

**Saretsky v M&C N.Y. (Times Square) Eat II, LLC**

2020 NY Slip Op 30201(U)

January 27, 2020

Supreme Court, New York County

Docket Number: 161874/2015

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 35EFM

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THEODORE SARETSKY, THEODORE SARETSKY,

INDEX NO. 161874/2015

Plaintiff,

MOTION DATE 12/20/2019

- v -

MOTION SEQ. NO. 007

M&C NEW YORK (TIMES SQUARE) EAT II, LLC, 18884  
FOOD CORPORATION, MCDONALD'S RESTAURANT  
#18884

**DECISION + ORDER ON  
MOTION**

Defendant.

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HON. CAROL R. EDMEAD:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 135, 136, 137, 138,  
139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 159  
were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

Upon the foregoing documents, it is

ORDERED that Defendant 18884 Food Corporation and McDonald's Restaurant  
#18884's motion for summary judgment (Motion Seq. 001) dismissing the Complaint as against  
them is granted; and it is further

ORDERED that the Clerk shall enter judgment accordingly and the action is severed and  
continues against the remaining defendant; and it is further

ORDERED that counsel for Defendant shall serve a copy of this decision, along with  
notice of entry, on all parties within 10 days of entry.

## MEMORANDUM DECISION

In this negligence action, defendant 18884 Food Corporation and McDonald's Restaurant #18884 ("McDonalds") moves for summary judgment pursuant to CPLR 3212.

### **BACKGROUND FACTS**

This motion arises out of an alleged trip and fall that occurred on March 29, 2015 on a sidewalk adjacent to premises located at 1651 Broadway in midtown Manhattan (NYSCEF doc No. 136, ¶ 19-21). Plaintiff Lorelle Saretsky was walking with her husband, Plaintiff Theodore Saretsky, and a friend when she fell into a hole in the sidewalk outside the premises (*id.*). The location of the sidewalk where Plaintiff fell was right outside McDonald's restaurant, located at West 51<sup>st</sup> Street and Broadway.

McDonalds now moves for dismissal of this action against it on the grounds that the lease between McDonalds and Defendant M&C New York (Times Square) Eat II ("M&C New York"), the owner of the subject property, unambiguously provides that M&C New York as the landlord is responsible for repair and maintenance of the public sidewalk. McDonald's also cites to the Administrative Code of the City of New York Section 7-210, which provides that property owners have a duty to maintain the public sidewalk and imposes no such duty on commercial tenants.

### **DISCUSSION**

Summary judgment is granted when "the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68

NY2d 320, 324 [1986]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also, *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). When the proponent fails to make a prima facie showing, the court must deny the motion, “regardless of the sufficiency of the opposing papers” (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

Under a motion to dismiss pursuant to CPLR 3211(a)(1), a party may dismiss a claim on the basis that “a defense is founded upon documentary evidence.” A motion to dismiss on the basis of such a defense may be granted “only where the documentary evidence utterly refutes [the complaint's] factual allegations” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; *Mill Financial, LLC v. Gillett*, 122 AD3d 98, 992 NYS2d 20 [1st Dept 2014]). In granting the dismissal, the Court must determine that “the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Mill Financial, supra*, citing *Art and Fashion Group Corp. v. Cyclops Production, Inc.*, 120 AD3d 436, 992 NYS2d 7 [1st Dept 2014]). To prevail on a motion pursuant to CPLR 3211(a)(1), the evidence offered by the moving party must be “unambiguous and of undisputed authenticity.” (*Fontanetta v Doe*, 73 AD3d 78, 86, 898 NYS2d 569, 575 [2d Dept 2010]).

Here, the documentary evidence provided by McDonalds makes a *prima facie* showing that McDonalds was under no obligation to maintain or repair the sidewalk adjacent to its store.

