

**Allaggio v City of New York**

2014 NY Slip Op 32294(U)

August 25, 2014

Supreme Court, New York County

Docket Number: 156612/2013

Judge: Anil C. Singh

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

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RANDI ALLAGGIO,

Plaintiff,

-against-

DECISION AND  
ORDER

Index No. 156612/2013

THE CITY OF NEW YORK, METROPOLITAN  
TRANSPORTATION AUTHORITY,  
LONG ISLAND RAIL ROAD, NATIONAL RAILROAD  
PASSENGER CORPORATION individually and doing  
business as AMTRACK, AMTRACK, THE REISE  
ORGANIAZATION, INC., individually and doing business  
as CARUSO'S PIZZA, and CARUSO'S PIZZA,

Defendants.

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HON. ANIL C. SINGH, J.:

In this action for sustained personal injuries, defendant, the City of New York ("the City") moves for an order pursuant to CPLR§3211(a)(7) dismissing the complaint and all cross claims and in the alternative pursuant to CPRL§3212 granting summary judgment in its favor. Plaintiff opposes the motion and cross moves for an order restoring this case to the active calendar due to a clerical error.

In resolving a motion to dismiss for failure to state a cause of action, the court must accept as true the facts as alleged in the complaint and afford plaintiff the benefit of every favorable inference and determine only whether the facts as

alleged fit within any cognizable theory. (Guggenheimer v. Ginzburg, 43 NY2d 268, 275 [1977]).

Plaintiff slip and fell while traversing along the Central Concourse within Penn Station on 8<sup>th</sup> Avenue and 31<sup>st</sup> Street on August 23, 2012 and as a result sustained personal injuries. Here, “[I]iability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises. . . . 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 v Delma Eng'g Corp., 139 AD2d 292, 296-97 [1st Dept 1988]). Plaintiff has alleged these elements in his complaint therefore the City’s motion to dismiss is denied.

Moving on to the City’s summary judgment motion. Plaintiff argues that this motion is premature. However, “[a]ny party may move for summary judgment in any action, after issue has been joined.” (CPLR§ 3212(a)). Here, issue was joined when the City served its answer to the verified complaint on August 16, 2013 thus their motion was not premature (Ruotolo v Mussman & Northey, 105 AD3d 591, 593 [1st Dept 2013]).

Substantively, “the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law. . . . Once this showing has been made, however, the burden shifts to the party opposing the

motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]).

The City argues that they do not own, operate, maintain, or control the Penn Station building where plaintiff alleges his accident occurred. In support of this position, the city proffers the deed recorded on April 29, 1986 which lists their co-defendant National Railroad Passenger Corporation as the owner of 4 Penn Plaza. Plaintiff also proffers an affidavit by a title examiner confirming that the aforementioned deed was the valid real estate title on the date of plaintiff's injury. However, plaintiff argues that an issue of ownership exists by pointing to the verified answer of co-defendant National Railroad Passenger Corporation which denies ownership of Penn Station. The City counters by arguing that their co-defendant's verified answer does not constitute admissible evidence.

In the complaint plaintiff does not allege that the City owns Penn Station but rather that it operated, managed, maintained, controlled, repaired, inspected, and supervised it (see Compl. ¶¶49-55). Regardless of the issue of ownership, the City has failed to make a prima facie showing of entitlement to judgment on these other theories of liability. Therefore, the City's summary judgment motion is denied. Accordingly it is,

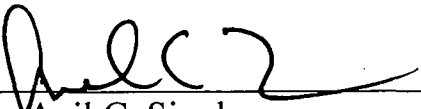
ORDERED that defendant the City of New York's motion to dismiss is denied; and it is further

ORDERED that defendant the City of New York's motion for summary judgment is denied; and it is further

ORDERED that Plaintiff Randi Alaggio's cross motion to restore this case to the active calendar is granted.

ORDERED that the Clerk is directed to enter judgment accordingly.

Date: August 25, 2014  
New York, New York

  
Anil C. Singh

**HON. ANIL C. SINGH**  
**SUPREME COURT JUSTICE**