johnson v. City of New York, 2013 WL 163800 (N.Y.A.D. 2 Dept.)). Moreover, no evidence has been presented which indicates that the City somehow caused or created the alleged defect or hazard through an affirmative act of negligence (see Yarborough v. City of New York, 10 N.Y.3d 726 [2008]; Hammond v. City of New York, 100 A.D.3d 563 [1st Dept. 2012]). Therefore, the instant claim warrants dismissal (see Rodriquez v. City of New York, 70 A.D.3d 450 [1st Dept. 2010]).

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 said defendant, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the caption is to be amended accordingly; and it is further

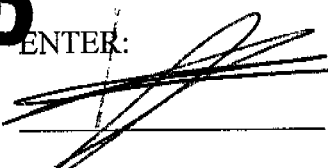
ORDERED that the remainder of the action shall continue, and it is further

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 movant shall serve a copy of this order on the other party at 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.

FILED

ENTER:



MAR 25 2013

**NEW YORK
COUNTY CLERKS OFFICE**

Hon. Kathryn E. Freed
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

DATED: March 19, 2013

MAR 19 2013