

**Danoff v Harry W. Lengsfeld II Revocable Trust**

2022 NY Slip Op 33375(U)

October 6, 2022

Supreme Court, New York County

Docket Number: Index No. 158082/2020

Judge: J. Machelle Sweeting

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. J. MACHELLE SWEETING PART 62**

*Justice*

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MARCIA DANOFF,

Plaintiff,

- v -

THE HARRY W. LENGFIELD II REVOCABLE TRUST,  
HARRY W. LENGFIELD, TRUSTEE, MICHELE BEINY  
HARKINS, MICHELE BEINY, INC., CITY OF NEW YORK

Defendants.

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INDEX NO. 158082/2020

MOTION DATE 04/06/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

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

In the underlying action, plaintiff alleges to have fallen and sustained injuries in front of residences located at 53, 53A and 55 East 82nd Street in New York County.

Pending before the court is a motion filed by The Harry W. Lengsfeld II Revocable Trust and Harry W. Lengsfeld, Trustee (collectively, the "Trust"), which owns 55 East 82nd Street (the "subject property"). The Trust seeks summary judgment, dismissing the claims against them, based on the fact that the plaintiff tripped on the sidewalk and the Trust is entitled to exemption pursuant to Section 7-210 (a)(3) of the Administrative Code of the City of New York.

### Standard for Summary Judgment

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 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1<sup>st</sup> Dept. 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 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 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 A.D.2d 520 [Sup. Ct. App. Div. 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 N.Y.2d 395 [NY Ct. of Appeals 1957]).

The proponent of a summary judgment motion must make 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 failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, “We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

### The Trust’s Prima Facie Case

The Trust argues that although the subject property located at 55 East 82nd Street is listed in the zoning documents as a two-family residence, in reality there is only one kitchen and the family of Mr. Lengsfeld, the Trustee, has occupied the residence as a single-family residence since 2017. The Trust argues that Mr. Lengsfeld does not rent the property, does not use the property for any commercial purposes, and the family has never done any work to the sidewalk or planted any trees in the area where the plaintiff alleges to have fallen. Accordingly, the Trust argues, they are exempt from any duty to maintain the public sidewalk and owed no duty to plaintiff in connection with the subject accident.

In support of their argument, the Trust attaches, *inter alia*, a copy of the deed to the residence (NYSCEF Document #42) and an Affidavit by Mr. Lengsfeld, (NYSCEF Document #41), that states, in substantive part:

1. I am the Trustee/Executor of the Harry W. Lengsfeld, II Revocable Trust The Trust was created for probate purposes.
2. The Trust is the owner of the property located at 55 East 82"d Street, New York, New York 10028 ("The Property").
3. I purchased the property in 2016 and the property was placed into the Trust.

4. There is a townhouse situated on the property which is a single-family residence. The house is listed as a two family house but there is only one kitchen in the residence and we have used the residence exclusively as a single family home.

5. In 2017, I moved into the residence with my family and we have occupied the residence since that time.

6. We do not rent any portion of the residence and have never used the residence for commercial purposes.

7. There is a concrete sidewalk located in front of the residence.

8. We have never done any work on the public sidewalk. Additionally, we do not have driveway and have not planted any trees in the area of the sidewalk in front of the residence.

9. Additionally, we never received any complaints about the sidewalk.

[...]

Section 7-210 of the Administrative Code of the City of New York, states 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.” *N.Y. Admin. Code, N.Y.C., N.Y. §7-210 (2003)*.

The section further indicates that “[t]his subdivision shall not apply to 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.” *Id.* 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.” *Id.*

Here, the Trust has submitted evidence, including a sworn Affidavit from Mr. Lengsfeld, that the subject property is a one or two-family residential real property, that is occupied by the owner of the property, and is used exclusively for residential purposes. Given this, the court finds that the Trust has satisfied their *prima facie* burden for summary judgment, and the burden now shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact.

### Opposition

In opposition, plaintiff argues, first, that this motion is premature, as the Trust failed to provide a response to plaintiff's discovery demands, and the moving defendants have not yet been deposed. Plaintiff argues, second that:

[C]onspicuously omitted from the defendant's affidavit is a statement that he regularly occupies the property, he only states that he moved onto the property or residence with family. [...] Here, the statement in defendant's affidavit that his family moved onto the property in 2017 does not relieve him of his obligation to show that he regularly occupies the property or residence.

Plaintiff argues, third, that using a property as a "home office" and taking a related income tax deduction is proof that the property is not exclusively used for residential purposes, and here, Mr. Lengsfeld's Affidavit did not state that he does not use the property as a "home office" in whole or in part.

Defendant Michele Beiny Harkins (“Harkins”)<sup>1</sup> also submitted opposition papers, and argues:

It is unclear based upon the affidavit attached to the defendants’ motion whether the defendant or their Trust meets the residency requirement as well as the exceptions to NYC Administrative Code 7-210. Only with further discovery will we be able to determine whether the facts surrounding the use of their property meets the exceptions set forth therein.

[...]

The motion should be denied as the movant or their predecessor could have caused or created the condition complained of or hired someone who caused or created the condition complained of by the plaintiff. Further, parties have not received a discovery response from The City of New York which would address permits opened in the area where the accident is alleged to have occurred, documents which would either support or dispel the arguments of the movant regarding work done in the area of the accident as well as special use allegations.

The court finds the arguments made in opposition to be unavailing and insufficient to rebut the *prima facie* case made by the Trust.

With respect to plaintiff’s argument that Mr. Lengsfield and family may not regularly occupy the subject property, this is belied by the plain language of the Affidavit, in which Mr. Lengsfield stated that in 2017, he moved into the residence with his family and they “have occupied the residence since that time.” With respect to plaintiff’s argument that Mr. Lengsfield may use the subject property as a home office, this, too is belied by the plain language of the Affidavit, in which Mr. Lengsfield stated that he and his family had “never used the residence for commercial purposes.”

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<sup>1</sup> This defendant should not be confused with defendant MICHELE BEINY, INC., who is represented by different counsel than is defendant Harkins.

With respect to plaintiff's argument that this motion is premature and Harkin's argument that further discovery is needed "to determine whether the facts surrounding the use of their property meets the exceptions set forth therein," neither party specifies what additional discovery is necessary, or in the sole possession of the Trust. Further, neither party provides any good-faith basis to rebut the Trust's central argument that the subject property is a residential real property that is owner occupied, and is used exclusively for residential purposes.

Finally, with respect to Harkin's argument that the parties have not received a discovery response from The City of New York which would address permits opened in the area, this falls under the category of "mere conclusions, expressions of hope or unsubstantiated allegations or assertions" that the New York Court of Appeals has stated is insufficient to rebut a *prima facie* case for summary judgment.

As the Trust properly argues in its Reply, Mr. Lengsfeld is the trustee of the Trust and he averred and submitted evidence to establish that the subject property is a single-family home, which is not used commercially; that there was no work done on the sidewalk; and the residents did not derive a special use from the sidewalk. This admissible evidence is uncontradicted on the record, and is sufficient to establish the moving defendants' entitlement to summary judgment.

Conclusion

Accordingly, it is hereby:

**ORDERED** that Motion #002, filed by The Harry W. Lengsfield II Revocable Trust and Harry W. Lengsfield, Trustee (collectively, the “Trust”) is GRANTED; and it is further

**ORDERED** that the complaint and any cross-claims against the Trust are dismissed with prejudice.

<u>10/6/2022</u> DATE		 _____ J. MACHELLE SWEETING, 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 type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE