

**Markovits v City of New York**

2014 NY Slip Op 30475(U)

February 28, 2014

Sup Ct, New York County

Docket Number: 106935/08

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN  
*Justice*

PART 21

MONICA MARKOVITS,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT  
AUTHORITY, MANHATTAN AND BRONX SURFACE  
TRANSIT OPERATING AUTHORITY, CEMUSA, NY, LLC,  
1625 BROADWAY, INC., BELLY DELLY DELI CORP.,  
and DAFFY TAFFY DELI, INC.,

Defendant.

INDEX NO. 106935/08

MOTION DATE 9/5/13

MOTION SEQ. NO. 005

The following papers, numbered 1 to 6, and papers in Motion Seq. No. 006 were read on this motion for summary judgment.

Notice of Motion — Affidavit of Service; Affirmation —  
Exhibits A-H, I [Affidavit] \_\_\_\_\_

No(s). 1-2; 3-4

Affirmation in Opposition—Affidavit of Service  
Affirmation in Support and in Partial Opposition \_\_\_\_\_

No(s). 5-6  
(See Seq. No. 006)

Upon the foregoing papers, it is ordered that this motion for summary judgment is decided in accordance with the annexed memorandum decision and order.


**FILED**

MAR 04 2014

HON. MICHAEL D. STALLMAN

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 2/28/14  
New York, New York

 J.S.C.

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

1. Check one:.....
2. Check if appropriate:..... MOTION IS:
3. Check if appropriate:.....

- |  |   |
|--|---|
| <input type="checkbox"/> CASE DISPOSED         | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION |
| <input checked="" type="checkbox"/> GRANTED    | <input type="checkbox"/> DENIED                           |
| <input type="checkbox"/> SETTLE ORDER          | <input type="checkbox"/> GRANTED IN PART                  |
| <input type="checkbox"/> DO NOT POST           | <input type="checkbox"/> SUBMIT ORDER                     |
| <input type="checkbox"/> FIDUCIARY APPOINTMENT | <input type="checkbox"/> OTHER                            |
| <input type="checkbox"/> REFERENCE             |   |

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 21

-----X  
MONICA MARKOVITS,

Plaintiff,

Index No. 106935/2008

- against -

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT  
AUTHORITY, MANHATTAN AND BRONX SURFACE  
TRANSIT OPERATING AUTHORITY, CEMUSA, NY, LLC,  
1625 BROADWAY, INC., BELLY DELLY DELI CORP., and  
DAFFY TAFFY DELI, INC.,

Defendants.  
-----X

**Decision and Order**

FILED

MAR 04 2014

COUNTY CLERK'S OFFICE  
NEW YORK

**HON. MICHAEL D. STALLMAN, J.:**

In this personal injury action, plaintiff alleges that, on October 22, 2007, she tripped and fell while alighting from a New York City Transit bus, due to a hole in the public sidewalk, situated within a bus shelter. The abutting property owner, defendant 1625 Broadway, Inc., moves for summary judgment dismissing the action as against it, or in the alternative, for summary judgment in its favor on its claims against its tenant, Daffy Taffy Deli, Inc., for contractual and common-law indemnification (Motion Seq. No. 005). Daffy Taffy Deli Corp. (Daffy Taffy) separately moves for summary judgment dismissing the complaint as against both Daffy Taffy and 1625 Broadway, Inc. (Motion Seq. No. 006). Lastly, plaintiff cross-moves for an order striking the answers of defendants City of New York and Cemusa, NY, LLC, or in the alternative, for an order granting a missing document charge.

This decision addresses both motions and the cross motion.

### BACKGROUND

Plaintiff testified that, on October 22, 2007, she boarded a M10 bus on Central Park West between West 93<sup>rd</sup> and West 94<sup>th</sup> Streets. (Brescia Affirm., Ex G [Markovits EBT], at 6, 8.) Plaintiff exited the front door of the bus when it stopped at a bus shelter on Broadway between West 49<sup>th</sup> Street and West 50<sup>th</sup> Street. (*Id.* at 8-9.) According to plaintiff, “I touched the sidewalk with my left foot and I went down like a ton.” (*Id.* at 19.) She stated that she “fell forward and diagonally” to her left. (*Id.* at 20-21.)

Plaintiff testified that, after she fell, she looked to the ground to see where she had stepped. (*Id.* at 22.) She testified that she saw a hole “inside the enclosure of the bus stop enclosure” and underneath the roof of the bus shelter. (*Id.* at 25.) Plaintiff described the depth of the hole as “[a]bout 3 or 4 centimeters”, “big”, and “enlongated” in shape. (*Id.* at 26.) At the deposition, plaintiff was shown photographs of the bus shelter, marked for identification as Exhibits A and B, and plaintiff was asked to mark the area in the photograph where her left foot came in contact with the sidewalk. (*Id.* at 72.) According to the deposition transcript, plaintiff circled the area on both photographs with her finger:

“MR. GUNZBURG: . . . let’s indicate for the record she pointed to an

\* 4]

area which is depicted as I guess a broken up portion of sidewalk in the bus shelter which appears to be contained in the sidewalk slabs. (*Id.* at 73.)

\* \* \*

Mr. GUNZBURG: Circle the area with your finger, let her do it with her finger. Let me describe it for the record, she has circled with her index finger an area depicted on the sidewalk which is claimed to be a whole which is located in the bus shelter.

Q. Ma'am, would you circle that with a pen, please?

MR. GUNZBURG: I'm going to object to that.

MR. CONNOR: We'll mark that for a ruling." (*Id.* at 6.)

### DISCUSSION

#### 1625 Broadway, Inc.'s and Daffy Taffy's Motions for Summary Judgment

The standards for summary judgment are well-settled.

"On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact, and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's [f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal citations and quotation marks omitted].)

It is undisputed that plaintiff fell in a sidewalk area within a bus shelter. 1625 Broadway, Inc. and Daffy Taffy both argue that the City was responsible for maintenance of that sidewalk area. Plaintiff argues that, under Administrative Code

§ 7-210, 1625 Broadway, Inc., as the abutting property owner, was under a duty to maintain the area where plaintiff allegedly fell.

The issue of whether the abutting property or whether the City is responsible for sidewalk defects located at a bus stop was discussed at length in this Court’s decision in *Bednark v City of New York* (42 Misc 3d 314 [Sup Ct, NY County 2013]). In *Bednark*, the plaintiff allegedly fell on a defective sidewalk upon alighting from a bus. The abutting property owners contended that defect was located in a bus stop, and therefore was not part of the sidewalk for the purpose of Administrative Code § 7-210. This Court rejected the argument, stating,

“Plaintiff did not trip and fall because of a structure installed in the sidewalk or because of snow or ice. On the date of plaintiff’s alleged trip and fall, there apparently was no bus stop sign in the area where plaintiff allegedly tripped and fell. Plaintiff did not trip and fall on a sidewalk flag upon which a bus shelter sits. . . .

Maintaining the sidewalk area at issue in a reasonably safe condition would not have interfered with any City structure sitting on, or installed in, a sidewalk flag.” (*Id.*)

*Bednark* is instructive here. In this case, the sidewalk defect is undisputedly in a sidewalk flag upon which sits a bus shelter. Maintaining the sidewalk area at issue in a reasonably safe condition would have interfered with the bus shelter sitting

upon the sidewalk flag.<sup>1</sup> Therefore, on October 22, 2007, the area where plaintiff allegedly tripped and fell was not within 1625 Broadway Inc.'s responsibility to maintain under Administrative Code § 7-210. Rather, such responsibility fell upon the City, which has the duty at common-law to maintain bus stops and "sidewalks attendant thereto." (*Shaller v City of New York*, 41 AD3d 697, 698 [2d Dept 2007].)

Plaintiff's reliance on *Esteva v City of New York* (30 AD3d 212 [1<sup>st</sup> Dept 2006]) is misplaced. The issue in *Esteva* was whether the area where the plaintiff allegedly fell was either on a City sidewalk, or within the property of an abutting landowner. Moreover, the trip and fall in *Esteva* predates the passage of Administrative Code § 7-210, which became effective September 14, 2003. (See *Esteva v City of New York*, Sup Ct, Bronx County, Aug. 4, 2005, Victor, J., index No. 20591/98 ["The note of issue was filed in 2001."].)

Therefore, 1625 Broadway, Inc. met its prima facie burden of demonstrating entitlement to summary judgment as a matter of law. (*Cf. Lai-Hor Ng Yiu v Crevatas*, 103 AD3d 691 [2d Dept 2013] [property owner established prima facie entitlement to judgment as a matter of law by demonstrating that the property abutting the sidewalk was exempt under Administrative Code § 7-210].)

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<sup>1</sup> Under 34 RCNY 2-09 (f) (4) (viii), "[a]ll flags containing substantial defects shall be fully replaced. Patching of individual flags is not permitted."

Although the City and Cemusa, NY LLC contend that a question of fact exists as to whether 1625 Broadway, Inc. created the condition, they do not submit any evidence that 1625 Broadway, Inc. either performed any repairs to the sidewalk area at issue, or engaged in an activity that could have resulted in the defect at issue.

Therefore, 1625 Broadway, Inc. is granted summary judgment dismissing the complaint and all cross claims as against it. 1625 Broadway, Inc.'s own first cross claim—for common-law indemnification and contribution against its co-defendants—is dismissed.

Daffy Taffy has also established prima facie entitlement to summary judgment as a matter of law. As discussed above, the City is responsible for maintaining the sidewalk area where plaintiff allegedly tripped and fell. In any event, it is undisputed that Daffy Taffy is a tenant.<sup>2</sup> As a tenant, not an abutting landowner, Daffy Taffy had no obligation under Administrative Code § 7-210 to maintain the public sidewalk adjacent to its store. (*O'Brien v Prestige Bay Plaza Dev. Corp.*, 103 AD3d 428, 429 [1st Dept 2013].)

However, plaintiff raises triable issues of fact as to whether Daffy Taffy

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<sup>2</sup> The complaint named “Daffy Taffy Deli, Inc.” as a defendant, and paragraph 31 of the amended verified complaint alleged that “at all times hereinafter mentioned, defendant, DAFFY TAFFY DELI, INC. (“DAFFY TAFFY”), was and is a tenant of the retail ground floor of THE PREMISES.” (Krolian Affirm., Ex A.)

“Daffy Taffy Deli, Corp.” answered the amended verified complaint and admitted to the allegations of paragraph 31 in its answer.

performed repairs to the sidewalk where plaintiff tripped and fell. Miyoung Beyn, testified on behalf of Daffy Taffy. (Gunzburg Affirm., Ex M [Beyn EBT].) According to Beyn, Daffy Taffy was a deli store owned by her mother and her ex-husband, and Beyn worked in the office, paying bills. (Beyn EBT, at 12-14, 17.)

Beyn testified at her deposition that they made repairs to the sidewalk:

“A. We did repair our part of the sidewalk.

Q. You did repair the sidewalk?

A. Sidewalk, yes.

Q. What did you do with regard to repairs to the sidewalk?

A. That, my ex-husband was the one who handled it so I have no clue.

Q. When you say your ex-husband handled it, what did he handle, what did he do?

A. He is the one who did the repair of the sidewalk, hire the contractor and he is the one that deal with them.

Q. When you say he repaired the sidewalk, do you know, did he have to fix something on the sidewalk, did something have to be repaired?

A. Yes, because our sidewalk is in bad condition, has holes in it so we were afraid people walk and trip.” (Beyn EBT, at 33.)

Although Beyn did not testify that Daffy Taffy made repairs to the area of the sidewalk upon which the bus shelter sits, Beyn’s testimony must be viewed in the light most favorable to plaintiff on Daffy Taffy’s motion.

Therefore, summary judgment dismissing the complaint and all cross claims as against Daffy Taffy is denied.

