

<b>Story v Harlem Up Deli Mkt. Inc.</b>
2020 NY Slip Op 33428(U)
October 19, 2020
Supreme Court, New York County
Docket Number: 160669/2017
Judge: Lyle E. Frank
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LYLE E. FRANK**  
*Justice*

**PART IAS MOTION 52EFM**

-----X  
LINDA STORY,  
Plaintiff,

**INDEX NO.** 160669/2017  
**MOTION DATE** 09/17/2020  
**MOTION SEQ. NO.** 004

- v -

HARLEM UP DELI MARKET INC, BEST OF HARLEM  
CORP, FUTURE PURCHASE, THE CITY OF NEW YORK,  
FRIEDLAND WINE & LIQUORS INC.,  
Defendant.

**DECISION + ORDER ON  
MOTION**

-----X  
FUTURE PURCHASE  
Plaintiff,

Third-Party  
Index No. 595203/2019

-against-

FRIEDLAND WINE & LIQUORS INC.  
Defendant.  
-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 93, 94, 95, 96, 97, 98, 102, 105, 106 were read on this motion to/for JUDGMENT - SUMMARY

Defendant, The City of New York, (the "City") pursuant to CPLR 3212, moves this Court for an order granting summary judgment, dismissing the complaint and all cross-claims. The City states that under 7-210 of the Administrative Code of the City of New York ("7-210"), the City is not liable for plaintiff's injuries. For the reasons set forth below, this Court grants the City's motion for summary judgment in its entirety and dismisses the complaint and all cross-claims against it.

Plaintiff alleged that on October 7, 2016, she tripped and fell on a metal plate left on the sidewalk in front of a property addressed as 585 Lenox Avenue, New York, New York.

### **Summary Judgment Standard**

A party moving for summary judgment must demonstrate an absence of any material issue of fact and an entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]. Because summary judgment is a drastic remedy that deprives a litigant of his or her day in court, the evidence in the record is viewed in a light most favorable to the party opposing the motion. *Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989].

Once the movant has established its entitlement to judgment as a matter of law, the burden then shifts to the opponent to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [“mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient”]).

### **Administrative Code § 7-210**

Section 7-210 provides in pertinent part that “the owner of real property abutting any sidewalk, including, but not limited to; the intersection quadrant for corner property shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition.” *NY Admin Code* §7-210.

Also, “[n]otwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential

purposes) in a reasonably safe condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.” *Id.*

To determine if the City is liable under 7-210, the court will look at: (1) the location of the sidewalk where the alleged accident transpired; (2) the non-City ownership of the real property that abuts the location where the alleged accident occurred; and (3) the non-exempt building classification of the abutting property. *Id.*

Therefore, the City makes out *prima facie* entitlement to summary judgment by establishing that the location of an occurrence meets the definition of Admin Code section 7-210, which the City has established.

In opposition to the City’s motion, plaintiff avers that because the actual use of the property is not known the City has not established that §7-210 applicable. However, the Court is not persuaded by the argument. Whether the building is occupied or not is of no moment as the classification of the property is one that is non-exempt for the purposes of Admin Code §7-210. Accordingly, the City has established its *prima facie* entitlement to judgment as a matter of law.

Defendant Future Purchase LLC opposes the instant motion on the grounds that there are questions of fact as to whether the City caused and created the defect. However, defendant fails to submit any evidence in admissible form to support its argument. It is well established that a motion for summary judgment may not be defeated by mere speculation. The Court has reviewed the parties’ other arguments and finds them unavailing. Consequently, the opponents have failed to raise a triable issue of fact.

Accordingly, it is hereby

ORDERED that the City’s motion is granted in its entirety and the complaint and all cross-claims are dismissed as against the City of New York; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of said defendant as to all claims and cross claims; 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 parties 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)); and it is further

ORDERED the case be transferred to a non-City part as the City of New York is no longer a party in this action.

ORDERED that the Clerk is directed to enter judgment accordingly.

10/19/2020  
DATE

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE

LYLE E. FRANK, J.S.C.  
**HON. LYLE E. FRANK**  
J.S.C.