

**Sangaray v West Riv. Assoc., LLC**

2013 NY Slip Op 30834(U)

April 19, 2013

Supreme Court, New York County

Docket Number: 104521/10

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY  
PRESENT: Hon. Doris Ling-Cohan, Justice Part 36

YOUSUFU SANGARAY,

Plaintiff,

-against-

WEST RIVER ASSOCIATES, LLC, SANDY  
MERCADO and RHINA MERCADO,

**FILED**

APR 23 2013

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INDEX NO. 104521/10

MOTION SEQ. NO. 002

WEST RIVER ASSOCIATES, LLC,

Third-Party Plaintiff,

-against-

PREMIUM RADIO DISPATCH and MULTI-SERVICE  
CORPORATION

Third-Party Defendants.

THIRD-PARTY INDEX  
NO. 590612/10

The following papers, numbered 1-9 were considered on this motion for summary judgment:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2, 3</u>
Answering Affidavits — Exhibits _____	<u>4, 5, 6, 7, 8</u>
Replying Affidavits _____	<u>9</u>

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that this motion for summary judgment is granted for the reasons set forth below.

Plaintiff Yousufu Sangaray (Sangaray) brings this action to recover damages for personal injuries allegedly sustained as a result of a trip and fall on a sidewalk between two buildings, 1787 Amsterdam Avenue, New York, New York, owned by defendant West River Associates, LLC (West River), and

1785 Amsterdam Avenue, New York, New York, owned by defendants Sandy Mercado and Rhina Mercado (jointly defendants Mercado).

### BACKGROUND

On August 23, 2009, plaintiff Sangaray tripped on a sidewalk joint and sustained personal injuries when he fell. Thereafter, plaintiff Sangaray commenced this action against defendants alleging that defendants are in violation of New York City Administrative Codes (NYC Admin. Code) §§7-210 and 19-152. Plaintiff Sangaray alleges that defendants were negligent in properly maintaining the public sidewalk in front of their respective buildings, in that the sidewalk was defective due to a sloping sidewalk flag which caused a height differential between the two flags of the sidewalk joint. Specifically, plaintiff Sangaray states that he was in the process of stepping from defendant West River's sunken sidewalk onto defendants Mercado's sidewalk, which was ground level, when he struck his toe and fell.

Defendant and third-party plaintiff West River commenced a third-party action against third-party defendants Premium Radio Dispatch and Multi-Service Corporation. Neither third-party defendants have appeared in this action. Defendant West River now moves for summary judgment.

### DISCUSSION

In order to establish negligence, a "plaintiff is required to prove the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury". *Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 (1<sup>st</sup> Dep't 2006), citing *Palsgraf v Long Is. R.R. Co.*, 248 NY 339 (1928). The standards of summary judgment are well settled. Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). To grant summary judgment, it must be clear that

no material or triable issues of fact are presented. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case”. *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure...to do [so]”. *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). However, the Court of Appeals has made clear that bare allegations or conclusory assertions are insufficient to create genuine, bona fide issues of fact necessary to defeat such a motion. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Defendant West River argues that it is entitled to summary judgment, as it is not the owner of the allegedly defective area of the sidewalk, which was the alleged cause of plaintiff Sangaray’s accident and resultant injuries, as plaintiff Sangaray did not fall on the sidewalk in front of defendant West River’s premises. Defendant West River further argues that NYC Admin. Codes §§7-210 and 19-152 only impose a duty to maintain the sidewalk abutting real property to the owner of such real property. According to defendant West River, as it is not the owner of the portion of the sidewalk flag where plaintiff Sangaray tripped, it is not in violation of the NYC Admin. Code, and it breached no duty owed to plaintiff Sangaray.

