

Kigel v Fifty Fifth Street LLC
2013 NY Slip Op 33303(U)
March 26, 2013
Sup Ct, New York County
Docket Number: 108338/04
Judge: Geoffrey D. Wright
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GEOFFREY D.S. WRIGHT PART 62
Justice

LEV KIGEL, INDEX NO. 108338/04

Plaintiff/Petitioner	MOTION DATE
- v -	
THE FIFTY FIFTH STREET LLC, SHOREHAM HOTEL ASSOCIATES, LP, LA CARAVELLE CORP., 33 WEST 55 TH HOTEL CORP., PTG SHORHAM 55 I, INC., By Its Trustee PTG Shorham 55 I Trust, PTG SHORHAM 55 II, INC., By Its Trustee PTG Shorham II Trust, KOT HOLDINGS LLC, UNIQUE HOTELS & RESORTS, INC., CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., TIME WARNER NY CABLE, INC., VERIZON NEW YORK, INC., RCN TELECOM SERVICES OF NEW YORK, INC., MONTE BELLO REALTY CORP., S. AUTLER CONTRACTING CORP., THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF TRANSPORTATION,	MOTION SEQ. NO. <u>016</u> MOTION CAL. NO.
Defendants	

Two Third-Party Actions

The following papers, numbered 1 to 6 were read on this motion to/for by La Caravelle and the City of New York to dismiss the complaint

<u>PAPERS NUMBERED</u>	
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 _____
Answering Affidavits — Exhibits _____	3,4 _____
Replying Affidavits _____	5,6 _____

Cross-Motion: Yes No

2

Upon the foregoing papers, it is ordered that this motion/petition by Defendant La Caravelle to dismiss the complaint and cross-claims against it is granted a/p/o. The cross-motion by the City of New York to dismiss the complaint and cross-claims against it is denied, a/p/o.

Dated: Mar 26, 2013

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITIONCheck if appropriate: DO NOT POST**FILED**

APR 04 2013

NEW YORK
COUNTY CLERK'S OFFICE 60

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: Part 62

X

LEV KIGEL,

Index #108338/04

Plaintiff-Petitioner(s),

Motion Cal. #

-against-

Motion Seq. #

DECISION/ORDER

Pursuant To Present:

Hon. Geoffrey Wright

Judge, Supreme Court

THE FIFTY FIFTH STREET LLC, SHOREHAM
 HOTEL ASSOCIATES, LP, LA CARAVELLE
 CORP., 33 WEST 55TH STREET HOTEL CORP.,
 PTG SHORAM 55 I, INC., By Its Trustee PTG
 Shorham 55 II Trust, PTG 55 II, INC., By Its Trustee
 PTG Shoram 55 II Trust, KOT HOLDINGS, LLC,
 UNIQUE HOTELS & RESORTS, INC., CONSOLIDATED
 EDISON OF NEW YORK, INC., TIME WARNER
 NY CABLE INC., VERIZON NEW YORK, INC.,
 RCN TELECOM SERVICES OF NEW YORK, INC.,
 MONTE BELLO REALTY CORP., S AUTLER
 CONTRACTING CORP., THE CITY OF NEW YORK
 and NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Defendant-Respondent(s),

X

RCN TELECOM SERVICES, INC.,

Index #591179/05

Third-Party Plaintiff,

-against-

FELIZ EQUITIES, INC.,

FILED

Third-Party Defendant.

