

**Eskanazi v Fein**

2014 NY Slip Op 34061(U)

August 19, 2014

Supreme Court, Bronx County

Docket Number: Index No. 20069/2012E

Judge: Lizbeth González

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 10(e)

-----X  
Marlene Eskanazi,

Plaintiff,

-against-

Phyllis Fein, Baba Convenience Store, Sweet  
Temptations, Article Second Trust LTW of Milton  
Fein and SW Realty Management, Inc.

Defendants.

-----X  
Phyllis Fein and Article Second Trust LTW of Milton  
Fein,

Third-Party Plaintiffs,

-against-

MTA Capital Construction Company and The  
Metropolitan Transportation Authority.

Third-Party Defendants.

-----X  
Recitation of the papers considered in reviewing the underlying motion for summary judgment as  
required by CPLR § 2219(a):

Notice of Motion and annexed Exhibits and Affidavits.....	1
Affirmations in Opposition and annexed Exhibits.....	2
Reply Affirmation.....	3

Plaintiff Eskanazi claims that she sustained serious injuries as a result of the defendants' negligence. Ms. Eskanazi alleges that on 9/16/11 she tripped and fell on a defective sidewalk in front of 1585 Second Avenue, a building allegedly owned by defendants Phyllis Fein and Article Second Trust LTW of Milton Fein ("Fein defendants" collectively), managed by defendant SW Realty Management, Inc. ("SW Realty") and leased by defendants Baba Convenience Store and Sweet Temptations. The Fein defendants impleaded third-party defendants MTA Capital Construction Company and the Metropolitan Transportation Authority ("MTA" collectively).

Movant SW Management, LLC (“SW Management”) claims that it is incorrectly sued as defendant SW Realty Management, Inc. SW Management states that it mailed a stipulation to the plaintiff to discontinue the action against it on the grounds that it neither owned, managed, occupied nor controlled the subject premises and made no special use of the sidewalk abutting the subject property. SW Management, a non-party, moves for summary judgment pursuant to CPLR 3212 because the plaintiff failed to execute and return the stipulation.

Plaintiff Eskinazi, the Fein defendants and third-party defendants MTA respectively oppose SW Management’s motion.

The movant is reminded that exhibits must be tabbed in all future submissions to this Court.

#### DISCUSSION

Since summary judgment is a drastic remedy which deprives the litigant of her day in court, it should only be employed when there is no doubt as to the absence of triable issues. (*Martin v Briggs*, 235 AD2d 192 [1st Dept 1997].)

CPLR 3212 provides that summary judgment is warranted if the movant shows through the submission of admissible evidence that the opposing party has no defense to the cause of action or that the cause of action or defense has no merit. (CPLR 3212[b].)

Non-party SW Management moves for summary judgment on the ground that it was incorrectly sued as SW Realty. In support of its motion, SW Management proffers the affidavit of Martin Blum, dated 6/3/13 and notarized on 6/11/13. Mr. Blum states that he has served as SW Management’s General Manager for approximately 20 years and oversees the company’s day to day operations. He states that SW Management is a real estate managing company and serves as the managing agent for buildings 1584, 1586 and 1588 on Second Avenue in New York City; all of these buildings are located on the east side of Second Avenue. According to Mr. Blum, SW Management has no relationship with 1585 Second Avenue, the plaintiff’s accident site, located on the west side.

In opposition to SW Management’s motion, the Fein defendants seek sanctions because Mr. Blum’s affidavit is perjurious and the motion is thus frivolous and false. (See Rules of the Chief Admin of the Courts [22 NYCRR] § 130-1.1).

In opposition to SW Management’s motion, the Fein defendants proffer certified copies of checks drawn from the joint account of SW Realty and non-party Florence Wasserstein reflecting

payments for the operational costs of the subject premises. The defendants also reference an SW Realty/Wasserstein check made payable to Seneca Insurance Company, the insurer of the subject premises and the company providing the defense and indemnification of the Fein defendants in this action.

The Fein defendants additionally proffer the affidavit and deposition testimony of Robert Fein whom they describe as an attorney, a trustee of defendant Article Second Trust LTW of Milton Fein and the son of the late Milton Fein and defendant Phyllis Fein. During his 7/15/13 deposition, Robert Fein testified that his aunt, Florence Wasserstein, is a principal of SW Realty and a part owner who is responsible for the management functions of the subject premises.

By affidavit dated 11/7/13, Mr. Fein reiterates his deposition testimony and states that he provided copies of the SW Realty/Wasserstein checks to the Fein defendants. Based on this information, the Fein defendants seek the Court's permission to rescind the stipulation of discontinuance against SW Management.

Third-party defendants MTA contend that SW Management's motion is premature and additional discovery is necessary. The MTA defendants contend that Mr. Fein's testimony and Mr. Blum's affidavit create triable issues of fact.

In opposition to SW Management's motion, plaintiff Eskanazi adopts the arguments set forth by the Fein defendants and the MTA in their respective opposition papers. Ms. Eskanazi avers that Mr. Blum's affidavit, dated 6/3/13 and notarized on 6/11/13, is "untrue and completely false." Plaintiff's counsel contends that Blum's material misrepresentations and false statements induced him to sign the stipulation discontinuing the action against SW Management; he, like the opposing defendants, now seeks the withdrawal of the stipulation with the Court's permission. The plaintiff also contends that the deposition testimony of Robert Fein, "a co-trustee of the defendant with an ownership interest in the subject property," creates an issue of fact as to whether SW Management managed the subject premises.

In its reply, SW Management proffers new evidence which may not be submitted at this juncture. (*Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380 [1<sup>st</sup> Dept 2006].)

## CONCLUSION

SW Management moves for summary judgment although it is not a named party. In its underlying motion, SW Management self-identifies as an entity being incorrectly sued as SW Realty. Based on the judicial admission volunteered by SW Management, the Court grants the plaintiff and defendants Fein and MTA's respective application requesting permission to withdraw the stipulation discontinuing the action against SW Management. The stipulation is accordingly vacated.

The evidence proffered establishes a nexus between SW Realty and 1585 Second Avenue, the subject premises.

After careful review, the Court finds that there are triable issues of fact. SW Management's motion is accordingly denied.

The plaintiff shall serve a copy of this Decision and Order with notice of entry within 30 days.

This is the Decision and Order of the Court.

Dated: August 19, 2014

So ordered,

  
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Hon. Lizbeth González, JSC