

|                                                                                                                                                                                                                                  |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Feeley v 136 E.38th St. LLC</b>                                                                                                                                                                                               |
| 2013 NY Slip Op 31459(U)                                                                                                                                                                                                         |
| July 9, 2013                                                                                                                                                                                                                     |
| Supreme Court, New York County                                                                                                                                                                                                   |
| Docket Number: 005121/2011                                                                                                                                                                                                       |
| Judge: Kathryn E. Freed                                                                                                                                                                                                          |
| Republished from New York State Unified Court<br>System's E-Courts Service.<br>Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for<br>any additional information on this case. |
| This opinion is uncorrected and not selected for official<br>publication.                                                                                                                                                        |

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

HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

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

**PART** 5

Index Number : 105121/2011

FEELEY, JOHN

vs

136 EAST 38TH STREET LLC,

Sequence Number : 001

DISMISS

*Case # 32*

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  
APPROPRIATE DECISION / ORDER

**FILED**

JUL 11 2013

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 7-9-13

JUL 09 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):

FILED

APR 19 1964  
FBI - NEW YORK

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

-----X  
JOHN FEELEY,

Plaintiff,

-against-

136 EAST 38<sup>th</sup> STREET LLC, THE CITY OF  
NEW YORK, and NEW YORK CITY  
DEPARTMENT OF TRANSPORTATION,

Defendants.  
-----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.....1-3.....  
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....  
ANSWERING AFFIDAVITS.....4.....  
REPLYING AFFIDAVITS.....  
EXHIBITS.....  
OTHER.....

DECISION/ORDER

Index No. 105121/2011

Seq. No. 001

PRESENT:

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

**FILED**

JUL 11 2013

NUMBERED

**NEW YORK  
COUNTY CLERKS OFFICE**

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

Defendant 136 East 38<sup>th</sup> Street LLC moves for an Order dismissing the instant case pursuant to CPLR§3211 and §3212, as there exist no issues of fact; and granting said defendant summary judgment as a matter of law. Plaintiff opposes. No opposition has been submitted from any other named party.

After a review of the papers presented, the transcribed deposition testimony, all relevant statutes and case law, the Court **grants** the instant motion.

FILED

RECEIVED  
JULY 1964  
FBI - NEW YORK

Factual and procedural background:

This is an action wherein plaintiff seeks monetary damages for personal injuries he allegedly sustained on January 27, 2011, when he slipped and fell as the result of the presence of snow, ice and/or slush on the sidewalk at the corner of East 38<sup>th</sup> Street and Lexington Avenue in the County of New York. The sidewalk was adjacent to 136 East 38<sup>th</sup> Street.

The instant action was commenced via the filing of a Summons and Complaint on or about May 9, 2011. Issue was joined by the service of 136 East 38<sup>th</sup> Street LLC on or about July 28, 2011. It should be noted that 136 East 38<sup>th</sup> Street LLC asserts that the City of New York and New York City Department of Transportation have purportedly joined issue, however, it has never been served with their Answer. Thus, it asserts that it cannot confirm with any semblance of certainty if these co-defendants have joined issue in the instant matter.

Positions of the parties:

Defendant 136 East 38<sup>th</sup> Street LLC argues that it is entitled to summary judgment as a matter of law because the subject property was exempt from liability pursuant to Administrative Code of the City of New York § 7-210(b), for the negligent failure to remove snow and ice from the sidewalk since defendant's property, a one family house was owner occupied and was used exclusively for residential purposes. Additionally, it argues that the area wherein plaintiff fell was a pedestrian ramp which was not a part of the sidewalk for the purposes of imposing liability on abutting landowners pursuant to said statute.

In support of its argument, it refers to and relies on the deposition testimony of Ms. Elizabeth Heller, Esq., her physician husband Shaun, sister Rachel and brother Michael, as well as Ms. Heller's accompanying Affirmation in Support. In said Affirmation in Support, Ms. Heller states that she, along with her sister Rachel, brother Michael, and husband Shaun, are the sole members of defendant

136 East 38<sup>th</sup> Street LLC, which owns the subject premises located at 136 East 38<sup>th</sup> Street, in New York County. She also states that said property is a one family home that was occupied solely by her, her husband, her infant son and her Nanny at the time of the accident. Ms. Heller further states that a few days prior to the accident, she was hearing weather reports of an impending snow storm. Since she was ten months pregnant with her second child, she decided to stay at her parents home until the storm passed, because her husband was scheduled to work late hours and she feared being alone in her condition.

Plaintiff argues that the instant motion warrants denial as triable issues of fact exist regarding whether he slipped on the ramp or the sidewalk and also regarding defendant's submission of inadequate proof evidencing that the subject property was owner occupied within the meaning of §7-210(b). Additionally, plaintiff argues that while the testimony indicates that the subject property was owned by the LLC, defendant fails to submit any legitimate proof that some or all of the purported members of said LLC actually resided at the property. It is important to note that in the aforementioned Affirmation In Support, Ms. Heller also states that "[I] am unable to locate the executed LLC papers but I can supply a copy of the unsigned papers if required. I am also ready, willing and able to appear at the oral argument of this motion and go on record about any facts or information this Honorable Court requires." (*Id.* p. 3, ¶7).

#### 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.2d 224 [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 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 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.

First, after reviewing Ms. Heller’s Affirmation In Support, the Court is satisfied with her assertion that the subject premises has been used exclusively for residential purposes. Indeed, the fact that she and/or her family may not have been inhabiting the premises at the exact time of plaintiff’s accident is of no consequence, and certainly does not undermine the legitimacy of their residency claim. In opposition, the Court finds that plaintiff has failed to raise a triable issue of fact ( see *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1989] ).

Moreover, as an aside, despite the fact that section 7-210 of the Administrative Code of the City of New York shifts liability for injuries resulting from defective sidewalks from the City to abutting property owners ( see *Vucetovic v. Epsom Downs, Inc.*, 10 N.Y.3d 517, 519-520 [2008] ), it is well settled that “pedestrian ramps are not part of the sidewalk for the purpose of imposing liability on abutting landowners pursuant to that provision” ( *Vidakovic v. City of New York*, 84 A.D.3d 1357, 1357-1358 [2d Dept. 2011]; *Gary v. 101 Owners Corp.*, 89 A.D.3d 627, 627-628 [1<sup>st</sup> Dept. 2011]; *Ortiz v. City of New York*, 67 A.D.3d 21, 23 [1<sup>st</sup> Dept. 2009 ], *revd. on other grounds* 14 N.Y.3d 779 [2010] ).

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendant 136 East 38<sup>th</sup> Street LLC’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 defendant 136 East 38<sup>th</sup> Street LLC shall serve a copy of this order on plaintiff, the remaining defendants and the Trial Support Office at 60 Centre Street, Room 158; and it is further

ORDERED that the instant case is to be placed on the City’s waiting list; and it is further

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

DATED: July 9, 2013

JUL 09 2013

**FILED**

JUL 11 2013

ENTER:

**NEW YORK**  
**COUNTY CLERKS OFFICE**  
 Hon. Kathryn E. Freed  
**HON. KATHRYN FREED**  
**JUSTICE OF SUPREME COURT**

FILED

PROFESSOR  
AND ASSISTANT CLERK