

<b>Diaz v 540 W. 145 LLC</b>
2019 NY Slip Op 33212(U)
October 24, 2019
Supreme Court, New York County
Docket Number: 154064/2016
Judge: Lyle E. Frank
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART IAS MOTION 52EFM

Justice

-----X

MILAGROS MEDINA DIAZ,

Plaintiff,

- v -

540 WEST 145 LLC, AXION MANAGEMENT LLC, SOLE,

Defendant.

-----X

SOLE

Plaintiff,

-against-

CITY OF NEW YORK

Defendant.

-----X

INDEX NO. 154064/2016
MOTION DATE 10/23/2019
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

Third-Party
Index No. 595385/2017

The following e-filed documents, listed by NYSCEF document number (Motion 003) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 82, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98 were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the Decision/Order of the Court is as follows:

Defendant, The City of New York, (the "City") pursuant to CPLR 3212, moves this Court for an order granting summary judgment, dismissing the third-party complaint and all cross-claims. The City states that under 7-210 of the Administrative Code of the City of New York ("7-210"), the City is not liable for plaintiff's injuries. For the reasons set forth below, this Court grants the City's motion for summary judgment in its entirety and dismisses the third-party action.

Plaintiff alleged that on April 12, 2016, she tripped and fell on the sidewalk in front of a property addressed as 540 West 145h Street, New York, New York.

Photographs of the sidewalk abutting 540 West 145h Street, were marked at the deposition and none of the photos depict a tree well. Further, plaintiff testifies that she did not see a tree in the area, nor did she fall on the curb, rather plaintiff fell on the sidewalk flag.

### **Summary Judgment Standard**

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562, 427 [1980].

The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 AD2d 331 [1<sup>st</sup> Dept 1984] *aff'd* 65 NY2d 732 [1985].

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]. Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]. Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957].

**Administrative Code § 7-210**

Section 7-210 provides in pertinent part that “the owner of real property abutting any sidewalk, including, but not limited to; the intersection quadrant for corner property shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition.” *NY Admin Code* §7-210.

Also, “[n]otwithstanding 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. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.” *Id.*

To determine if the City is liable under 7-210, the court will look at: (1) the location of the sidewalk where the alleged accident transpired; (2) the non-City ownership of the real property that abuts the location where the alleged accident occurred; and (3) the non-exempt building classification of the abutting property. *Id.*

Therefore, the City makes out *prima facie* entitlement to summary judgment by establishing that the location of an occurrence meets the definition of section 7-210, which the City has established.

In opposition to the City’s motion, Sole attempts to label the location of the accident a tree well which would render §7-210 inapplicable. However, third-party plaintiff has provided no admissible evidence to support this contention. It is well established that a motion for summary


judgment may not be defeated by mere speculation. Consequently, third-party plaintiff has failed to raise a triable issue of fact. Notably, plaintiff had no position on the City's motion.

Accordingly, it is hereby

ORDERED that the City's motion is granted in its entirety and the third-party complaint and all cross-claims are dismissed as against the City of New York; and it is further

ORDERED that the third-party action is severed, and the action shall continue under the original index number; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

<u>10/24/2019</u> DATE		 LYLE E. FRANK, J.S.C. <b>HON. LYLE E. FRANK</b> J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input checked="" type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE