

<b>Dupree v Tower 157, LLC</b>
2013 NY Slip Op 32999(U)
November 25, 2013
Supreme Court, New York County
Docket Number: 153029/2013
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:

PART 5

*Justice*  
Index Number : 153029/2013  
DUPREE, ALFRED M.  
vs  
TOWER 157, LLC.  
Sequence Number : 001  
DISMISS ACTION

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**

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

Dated: 11-25-13  
NOV 25 2013

  
HON. KATHRYN FREED, J.S.C.  
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  
ALFRED M. DUPREE,

Plaintiff,

-against-

DECISION/ORDER  
Index No. 153029/2013  
Seq. No. 001

TOWER 157, LLC, ARKAR, INC.,  
1961 AMSTERDAM GOURMET DELI, INC., THE  
CITY OF NEW YORK, THE NEW YORK CITY  
DEPARTMENT OF SANITATION AND THE NEW  
YORK CITY DEPARTMENT OF PARKS AND  
RECREATION,

Defendants.

-----X  
KATHRYN E. FREED, J.S.C:

RECITATION, AS REQUIRED BY CPLR2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ATTACHED.....	.....1-2.....
ORDER TO SHOW CAUSE.....	.....
ANSWERING AFFIDAVITS.....	.....
REPLYING AFFIDAVITS.....	.....
EXHIBITS.....	.....3-12.....
OTHER.....	.....

UPON THE FORGOING CITED PAPERS, THIS DECISION/ORDER OF THE MOTION IS AS FOLLOWS:

Defendants The City Of New York, The City Of New York s/h/a The New York City Department Of Sanitation, and The City Of New York s/h/a The New York City Department Of Parks And Recreation ( collectively, “the City”), moves for an Order pursuant to CPLR§ 3211(a)(7), dismissing the Complaint and all cross-claims, if any, against the City, or in the alternative, pursuant to CPLR§ 3212, granting summary judgment to the City, dismissing the Complaint and all cross-claims against it. No opposition has been submitted by any other party.

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

Factual and procedural background:

Plaintiff seeks monetary damages for personal injuries allegedly sustained on February 9, 2013, when he fell on the sidewalk due to an accumulation of snow and ice. Consequently, he filed a Notice of Claim on or about February 28, 2013, alleging that the accident occurred “at or near the corner of West 157<sup>th</sup> Street and Amsterdam Avenue, County of New York, State of New York.” The City asserts that more specifically, the sidewalk is located in front of 1961 Amsterdam Avenue, County of New York, State of New York.” ( Exh. A, ¶ 3). Plaintiff then commenced the instant suit via the filing of a Summons and Complaint on or about April 22, 2013. On or about May 7, 2013, the City imposed its Answer. It asserts that to date, it has not received any Verified Answers from any of its co-defendants.

The City argues that summary judgment must be granted in that pursuant to section §7-210 of the Administrative Code of the City of New York, it is not liable for plaintiff’s alleged injuries, in that liability for injuries emanating from defective sidewalk conditions in front of certain properties is shifted from it to abutting property owners, and also that the property does not fall within any of the exemptions set forth in said statute. The City also argues that its motions for summary judgment pursuant to Administrative Code 7-210 in cases involving sidewalk snow and ice removal are routinely granted. The City further argues that there is no evidence that it caused or created the alleged defect or made special use of the subject location.

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 v. 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] ).

A defendant moving for summary judgment in a slip and fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it” ( *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 [1986]; see *Petersel v. Good Samaritan Hosp. of Suffern, N.Y.*, 99 A.D.3d 880, 880 [2d Dept. 2012]; *Branham v. Lowes Orpheum Cinemas, Inc.*, 31 A.D.3d 319, 320 [1<sup>st</sup> Dept. 2006], *affd* 8 N.Y.3d 931 [2007]; *Willis v. Galileo Cortlandt, LLC*, 106 A.D.3d 630 [2d Dept. 2013] ). Only after the moving defendant has established this threshold, will the court consider the sufficiency of plaintiff’s opposition ( see *Perez v. Rodriguez*, 25 A.D.3d 506 [1<sup>st</sup> Dept. 2006] ).

In the instant motion, plaintiff alleges to have slipped and fell “at or near the corner of West 157<sup>th</sup> Street and Amsterdam Avenue, County of New York, State of New York. More specifically, the sidewalk is located in front of 1961 Amsterdam Avenue, County of New York, State of New York.” ( See Notice of Claim, Exh. A. ). Additionally, plaintiff’s Complaint alleges that the incident

occurred “on the sidewalk adjacent to 1961 Amsterdam Avenue, County of New York, thereafter referred to as the ‘Location’ .” (Exh. B, ¶ 92).

Administrative Code of the City of New York § 7-210 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 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 provisions 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 further support of its position, the City submits an Affirmation of David C. Atik, (Exh. D).

Mr. Atik is employed by the City of New York Department of Finance. In his affirmation, he states that Finance maintains and operates the Real Property Assessment Bureau (“RPAD”) database. The information contained in said database includes information regarding property ownership and building classification information. In assessing this database, Mr. Atik states that he conducted a search relating to 1961 Amsterdam Avenue, New York, and determined that the City was and is not the owner of this particular property.

In the case at bar, the subject location does not fall within any of the exemptions promulgated by §7-120. Indeed, it is neither a one-, two-, or three- family residential property that is in whole

or in part owner-occupied and used exclusively for residential purposes. More importantly, it is not owned by the City. Hence, the City has sufficiently demonstrated, prima facie, that it may not be held liable for plaintiff's injuries ( see *Nicoletti v. City of New York*, 77 A.D.3d 715 [2d Dept. 2010]; *Gordy v. City of New York*, 67 A.D.3d 523 [1<sup>st</sup> Dept. 2009]; *Rodriguez v. City of New York*, 70 A.D.3d 450 [1<sup>st</sup> Dept. 2010] ).

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendants the City of New York, the City of New York s/h/a The New York City Department of Sanitation, and the City of New York s/h/a The New York City Department of Parks and Recreation ( collectively, "the 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 remainder of this action shall continue; and it is further

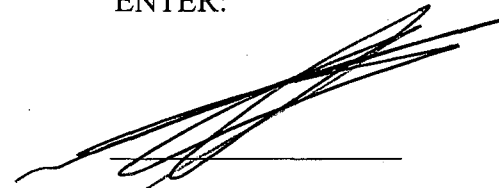
ORDERED that the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Plaintiff shall serve a copy of this order on all other parties and the Trial Support Office at 60 Centre Street, Room 158. Any compliance conferences currently scheduled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

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

DATED: November 25, 2013

NOV 25 2013

ENTER:



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