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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN
Justice

Part 10

FILED
AUG 30 2017
COUNTY CLERK
QUEENS COUNTY

Tammy McNamee,

Index
Number: 6518/14

Plaintiff,

- against -

Motion
Date: 8/1/17

The City of New York and Elizabeth
O'Connor,

Motion
Cal. Number: 77

Motion Seq. No.: 2

Defendants.

The following papers numbered 1 to 8 read on this motion by
defendant, Elizabeth O'Connor, for summary judgment.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition.....	5-6
Reply.....	7-8

Upon the foregoing papers it is ordered that the motion is
decided as follows:

Motion by O'Connor for summary judgment dismissing the
complaint and all cross-claims against her is granted.

Plaintiff allegedly sustained injuries as a result of tripping
and falling upon the public sidewalk in front of 71-22 66th Drive
in Queens County on February 28, 2013. The un rebutted evidence
presented on this motion is that said abutting property is a
residential home of less than four families and is, and was on the
date of the accident, owned and occupied by O'Connor as her
residence. The un rebutted evidence also is that O'Connor did not
perform any work or do anything to the sidewalk and, therefore did
not create the cracked condition of the sidewalk. Moreover, the
record on this motion demonstrates that the area of sidewalk did
not abut O'Connor's driveway and there is no issue of a special
use. Therefore, plaintiff has established a prima facie entitlement

to summary judgment by proffering undisputed evidence that she bore no duty of care to plaintiff for the condition of the sidewalk, either statutorily under §7-210 of the Administrative Code or under principles of common law negligence.

Plaintiff's counsel's speculative contention in opposition that O'Connor may have created the broken condition of the sidewalk by pulling weeds out of the existing cracks raises no triable issue of fact. Moreover, contrary to plaintiff's counsel's argument that O'Connor failed to show objective proof that her abutting property was a residential property of less than four families, and thus exempt from liability under §7-210, her deposition testimony that the property was a one-family home occupied by her was sufficient, admissible, evidence establishing a prima facie entitlement to summary judgment. The burden shifted to plaintiff to rebut O'Connor's prima facie showing by proffering evidence in admissible form that the property was not a residential property of less than four families. In this regard, plaintiff's counsel could have easily retrieved the certificate of occupancy of the property as proof of the number of residential units and/or proof of its designation as not an exclusively residential property. He has failed to do so.

Accordingly, the caption of this action is amended to read as follows:

-----X
Tammy McNamee,

Plaintiff,

- against -

The City of New York,

Defendant.
-----X

Index
Number: 6518/14

Dated: August 21, 2017



KEVIN J. KERRIGAN, J.S.C.

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QUEENS COUNTY