

<b>Odell v New York City Police Dept.</b>
2021 NY Slip Op 31687(U)
May 21, 2021
Supreme Court, New York County
Docket Number: 151752/2017
Judge: Lyle E. Frank
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LYLE E. FRANK PART 52**

*Justice*

-----X

JUDITH ODELL, CHARLES ODELL,  
Plaintiff,

INDEX NO. 151752/2017

MOTION DATE 05/20/2021

MOTION SEQ. NO. 003 004

- v -

NEW YORK CITY POLICE DEPARTMENT, CITY OF NEW  
YORK, LITTLE ITALY MERCHANTS ASSOCIATION, INC.,

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

NEW YORK CITY POLICE DEPARTMENT, CITY OF NEW  
YORK

Third-Party  
Index No. 595375/2019

Plaintiff,

-against-

LITTLE ITALY MERCHANTS ASSOCIATIONS, INC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 90, 92, 93, 94, 95, 96, 97, 98, 106, 111, 112

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 99, 100, 101, 102, 103, 104, 105, 107, 108, 109, 113

were read on this motion to/for JUDGMENT - SUMMARY.

This is an action to recover damages from injuries allegedly sustained as a result of a trip and fall. Plaintiff alleges that on June 13, 2016 she tripped and fell over an improperly placed metal barrier. Defendant/third-party defendant, Little Italy Merchants Associations, Inc. (LIMA), move for summary judgment on the grounds that the metal barriers are not inherently dangerous, and their location was open and obvious. Defendants/third-party plaintiffs, New

York City Police Department and City of New York (City) move for summary judgment on the grounds that the City did not have control over the metal barrier in question. Based on the reasons set forth below, the City's motion is granted in its entirety and LIMA's motion is denied.

It is a well-established principle that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]. As such, 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]. Courts have also recognized that 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.

### **The City's Motion**

The City has established a *prima facie* entitlement to judgment as a matter of law. A plaintiff must establish that a defendant owed a duty of care and then breached that duty to that plaintiff. *Turcotte v Fell*, 68 NY2d 432, 502 [1986]. Furthermore, if a party does not own, control, occupy, or have a special use for the property where the alleged defective or dangerous condition existed, then that party cannot be held liable for injuries caused by the defective or dangerous conditions. *Minot v City of New York*, 230 AD2d 719 [2d Dept 1996]. Lastly, if a movant proffers sufficient evidence to demonstrate an absence of any material issues of fact, then the movant has met their burden to make a *prima facie* showing of entitlement as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].

Here, the testimony and documentary evidence establish that the metal barriers were being used by LIMA. Accordingly, the City has established that it did not owe a duty of care to plaintiff.

### **LIMA's Motion**

LIMA primarily argues that the metal barriers on the sidewalk were not hidden, obvious, and not inherently dangerous. In support of this position, LIMA contends that it was not using the metal barriers on the date of the incident, did not receive any complaints regarding the barriers and did not have notice of or create a dangerous or hazardous condition.

The Court finds that there is a question of fact as to cause of plaintiff's accident. It is undisputed that LIMA was permitted to use the metal barricades in question for a specified period, that includes the date of the incident. LIMA was responsible for the placement and storage of the barricades while the permit was active. Moreover, the testimony by a witness for LIMA indicated that while it was the procedure of LIMA to store these barricades, the witness could not recall if the barricades were stored prior to the accident. There is a question of fact as to LIMA's negligence with respect to the placement of the metal barricades.

Moreover, the Court does not find that the barriers were open and obvious and not unreasonably dangerous as a matter of law. While in some instances summary judgment would be appropriate where metal barricades caused a plaintiff's accident, the Court does not find this is such a case. The plaintiff testified that she saw a barricade that was parallel to the curb, and that it was close to the crosswalk line, Additional barricades were not flush to each other, and at least one was jutting out onto the sidewalk. Based on this record, in the light most favorable to the plaintiff, a question of fact exists for a finder of fact whether such barricades constituted an unreasonably dangerous condition. Accordingly, it is hereby

ORDERED that defendants/third-party plaintiffs', New York City Police Department and City of New York, motion for summary judgment is granted in its entirety and the complaint and all cross-claims are dismissed as to those entities, with the third party action dismissed as moot; and it is further

ADJUDGED that defendant's, Little Italy Merchants Associations, Inc., motion is denied, and it is further

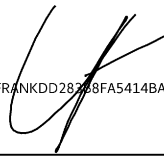
ORDERED that the Clerk of the Court is directed to enter judgment accordingly in favor of defendants New York City Police Department and the City of New York; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissals and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

  
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5/21/2021  
 DATE

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 LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE