

Rodriguez v City of New York

2014 NY Slip Op 30798(U)

March 31, 2014

Sup Ct, New York County

Docket Number: 114790/10

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

PRESENT: _____
Justice

PART 5

Index Number : 114790/2010
RODRIGUEZ, GISELA
vs
CITY OF NEW YORK
Sequence Number : 002
DISMISS

CAL: # 48

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

APR 01 2014

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3-31-14
MAR 31 2014

 _____, J.S.C.

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
GISELA RODRIGUEZ and ANGEL V. RODRIGUEZ,

Plaintiffs,

-against-

DECISION/ORDER
Index No. 114790/10
Seq. No. 002

THE CITY OF NEW YORK, LOWER MANHATTAN
DEVELOPMENT CORPORATION, EMPIRE STATE
DEVELOPMENT CORPORATION AND THE NEW
YORK CITY ECONOMIC DEVELOPMENT
CORPORATION,

Defendants.

FILED

APR 01 2014

-----X
KATHRYN E. FREED, J.S.C.:

NEW YORK
COUNTY CLERK'S OFFICE

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 (Exs. A-F)
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIRMATIONS.....
REPLY AFFIRMATIONS.....
OTHER.....

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

In this personal injury action, defendant Empire State Development Corporation (“ESDC”) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross

claims and counterclaims asserted against it. The motion is unopposed.¹ After reviewing the motion papers and considering the applicable statutes and case law, that branch of the motion seeking dismissal of the complaint is **granted** and that branch of the motion seeking dismissal of the cross claims and counterclaims is **denied** with leave to renew upon proper papers.

Factual and Procedural Background:

Plaintiff Gisela Rodriguez alleges that, on November 24, 2009, she was injured when she tripped and fell on an uneven sidewalk adjacent to 14 Wall Street in Manhattan. Ex. 1.² On or about November 10, 2010, plaintiff commenced this action by filing a summons and complaint against ESDC and co-defendants The City of New York, Lower Manhattan Development Corporation, and the New York City Economic Development Corporation, alleging that their negligence in creating the condition or in failing to properly maintain the sidewalk caused her accident. Although plaintiff alleges that ESDC controlled the sidewalk in question and owned barricades located on Wall Street, she does not allege that it owned 14 Wall Street. Ex. A. Plaintiff's husband, Angel V. Rodriguez, asserts a derivative claim for loss of consortium and medical expenses.

In her bill of particulars, plaintiff alleged that she was injured on November 24, 2009 when she tripped and fell due to a defective sidewalk adjacent to the premises at 14 Wall Street, between Nassau and New Streets, in Manhattan. Ex. C, at par. 3. At her 50-h hearing on June 1, 2010, plaintiff testified that she was injured when she slipped and fell on an uneven sidewalk on Wall

¹Although plaintiff's counsel submits an "Affirmation In Opposition" dated January 23, 2014, she states in the affirmation that "she takes no position" with respect to the motion and "submits that should this Court grant [this] motion, it should do so on the merits."

²All references are to the exhibits annexed to ESDC's motion.

Street. Ex. D, at pp. 10-11. When deposed on September 21, 2012, plaintiff testified that she was injured due to an “elevation” on the sidewalk on Wall Street. Ex. E, at pp. 15, 20, 24-25. Plaintiff said she was not aware of any barricades in the area where she fell. Ex. E, at p. 61.

Simon David Wynn appeared for deposition on behalf of ESDC on February 21, 2013. He testified that ESDC was a subsidiary of nonparty New York State Urban Development Corporation (“NYSUDC”) and that NYSUDC generally did business as ESDC. Ex. F, at p. 7. According to Wynn, ESDC was a corporation, but it had no office and no employees. Ex. F, at pp. 7-8. After looking at the photographs annexed to the notice of claim and searching the records of NYSUDC and ESDC, Wynn testified that neither of those entities had any involvement in the “repair, renovation, modification, replacement or maintenance of the sidewalk” in the area where the plaintiff allegedly fell. Ex. F, at pp. 8-12, 16-17. He further stated that ESDC “had nothing whatsoever to do with the sidewalk, curb or street” where the plaintiff fell (Ex. F, at p. 17). Nor did Wynn give any testimony establishing, or even suggesting, that ESDC was related in any way to 14 Wall Street.

ESDC now moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims and counterclaims against it on the ground that it did not have any involvement in constructing, operating or maintaining the sidewalk where the alleged incident occurred.

ESDC’s Position:

ESDC argues that it is entitled to summary judgment dismissing the complaint and all cross claims and counterclaims against it on the ground that it did not cause or contribute to the plaintiff’s injuries. As noted at footnote 1 above, plaintiff has, for all intents and purposes, failed to oppose the motion and no other party has submitted opposition.

Conclusions of Law:

“The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 (1st Dept. 2007), citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1989).

Here, ESDC established its prima facie entitlement to summary judgment by submitting Wynn’s sworn deposition testimony that ESDC had no involvement in the “repair, renovation, modification, replacement or maintenance of the sidewalk” in the area where the plaintiff allegedly fell (Ex. F, at p. 12) and “had nothing whatsoever to do with the sidewalk, curb or street” (Ex. F, at p. 17). *See Blech v West Park Presbyterian Church*, 97 AD3d 443, 443-44 (1st Dept 2012). Since no party has submitted opposition raising a triable issue of fact, ESDC is entitled to summary judgment dismissing the complaint. *See Kalish v HEI Hospitality, LLC*, ___ AD3d ___, 980 NYS2d 80 (1st Dept 2014).

This Court notes that, although ESDC seeks dismissal of all cross claims and counterclaims against it, the movant fails to annex any pleadings to its motion containing any such claims. The only answer annexed to ESDC’s motion is its own. Ex. B. Thus, the denial of this branch of ESDC’s is warranted. *See CPLR 3212(b); Niagara Frontier Transp. Auth. v City of Buffalo Sewer Auth.*, 1 AD3d 893, 896 (4th Dept 2003). However, this Court denies that branch of the motion with leave to renew upon proper papers. *See Garrison Commercial Funding IV Reo LLC v NMP-Group LLC*,

30 Misc3d 1227(A) (Sup Ct New York Co 2011).

Therefore, in accordance with the foregoing; it is hereby:

ORDERED that the branch of the motion by defendant Empire State Development Corporation seeking summary judgment dismissing the complaint is granted, 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,

ORDERED that the branch of the motion by defendant Empire State Development Corporation seeking summary judgment dismissing all cross claims and counterclaims against it is denied with leave to renew upon proper papers; and it is further,

ORDERED that the action shall continue against the remaining defendants, and that any cross claims and counterclaims pending against defendant Empire State Development Corporation shall continue as well; and it is further,

ORDERED that counsel for defendant Empire State Development Corporation shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the entry of judgment in its favor; and it is further,

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

DATED: March 31, 2014


FILED

MAR 31 2014

APR 01 2014

NEW YORK
COUNTY CLERK'S OFFICE

ENTER:


Hon. Kathryn E. Freed
JUSTICE J.S.C. SUPREME COURT