Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** IA PART 6
Justice

BARBARA GARBER,

Index No. 702955/14

Plaintiff,

-against-

Motion Date September 13, 2016

THE CITY OF NEW YORK, et al.,

Motion Seq. No. 13

Defendants.

Motion Cal. No. 62

The following papers read on this motion by defendants Disano Demolition Co. Inc. (Disano Demolition) and Disano Construction Co., Inc. (Disano Construction) for an order granting summary judgment dismissing the complaint and all cross claims against them.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Affidavit.....	EF 411-429
Opposing Affirmation-Exhibits-Memorandum of Law.....	EF 484-499
Opposing Affirmation-Exhibits.....	EF 537-565
Opposing Affirmation-Affidavits-Exhibits.....	EF 567-571
Reply Affirmation.....	EF 572-573
Reply Affirmation.....	EF 574

Upon the foregoing papers the motion is determined as follows:

Plaintiff Barbara Garber alleges that she sustained personal injuries on April 30, 2011, as a result of a trip and fall on the sidewalk/driveway located at 44-35 Purves Street, Queens, New York. Ms. Garber testified at her deposition that at approximately 1:30 p.m. she was walking on the sidewalk next to her residence; that said sidewalk was adjacent to an empty lot, whose address is 44-35 Purves Street; that as she was walking

she tripped and fell; that after she fell she observed a divot two (2) inches in depth where her right foot had caught; and that as a result of the fall she sustained a fracture to her right foot, requiring surgery. Ms. Garber stated that she fell on the portion of the sidewalk where the driveway to the vacant lot meets the sidewalk.

The following facts are undisputed. Defendant JJP Coleman LLC purchased the real property located at 44-35 Purves Street, Queens, New York on August 30, 2007 from J.J P. Realty Corp. Said purchase was financed by a purchase money mortgage given by Laura Lee Realty, Inc. (Laura Lee). Defendant John J. Perno executed the deed on behalf of J.J.P. Realty Corp., and is also the Chief Financial Officer of Laura Lee.

Pietro Oppedisano is the sole shareholder and president of Disano Construction Co. Inc. and his sister Anna Maria Oppedisano is its vice president. Ms. Oppedisano is the sole shareholder and president of Disano Demolition. Both corporations are engaged in demolition and concrete work. Defendant Disano Construction entered into a written agreement dated December 20, 2007, with JJP Coleman LLC to perform demolition work at the said real property. The agreement originally provided that a two (2) story building on said real property would be demolished and that a second building located at 44-39 Purves Street would also be demolished. The agreement, however, was modified to exclude the demolition of the building at 44-39 Purves Street and the contract price was reduced. Pursuant to said agreement, Disano Construction was to obtain a demolition and fence permits with respect to the two (2) story building.

Disano Demolition, rather than Disano Construction, filed applications with the Department of Buildings for permits to erect a construction fence at the subject real property and to demolish the two (2) story building. Said applications were approved on January 22, 2008, and the permits were issued on March 10, 2008. Disano Construction. completed the demolition work and issued an invoice for payment to JJP Coleman LLC, dated May 23, 2008, but did not receive payment for its work. After the demolition work was completed, Disano Construction kept two (2) or three (3) large containers and one (1) or two (2) vehicles on the now vacant real property located 44-35 Purves Street. Defendant Long Island Concrete Inc. also maintained certain materials on said real property.

In the Fall of 2008, JJP Coleman LLC defaulted on its mortgage, and in 2009 Laura Lee commenced a mortgage foreclosure action entitled *Laura Lee Realty Corp. v JJP Coleman*, *et al*, Index No. 9921/2009. Laura Lee's motion for summary judgment and for an order of reference was granted pursuant to an order dated June 21, 2010. A separate mortgage foreclosure action was commenced against JJP Coleman LLC, entitled *James W. Coleman v JJP Coleman, LLC, et al.* Index No. 9912/2009, regarding a mortgage given

with respect to the adjoining real property known as 44-37/39 Purves Street, Long Island City, New York. In January 2011, James W. Coleman, JJP Coleman LLC, and Laura Lee entered into a settlement agreement, whereby JJP Coleman LLC acknowledged its defaults on both mortgages and agreed, among other things, to the consolidation of both foreclosure actions in order to facilitate the sale of the properties at the same time, and to withdraw with prejudice its answer and affirmative defenses in both actions. It was contemplated that upon foreclosure both properties would be sold together, and that JJP Coleman LLC would be paid certain sums for each property.

The January 2011 stipulation, submitted in opposition to the motion, provides, in pertinent part, as follows: "37. JJP [Coleman LLC] further represents that it has owned and been in possession of the respective premises for the past 2 years, and that it has not received any claim against title by any other party, except the claims set forth by plaintiff's in their respective actions, and" "38. JJP represents and Coleman and LL Realty [James Coleman and Laura Lee Realty] acknowledge that the defendant named in the respective foreclosure proceedings, Disano Construction, Inc., is currently storing equipment on the Properties and otherwise occupying and making use of the Properties, and this agreement is made subject to those facts, and JJP make no representation or warranty that it shall deliver the Properties free and clear of Disano's occupation of the same".

In the *Laura Lee* foreclosure action, a stipulation of settlement dated February 2, 2011 was submitted to the court on March 28, 2011, and Laura Lee's motion for a judgment of foreclosure and sale was granted pursuant to an order dated July 5, 2011. A final judgment of foreclosure and sale was granted on September 1, 2011 and entered on September 6, 2011, at which time the referee appointed to compute the amounts due was discharged and a referee was appointed to conduct the sale of the property. The mortgage property known as 44-35 Purvis Street, also known as Purves Street was sold at public auction on December 16, 2011 to Laura Lee for the sum of $100,000 and on January 12, 2012, Laura Lee assigned its bid to 44-35 Purvis Street LLC. The subject real property was transferred to 44-35 Purvis Street LLC, pursuant to a referee's deed dated January 12, 2012.

It is well settled that where, as here, a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in its favor (*Bush v St. Clare's Hosp.*, 82 NY2d 738, 739 [1993]*; Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853[1985]). This standard requires that the proponent of a motion for summary judgment make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*Winegrad v New York*

Univ. Med. Ctr., 64 NY2d at 853; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717[1986]; *Zuckerman* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2D 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerma*n, *supra* at 562). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affirmed* 62 NY2d 686 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, [1978]: *Fried v Bower & Gardner*, 46 NY2d 765, 767[1978]).

" 'Liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property'" (*Breland v Bayridge Air Rights, Inc.*, 65 AD3d 559, 560 [2d Dept 2009], *quoting Noia v Maselli*, 45 AD3d 746, 746 [2d Dept 2007]; *see Leibovici v Imperial Parking Mgt. Corp.*, 139 AD3d 909, 909-910 [2nd Dept 2016]; *Velez v Captain Luna's Mar.*, 74 AD3d 1191 [2nd Dept 2010]; *Ruffino v New York City Tr. Auth.*, 55 AD3d 819, 820[2d Dept 2008]). " 'Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property'" (*Velez v Captain Luna's Mar.*, 74 AD3d at 1192, *quoting Turrisi v Ponderosa, Inc.*, 179 AD2d 956, 957[1992]; *see Sobel v City of NY*, 120 AD3d 485, 486 [2nd Dept 2014]; *Usman v Alexander's Rego Shopping Ctr., Inc.*, 11 AD3d 450, 451[2d Dept 2004]).

Administrative Code of the City of New York § 7-210 "unambiguously imposes a duty upon owners of certain real property to maintain the sidewalk abutting their property in a reasonably safe condition, and provides that said owners are liable for personal injury that is proximately caused by such failure" (*Sangaray v W. Riv. Assoc., LLC*, 26 NY3d 793 [2016]; *see also Vucetovic v Epsom Downs, Inc.,* 10 NY3d 517, 520[2008]; *Williams v Castronovo* _ AD3d _, 2017 NY Slip Op 00340 [2d Dept 2017]; *Stoloyvitskaya v Dennis Boardwalk, LLC,* 101 AD3d 1106 [2d Dept 2012]).

The evidence presented here establishes that JJP Coleman LLC was the record owner of the real property located at 44-35 Purves Street which abuts the sidewalk that plaintiff alleges was in an unsafe condition at the time of her accident. The fact that said

real property was the subject of a foreclosure action and a settlement agreement in said action did not effectuate a change of ownership of the real property at the time of the plaintiff's accident. It is noted that in the January 2011stipulation entered into in the Laura Lee foreclosure action, JJP Coleman LLC acknowledged that it had been in possession of the subject Purves Street property for past two (2) years, and that Disano Construction was storing equipment on said property. Until the subject real property was transferred pursuant to a referee's deed on January 12, 2012, JJP Coleman LLC remained the record owner of said real property, and was statutorily responsible for maintaining the abutting sidewalk.

As regards Disano Construction, although this defendant stored its equipment and vehicles on the subject real property after it completed the demolition work, it had no obligation under Administrative Code § 7-210 to maintain the adjacent public sidewalk, as this provision does not apply to non-owners such as lessees, licensees, occupants or squatters (*see O'Brien v Prestige Bay Plaza Dev. Corp*., 103 AD3d 428, 429 [1st Dept 2013]). Rather, as a non-owner, Disano Construction's duty to the plaintiff arises under common law principles, and it can be found liable only of it created the alleged defective condition, or had special use of the sidewalk.

Mr. Oppedisano stated at his deposition that Disano Construction performed the demolition work at the subject real property; that upon its completion, it was inspected by the Department of Buildings; that he was personally present during said inspection, and was never informed that the there were any problems with the condition of the sidewalk and driveway; that if there had been any problem with the sidewalk and driveway, the inspector would not signed off on the work and he would have been required to make any needed repairs to the sidewalk or driveway; that the Department of Building's inspector signed off or approved the work performed by Disano Construction on June 6, 2008; and that once said work was approved he had no further responsibility for the premises.

Mr. Oppedisano further stated that at the time the work was signed off, the sidewalk and driveway adjacent to 44-35 Purves Street was "fine", and that it was not in the deteriorated condition depicted in a photograph taken after the plaintiff's accident. He stated that Disano Construction Co. Inc. did not do any further work at the site, and that for a period of two (2) to three (3) months after the work was completed he left two (2) to three (3) containers and a flatbed truck or pickup truck on the subject real property, in order to "protect his interest". He stated that he once he determined that JJP Coleman LLC lacked the funds to pay the sum owed, he removed all of his equipment from the subject real property.

In opposition to the within motion, defendant Long Island Concrete Inc has

submitted the deposition testimony of Thomas J. Perno, who was deposed on its behalf. Mr. Perno stated that in 2003 he was employed as foreman by LIC & Sons Construction Inc., a masonry and concrete business, and that his father John J. Perno was the sole shareholder and officer of said corporation. His father also was the sole shareholder and officer of JJP Realty, Inc., the then owner of the real property located at 44-35 Purves Street. Mr. Perno stated that prior to the sale of the Purves Street property, LIC & Sons Construction Inc. and another entity occupied the two (2) story building on said real property. He stated that in 2003, LIC & Sons Construction Inc. installed a new sidewalk and driveway in front of 44-35 Purves Street, from property line to property line, measuring 50 linear feet; that it was in immaculate condition when it was installed; and that although thereafter there was some normal wear and tear, there was nothing hazardous to a pedestrian, until after the property was sold, and the two (2) story building was demolished, and that the sidewalk and driveway deteriorated due to the demolition work. Mr. Perno stated that after the demolition work was performed the sidewalk and driveway remained in the same deteriorated condition and was never repaired by the property owner. Mr. Perno further stated that he stored certain material on the Purves Street property at the same time that the Disano entity stored trucks and equipment on said property.

Notably, Mr. Oppedisano did not provide any testimony as to the condition of the sidewalk after he removed his equipment from the subject real property, and did not provide any documentary evidence with respect to the inspection conducted by the Department of Buildings in 2008. In addition, his testimony regarding the period of time his equipment and trucks remained on the property is contradicted by the documentary evidence, his testimony regarding the condition of the sidewalk after the demolition work was performed is contradicted by Mr. Perno. It is not the court's function on a motion for summary judgment to assess credibility (*see Ferrante v Am. Lung Ass'n*, 90 NY2d 623, 631 [1997]; *Capelin Assocs. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]). Disano Construction, thus, has not established, prima facie, its entitlement to summary judgment, as issues of fact exist as to whether it created the alleged defective condition either during the time it performed the demolition work, or during the time it maintained heavy equipment and vehicles on the subject real property.

Defendant Disano Demolition has established, prima facie, its entitlement to summary judgment dismissing the complaint and all cross claims. Although this corporation may have improperly obtained permits from the Department of Building on behalf of Disano Construction, there is no evidence that Disano Demolition erected the construction fence, performed the demolition work, or otherwise maintained equipment or materials at the subject real property. Moreover, there is no evidence that Disano Demolition created the alleged unsafe condition on the abutting sidewalk/driveway, or that it had a special use of the sidewalk or driveway. Plaintiff's counsel's assertions that

Disano Demolition and Disano Construction have some of the same corporate officers, and shared the same business address, are insufficient to raise a triable issue of fact so as to warrant the denial of summary judgment.

In view of the foregoing, that branch of the defendant's motion which seeks to dismiss the complaint and all cross claims as to Disano Construction is denied, and that branch of the defendant's motion which seeks to dismiss the complaint and all cross claims as to Disano Demolition, is granted.

Dated: January 26, 2017

.....
Howard G. Lane, J.S.C.