The lease entered into between McDonalds and M&C New York states that M&C New York, as the Landlord, is responsible for the maintenance of “all structural elements of the Demised Premises” (NYSCEF doc No. 151 at 125). The First Department has established that repairs to a public sidewalk are considered structural and commercial tenants have no obligation for the maintenance of public sidewalks unless specified in the relevant lease (*See Cucinotta v City of New York*, 68 AD3d 682 [1<sup>st</sup> Dept 2009], *O’Brien v Prestige Bay Plaza Development Corp*, 103 AD3d 428 [1<sup>st</sup> Dept 2013]). The lease also specifically outlines M&C New York’s obligation regarding public sidewalks, stating:

“(f) Maintenance of Sidewalks; Cost Sharing: Landlord shall put, keep and maintain the sidewalks and curbs adjoining the Demised Premises in a clean and orderly condition, free of debris, rubbish, snow, ice, and unlawful obstruction. Neither tenant nor any subtenant shall deposit any debris, rubbish or other material creating an obstruction on the sidewalk surrounding the structure.”

(NYSCEF doc No. 151 at 126-127).

The lease thus unambiguously demonstrates that McDonalds was under no contracted obligation to maintain and repair the sidewalk involved in this alleged accident. As M&C New York has introduced no evidence indicating any burden-shifting provision in the agreement, McDonalds has met its burden of establishing that the lease shoulders liability solely with M&C New York (*see Cucinotta*, 68 AD3d 682). McDonalds was also under no statutory obligation. Under the New York City Administrative Code, property owners have a non-delegable duty to maintain abutting sidewalks in a reasonably safe condition (Administrative Code §7-210). The code imposes no such requirement on commercial tenants, and therefore tenants can only have an obligation if their contract with the landlord specifies as such. M&C New York does not contest the fact that it is owner of the subject premises (NYSCEF Doc No. 155). Therefore, it

cannot contest the argument that McDonalds assumed no duty to maintain or repair the sidewalk and thus it cannot be subject to liability for damages allegedly suffered by Plaintiff.

In its opposition to McDonalds' motion for summary judgment, Plaintiff argues that the documentary evidence was not provided in admissible form, as McDonalds provided no affidavit or deposition testimony to authenticate the documents or signatures appearing therein, which is required to ascertain the reliability of documents submitted in support of a summary judgment motion (*IRB-Brasil Resseguros S.A.,v. Portobello International Limited*, 84 AD3d 637 [1st Dept. 2011]). However, subsequent to the filing of Plaintiff's opposition, McDonalds submitted an affidavit wherein their Senior Paralegal attested to the accuracy of the documents submitted and noted they were in effect on the date of the accident (NYSCEF doc No. 161). The documents thus may properly be considered.

The only other argument proffered by Plaintiff is that the motion is premature, as discovery is incomplete and witnesses of M&C New York and McDonalds have not yet been produced for deposition. However, this argument is of no moment as McDonalds is relying on unrefuted documentary evidence in its argument, and Plaintiff has not indicated why deposition testimony would undermine McDonalds' prima facie case that it had no duty to maintain the sidewalk.

As the documentary evidence introduced by McDonalds unambiguously supports its prima facie showing that it had no duty to maintain or repair the sidewalks involved in the underlying accident, the Court finds McDonalds has demonstrated its entitlement to summary judgment and shall be dismissed from this case.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Defendant 18884 Food Corporation and McDonald's Restaurant #18884's motion for summary judgment (Motion Seq. 001) dismissing the Complaint as against them is granted; and it is further

ORDERED that the Clerk shall enter judgment accordingly and the action is severed and continues against the remaining defendant; and it is further

ORDERED that counsel for Defendant shall serve a copy of this decision, along with notice of entry, on all parties within 10 days of entry.

*[Handwritten Signature]*  
20200128151326 CED:MEAD7AF883DE4AD14825B43858557564E013

1/27/2020  
DATE

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CAROL R. EDMEAD, 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"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
				REFERENCE