

Ruiz-Mendoza v City of New York

2013 NY Slip Op 30099(U)

January 11, 2013

Supreme Court, New York County

Docket Number: 107302/2010

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

PRESENT: _____
Justice _____

PART 5

Index Number : 107302/2010
RUIZ-MENDOZA, NORBERTO

INDEX NO. _____

vs
CITY OF NEW YORK

MOTION DATE _____

Sequence Number : 002

MOTION SEQ. NO. _____

DISMISS

CAL: #97

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

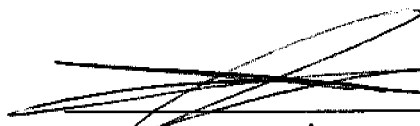
FILED
JAN 23 2013
COUNTY CLERKS OFFICE
NEW YORK

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 1-11-13

JAN 11 2013



HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

-----X
NORBERTO RUIZ-MENDOZA,

Plaintiff,

-against-

THE CITY OF NEW YORK and GRAY SEAL REALTY
INC.,

Defendant.

-----X
GRAY SEAL REALTY, INC.

Third-Party Plaintiff.

-against-

PAPA FRESH, INC.,

Third-Party Defendant.

-----X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....1,2.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS.....
EXHIBITS.....3-6.....
STIPULATIONS.....
OTHER.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Defendant City of New York, (hereinafter, "The City"), moves for an Order pursuant to

DECISION/ORDER

Index No.: 112730-12

Seq. No.: 002

107302/10

PRESENT:

Hon. Kathryn E. Freed

J.S.C.

FILED

JAN 23 2013

COUNTY CLERKS OFFICE
NEW YORK

C.P.L.R. § 3211, dismissing the complaint and any cross claims as against it and/or moves for an Order pursuant to C.P.L.R. § 3212, granting summary judgment. No opposition has been submitted by any of the other named parties.

The instant action emanates from an incident occurring on January 28, 2010, wherein plaintiff was struck in the head by a cellar vault door as he ascended the interior vault cellar steps of 594 Amsterdam Avenue, New York, New York, in the scope of his employment at Papa Johns Pizza.

Plaintiff subsequently commenced this action on June 14, 2010 with the service of a Summons and Complaint. The City joined issued by service of its Answer on June 23, 2010. On July 11, 2012, David Schloss, Senior Title Examiner with the New York Law Department, conducted a title search for 594 Amsterdam Avenue, and discovered that on the day of plaintiff's accident, record title was in Grey Seal Realty via a deed recorded on September 27, 1968. Additionally, a copy of this lease agreement was in effect between Grey Seal Realty and Papa Johns. On April 6, 2012, plaintiff served the parties with a notice to admit that this lease was in full force and effect on the date of the accident. In response, Third-Party defendant, Papa Fresh Inc., admitted that the lease was true and accurate and that it was in full force and effect on that date.

The City argues that it cannot be held liable for plaintiff's injury(ies), since it did not own, control or maintain the premises on the date of his accident. Therefore, it owed him no duty of care.

Conclusions of law:

Summary judgment is considered a "drastic" remedy (*see Andre v. Pomeroy*, 35 N.Y.2d 361 [1974]; *Martin v. Briggs*, 235 A.D.2d 192 [1st Dept. 1997]; *Chemical Bank v. West 195th Street Development Corp.*, 161 A.D.2d 218 [1st Dept. 1990]). In order to prevail on a summary judgment

motion, the movant must submit evidentiary proof in admissible form sufficient to establish a prima facie showing of entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). Once the movant demonstrates entitlement to judgment, the burden shifts to the opponent to rebut that prima facie showing (Bethlehem Steel Corp. v. Solow, 51 N.Y.2d 870, 872 [1989]). In opposing such a motion, the party must lay bare its evidentiary proof. “Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture, or speculation” (Morgan v. New York Telephone, 220 A.D.2d 728, 729 [2d Dept. 1995]; Zuckerman v. City of New York, *supra*).

“To impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it” (Sermos v. Gruppuso, 95 A.D.3d 985, [2d Dept. 2010] citing Dennehy-Murphy v. Nor-Topia Serv. Ctr., Inc., 91 A.D.3d 629 [2d Dept. 2009]; *see also* Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837-838 [1986]; Callan v. Structure Tone, Inc., 52 A.D.3d 334 [1st Dept. 2008]; Lewis v. Lower E. Side Tenement Museum, 40 A.D.3d 438 [1st Dept. 2007]; Raffa v. The City of New York, 100 A.D.3d 558 [1st Dept. 2010]).

In the case at bar, the Court has examined the subject deed, appended to the City’s papers as Exhibit “D,” and finds that record title of the property was in Grey Seal Realty Corp., pursuant to a deed recorded September 27, 1968.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendant City of New York’s motion for summary judgment is granted and it is further

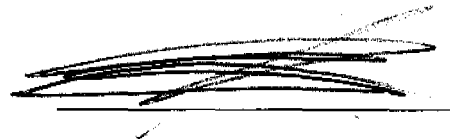
ORDERED that the complaint and any cross-claims against it are dismissed and it is further

ORDERED that the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Plaintiff shall serve a copy of this Order on all other parties and the Trial Support Office, 60 Centre Street, Room 158. Any compliance conferences currently scheduled are hereby canceled and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: January 11, 2013

JAN 11 2013



Hon. Kathryn E. Freed
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

FILED

JAN 23 2013

COUNTY CLERK'S OFFICE
NEW YORK