

<b>Mohn v West 141st St.</b>
2013 NY Slip Op 30966(U)
April 29, 2013
Sup Ct, New York County
Docket Number: 108379/2009
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 : 108379/2009  
MOHN, ELLEN  
vs.  
WEST 141ST STREET  
SEQUENCE NUMBER : 002  
DISMISS CAL #56

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**

MAY 06 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 4-29-13  
APR 29 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

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

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

-----X  
ELLEN MOHN,

Plaintiff,

-against-

WEST 141<sup>ST</sup> STREET,

Defendants.

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

DECISION/ORDER  
Index No.: 108379/2009  
Seq. No.: 002

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

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.....	1-2.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....
REPLYING AFFIDAVITS.....	.....
EXHIBITS.....	.....
STIPULATIONS.....	.....
OTHER.....	.....

**FILED**  
MAY 06 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

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

Third -Party Defendant, City of New York ( hereinafter, "the City"), moves for an Order pursuant to CPLR§ 3211 dismissing Third-Party Plaintiff's Complaint against it; or in the alternative, the City moves for an Order pursuant to CPLR§ 3212, granting summary judgment, dismissing the Third-Party Complaint and any and all claims against it. No opposition has been submitted.

After a review of the papers presented, all relevant statutes and case law, the Court grants the City's motion.

Factual and procedural background:

Plaintiff seeks to recover monetary compensation for personal injuries she allegedly sustained on April 29, 2009, when she tripped and fell on the sidewalk in front of 152 West 141<sup>st</sup> Street, in New York County. Consequently, on June 12, 2009, plaintiff initiated her action against Third-Party Plaintiffs, West 141<sup>st</sup> Street L.P. and West 141<sup>st</sup> Street LLC. Non-City defendants and Third-Party Plaintiffs filed their Answer. On December 11, 2009, plaintiff filed a Supplemental Summons and Verified Complaint to add Lasoeur Brownstones, LLC as a defendant. On June 25, 2010, plaintiff filed a Second Supplemental Summons and Amended Complaint adding Lasoeur Management and Development Corporation as defendants.

On August 2, 2010, the City received a Third-Party Summons and Complaint, served by West 141<sup>st</sup> Street L.P. and West 141<sup>st</sup> Street, LLC, ( hereinafter, "Third-Party Plaintiffs"). The City filed a Third-Party Answer. On September 21, 2010, plaintiff served a Verified Bill of Particulars. On November 1, 2010, Third-Party Plaintiffs served a Bill of Particulars on the City. It should be noted that all of the aforementioned documents are annexed as Exhibits to the instant motion.

On August 12, 2011, both Plaintiff and the City appeared for a deposition. On December 4, 2012, Plaintiff filed her Note of Issue. The last conference in this matter was held on January 15, 2013, wherein this Court struck defendant Lasoeur Brownstone LLC's Answer for failure to appear at scheduled conferences in accordance with the previous October 16, 2012 compliance order rendered by Justice Jaffe.

During the deposition, plaintiff testified that the subject accident occurred on April 29, 2009, at approximately 7:30 a.m. at 152 West 141<sup>st</sup> Street. As she was walking along the sidewalk in front of 152 West 141<sup>st</sup> Street, her right foot hit a portion of raised concrete, causing her to fall forward. During the deposition, she was shown four photographs which plaintiff testified were taken using

her cellular phone on the date of the accident. She verified that said photographs fairly and accurately depicted the area of her accident as it appeared on that date. She drew a circle on one of the photographs indicating where her right foot came into contact with the raised concrete. This particular photograph indicated that plaintiff's accident resulted from a misleveling between two sidewalk flags. Plaintiff further testified that her foot did not come into contact with the tree well at the accident location.

The City asserts that it is obvious from plaintiff's own testimony as well as the aforementioned documents and photographs, that she fell due to an alleged defect located squarely on the sidewalk, and not on the street, curb or tree well. Additionally, in support of its position, the City annexes an affidavit of Omar Codling, as its Exhibit "N."

In his affidavit, Mr. Codling avers that he is an employee of the City of New York Department of Transportation, ( hereinafter, "DOT"), and his duties include searching for records including permits, applications for permits, corrective action requests, notices of violations, inspections, maintenance and repair orders, sidewalk violations, contracts and complaints. He also avers that DOT records are preserved and maintained in accordance with the guidelines promulgated for records retention and disposition as required in the New York City Charter and administered by the New York City Department of Records and Information Service. Mr. Codling further avers that at the request of the New York City Law Department, he personally conducted a search of the sidewalk at 152 West 141<sup>st</sup> Street encompassing a period of two years prior to and including April 29, 2009. Said search only revealed a Big Apple Map, which was served on the DOT by the Big Apple Pothole and Sidewalk Protection Corporation on October 23, 2003.

The City argues that pursuant to Administrative Code §7-210 of the City of New York, it is not liable for plaintiff's alleged injuries, because that section shifted liability for injuries arising from

defective sidewalk conditions from the City to the owner of the real property abutting the sidewalk, and the instant accident occurred on the sidewalk in front of 152 West 141<sup>st</sup> Street. The City also argues that in the context of §7-201(c)(2), (also known as the “Prior Written Notice Law”), courts have held that a municipality meets its burden of prima facie entitlement to summary judgment when it demonstrates the absence of prior written notice. The City argues that Third-Party Plaintiffs failed to plead and cannot demonstrate that the City either caused or created the condition which allegedly caused plaintiff’s accident.

In support for its argument, the City also refers to and relies on the affidavit of David C. Atik, annexed as Exhibit “N.” In said affidavit, Mr. Atik avers that he is employed by the New York City Department of Finance and his duties include responding to FOIL requests, subpoenas and other demands for information concerning his employer’s property records. Mr. Atik also avers that at the request of the Office of the Corporation Counsel, he conducted a search of the Property Assessment Roll Database for records relating to 152 West 141<sup>st</sup> Street, New York, New York. Said search revealed that on April 29, 2009, the City of New York was not the owner of the 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. 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 [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.2d224 [1<sup>st</sup> Dept. 2002] ).

Section § 7-210 of the Administrative Code of the City of New York provides in pertinent part that:

b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but shall not be 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 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.

In the case at bar, the alleged accident occurred on the sidewalk in front of 152 West 121<sup>st</sup> Street, a building which has been demonstrated by Mr. Atik, as not being owned by the City. Indeed, the property located at 152 West 141<sup>st</sup> Street does not fall within any of the exceptions promulgated by §7-120, in that it is neither a one-, two-, or three-family residential property which in whole or part, is not owned by the City. Moreover, no evidence has been presented that the City was

[\* 7]  
responsible in any way for creating the subject defect in the sidewalk which allegedly caused the accident.

Thus, the Court finds that the City has submitted prima facie proof that it does not own the subject property nor created the defective condition on said property. Moreover, said prima facie showing has not been rebutted.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that Third-Party Defendant, the City of New York's motion for summary judgment is granted and the complaint and any cross-claims against it are hereby severed and dismissed 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

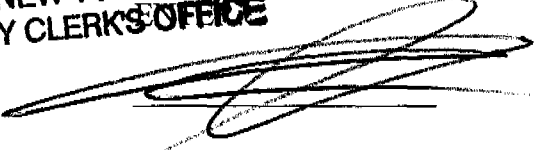
ORDERED that the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Third-Party Defendant City shall serve a copy of this order on all other parties and the Trial Support Office at 60 Centre Street, Room 158. Any compliance conferences currently scheduled are hereby cancelled; and it is further

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

DATED: April 29, 2013

APR 29 2013

**FILED**  
MAY 06 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

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

HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT