

Zang v New York City Tr. Auth.
2013 NY Slip Op 30839(U)
April 18, 2013
Supreme Court, New York County
Docket Number: 109723/05
Judge: Michael D. Stallman
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 4/23/2013
[* 1]
**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

Index Number : 109723/2005
ZANG, MILDRED
vs.
TRANSIT AUTHORITY
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 109723/05
MOTION DATE 1/23/13
MOTION SEQ. NO. 003

The following papers, numbered 1 to 7 were read on this motion for summary judgment

Notice of Motion; Affirmation — Exhibits A-Q [Affidavit] _____ | No(s). 1; 2-3
Answering Affirmation — Exhibits A-F _____ | No(s). 4
Replying Affirmation — Exhibits 1 [Affidavit]- 2 [Affidavit]-3 _____ | No(s). 5-7

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

FILED

APR 23 2013

COUNTY CLERK'S OFFICE
NEW YORK

HON. MICHAEL D. STALLMAN

Dated: 4/18/13
New York, New York


_____, J.S.C.

- MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):
1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
2. Check if 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: IAS PART 21**

-----X
MILDRED ZANG and ROBERT ZANG,

Plaintiffs,

Index No. 109723/05

-v-

Decision and Order

THE NEW YORK CITY TRANSIT AUTHORITY,
CF LEX ASSOCIATES A/K/A CF LEX CORP.,
BOSTON PROPERTIES, INC., LEXREAL ASSOCIATES
PARTNERSHIP, and LEXREAL ASSOCIATES.,

Defendants.
-----X

HON. MICHAEL D. STALLMAN, J.:

In this personal injury action arising out of a slip and fall on a stairway leading to the subway station at East 53rd Street and Lexington Avenue, defendants Boston Properties, Inc., Lexreal Associates Limited Partnership and Lexreal Associates (collectively the Boston parties) move for summary judgment dismissing the complaint and any cross claims against them, and plaintiff opposes (motion sequence 003). In motion sequence 004, defendant New York City Transit Authority (NYCTA) moves for summary judgment dismissing the complaint and any cross claims against it. Plaintiff opposes the motion, and the Boston parties partially oppose the motion. This decision addresses both motions.

BACKGROUND

Plaintiff Mildred Zang alleges that on June 8, 2004, she slipped and fell on a

step on a staircase which led from the plaza at 599 Lexington Avenue to the subway station at East 53rd Street and Lexington Avenue. The Boston parties allegedly own the commercial building and plaza at 599 Lexington Avenue, and pursuant an easement agreement with the NYCTA, the Boston parties performed maintenance, inspections and repairs of the plaza and staircase. The NYCTA controls and operates the subway station. Plaintiffs commenced this action against the NYCTA and the Boston parties. Plaintiff Mildred Zang's husband, Robert Zang, brings a loss of consortium claim.

According to counsel for the Boston parties, plaintiff never served defendant CF Lex Associates with process. (Lewbel Affirmation at fn. 1.) CF Lex Associates apparently did not move, serve an answer or otherwise participate in the litigation. Plaintiff did not seek to enter a default against CF Lex Associates. The Boston parties' motion for summary judgment was not made on behalf of CF Lex Associates; other than incorrectly asserting that CF Lex Associates was included in the Boston parties' motion, plaintiff does not address this service question. Accordingly, the action is deemed abandoned as against CF Lex Associates.

DISCUSSION

Motion Sequence 003

The Boston parties have met their prima facie burden for establishing judgment as a matter of law. “It is well settled that a defendant is entitled to summary judgment as a matter of law when a plaintiff provides testimony that he or she is unable to identify the defect that caused his or her injury.” (*Siegel v City of New York*, 86 AD3d 452, 454 [1st Dept 2011].) Defendants have established that plaintiff Mildred Zang did not know what she slipped on, and therefore, the Boston parties cannot be held liable for any of plaintiff’s injuries.

Plaintiff testified at her deposition that she does not know what she slipped on, or how she fell, and that the stairway was neither wet nor did it have any debris on it. (Lewbel Affirmation, Ex. K at 65-66, 71, 75, 79, 138, 139, 160.) Plaintiff further testified that she did not see any defects on the step she slipped on, but when she looked back she saw that the step was shiny, and it felt hot and slippery. (*Id.* at 74-75, 77, 139-140.) She further testified that it was not wet and there were no foreign substances on the step. (*Id.* at 139.) Plaintiff circled the area where she fell based on her recollection of which step she slipped on, not by identifying any defect on the step. (*Id.* at 137.) Moreover, it does not appear from the photograph that any defect existed. (*Id.*, Ex. P.) In this case, it is clear that plaintiff cannot

[* 5].

identify any defect which caused her alleged accident. Moreover, plaintiff cannot establish that her fall was caused by something other than “the inherently slippery condition of the floor.” (*DeMartini v Trump 767 5th Ave., LLC*, 41 AD3d 181, 182 [1st Dept 2007].)

Plaintiff argues that defendants submitted inadmissible evidence to support its motion for summary judgment, because plaintiff did not sign her deposition transcript. However, “[t]he fact that [plaintiff’s] admission was contained in an unsigned deposition transcript does not preclude its use as an admission against interest. (*Tower Ins. Co. of NY v Khan*, 93 AD3d 618, 619 [1st Dept 2012].)

Plaintiff also argues that there are triable issues because the Boston parties did not offer any evidence as to the last time the steps were inspected or cleaned.

However, the Boston parties have established entitlement to summary judgment because plaintiff has not identified an actionable defect.

Motion Sequence 004

The NYCTA has met its prima facie burden for establishing judgment as a matter of law. Plaintiff cannot identify any actionable defect. Therefore, the NYCTA cannot be held liable for any injuries plaintiff sustained. Plaintiff repeatedly testified at her deposition that she did not know what caused her to fall and that she did not see any debris or wetness on the stairs. (Coffey Affirmation,

Ex. G at 65-66, 71, 75, 79, 138, 139, 160.) She stated, "I landed on the floor, that's all I knew. I don't know how I got to the floor." (*Id.* at 71.) She further stated that "[i]t felt slick. It felt - - it was shiny. It was very slick, worn. It seemed like it was worn, slick and shiny. That's all I could see." (*Id.* at 75.) Plaintiff has not been able to identify an actionable defect, but only states that the step felt slippery and worn. "It is well settled that a defendant is entitled to summary judgment as a matter of law when a plaintiff provides testimony that he or she is unable to identify the defect that caused his or her injury." (*Siegel*, 86 AD3d at 454.) Furthermore, plaintiff cannot establish that her fall was caused by something other than "the inherently slippery condition of the floor." (*DeMartini*, 41 AD3d at 182.)

Plaintiff argues that the NYCTA has not submitted evidence in admissible form because plaintiff did not sign her deposition transcript. However, "[t]he fact that [plaintiff's] admission was contained in an unsigned deposition transcript does not preclude its use as an admission against her interest." (*Tower Ins. Co. Of NY*, 93 AD3d at 619.) Plaintiff further argues that there is an issue of fact as to whether the NYCTA created the defective condition, but does not offer evidence to show either a defective condition or that the NYCTA created it. Plaintiff has not been able to identify any defective condition. Therefore, this argument is

* 7]
moot.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of defendants Boston Properties, Inc., Lexreal Associates Limited Partnership, and Lexreal Associates for summary judgment is granted and the complaint and all cross claims are dismissed in their entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the motion of defendant New York City Transit Authority is granted and the complaint and all cross claims are dismissed in their entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

* 8]
ORDERED that the action is deemed abandoned as against defendant CF
Lex Associates a/k/a CF Lex Corp., and the Clerk is directed to enter judgment
accordingly in favor of said defendant.

Dated: April 16, 2013
New York, NY

ENTER:



J.S.C.

HON. MICHAEL D. STALLMAN

FILED
APR 23 2013
COUNTY CLERK'S OFFICE
NEW YORK