X

APR 04 2013

NEW YORK
 COUNTY CLERK'S OFFICE

TIME WARNER CABLE OF NEW YORK CITY
 A Division Of Time Warner Entertainment Company, L.P.,
 s/h/a Time Warner Cable Of NY Cable, Inc.,

Second-Third Party Plaintiff,

Index #591136/09

-against-

HYLAN DATACOM & ELECTRICAL, INC.,
 Individually And As Successor In Interest To
 Trinity Communication Corporation and
 TRINITY COMMUNICATIONS CORPORATION,
 Individually,

FILED

APR 04 2013

Second-Third Party Plaintiff,

-----X

NEW YORK
 COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to: dismiss the complaint

PAPERS	NUMBERED
Notice of Petition/Motion, Affidavits & Exhibits Annexed	1
Order to Show Cause, Affidavits & Exhibits	
Answering Affidavits & Exhibits Annex	3,4
Replying Affidavits & Exhibits Annexed	5,6
Other (Cross-motion) & Exhibits Annexed	2
Supporting Affirmation	

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

This law suit involves a trip and fall over a misleveled grate in the sidewalk in front of 33 West 55th Street, on April 14, 2003. The Defendant La Caravelle Corp., a lessee of restaurant space, now moves for summary judgment dismissing the complaint. La Caravelle is joined in the motion by the City of New York.

The motion by La Caravelle is based in part on its lease terms, which does not require it to maintain the grate or the sidewalk in front of its restaurant, and the argument that its leasehold does not abut the location of the grate.

Briefly summarized, the restaurant argues that the accident occurred in April 2003. On that date, section 7-210 of the New York City Administrative Code had yet to become effective, and therefore, land owners and their tenants had no statutory obligation to maintain the sidewalks abutting their property. Further, La Caravelle did not perform work in the area

at any time. Finally, as of April 2003, the standard in effect was that it would have had to have been on notice of some condition that needed to be corrected. In support of this argument, La Caravelle relies on the deposition testimony of the Plaintiff, who walked the block in question on a regular basis, and could not identify the defect as existing prior to the accident [*L.L. 49/2003 § 1, EFF. SEPT. 14, 2003*].

Prior to September 2003, the City of New York was obligated to maintain the sidewalks, all things being equal [*WEISKOPF v. CITY OF NEW YORK*, 5 A.D.3d 202, 773 N.Y.S.2d 389, 2004 N.Y. Slip Op. 01676, “It is well settled that the duty to keep public sidewalks in reasonably safe condition and to repair any defects falls upon the municipality (*D'Ambrosio v. City of New York*, 55 N.Y.2d 454, 450 N.Y.S.2d 149, 435 N.E.2d 366; *Nuesi v. City of New York*, 205 A.D.2d 370, 613 N.Y.S.2d 175). An exception to this general rule exists, however, where an owner of land which abuts a public sidewalk created the defect or uses the sidewalk for a special purpose (*D'Ambrosio v. City of New York*, *supra* at 462, 450 N.Y.S.2d 149, 435 N.E.2d 366; *Ausderan v. City of New York*, 219 A.D.2d 562, 631 N.Y.S.2d 512; *Granville v. City of New York*, 211 A.D.2d 195, 196, 627 N.Y.S.2d 4).”] In a case based on facts similar to this one, the Appellate Division, First Department, affirmed the dismissal of a complaint, holding that the tenant of the store abutting the site of the accident had “demonstrated that it did not create the alleged defect through any special use of the sidewalk or otherwise (see *Weiskopf v. City of New York*, 5 A.D.3d 202, 773 N.Y.S.2d 389 [2004]), and that it is not a landowner and therefore is not subject to a statutory obligation to maintain the sidewalk in “reasonably safe condition” (see *Administrative Code of City of N.Y. § 7-210..*” *ABRAMSON v. EDEN FARM, INC.*, 70 A.D.3d 514, 894 N.Y.S.2d 429, 2010 N.Y. Slip Op. 01418]. The Plaintiff’s opposing papers are more precatory than cogent. The motion by La Caravelle to dismiss the complaint is granted.

The motion by the City to dismiss the complaint is denied. Although the City argues lack of notice, the Plaintiff cites an earlier decision of mine, in which I referred to the existence of Big Apple maps raising a question of notice. The question of act has not been addressed in the moving and reply papers, much less answered.

This constitutes the decision and order of the court.

Dated: March 26, 2013


GEOFFREY D. WRIGHT

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NEW YORK
COUNTY CLERKS OFFICE