Plaintiff’s Cross Motion

Plaintiff cross-moves to strike the answers of the City and Cemusa, NY, LLC,

or in the alternative, for an order directing a missing document charge, on the ground of spoliation. According to plaintiff, the City and Cemusa, NY LLC did not produce the following documents:

- “1. Bi-weekly inspection and repair reports,
2. Emails between CEMUSA and Shelter Express regarding bus shelter repairs,
3. CEMUSA excel spreadsheets which list out complaints received by CEMUSA regarding the bus shelter and the sidewalk, and,
4. Any complaints received by CEMUSA regarding the bus shelter and sidewalk.” (Gunzburg Affirm. ¶ 7.)

As plaintiff indicates, these documents were demanded in a letter dated February 24, 2011 from plaintiff’s counsel (Gunzburg Affirm., Ex O), and Cemusa, NY, LLC was directed to respond to the letter in two so-ordered stipulations dated May 26, 2011 and December 8, 2011. (Gunzburg Affirm., Ex P.) Plaintiffs contend that spoliation occurred because “most of the materials requested were never produced” and “defendants have never offered any reasonable explanation for their non-production.” (Gunzburg Affirm. ¶ 13.)

However, as the City and Cemusa, NY, LLC indicate, they eventually responded to the February 24, 2011 letter by a response dated February 5, 2013. (Castelli Opp. Affirm., Ex B.) With respect to some demanded items, Cemusa, NY, LLC responded that it was not in possession or aware of the existence of such items, and an affidavit to that effect would be provided by Carmine Addisano, Operations

Manager for Cemusa, NY, LLC under the separate cover. (*Id.*) By a so-ordered stipulation dated February 7, 2013, the parties agreed that the City and Cemusa, NY, LLC would provide affidavits referenced in the February 5, 2013 discovery response within 30 days. (Castelli Opp. Affirm., Ex D.) However, plaintiff filed the note of issue eight days later on February 15, 2013.

“Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126.” (*Holland v W.M. Realty Mgt., Inc.*, 64 AD3d 627, 629 [2d Dept 2009].) However, discovery sanctions are inappropriate here because plaintiff waived further disclosure by filing a note of issue without reserving her rights or preserving objections. (*Rivera-Irby v City of New York*, 71 AD3d 482, 482 [1st Dept 2010]; *see Fernandez v City of New York*, 84 AD3d 595 [1st Dept 2011] [claim that plaintiff was entitled to an adverse inference was waived because plaintiff filed a note of issue certifying that discovery was complete]; *Xiao-Feng Wang v Forty Second St. Dev. Corp.*, 282 AD2d 343 [1st Dept 2001] [motion to strike answer pursuant to CPLR 3216 properly denied because plaintiffs had previously certified in a note of issue that there was no outstanding discovery]; *compare with Horizon Inc. v Wolkowicki*, 55 AD3d 337 [1st Dept 2008][plaintiffs’ motion for sanctions was timely because plaintiffs preserved their objection to the defendants’ failure to produce in their note

of issue].)

Here, the note of issue that plaintiffs filed did not preserve any objections as to the City and Cemusa, NY, LLC's alleged failure to comply with discovery. (Castelli Opp. Affirm., Ex E.) Plaintiffs' attorney was aware that, at the court conference on February 7, 2013, the parties agreed that the City and Cemusa, NY, LLC had 30 additional days to provide an affidavit that some of the documents sought did not exist. And yet, plaintiff filed the note of issue eight days later.

Therefore, plaintiff's cross motion is denied.

### **CONCLUSION**

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant 1625 Broadway, Inc. (Motion Seq. No. 005) is granted summary judgment, the complaint and all cross claims are severed and dismissed as against defendant 1625 Broadway, Inc., with costs and disbursements to this defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of defendant 1625 Broadway, Inc. accordingly; and it is further

ORDERED that the first cross claim of defendant 1625 Broadway, Inc. is dismissed; and it is further

ORDERED that the motion for summary judgment by defendant Daffy Taffy Deli Corp. (Motion Seq. No. 006) is denied; and it is further

ORDERED that plaintiff's cross motion is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: February 28, 2014  
New York, New York

ENTER:

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

FILED

MAR 04 2014

COUNTY CLERK'S OFFICE  
NEW YORK