SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

----------X

SUSAN CONFESSORE, **Part C-2**

Plaintiff, **Present:**

HON. THOMAS P. ALIOTTA

-against-

DECISION AND ORDER

THE CITY OF NEW YORK, ROBERT KIRSCHNER, and ISABELLA KIRSCHNER, **Index No. 101563/11**

Defendants. **Motion No. 2413-001**

----------X

The following papers numbered 1 to 4 were marked fully submitted on the 5th day of December, 2012.

	Papers Numbered
Notice of Motion for Summary Judgment, by Defendant City of New York, with Supporting Papers and Exhibits (dated July 31, 2012)	1
Affirmation in Opposition by Plaintiff (dated September 24, 2012)	2
Affirmation in Opposition by Co-Defendants Robert and Isabella Kirschner (dated October 12, 2012)	3
Reply Affirmation by Defendant City of New York (dated December 4, 2012)	4

Upon the foregoing papers, the motion by defendant, the City of New York (hereinafter the "City") for an order granting it summary judgment and dismissing the complaint as against it is granted.

The instant action was brought by plaintiff Susan Confessore to recover damages for personal injuries allegedly sustained when she tripped and fell on the sidewalk in front of 965 Sheldon Avenue, Staten Island, New York, on March 20, 2010. It is

undisputed that the property adjacent to the sidewalk where the accident occurred had been owned by co-defendants Robert and Isabella Kirschner for over twenty-five years. It is further undisputed that the property has always been leased, and that neither Robert nor his wife has ever lived there (*see* Movant's Exhibit "F", pp 6,7).

Effective September 14, 2003, section 7-210 of the Administrative Code of the City of New York was amended to absolve the City of liability for injuries arising from defective sidewalks, and to shift such liability onto adjacent landowners except in one instance, *i.e.*, where the adjacent property is an owner-occupied one-, two-or three-family dwelling. Thus, section 7-210 provides in pertinent part:

> c. Notwithstanding 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.

Accordingly, based upon the undisputed date and location of the subject accident, the City may not be held liable for plaintiff's

personal injuries caused by any alleged negligent failure to maintain the sidewalk in a reasonably safe condition.

In this regard, the uncontroverted testimony of defendant Robert Kirschner (*see* Movant's Exhibit "F"), establishes that the premises which abuts the sidewalk in question was not "owner occupied" either "in whole or in part", at the time of plaintiff's fall. Hence, the property was not exempt from the liability-shifting effect of the foregoing Administrative Code provision, and the City cannot be held liable for plaintiff's injuries as a matter of law.

Additionally, plaintiff's belated attempt to raise a feigned issue of fact regarding the exact location of her fall is insufficient to defeat the City's motion. Plaintiff testified at her Examination Before Trial that the cause of her fall was a section of uneven sidewalk that was partially obscured by a parked car (*see* Movant's Exhibit "E", pp 22, 26), and specifically described the accident location at her 50-h hearing as the sidewalk between the driveway and roadway in front of 965 Sheldon Avenue (*see* Reply Affirmation Exhibit "B", pp 21-23).

Finally, the record is devoid of any evidence sufficient to raise an issue of fact as to whether or not the City had performed any work at the subject location which immediately resulted in a dangerous condition, or that it made a special use of the sidewalk

(*see* Yarborough v City of New York, 10 NY3d 726; Adams v City of Poughkeepsie, 296 AD2d 468). On this issue, the only pertinent evidence is Mr. Kirschner's EBT testimony to the effect that the City had, since 1988, placed asphalt at the end of his driveway on two occasions, and the affidavit of Omar Codling, a record-searcher for the New York City Department of Transportation, indicating that there was no record of any "permits, applications for permits, Corrective Action Requests, Notice[s] of Violation, inspection, maintenance and repair orders, sidewalk violations, contracts or complaints for the [subject] location" during the two years immediately prior to plaintiff's injury (*see* Movant's Exhibit "I"). Thus, any repairs that may have been effectuated by the City or its agents were too remote in time to raise an issue of fact as to whether or not the City caused or created the uneven sidewalk defect which is alleged to have caused plaintiff's injury (*see* Yarborough v City of New York, 10 NY3d 726, *supra*; Koehler v. Incorporated Vil. of Lindenhurst, 42 AD3d 438).

Accordingly it is hereby

ORDERED that the motion is granted, and the complaint and any cross claims against the City of New York are hereby severed and dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

E N T E R,

CONFESSORE v THE CITY OF NEW YORK, et al.

_____
HON. THOMAS P. ALIOTTA,
J.S.C.

Dated: FEBRUARY 1, 2013