

Aller v City of New York
2008 NY Slip Op 33162(U)
November 21, 2008
Supreme Court, New York County
Docket Number: 108480/04
Judge: Matthew F. Cooper
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MATTHEW E. COOPER
HON. PAUL G. FEINMAN

PART 52

Index Number : 108480/2004
ALLER, NELIDA
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. 108480/2004
MOTION DATE _____
MOTION SEQ. NO. 005
MOTION CAL. NO. _____

this motion to/for summary judgment

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

NOV 25 2008

COUNTY CLERK'S OFFICE
NEW YORK

MOTION AND CROSS MOTION(S) ARE DECIDED
IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 11/21/08

MA
MATTHEW F. COOPER L.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X
NELIDA ALLER,

Plaintiff,

-against-

THE CITY OF NEW YORK, MICHAEL S.
APPELBAUM, GEORGE HEINRICH, FEROMA
CONTRACTING, INC., and C&E PLASTER &
CONSTRUCTION CO., INC.,

Defendants.
-----X

Index Number 108480/04
Mot. Seq. No. 004 & 005

DECISION AND ORDER
FILED
NOV 25 2008
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Papers and exhibits considered in review of the motions in Nelida Aller v. City of New York, et al.:

Feroma Contracting, Notice of Motion	1
Feroma Contracting, Memorandum of Law in Support of Motion	2
Heinrich, Notice of Motion	3
C&E Plaster, Notice of Cross-Motion	4
Appelbaum, Notice of Cross-Motion	5
Feroma, Affirmation in Reply to Appelbaum's Motion	6
Feroma, Affirmation in Partial Opposition and Reply to C&E Plaster's Cross-Motion	7
Aller, Affidavit in Opposition to All Motions for SJ	8
C&E Plaster, Affirmation in Reply to All Cross-Claims and in Support of SJ	9
Appelbaum, Affirmation in Reply to Aller's Affidavit in Opposition	10
Feroma, Affirmation in Reply to Aller's Affidavit in Opposition	11
Heinrich, Affirmation in Reply to Aller's Affidavit in Opposition	12

Matthew F. Cooper, J:

Plaintiff, Nelida Aller, has brought this action against the defendants for injuries sustained when she allegedly tripped and fell on a sidewalk in front of two residential buildings on Manhattan's Upper East Side. All defendants, with the exception of the City of New York ("the City"), move either by direct or cross-motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross-claims as against them. In addition, defendant Feroma Contracting, Inc. ("Feroma") moves for summary judgment against C&E Plaster & Construction Co., Inc. ("C&E Plaster") in the consolidated third-party action.

Background

On October 8, 2003, plaintiff was walking on the sidewalk on East 83rd Street towards Fifth Avenue. Plaintiff alleges she sustained injuries when she tripped on an uneven and/or cracked portion of the sidewalk, somewhere between 19 East 83rd Street and 21 East 83rd Street. Feroma Mot. Ex. R, Aller EBT ("Aller") 8:21-9:16. Plaintiff subsequently brought a cause of action for negligence against the City; the owner of 21 East 83rd Street, Michael Appelbaum ("Appelbaum"); and the owner of 19 East 83rd Street, George Heinrich ("Heinrich"). Plaintiff then amended her complaint adding defendant Feroma, a contractor hired by Appelbaum in 2000. Feroma then filed a third-party action against its subcontractor, C&E Plaster, after which plaintiff again amended her complaint to include the City, Appelbaum, Heinrich, Feroma and C&E Plaster as defendants.

In 2000, Appelbaum purchased the property located at 21 East 83rd Street. Feroma Mot. Ex. N, Appelbaum EBT ("Appelbaum") 6:12-14. Appelbaum hired Feroma in mid-2000 to renovate the multi-family dwelling into a single-family home. Appelbaum 6:24-7:10-12. Feroma,

strictly an interior renovation company, then hired C&E Plaster to conduct all required exterior work, including the cement work in the front and rear of the building and the replacement of the abutting sidewalks. Feroma Mot. Ex. P, Feniello EBT (“Feniello”) 7:24-8:5, 10:20-12:3. C&E Plaster removed the old concrete sidewalks in front of 21 East 83rd Street and replaced them with new concrete sidewalks. Feroma Mot. Ex. Q, Cervini EBT 8:22-23. Work on the building was completed by Feroma sometime in December of 2001. Feniello 17:16-23. After that date, no employee of Feroma returned to 21 East 83rd Street nor were any complaints made about the work performed. Feniello 17:16-13, 26:6-9. Appelbaum testified that he was satisfied with Feroma’s work and noticed no cracks or other defects in the sidewalk. Appelbaum 10:8-15. Heinrich testified that the sidewalk in front of his building, 19 East 83rd Street, had also been replaced during 1999 or 2000. Heinrich Mot. Ex. J, Heinrich EBT 7:6-8.

Plaintiff’s deposition testimony revealed uncertainty as to the specific circumstances surrounding her fall. Plaintiff stated she did not see what caused her to fall prior to the fall itself. It was only after she had fallen, been helped up by bystanders, and placed in a chair that she says she was able to observe the “unlevel” area of the sidewalk. Aller 39:8, 49:18-23. Moreover, plaintiff could not conclusively identify the specific building in front of which the fall occurred nor was she able to locate the portion of the sidewalk on which she was walking when she tripped. Instead, she identified three alternative locations on the sidewalk where the fall may have occurred, including four inches from the building, four inches from the curb, and in the middle of the sidewalk. Aller 11:22-24; 25:22-26:2; 58:9-14.

In their motions for summary judgment, defendants Feroma, Appelbaum, Heinrich and C&E Plaster argue no triable issue of fact exists allowing the plaintiff to proceed on her claim of

negligence. The moving parties maintain that plaintiff's entire claim is speculative as to the cause of the injury and the location of the fall and therefore cannot survive a motion for summary judgment.

Legal Analysis

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form which recites the material facts and demonstrates that the cause of action lacks merit. *GTF Mktg. v. Colonial Aluminum Sales*, 66 NY2d 965, 967 (1985). Once the moving party has met this burden, the party opposing the motion must introduce "facts sufficient to raise a triable factual issue." *Parks v. Greenberg*, 161 AD2d 467, 468-69 (1st Dept 1990). "Rank speculation is no substitute for evidentiary proof in admissible form that is required to establish the existence of a material fact and, thus, defeat a motion for summary judgment." *Kane v. Estia Greek Rest.*, 4 AD3d 189, 190 (1st Dept 2004), quoting *Sawh v. Schoen*, 215 AD2d 291, 293 (1st Dept 1995). A summary judgment motion, therefore, may not be defeated merely by surmise, conjecture, or speculation. *Grullon v. City of New York*, 297 AD2d 261, 264 (1st Dept 2002). Further, the Appellate Division for the First Department has held that "where the facts proven show that there are several possible causes of an injury, for one or more of which the defendant was not responsible, and it is just as reasonable and probable that the injury was the result of one cause as the other, plaintiff cannot have a recovery, since he has failed to prove that the negligence of the defendant caused the injury." *McNally v. Sabban*, 32 AD3d 340, 341 (1st Dept 2006), quoting *Lynn v. Lynn*, 216 AD2d 194,195 (1st Dept 1995).

In the case at hand, plaintiff testified that she did not see or know of the cause of her fall, and it was only after the fall that she was able to survey the sidewalk and speculate as to the

cause. Plaintiff was unable to identify conclusively where the accident occurred or the portion of the sidewalk on which she fell. Based on plaintiff's inconclusive and speculative testimony, it is clear that the plaintiff is presuming that the crack and/or uneven portion of the sidewalk, seen upon her review of the landscape after her fall, was the proximate cause of the accident, rather than some other cause. Plaintiff has introduced no concrete evidence establishing that the uneven sidewalk was the proximate cause of her injury. Such speculation regarding proximate cause is insufficient to establish a triable issue of fact and cannot withstand a summary judgment motion. *Kane*, 4 AD3d at 190; *see Dapp v. Larson*, 240 AD2d 918 (3d Dept 1997)(holding that where a plaintiff did not see the cause of her fall and can only assume that the deteriorated sidewalk was the cause, such conjecture and speculation lacks probative value and does not raise a triable issue of fact); *see also Taub v. Art Students League of N.Y.*, 39 AD3d 259, 260 (1st Dept 2007) (holding that where a plaintiff surmises as to the cause of her fall upon seeing metal sticking out in the hallway after the incident, probative evidence does not exist and cannot withstand a summary judgment motion). Although there exists case law in which a defendant's summary judgment motion was deemed improper where ownership of the sidewalk containing the defect was contested, the question of ownership in this case is irrelevant as the plaintiff is unable to establish the cause or location of her fall. *But see Soto v. Lime Tree Gourmet Deli, et al.*, 18 AD3d 284 (1st Dept 2005).

Since the only evidence presented by the plaintiff is speculative as to the cause of the fall, and because she is unable to sufficiently identify the building in front of which the accident took place or the portion of the sidewalk she tripped over, defendants' motions for dismissal must be granted. Although each defendant, in moving for summary judgment, asserts a reason unique to

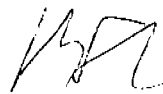
that defendant's particular circumstances excusing liability, all join in the common argument that the plaintiff failed to establish the cause and location of the fall. Having found this argument persuasive, the court need not address defendants' other arguments or cross-motions against each other.

In light of the foregoing, it is therefore

ORDERED that the motions for summary judgment as against the plaintiff are granted and the complaint is dismissed as against Feroma Contracting, Inc., Michael Appelbaum, George Heinrich and C&E Plaster & Construction Co., Inc.; defendants' motions to dismiss the cross-claims for contractual and common law indemnification, breach of contract, and contribution are granted; Feroma Contracting, Inc.'s motion for summary judgment as against C&E Plaster & Construction Co., Inc. is denied as moot; and upon service upon him of this order and decision with notice of entry, the Clerk of the court is directed to enter judgment accordingly and sever the remainder of the action, which shall continue.

Dated: November 21, 2008

ENTER:



Matthew F. Cooper, J.S.C.

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