

<b>Correl v Averde Limited-Profit Hous. Corp.</b>
2017 NY Slip Op 32421(U)
October 3, 2017
Supreme Court, Queens County
Docket Number: 705956/15
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE  
Justice

IAS PART 6

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KEVIN CORREL,

Index No. 705956/15

Plaintiff,

Motion  
Date August 21, 2017

-against-

Motion  
Cal. No. 34

AVERNE LIMITED-PROFIT HOUSING CORP.  
and NYC DEPARTMENT OF HOUSING  
PRESERVATION AND DEVELOPMENT,

Motion  
Seq. No. 2

Defendants.

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AVERNE LIMITED-PROFIT HOUSING CORP.

Third-Party Plaintiff,

-against-

THE CITY OF NEW YORK,

Third-Party Defendant.  
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**FILED**  
OCT 16 2017  
COUNTY CLERK  
QUEENS COUNTY

Papers  
Numbered

Notice of Motion.....	HC A
Aff. In Opposition.....	EF 31
Exhibits.....	EF 32
Aff. In Reply.....	HC B

Upon the foregoing papers it is ordered that the branch of the motion by defendant, the City of New York s/h/a NYC Department of Housing Preservation and Development ("the City") and third-party defendant, the City of New York ("the City") for an order pursuant to CPLR 3211(a)(7) dismissing the plaintiff's Complaint and all cross claims against the New York City Department of Housing Preservation and Development is hereby granted without opposition. The New York City Department of Housing Preservation and Development is a department or agency of the City. Movants established that actions involving a City

department or agency must be brought in the name of the City pursuant to New York City Charter Ch. 17 § 396. No opposition is presented on this argument. Accordingly, this branch of the motion is granted and the case is dismissed as against the defendant, NYC Department of Housing Preservation and Development.

That branch of the motion by defendant, the City of New York s/h/a NYC Department of Housing Preservation and Development ("the City") and third-party defendant, the City of New York ("the City") for summary judgment pursuant to CPLR 3212 dismissing the plaintiff's Complaint and all cross claims against the City is hereby denied.

This is a personal injury action whereby on September 5, 2012, plaintiff, Kevin Correl allegedly tripped and fell on a sidewalk condition located in front of 324 Beach 59<sup>th</sup> Street, Queens, New York, due to the negligence of defendants. It is alleged that the accident was caused by a height differential between the sidewalk and an abutting utility strip.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4<sup>th</sup> Dept 2000]).

To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty, a breach of the duty, and that said breach was the proximate cause of their injuries (see, *Gordon v. Muchnick*, 180 AD2d 715 [2d Dept 1992]). However, absent a duty of care, there is no breach and no liability (*Id.*; see also, *Marasco v. C.D.R. Electronics Security & Surveillance Systems Co., et. al.*, 1 AD3d 578 [2d Dept 2003]).

Movants presented via, inter alia, the examination before trial transcript testimony of Department of Transportation Records Searcher, Fulu Bhowmick; copies of records maintained by the New York City Department of Finance; an affidavit of George Mark, Assistant Commissioner of the Department of Finance; and plaintiff's own 50-h hearing testimony, a prima facie case that there are no triable issues of fact. Movants established that the City is not liable for the alleged injuries because pursuant to §7-210 of the Administrative Code of the City of New York, liability for injuries arising from a defective sidewalk was shifted from the City of New York to the owner of the real property abutting the defective sidewalk (ie. Arverne Limit HSE Co.) and that it neither caused nor created an unsafe condition (see, *Rajgopaul, et. al. v. Toys "R" Us*, 297 AD2d 728 [2nd Dept 2002]; *Cruz v. Otis Elevator Company*, 238 AD2d 540 [2nd Dept 1997]), nor made a special use thereof (*Minott v. City of New York*, 230 AD2d 719 [2d Dept 1996]). Accordingly, the City of New York established a prima facie case.


Defendant/third-party plaintiff Arverne Limited-Profit Housing Corp. ("Arverne") presented sufficient evidentiary proof in admissible form to establish a triable issue of fact. In opposition, Arverne submits, inter alia, an affidavit of Michael C. Simon, PE, a licensed professional engineer who averred inter alia that: he conducted a site investigation of the subject property and concluded: "(1) that the approximate 3-inch difference in elevation between the utility strip and the sidewalk resulted from soil erosion, which, in turn, was caused by the lack of curbing at this location; and (2) that adding soil to the utility strip while the curbs are still missing will not remedy the difference in elevation, as the soil will continue to wash out into the road, and into the catch basin at the corner of 59<sup>th</sup> Street." (*Trincere v. County of Suffolk*, 90 NY2d 976 [1997]). Arverne established that there is a triable issue of fact as to whether the curb's dilapidation caused or contributed to the mis-leveling condition.

Accordingly, there are triable issues of fact in connection with, inter alia, whether a defective condition existed, whether movant caused or created a defective condition, and whether

movant acted reasonably under the circumstances. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, the branch of the motion for summary judgment pursuant to CPLR 3212 is denied.

This constitutes the decision and order of the Court.

Dated: October 3, 2017

  
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Howard G. Lane, J.S.C.

**FILED**  
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COUNTY CLERK  
QUEENS COUNTY