

**Villani v New York Socy. for the Relief of the  
Ruptured & Crippled, Maintaining the Hosp. for  
Special Surgery**

2013 NY Slip Op 31968(U)

August 16, 2013

Supreme Court, New York County

Docket Number: 110546/2009

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 : 110546/2009  
VILLANI, RICHARD  
vs.  
NY SOCIETY  
SEQUENCE NUMBER : 004  
DISMISS  
CALL # 79

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). \_\_\_\_\_

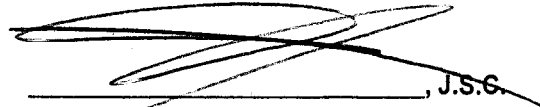
Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

FILED

AUG 22 2013

COUNTY CLERK'S OFFICE  
NEW YORK

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

HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT  
 NON-FINAL DISPOSITION

- 1. CHECK ONE: .....  CASE DISPOSED
- 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):

Dated: 8-16-13  
AUG 16 2013

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

-----X  
RICHARD VILLANI,

Plaintiff,

-against-

DECISION/ORDER  
Index No. 110546/2009  
Seq. No. 004

NEW YORK SOCIETY FOR THE RELIEF OF  
THE RUPTURED AND CRIPPLED, MAINTAINING  
THE HOSPITAL FOR SPECIAL SURGERY D/B/A  
"THE HOSPITAL FOR SPECIAL SURGERY," AND  
THE CITY OF NEW YORK,

Defendants.

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

**FILED**  
AUG 22 2013  
COUNTY CLERK'S OFFICE  
NEW YORK

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF CROSS MOTION AND AFFIDAVITS ANNEXED.....	.....1-2.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....
ANSWERING AFFIDAVITS.....	.....3.....
REPLYING AFFIDAVITS.....	.....4.....
EXHIBITS.....	.....
OTHER.....	.....

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

Defendant New York Society for the Relief of the Ruptured and Crippled, Maintaining The Hospital For Special Surgery D/B/A "The Hospital For Special Surgery ("the Hospital"), moves for an Order pursuant to CPLR§ 3212, granting it summary judgment dismissing the Complaint and all cross-claims. Plaintiff opposes.

It should be noted that plaintiff previously discontinued its case against the City on or about February 12, 2013 After a review of the papers presented, all relevant statutes and case law, the Court **denies** the motion.

Factual and procedural background:

Plaintiff seeks monetary damages for personal injuries he allegedly sustained on August 15, 2008, when he slipped and fell on a pedestrian ramp adjacent to the Hospital on East 71<sup>st</sup> Street between York Avenue and the FDR Drive in New York County. Plaintiff asserts that on that day he was visiting his girlfriend who was a patient at the hospital. He stopped to smoke a cigarette under the hospital's awning because it was raining. As soon as his foot made contact onto the ramp connecting the hospital to the hotel on the other side, his foot slipped out from underneath him, propelling him backwards. As a result, he fell, sustaining an injury to his left wrist, which later required two surgeries.

The Court reviewed the deposition testimony of several employees of defendant Hospital, which plaintiff proffers to convince the Court that the subject ramp had a "special use." Mr. Edward Leslie, lead engineer at the Hospital testified at a deposition held on October 4, 2011. Mr. Leslie testified that to his knowledge, the subject ramps are used to assist handicapped and other individuals going from the hospital across to the Belaire, a hotel associated with the Hospital, and vice versa. He also testified that neither he, nor anyone he supervised, was responsible for maintaining the subject ramps, or the walkway between the hospital and the hotel. Additionally, Mr. Leslie testified that the ramp in question was cleaned and swept by people in the Housekeeping Unit. He further testified that his direct supervisor would be responsible for maintaining the ramp in a safe condition, however he could not recall the name of his supervisor in 2008. Mr. Leslie also testified that he never saw anyone painting or working on either of the ramps. However, he testified that prior to and following August 15, 2008, he has seen people associated with the Housekeeping Department clean and sweep them.

Mr. Donald Foiles, Director of Security at the Hospital testified at a deposition held on July 19, 2012. ( Cross-Motion Ex. F). In pertinent part, Mr. Foiles testified that the subject ramp was “a curb cut for wheelchairs.” *Id.* at p.30

On August 28, 2011, Robert L. Schwartzberg, P.E., licensed engineer inspected the subject ramp, on behalf of plaintiff, and issued a report indicating that his inspection revealed significant deficiencies with same. Said report is annexed to the Aff. in Opp. as Ex. A. In pertinent part, Mr. Schwartzberg states that his measurements of the subject ramp indicated that the downward slope at the center had a 2 5/8 inch rise in a 24 inch horizontal span. Additionally, the areas located to each side of the center had a 3/4 inch rise in a 14 inch horizontal span at the upper end and a 3 1/4 inch rise in a 24 inch horizontal span at the lower end. Said ratio was significantly in excess of the 1-12 ratio mandated by the Americans with Disabilities Act, (“ADA”).

The Hospital proffers the report of Stephen N. Emolo, a Traffic Reconstructionist, annexed to their cross-motion as Exhibit G. The report states in pertinent part that on October 26, 2012, Mr. Emolo conducted an inspection of the subject ramp. He determined that “the measurements that were obtained along the subject ramp...were above accepted industry standard for a safe, nonhazardous walking surface.” (*Id.* p.7). Mr. Emolo also found the ramp to be structurally sound and in good repair, and that the steepness of its slope in and of itself does not by design make its surface slippery and/or a hazard to pedestrians. He also concludes that the any inspection by Hospital staff would not have revealed an unsafe condition at the curb ramp.

Positions of the parties:

The Hospital argues it is entitled to summary judgment in that no dangerous or defective condition existed with the subject ramp. It argues that in order to impose liability on a defendant in

a premises liability case, evidence must exist which tends to show the existence of a dangerous and defective condition, and that it neither created such condition or possessed actual or constructive notice it. The Hospital also argues that there was nothing dangerous or defective with the subject ramp. Additionally, it argues that in the event the Court determines that the subject ramp was dangerous or defective, it still did not have any actual notice of a defect, in that no apparent defect was visible. Additionally, it argues that it did not have constructive notice of any defect in that no one performed any work on the ramp in response to any directive issued by it.

Plaintiff argues that the Hospital had a duty of care with respect to the subject ramp despite the fact that the ramp was located on the city sidewalk. Based on the fact that it made special use of said ramp, it had to have maintained access to and exercised control over it.

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.3d 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 [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] ).

“Liability for a dangerous condition is generally predicated on either ownership, control or special use of the property” ( *Lopez v. Allied Amusement Shows, Inc.*, 83 A.D.3d 519 [1<sup>st</sup> Dept. 2011]; see also *Balsam v. Delma Eng’g Corp.*, 139 A.D.2d 292, 296 [1<sup>st</sup> Dept. 1988], *lv dismissed and denied in part* 73 N.Y.2d 783 [1988] ; *Petty v. Dumont*, 77 A.D.3d 466, 478 [1<sup>st</sup> Dept. 2010] ). “The existence of one or more of these elements is sufficient to give rise to a duty of care. Where none is present, a party cannot be held liable for injury caused by the defective or dangerous condition of the property” ( *Balsam*, 139 A.D.2d at 296-297 ). Where an abutting landowner derives a special benefit from public property unrelated to the public use, the person obtaining the benefit is required to maintain the used property in a reasonably safe condition to avoid injury to others ( *Kaufman v. Silver*, 90 N.Y.2d 204, 207 [1997] ).

However, a landowner is not liable for a defect in a pedestrian ramp leading from the street onto a sidewalk unless the landowner created the defect or the ramp was created for its special use ( see *Ortiz v. City of New York*, 67 A.D.3d 21, 27-28 [2009], *revd. on other grounds*, 14 N.Y.3d 779 [2010]; *Vidakovic v. City of New York*, 84 A.D.3d 1357, 1358 [2d Dept. 2011]; *Gary v. 101 Owners Corp.*, 89 A.D.3d 627 [1<sup>st</sup> Dept. 2011] ).

In the case at bar, the Court finds that defendant Hospital has failed to establish a prima facie entitlement to summary judgment. Indeed, the issue of whether it made special use of the subject ramp is a question of material fact that should be reserved for a jury’s determination. Moreover, the conflicting expert reports also create a question of fact, which necessitates a jury’s determination ( see gen. *Cruz v. Barnabus Hosp.*, 50 A.D.3d 382 [1<sup>st</sup> Dept. 2008]; *McManus v. Lipton*, 107 A.D.3d 463 [1<sup>st</sup> Dept. 2013] ).

Therefore, in accordance with the forgoing, it is hereby

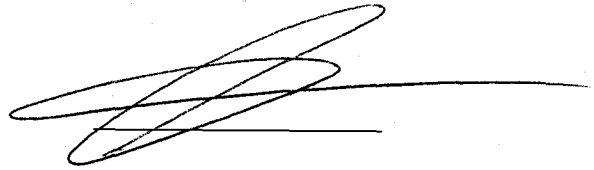
ORDERED that the motion for summary judgment made by defendant New York Society for the Relief of the Ruptured and Crippled, Maintaining the Hospital for Special Surgery D/B/A "The Hospital For Special Surgery," is denied; and it is further

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

DATED: August 16, 2013

**AUG 16 2013**

ENTER:



Hon. Kathryn E. Freed

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

**FILED**

**AUG 22 2013**

**COUNTY CLERK'S OFFICE  
NEW YORK**