

**Jimenez v City of New York**

2012 NY Slip Op 30214(U)

January 27, 2012

Sup Ct, NY County

Docket Number: 113496/08

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE J.S.C.

PART 5

Index Number : 113496/2008

JIMENEZ, ANGEL

vs.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

CAL # 46

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

his motion to/for \_\_\_\_\_

PAPERS NUMBERED

1

2

3

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

FILED

JAN 31 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/27/12  
JAN 27 2012

BARBARA JAFFE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 5

-----X  
ANGEL JIMENEZ and LINA RAMOS,

Index No. 113496/08

Plaintiffs,

Motion Date: 11/1/11

Motion Seq. No.: 001

-against-

**DECISION AND ORDER**

THE CITY OF NEW YORK, COLIN  
CONSTRUCTION & MANAGEMENT CO. INC. and  
HSBC NORTH AMERICA INC.,

**FILED**

**JAN 31 2012**

Defendants.

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
BARBARA JAFFE, JSC:

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By notice of motion dated May 4, 2011, defendants Colin Construction & Management Co. Inc. (Colin) and HSBC North America Inc. (HSBC) (defendants, collectively) move pursuant to CPLR 3212 for an order summarily dismissing plaintiffs' complaint and all cross claims against them. Plaintiffs oppose.

**I. BACKGROUND**

On June 28, 2008, plaintiff Angel Jimenez tripped and fell on the sidewalk on the northwest corner of the intersection of Sixth Avenue and 14<sup>th</sup> Street in Manhattan, allegedly due to a combination of accumulated and trapped water, improper maintenance of the sidewalk, garbage and debris strewn across it, and a broken, misaligned, slanted and/or uneven portion of the pavement. (Affirmation of Heidi M. Weiss, Esq., dated May 4, 2011 [Weiss Aff.], Exh. A).

On or about October 2, 2008, plaintiffs commenced the instant action by serving defendants with their summons and complaint, and on or about February 6, 2009 and March 13, 2009, defendants served their answers. (*Id.*). In their verified bill of particulars, plaintiffs allege that the accident occurred on the sidewalk adjacent to 101 West 14<sup>th</sup> Street. (*Id.*, Exh. C).

At a 50-h hearing held on October 2, 2008, Jimenez testified that there was garbage blocking a drain in the street, causing a puddle to form, and that when he stepped off the curb onto the street, he slipped in the puddle and fell. On a photograph reflecting the accident scene, Jimenez marked two "x's" where he fell, one on the part of the curb sloping down toward the street or pedestrian ramp, and the other on the street. (*Id.*, Exh. F).

On May 25, 2010, Jimenez testified at an examination before trial (EBT) that he had fallen on West 14<sup>th</sup> Street before he crossed Sixth Avenue, that it had been raining, and that a large puddle had formed on the edge or in front of the subway entrance on Sixth Avenue. He had stepped from the curb onto the street, onto one of the white crosswalk lines, when his foot slipped, causing him to fall backward and land on the sidewalk. Jimenez marked several photographs depicting the scene, reflecting that he had fallen on the crosswalk in the street. (*Id.*, Exhs. H, I).

At an EBT held on August 31, 2010, Yolanda Padilla, an HSBC assistant manager at the branch at Sixth Avenue and 14<sup>th</sup> Street in Manhattan, testified that part of her duties included monitoring the sidewalk in front of the premises for maintenance issues such as snow and ice accumulation, and that she would call someone at HSBC if snow or ice needed removal. She did not notify HSBC about sidewalk conditions other than snow and ice, nor was she aware that it was her duty to maintain the sidewalk in a safe condition. Before plaintiff's accident, Padilla had

observed no defects in the sidewalk in front of the branch and knew of no prior accidents. (*Id.*, Exh. I).

By affidavit dated May 4, 2011, Fred Colin, Colin's president, states that Colin is the agent for the landlord of the premises leased to HSBC, that pursuant to the lease HSBC maintains the premises and abutting sidewalk, that Colin is not HSBC's managing agent, and that Colin performed no maintenance on the premises, the abutting sidewalk, or the street intersection. (*Id.*, Exh. K).

## II. CONTENTIONS

Defendants argue that they may not be held liable here as Jimenez slipped and fell on the street and not the sidewalk, and even if he fell on the sidewalk ramp, City is responsible for maintaining the street and sidewalk ramp in a safe condition. (Weiss Aff.).

Plaintiffs contend that Jimenez fell on the sidewalk and not the street or sidewalk ramp, and that he fell as a result of a broken or misleveled portion of or a hole in the sidewalk, not because he slipped on water, relying on a transcript of an EBT taken of Jimenez on August 17, 2010. They also assert that defendants provide no evidence showing that they did not create the condition or have actual or constructive notice of it. (Affirmation of Paul Ehrlich, Esq., dated Aug. 19, 2011, Exh. B).

In reply, defendants maintain that Jimenez's August 2010 EBT transcript is inadmissible as they were given no notice of the EBT and were not present at it, and that even if admissible, the testimony is self-serving and contradicts his prior testimony. They also observe that Jimenez was served with a copy of the May 2010 EBT transcript as required by CPLR 3116 and made no changes or corrections to it. (Affirmation of Heidi M. Weiss, Esq., dated Aug. 26, 2011).

### III. ANALYSIS

Pursuant to CPLR 3117(a)(3), “the deposition of any person may be used by any party for any purpose against any other party who was present or represented at the taking of the deposition or who had the notice required under these rules,” provided certain conditions are met. (See Connors, Practice Commentaries, McKinney’s Cons Laws of NY, CPLR C3117:6 [2004 main vol] [court has power to exclude use of deposition if party noticing deposition failed to provide notice to another party]).

Absent any evidence that defendants were given notice of the August 2010 EBT, the transcript is inadmissible as evidence by plaintiffs against defendants. (See *Morello v Brookfield Constr. Co.*, 4 NY2d 83 [1958] [EBT testimony inadmissible against defendants who were not notified of EBT]; *Weinberg v City of New York*, 3 AD3d 489 [2d Dept 2004] [transcript of plaintiff’s 50-H testimony could not be used as evidence against non-City defendants as they were not notified of and did not attend 50-H hearing]; *Claypool v City of New York*, 267 AD2d 33 [1<sup>st</sup> Dept 1999] [same]).

And, given Jimenez’s testimony at the 50-H hearing and May 2010 EBT that he fell in the crosswalk on the street after he had stepped off of the sidewalk, defendants have established, *prima facie*, that they may not be held liable as the accident did not occur on the sidewalk abutting their premises. (Cf Administrative Code of the City of New York § 7-210 [owner of real property abutting a sidewalk has duty of maintaining it in reasonably safe condition]).

Having offered no admissible evidence contesting defendants’ *prima facie* showing, plaintiff have failed to raise any triable issue as to defendants’ liability.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants Colin Construction & Management Co. Inc. and HSBC North America Inc.'s motion for summary judgment is granted, and the complaint and any cross claims are dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly.

**FILED**

ENTER:



JAN 31 2012

Barbara Jaffe, JSC

**BARBARA JAFFE**  
J.S.C.

NEW YORK  
COUNTY CLERK'S OFFICE

DATED: January 27, 2012  
New York, New York

JAN 27 2012