

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ERNEST F. HART IAS PART 6  
Justice

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ROSA CALLE-GONZALEZ,

Plaintiff(s),

-against-

MIKHAIL BORUKHOV, VERONIKA NAZGINOVA,  
and THE CITY OF NEW YORK,

Defendant(s).  
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JUSTICE ERNEST F. HART

Index No.: 4753/2016

Motion Date:  
June 25, 2018

Cal. No.: 85

Mot. Seq. No.: 2



The following papers numbered 1 to 9 read on this motion by Defendants MIKHAIL BORUKHOV and VERONIKA NAZGINOVA for an Order, pursuant to CPLR §3212, granting summary judgment in favor of said Defendants and dismissing Plaintiff's Complaint and any and all cross-claims as against them.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits .....	1 - 6
Memorandum of Law in Support .....	7
Answering Affidavits-Exhibits.....	8 - 9
Replying Affidavits.....	

Upon the foregoing papers, it is ordered that the motion by Defendants MIKHAIL BORUKHOV and VERONIKA NAZGINOVA for an Order, pursuant to CPLR §3212, granting summary judgment in favor of said Defendants and dismissing Plaintiff's Complaint, is hereby granted.

Plaintiff commenced this action to recover for personal injuries she allegedly sustained on December 3, 2015 as a result of a trip and fall on an alleged raised condition situated on a public sidewalk abutting Defendants MIKHAIL BORUKHOV and VERONIKA NAZGINOVA's premises located at 58-05 187th Street, Fresh Meadows, New York 11365.

A Summons and Verified Complaint was filed by Plaintiff on April 20, 2016. Defendants MIKHAIL BORUKHOV and VERONIKA NAZGINOVA ("Defendant Homeowners") now move for summary judgment on the issue of liability and argue that they fall within the exception

recognized under § 7-210 of the New York Administrative Code as the owners of a one-family owner-occupied residence used exclusively for residential purposes.

#### **Homeowners Exemption Under § 7-210**

Pursuant to § 7-210 of the New York Administrative Code, landowners are responsible for injuries sustained by pedestrians on sidewalks that abut the premises. However, residential homeowners are exempt from liability when the property is a one-, two-, or three-family residential property ("homeowners exemption"). The homeowner's exemption requires that the property: (i) be owner occupied, in whole or in part, and (ii) is used exclusively for residential purposes. Vucetovic, et. al. v. Epsom Downs Inc., 10 N.Y.3d 517, 890 N.E.2d, 860 N.Y.S.2d 429 (2008). Here, the record reflects that Defendant Homeowners are the owners of the subject one-family residential property which is also used exclusively for residential purposes. As such, it is apparent that these Defendants fall under this exemption.

#### **Creation of a Dangerous Condition and Special Use**

It also cannot be said that the Defendant Homeowners created the allegedly dangerous condition. The exemption does not apply when the landowner actually created the dangerous condition, made negligent repairs thereby causing the condition, created the dangerous condition through a special use of the sidewalk, or violated a statute or ordinance imposing liability on the abutting landowner for failing to maintain the sidewalk. Crawford v. City of New York, 98 A.D.3d 935, 950 N.Y.S.2d 743, 745 (2d Dept. 2012); Smirnova v. City of New York, 64 A.D.3d 641, 882 N.Y.S.2d 513 (2d Dept. 2009).

According to Defendant Homeowners' affidavits, at no time prior to the date of the incident, did they or anyone on their behalf make any changes or perform any work on the portion of the sidewalk where Plaintiff claimed to have fallen. Nor has there been evidence presented indicating the contrary. The record, therefore, fails to raise an issue of fact as to whether Defendant Homeowners created the dangerous condition.

Additionally, there is no indication that Defendant Homeowners made "special use" of the sidewalk that would preclude them from the exemption. The principle of "special use" only imposes liability on an abutting landowner where he puts part of a public way to special use for his own benefit. Minott v. City of New York, 230 A.D.2d 719, 645 N.Y.S.2d 879 (2d Dept. 1996); Balsam v. Delma Eng'g Corp., 139 A.D.2d 292, 532 N.Y.S.2d 105 (1st Dept. 1990). Special use generally involves the installation of some object in the street or on the sidewalk or "some variance in the construction

thereof." Id. Here, Plaintiff does not dispute the Defendant Homeowners' assertion that they did not make "special use" of the sidewalk.

**Summary Judgment Standard**

Summary judgment is a drastic remedy, which deprives a litigant of his or her day in court, and should only be granted where there is no doubt as to the absence of triable issues. See Kolivas v. Kirchoff, 14 A.D.3d 493 (2d Dep't. 2005); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). The Court's function in determining a motion for summary judgment is not to resolve issues of fact or determine matters of credibility but to determine whether such issues exist. See Scott v. Long Island Power Auth., 294 A.D.2d 348 (2d Dep't. 2002); Anyanwu v. Johnson, 276 A.D.2d 572 (2d Dep't. 2000). In viewing the evidence, the Court must accept the plaintiff's pleadings as true and the proof must be read in the light most favorable to the plaintiff, as the party opposing the motion. See Negri v. Stop & Shop, Inc., 65 N.Y.2d 625 (1985).

The Plaintiff opposes Defendants' motion only to the extent that if summary judgment is granted in favor of the moving Defendants, the responsibility of maintaining the sidewalk in a reasonably safe condition rests upon the defendant THE CITY OF NEW YORK. Plaintiff, however, does not refute any of Defendant Homeowners' assertions or defenses. Plaintiff, in opposition, agrees that Defendant Homeowners own the one-family dwelling located at 58-05 187th Street, Fresh Meadows, New York 11365. Plaintiff also asserts that there is no evidence that the Defendant Homeowners made special use of the sidewalk. Moreover, Plaintiff concedes that the Defendant Homeowners cannot be said to be responsible for Plaintiff's accident.

Based upon the aforementioned, Defendant MIKHAIL BORUKHOV's and VERONIKA NAZGINOVA's motion for summary judgment on the issue of liability is hereby granted, and the Complaint is dismissed as against MIKHAIL BORUKHOV and VERONIKA NAZGINOVA.

Dated: August 27, 2018

  
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 ERNEST V. HART, J.S.C.

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