

**Saenger v City of New York**

2021 NY Slip Op 34175(U)

December 10, 2021

Supreme Court, Queens County

Docket Number: Index No. 701384/21

Judge: Kevin J. Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

**FILED**  
**12/13/2021**  
**COUNTY CLERK**  
**QUEENS COUNTY**

Present: HONORABLE KEVIN J. KERRIGAN Part 10  
Justice

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James Saenger,  
  
Plaintiff,  
- against -

Index  
Number: 701384/21  
  
Motion  
Date: 12/6/21

The City of New York and Eileen Chen,  
  
Defendants.

Motion Seq. No.: 2

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The following papers numbered E6-E29 & E31-E36 read on this motion by defendant, Eileen Chen, for an order to amend the caption, lift the stay imposed because of the death of James Saenger and for summary judgment; and cross-motion by plaintiff for an order sanctioning defendant, The City of New York ("City"), denying defendant, Eileen Chen's cross-motion for summary judgment and to amend the caption and to lift the stay imposed by the death of James Saenger.

Papers  
Numbered

Notice of Motion-Affirmation-Exhibits.....	E6-21
Notice of Cross-Motion-Affirmation-Exhibits.....	E22-27
Affirmation in Support.....	E28-29
Affirmation in Opposition-Exhibits.....	E31-34
Affirmation in Opposition.....	E35
Reply.....	E36

Upon the foregoing papers it is ordered that the motion is decided as follows:

This is an action for personal injury allegedly sustained by plaintiff as the result of an accident wherein he tripped and fell on the sidewalk stairs and onto the street in front of the two-family home owned by Eileen Chan (referred to in this action as "Chen") located at 904 124th Street, College Point, County of Queens, on October 28, 2017.

Plaintiff commenced suit by the filing of a summons and complaint bearing index number 4277/2017. An answer was interposed on behalf of Ms. Chan on August 23, 2018. The City of New York has appeared in this action by service of an answer which is undated but appears to have been served some time between June of 2018 and February 14, 2019.

Deposition of plaintiff James Saenger was held on May 14, 2019. Plaintiff James Saenger died on May 16, 2019, and limited letters of administration were issued on February 24, 2020, appointing Robert C. Saenger as the fiduciary for the estate of James Saenger. This matter was converted to an efile matter by stipulation dated December 12, 2020 and assigned the present index number.

Defendant's motion and plaintiff's cross-motion are granted to the extent that the caption is amended to reflect the appointment of Robert C. Saenger as administrator for the estate of plaintiff James Saenger and the stay imposed because of the death of James Saenger is hereby lifted.

The caption of this action is hereby amended appears follows:

Justice	
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Robert C. Saenger as Administrator for the Estate of James Saenger, deceased,	Index Number: 701384/21
Plaintiff,	
- against -	Motion Date: 12/6/21
The City of New York and Eileen Chen,	Motion Seq. No.: 2
Defendants.	
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In support of her motion for summary judgment defendant Chen submits, inter alia, an affirmation by her attorney, a photograph depicting the sidewalk steps where plaintiff tripped and fell- which photograph was submitted at plaintiff's deposition, a copy of letters of administration appointing Robert C. Saenger as the fiduciary for the estate of plaintiff James Saenger, the deposition transcript for defendant Chen dated, July 22, 2021, and the deposition transcript for James Saenger, dated May 14, 2019.

Chen testified at deposition that the rise of all of the steps are the same height. Chen also submits the photograph of the stairs showing a height differential among rise of each of the steps comprising the stairs and also compared with the grading of the street.

Defendant's counsel's assertion that 'it is obvious that the height differential was created because of the street not because of the stairs' that is, the height differential between the last step and the street is not due to the step being too high, but

rather the street being too low, is without merit.

In opposition to defendant Chen's motion, plaintiff submits, inter alia, the affirmation of his attorney and the deposition transcript for James Saeger, dated May 14, 2019.

Saenger testified that it was on the 'fourth step onto the street where he sustained his injury', that he fell on the fourth step and into the street.'

In order to obtain summary judgment, movants must make a prima facie showing that they are entitled to said relief, by tendering sufficient proof, in admissible form, to eliminate any material issues of fact (see Winegrad v. New York Univ. Med. Ctr., 64 NY 2d 851 [1985]; Zuckerman v. City of New York, 49 NY 2d 557 [1980]). Defendant Chen has not met her prima facie burden.

Chen's own submissions regarding the height differential of the steps is contradictory, and in part corroborates plaintiff's evidence regarding the height differential among the steps. The evidence presented is contradictory and raises questions of fact preclusive of granting summary judgment to Chen.

Accordingly, Chen's motion for summary judgment is denied. Further, for the same reasons and questions of fact raised, plaintiff's cross-motion for summary judgment is denied.

Plaintiff also cross-moves for an order of the Court pursuant to CPLR 3126(3), striking the answer of City, and directing the entry of a default judgment in favor of plaintiff, against City.

In support of the cross-motion plaintiff submits, inter alia, the Order issued by Hon Mojgan C. Lancman on May 17, 2021, directing, inter alia, that City submit to deposition on July 22, 2021 and directing Chen to submit to deposition on July 22, 2021, and ordered that the subject depositions may be adjourned only upon a prior written order issued by the Court. Chen did so appear and was deposed on July 22, 2021. Defendant City did not appear for deposition as directed and the Court did not issue a prior written order permitting the deposition of City to be adjourned.

On this record it appears that the counsel for plaintiff has made good-faith efforts to address the issues regarding outstanding discovery, and City has not reciprocated. However, plaintiff has not demonstrated that the conduct by City has been of such extent or duration and by its nature contumacious or due to bad faith that the court is unwilling, at this time, to strike

City's answer.

Accordingly, plaintiff's cross-motion is granted to the extent that City is directed to appear for deposition by plaintiff within sixty (60) days of the date of service of a copy of this order with notice of entry, and this deposition of City shall not be adjourned.

If City fails to appear for deposition within sixty (60) days of the date of entry of this order, City's answer is stricken.

Regarding any outstanding discovery, this Court does not have discovery conference calendars and does not schedule or conduct discovery conferences in cases not involving the Health and Hospitals Corporation. In this case, therefore, the parties are free to stipulate to any remaining discovery, and if they are unable to do so, and compliance with any outstanding discovery demands served is not forthcoming, an appropriate motion may be made in the Compliance Conference Part.

Serve a copy of this order with notice of entry without undue delay.

Dated: December 10, 2021

  
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KEVIN J. KERRIGAN, J.S.C.

**FILED**  
**12/13/2021**  
**COUNTY CLERK**  
**QUEENS COUNTY**