

Lugo v Bri Realty, Inc.
2014 NY Slip Op 32094(U)
July 22, 2014
Sup Ct, Bronx County
Docket Number: 304587/11
Judge: Mark Friedlander
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

**NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25**

MILAGROS LUGO,

Plaintiff,

**MEMORANDUM
DECISION/ORDER**
Index No.: 304587/11

-against-

BRI REALTY, INC.,

Defendant.

BRI REALTY, INC.,

Third-Party Plaintiff,

Third-Party Index No.:
83693/13

-against-

245 EAST MOSHOLU PARKWAY HOUSING
DEVELOPMENT FUND CORPORATION,

Third-Party Defendant.

HON. MARK FRIEDLANDER

Third-party defendant, 245 East Mosholu Parkway Housing Development Fund Corporation (“MPH”), moves for an order, pursuant to CPLR§3212, dismissing the third-party complaint as a matter of law, upon the ground that the site of plaintiff’s accident was not owned, maintained, or controlled by MPH. The motion is decided as hereinafter indicated.

This is an action by plaintiff to recover monetary damages for personal injuries allegedly sustained on February 18, 2010, as a result of her slipping and falling on ice on the sidewalk.

Defendant/third-party plaintiff, BRI Realty, Inc. (“BRI”), is the owner of 241 East Mosholu Parkway North, Bronx, New York. At the time of plaintiff’s accident, MPH was the

owner of unimproved property adjacent to 241 East Mosholu Parkway North, which now has a building erected thereon, designated as 245 East Mosholu Parkway North. Plaintiff's complaint alleges that she was lawfully on the sidewalk in front of BRI's premises, when she was caused to slip and fall as a result of BRI's negligence. Pursuant to New York City Administrative Code §7-210, the owner of property abutting a sidewalk is responsible for its maintenance and repair, including removal of snow and ice. Liability, if any, for plaintiff's alleged injuries, is therefore predicated upon who owned the property abutting the sidewalk where plaintiff fell.

In support of the motion, MPH submits, *inter alia*, a copy of the pleadings in this action, the pleadings in a prior action by plaintiff against MPH, a stipulation of discontinuance with prejudice of the prior action, transcripts of the deposition testimony of plaintiff (from the prior and instant actions), of Nicolas Loizou, a property manager employed by Acacia Network, of nonparty witness Zenel Nikqi, of Iber Nikqi on behalf of BRI, of non-party witness Blerim Gjocaj ("Gjocaj"), photographs, and a deed to MPH's property. In opposition to the motion, BRI submits, *inter alia*, a copy of plaintiff's bill of particulars in the prior action, plaintiff's response to defendant's combined demands in the prior action, photographs, and a deed to MPH's property. In its reply, MPH submits a copy of plaintiff's ambulance and emergency room records from Moses Emergency Department of Montefiore Hospital, relating to her accident, and dated February 18, 2010.

MPH's motion for summary judgment is granted, and the third-party complaint of BRI against MPH is dismissed, as the third-party complaint fails to state a cause of action against MPH. As previously stated above, pursuant to the New York City Administrative Code §7-210, any liability to plaintiff is predicated on the identity of the owner of the property abutting the

sidewalk where plaintiff fell. At the trial of this action, were the jury to find that plaintiff fell on the sidewalk abutting BRI's property, MPH, not being the owner of the abutting property, would have no liability, and there would be no viable claim by BRI against MPH. On the other hand, if, at the trial of this action, the jury were to find that plaintiff fell on the sidewalk which was not abutting BRI's property, and/or that MPH was the owner of the property abutting the situs of the accident, then BRI would have no liability. Further, there is no direct claim by plaintiff against MPH, the plaintiff having discontinued a previous action against MPH, with prejudice.

Parenthetically, were the Court to need to reach the issue of the location of plaintiff's fall, the Court would have found that plaintiff fell on the sidewalk abutting BRI's property, and would have granted MPH summary judgment on that ground.

Plaintiff was deposed on two occasions. Plaintiff testified that on the day of her accident, she exited from the front entrance of her building, 241 East Mosholu Parkway North, where she had been living for ten years. She walked approximately five steps to her left and fell "right in the middle," in front of her building, which was about one foot from a "water pump," later identified by her as a fire hydrant. The photographs of the spot at which plaintiff testified she fell show a location in front of 241 East Mosholu Parkway North. Other than plaintiff, there were no witnesses to the accident.

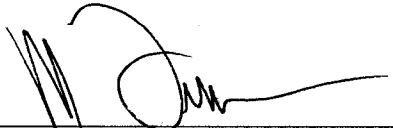
In opposition to the motion, defendant BRI asserts: (1) that in a prior action, plaintiff's complaint and bill of particulars both state that her accident occurred in front of 245 East Mosholu Parkway North, not 241 East Mosholu Parkway North; and (2) that there is an issue of fact as to whether plaintiff fell in front of 241 or 245 East Mosholu Parkway North.

The complaint and bill of particulars in the prior action were not verified by plaintiff

herself, but by her attorneys. Further, the Court finds the testimony of the non-party witness Gjocaj to be insufficient to create a triable issue as to where plaintiff fell. Gjocaj did not witness the accident. His testimony does not specify the date of his observations, or positively identify plaintiff as the person he saw on the ground on the sidewalk abutting MPH's property, and his failure to see an ambulance at the scene makes his testimony incredible as a matter of law, since it is undisputed that an ambulance would have been at the scene at the point in time that Gjocaj claimed to witness the event.

The foregoing constitutes the Decision and Order of the Court.

Dated: 7/22/14



MARK FRIEDLANDER, J.S.C.