In support of its motion, defendant West River proffers, *inter alia*, the deposition transcript of plaintiff Sangaray, the deposition transcript of Allan Heussinger, a managing member of defendant West River, pictures of the defective sidewalk in which plaintiff Sangaray circled where he tripped, the affidavit of Angelo J. Fiorenza (Fiorenza), a professional land surveyor, and a survey of defendant West River’s property. Defendant West River contends that, although the vast majority of the defective

sloping sidewalk flag abuts its property, the area where plaintiff Sangaray alleges he fell indisputably abuts defendants Mercado's property.

In opposition, plaintiff Sangaray argues that defendant West River failed to make a *prima facie* showing of entitlement to summary judgment. Plaintiff Sangaray contends that defendant West River allowed its sidewalk flagstones to cave in and sink several inches below ground level, and thus, a jury could find that defendant West River contributed to the creation of the defect on defendant Mercado's property. Plaintiff Sangaray argues that, pursuant to NYC Admin. Code §7-210, if a landowner's failure to maintain its sidewalk in a reasonably safe condition proximately causes an accident, such landowner may be held liable, even if the accident takes place in front of another person's property. In making this argument, plaintiff Sangaray relies on the plain language of NYC Admin. Code §7-210, which states, in pertinent part, that "[i]t shall be the duty of the owner of real property abutting any sidewalk...to maintain such sidewalk in a reasonably safe condition." Further, plaintiff Sangaray asserts that defendant West River's motion for summary judgment must be denied, as defendant West River failed to establish that its negligent maintenance of its own sidewalk was not a proximate cause of plaintiff Sangaray's accident.

Defendants Mercado also oppose defendant West River's motion for summary judgment, arguing that questions of fact exist. In opposition, defendants Mercado proffer, *inter alia*, the affidavit of Paul Angelides (Andelides), a licensed New York State Professional Engineer, and a survey of portion of the sidewalk abutting both 1787 and 1785 Amsterdam Avenue. Defendants Mercado argue that NYC Admin. Code §7-210 does not limit which defects owners can be held responsible for. Relying on the language of NYC Admin. Code §7-210 quoted above, defendants Mercado argue that any owner of real property can be held responsible for a defect on another's property, so long as that owners' failure to maintain their sidewalk in a reasonably safe condition was the proximate cause of the accident.

Defendants Mercado further contend that defendant West River had notice of the defect, as defendant Rhina Mercado contacted the super working in 1787 Amsterdam Avenue to inform him of the sloping sidewalk. Lastly, defendants Mercado argue that defendant West River asserted control over the defective portion of the sidewalk by hiring a contractor to repair the sidewalk flag, and re-paved the entire defective area, even though a portion of it was beyond defendant West River's property line.

In reply, defendant West River contends that neither plaintiff Sangaray, nor defendants Mercado, raised a genuine issue of fact sufficient to defeat summary judgment. Specifically, defendant West River asserts that plaintiff Sangaray's argument, that defendant West River's negligent failure to maintain the sidewalk in a safe condition was a proximate cause of plaintiff Sangaray's accident, is irrelevant since it is undisputed that plaintiff Sangaray's accident did not occur on defendant West River's property. Defendant West River relies on *Montalbano v 136 W. 80<sup>th</sup> St. CP*, 84 AD3d 600 (1<sup>st</sup> Dep't 2011), in asserting that, as the portion of the defective sidewalk flag was not on its property, it owed and breached no duty to plaintiff Sangaray.

Upon the within submissions, defendant West River has established entitlement to summary judgment as a matter of law. Here, it is uncontested that the two sidewalk flags at issue appear to abut defendant West River's property and defendants Mercado's property respectively. It is further undisputed that both defendant West River's professional land surveyor Fiorenza and defendants Mercado's Professional Engineer Angelides agree that over 90% of the defective sidewalk flag was located on defendant West River's property. Further, defendants Mercado and plaintiff Sangaray concede that the portion of the defective sidewalk flag where plaintiff Sangaray tripped and fell was owned by defendants Mercado, despite the fact that the vast majority of the defective sidewalk flag was on defendant West River's property.

Defendant West River is correct in arguing that *Montalbano v 136 W. 80<sup>th</sup> St. CP*, 84 AD3d 600

(1<sup>st</sup> Dep't 2011) is the controlling case law, as the facts are nearly identical to the instant action.<sup>1</sup> In *Montalbano*, as here, the plaintiff tripped and fell on a defective sidewalk between two buildings. The majority of the defective sidewalk flag, in *Montalbano*, abutted the property owned by one of the defendants, Callanan, while the portion of the sidewalk flag where the plaintiff actually fell did not abut his property, but rather, as here, was owned by the neighboring building. Additionally, after the plaintiff's accident, Callanan similarly repaired the defective sidewalk flag, including the portion that was not on his property. Callanan cross-moved for summary judgment arguing that he did not breach any duty owed to the plaintiff, as the portion of the sidewalk where the plaintiff fell did not abut his property, even though the majority of the defective sidewalk flag was undisputedly abutting his property. The Appellate Division, First Department, in *Montalbano*, held that there is "uncontroverted evidence that [defendant's] property does not abut the portion of the sidewalk where [the] plaintiff fell. [Defendant] thus established that he did not have a duty to maintain the portion of the sidewalk where plaintiff fell in a reasonably safe condition...[and] he is entitled to judgment as a matter of law." *Id.*, 84 AD3d at 602-603 (internal citations omitted).

Here, defendant West River has established that the portion of the sidewalk on which plaintiff Sangaray tripped and fell, was owned by defendants Mercado. As such, defendant West River has established entitlement to summary judgment as a matter of law. To oppose this, plaintiff Sangaray submits only an attorney's affirmation. "[A] bare affirmation of . . . [an] attorney who demonstrated no personal knowledge . . . is without evidentiary value and thus unavailing." *Zuckerman v City of New*

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<sup>1</sup> This court is constrained to follow *Montalbano* as the facts are identical, notwithstanding that it would appear to be difficult or impossible for the 10% owner of a flagstone to fix such an alleged defect, as the remaining flagstones on the Mercado property appear to be level and not sinking. Nor has there been an attempt to distinguish *Montalbano*, by possibly asserting through an expert's affidavit that defendant West River had negligently replaced the entire flag in the past and, thus, created the defect, or arguing that having replaced the entire flag in the past, West River assumed the duty to maintain it.

York, 49 NY2d 557, 563 (1980). Furthermore, an affirmation by an attorney who is without the requisite knowledge of the facts has no probative value. *Di Falco, Field & Lomenzo v Newburgh Dyeing Corp.*, 81 AD2d 560, 561 (1<sup>st</sup> Dep't 1981), *aff'd* 54 NY2d 715 (1981). An attorney's conclusory and speculative affirmation, is insufficient to raise any factual issues to warrant a denial of a motion for summary judgment. *See GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 968 (1985). Thus, plaintiff Sangaray has failed to raise any factual issues.

Defendants Mercado have also failed to raise any issues of fact sufficient to warrant a denial of defendant West River's motion for summary judgment. Significantly, aside from its conclusory statement that issues of fact exist, defendants Mercado have not disputed any of the facts established by defendant West River. In fact, defendants Mercado's Professional Engineer Angelides agrees that the portion of the sidewalk where plaintiff Sangaray tripped and fell is owned by defendants Mercado. As both plaintiff Sangaray and defendants Mercado have failed to raise a genuine issue of fact, defendant West River's motion for summary judgment must be granted, as it breached no duty owed to plaintiff Sangaray when he tripped and fell on a portion of the sidewalk owned by defendants Mercado. *See Montalbano v 136 W. 80<sup>th</sup> St. CP*, 84 AD3d 600 (1<sup>st</sup> Dep't 2011).

As such, it is

ORDERED that defendant West River's motion to for summary judgment is granted; and it is further

ORDERED that within 30 days of entry, defendant West River shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the decision/order of the Court.

Dated: 4/19/13

**FILED**  
 APR 23 2013  
 DORIS LING-COHAN, J.S. 23  
 [ X ] NON-FINAL DISPOSITION  
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