SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

RAFAEL VIDAL,	**Part C-2**
Plaintiff,	**Present:**
	HON. THOMAS P. ALIOTTA
-against-	
	DECISION AND ORDER
CITY OF NEW YORK, VIRAL REALTY CORP., ANN PHILLIPS and LAIRD PHILLIPS,	**Index No. 104436/11**
	Motion No. 3267-001
Defendants.	

The following papers numbered 1 to 4 were marked fully submitted on the 16th day of January, 2013:

	Papers Numbered
Notice of Motion for Summary Judgment of Defendant City of New York (Affirmation in Support) (Dated November 7, 2012)	1
Plaintiff's Affirmation in Opposition to Summary Judgment (Dated December 13, 2012)	2
Affirmation in Opposition of Defendant Viral Realty Corp. (Dated January 3, 2013)	3
Reply Affirmation in Further Support of City's Motion (Dated January 14, 2013)	4

Upon the foregoing papers, the motion for summary judgment of defendant the City of New York (hereinafter "City") is granted.

Plaintiff, a home improvement contractor, claims to have sustained extensive personal injuries (including the fracture and surgical repair of his right ankle) when he tripped and fell while walking along the sidewalk in front of 1196 Castleton Avenue,

Staten Island, New York[1] on the evening of September 28, 2010. According to plaintiff, the cause of his trip and fall was the presence of a "raised metal square, with protruding nuts and/or bolts, that created a depression which created a tripping hazard within the square, which appears to be the remnants of a pay telephone that was negligently and improperly removed by [the City]" (*see* City's Exhibit A). Plaintiff has also sued Viral Realty Corp. (hereinafter "Viral Realty"), and Ann and Laird Philips, alleging that those defendants owned, leased, operated, managed, maintained and/or controlled the premises adjoining the sidewalk. The latter two defendants have not appeared in the action.

In moving for summary judgment, the City argues, *inter alia*, that it is not liable for plaintiff's injuries inasmuch as §7-210 of the Administrative Code of the City of New York (effective September 14, 2003) has shifted liability for injuries arising out of purported sidewalk defects from the City to the owner of the

[1]Plaintiff's Notice of Claim (City's Exhibit A) identifies the accident location as "a sidewalk adjacent to 1194 Castleton Avenue, Staten Island, New York and 1196-A Castleton Avenue, Staten Island, New York", while his Verified Complaint, attached as City's Exhibit B, identifies the location as "the sidewalk in front of and adjacent to 1192 and 1196 Castleton Avenue, Staten Island, New York." At his December 20, 2011 hearing pursuant to General Municipal Law §50 (h), plaintiff testified that the accident occurred "[i]n front of La Familia Restaurant on Castleton Avenue" (*see* City's Exhibit E, p 5 ll 12-14). 1196 Castleton Avenue is the definitive location as affirmed by plaintiff in paragraph 3 of his Affirmation in Opposition to this motion.

abutting real property, except under the exemption provided therein for the owners of one, two or three-family residential dwellings that are owner-occupied and used exclusively for residential purposes.[2] In this case, the City maintains that the abutting property is commercial in nature. In addition, it maintains that no liability may attach to the City since it neither caused nor created the allegedly hazardous condition (*i.e.*, it did not remove the public payphone), nor did it derive a special benefit from this particular use of the public sidewalk.

In support of its argument, the City submits two printouts (together with affidavits authenticating the accuracy of same) from its Department of Finance, Real Property Assessment Division database, demonstrating that (1) 1196A Castleton Avenue does not exist; (2) both 1190-1194 and 1196 Castleton Avenue are classified as "K4" premises (*i.e.*, stores with apartments above); and (3) the City does not own either 1190-1194 or 1196 Castleton Avenue (*see* City's Exhibits F, G). The City also attaches the October 25, 2012 authenticating affidavit and printout from an employee of the New York City Department of Information Technology and Telecommunications (hereinafter "DOITT") indicating that a public

[2] §7-210 (c) of the Administrative Code of the City of New York states, in relevant part, that "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".

payphone had been installed in front of 1196 Castleton Avenue on June 8, 1995, and that it was not removed by or on notice to DOITT or any independent contractor working on DOITT's behalf[3] (*see* City's Exhibit H).

Plaintiff and defendant Viral Realty oppose the motion on the grounds that it is premature since depositions are required in order to (1) pin-point the exact location of plaintiff's fall, (2) ascertain whether the City derived a special benefit from the issuance and/or renewal of permits for the maintenance of pay telephones on the sidewalks, and (3) whether the City acquired notice of the defective sidewalk condition through DOITT.

As previously indicated, the motion for summary judgment is granted, and the complaint as against the City is dismissed.

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v. Prospect Hosp., 68 NY2d 320, 324). Here, the authenticated records of the New York City Department of Finance adequately indicate that none of the tax lot(s) in question fall within the exemption for owner-occupied one, two, or three-family residential dwellings. Hence, any discrepancy as to the precise location of the subject accident is of no real

[3]DOITT is charged, *inter alia*, with the regulation of public payphones on City sidewalks.

consequence on the issue of the City's liability under the Administrative Code. Moreover, the affidavit of Patrick Fergus on behalf of DOITT is sufficient to demonstrate *prima facie* that the City, through DOITT, had no notice of, and did not cause or create the alleged hazard by its "affirmative negligence" (*see* Oboler v. City of New York, 8 NY3d 888, 889; Amabile v. City of Buffalo, 93 NY2d 471, 474).

The City having thus demonstrated its *prima facie* entitlement to judgment as a matter of law, the burden shifts "to the [opposing party] to lay bare his or her proof and demonstrate the existence of a triable issue of fact" (Chance v. Felder, 33 AD3d 645, 645-646; *see* Zuckerman v. City of New York, 49 NY2d 557, 560). In reviewing such a motion, the court is enjoined to accept as true any evidence tendered by the opposing party, and "must deny the motion if there is arguably any doubt as to the existence of a triable issue" (Fleming v. Graham, 34 AD3d 525, 526, rev'd on other grounds 10 NY3d 296 [*internal quotation marks omitted*]).

At bar, neither opponent has demonstrated through admissible evidence the existence of any triable issue of fact. In this regard, mere speculation that depositions may reveal the presence of a special benefit to the City does not warrant the denial of summary judgment (*see* Arpi v. New York City Tr. Auth., 42 AD3d 478, 479). Moreover, it is well settled that the affirmation of an attorney with no personal knowledge of the facts is insufficient to

defeat the motion (Zuckermanv.City of New York, 49 NY2d at 563).

Accordingly, it is

ORDERED, that the motion for summary judgment of defendant the City of New York is granted; and it is further

ORDERED, that the complaint and any cross claims asserted against it are severed and dismissed; and it is further

ORDERED, that the Clerk enter judgment accordingly.

E N T E R,

/s/
Hon. Thomas P. Aliotta

J.S.C.

Dated: March 15, 2013
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