

<b>Yaman v Gristede's Foods, Inc.</b>
2020 NY Slip Op 31601(U)
May 22, 2020
Supreme Court, New York County
Docket Number: 158046/2016
Judge: Laurence L. Love
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LAURENCE L. LOVE PART 62**

*Justice*

-----X

ROSEANN YAMAN, PETER YAMAN,  
  
Plaintiff,

- v -

GRISTEDE'S FOODS, INC. / NAMDOR INC., CKMR  
CORPORATION, THE CITY OF NEW YORK

Defendant.

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**INDEX NO.** 158046/2016  
**MOTION DATE** 3/25/2020  
**MOTION SEQ. NO.** 007

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 194, 204, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion is decided as follows:

Plaintiffs, Roseann Yaman and Peter Yaman, commenced this action seeking to recover monetary damages for alleged injuries Roseann Yaman sustained on January 13, 2016, when she caught her toe in a sidewalk crack and then tripped over a loose cobblestone near a tree well on the sidewalk in front of 351-355 First Avenue in the City, County, and State of New York. Defendant, CKMR Corporation ("CKMR") is the owner of the subject property, which is leased in its entirety to defendant, Gristede's Foods, Inc/NAMDOR, Inc. ("Gristede's"). Under Motion Sequence #4, CKMR moved for summary judgment arguing that it owed no duty to plaintiffs and did not have any obligation to maintain the location where plaintiff fell. Gristede's cross-moved for summary judgment arguing that plaintiff cannot establish that Gristede's owed them a duty, and, even if Gristede's did owe a duty, it was not negligent, did not create the alleged condition, and did not make a special use of the sidewalk. Gristede's further argued that as tenant of the premises, it cannot be held liable under § 7-210 of the Administrative Code of the City of New

York. In a decision dated December 26, 2018, this Court denied, in its entirety, CKMR's motion finding that as discussed in *Collado v Cruz*, Administrative Code Section 7-210 "imposes a non-delegable duty on the owner of the abutting premises to maintain and repair the sidewalk." (917 NYS2d 178 [1st Dept 2011] (further stating that "provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party"). The Court further granted Gristede's motion to the extent that plaintiff's main complaint was dismissed as against Gristede's, however, CKMR's cross-claims for contractual indemnification based on its lease with Gristede's were left in place. Said lease agreement specifically imposed on the tenant the obligation to make repairs to the abutting sidewalk. In a decision dated, June 12, 2019, this Court denied Gristede's motion for reargument and denied CKMR's cross-motion seeking contractual indemnification, finding that:

CKMR avers that it is entitled to contractual indemnification because the plaintiff's fall was caused in part by a crack in the sidewalk, a defect which could have been caused or created by Gristede's who was responsible for the sidewalk pursuant to its lease. Conversely, Gristede's maintains that plaintiff's accident was caused by a defect in the tree well for which the City is responsible. Plaintiff disputes Gristede's description of the defect. The nature of a summary judgment motion is to ascertain whether triable issues of fact remain- While it is undisputed that plaintiff fell in the area outside of Gristede's it is unclear from the conflicting accounts what caused plaintiff's fall and resultingly whether CKMR is entitled to indemnification here.

The Court notes that if plaintiff's fall is found to have been caused by a crack in the sidewalk, CKMR is entitled to indemnification from Gristede's as a matter of law.

Defendant, the City of New York now moves for summary judgment on the grounds that pursuant to § 7-201 of the Administrative Code of the City of New York, the City had no prior written notice of the alleged defective condition and it did not cause and create the alleged

condition. CKMR cross-moves seeking indemnification from Gristede's, despite this Court's previous denial of its motion seeking identical relief.

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d331 (1<sup>st</sup> Dept., 1984) *aff'd* 65 N.Y.2d 732 (1985). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

As discussed in *Katz v. City of New York*, 87 N.Y.2d 241, 243 (1995),

Administrative Code of the City of New York § 7-201 (c) limits the City's duty of care over municipal streets and sidewalks by imposing liability only for those defects or hazardous conditions which its officials have been actually notified exist at a specified location (see generally, *Poirier v City of Schenectady*, 85 NY2d 310, 314). As recognized by plaintiff, prior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against the City (see, *Poirier v City of Schenectady*, 85 NY2d, at 313, *supra*; *Barry v Niagara Frontier Tr. Sys.*, 35 NY2d 629, 633-634). The failure to demonstrate prior written notice leaves plaintiff without legal recourse against the City for its purported nonfeasance or malfeasance in remedying a

defective sidewalk. Because this prior written notice provision is a limited waiver of sovereign immunity, in derogation of common law, it is strictly construed (see, *Laing v City of New York*, 71 NY2d 912, 914; *Doremus v Incorporated Vil. of Lynbrook*, 18 NY2d 362, 366).

In support of its motion, the City submits Plaintiff's 50-h hearing transcript, plaintiff's EBT transcript, a two year sidewalk search for the subject location together with an affidavit for same, three searches conducted by the Department of Parks and Recreation and affidavits for same. Taken together, the City submission establishes the City did not have prior written notice of any defect in the subject tree well, nor did it cause and create the condition.

In opposition, plaintiff argues that the instant motion is untimely. Said objection is without merit as the instant motion was made within sixty days of filing of the Note of Issue. Plaintiff further argues "The Plaintiff's deposition clearly stated in her own words that she was walking north on the sidewalk, her foot was caught in a cracked sidewalk which put her off balance to the extent that she tripped over a large stone paver which was sticking vertically outside the edge of a tree well. She tripped over the stone in her path and "went flying" and landed on her face on the sidewalk pavement outside of the tree well." Plaintiff's argument fails to establish an issue of fact for trial as if plaintiff tripped over a crack in the sidewalk, same is the responsibility of the property owner pursuant to Administrative Code Section 7-210. Recognizing that there can be more than one proximate cause of an incident, the City has established that if plaintiff fell in the way that she describes in her deposition, which is an issue of fact contested by the other defendants, the City did not have prior written notice of a defect in the tree well. In opposition, CKMR and Gristede's argue that the City has not established its *prima facie* entitlement to summary judgment as the Big Apple Map can provide prior written notice to the City. Said defendants misconstrue the City's argument. The Big Apple Map would put the City on notice of a defective condition in the tree

well, if same were indicated on the map, which it is not. The map indicates numerous defective conditions on the subject sidewalk, but contains no markings indicating a defect in the tree well. As such, neither plaintiff nor CKMR and Gristede's have raised an issue of fact. As such, the City of New York's motion must be granted.

Defendant, CKMR's motion seeking indemnification must be denied as this Court has previously ruled on same.

ORDERED that the motion of defendant the City of New York to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein ; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

The Clerk of the Court is directed to transfer this action to a non-city part as the City of New York is no longer a party.

5/22/2020

DATE



LAURENCE L. LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE