

Demonte v City of New York
2016 NY Slip Op 31092(U)
June 14, 2016
Supreme Court, New York County
Docket Number: 150192/2014
Judge: Michael D. Stallman
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

**PRESENT: Hon. MICHAEL D. STALLMAN
*Justice***

PART 21

DAVIDA DEMONTE and ARNOLD DEMONTE

INDEX NO. 150192/2014

Plaintiffs,

MOTION DATE 2/25/16

MOTION SEQ. NO. 004

- v -

**THE CITY OF NEW YORK, NEW YORK CITY TRANSIT
AUTHORITY and J.E.M.B. REALTY CORP.,**

Defendants.

The following papers, numbered 39-46, 47-54, were read on this motion to dismiss and cross motion for leave to amend

Notice of Motion —Affidavit—Affirmation — Exhibits A-D—Affidavit of Service	█ No(s). <u>39-46</u>
Notice of Cross Motion—Affirmation in Opposition and in Support of Cross Motion — Exhibits A-B—Affidavit of Service	█ No(s). <u>47-51</u>
Affirmation in Reply and in Opposition to Cross Motion — Exhibit A — Affidavit of Service	█ No(s). <u>52</u>
Reply Affirmation—Affidavit of Service	█ No(s). <u>53-54</u>

Upon the foregoing papers, it is ordered that this motion to dismiss by defendant J.E.M.B. Realty Corp. is denied, without prejudice to a motion for summary judgment; and it is further

ORDERED that plaintiff’s cross motion for leave to amend to add an additional defendant Herald Towers, LLC in this action by serving a supplemental summons and amended complaint is granted; and it is further

(Continued...)

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

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ORDERED that the second supplemental summons and second amended complaint in the form annexed to the cross motion as Exhibit B shall be deemed served upon the current parties upon service of a copy of this order with notice of entry;

ORDERED that the supplemental summons and second amended complaint shall be personally served on defendant Herald Towers, LLC, along with a copy of this order, within 20 days of service of a copy of this order with notice of entry; and it is further

ORDERED that the caption is hereby amended as follows:

DAVIDA DEMONTE and ARNOLD DEMONTE,

Plaintiffs,

- v -

**THE CITY OF NEW YORK, NEW YORK CITY TRANSIT
AUTHORITY, J.E.MB. REALTY CORP., and HERALD
TOWERS, LLC,**

Defendants.

Plaintiff must serve a copy of this order on the General Clerk's Office (60 Centre Street, Room 119) and the County Clerk, who are directed to mark their records to reflect this amendment.

On March 20, 2013, plaintiff Davida DeMonte allegedly fell while exiting from the subway at West 34th Street and 6th Avenue in Manhattan, next to premises located at 60 West 34th Street. Plaintiff claims that she did not see that she exited onto a raised, unpainted, unlit, and unmarked platform, which allegedly blended into the surrounding sidewalk.

Defendant J.E.M.B. Realty Corp. (JEMB) now moves to dismiss

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Defendant J.E.M.B. Realty Corp. (JEMB) now moves to dismiss the complaint and all cross claims as against it, pursuant to CPLR 3211 (a) (1) and (7). Plaintiffs oppose the motion and cross-move for leave to add Herald Towers, LLC as a defendant in this action. JEMB opposes the cross motion.

JEMB's motion to dismiss is denied, without prejudice to a motion for summary judgment. In essence, JEMB submitted an affidavit denying allegations that it is the abutting property owner. However, JEMB does not submit any documentary evidence conclusively refuting such allegations, such as title records indicating that another entity is the abutting property owner. Neither has JEMB demonstrated entitlement to dismissal under CPLR 3211 (a) (7). The complaint. The responsibility for maintaining the platform where plaintiff allegedly fell cannot be determined, as a matter of law, based solely on the pleadings.

Plaintiffs' cross motion to add Herald Towers, LLC as a defendant is granted. Plaintiffs submit a copy of a property tax bill for property locate at 1282 Broadway, which indicates that the owner is "Herald Towers." (Riso Affirm., Ex B.) That the Court grants plaintiffs leave shall not be construed as a determination that Herald Towers, LLC has a legal duty to maintain the area where plaintiff Davida Demonte allegedly fell. Rather, the Court has determined that, on this motion, plaintiffs' contentions that Herald Towers, LLC is either responsible for maintenance of the platform under Administrative Code § 7-210, or was under a duty to adequately light the area, are theories that are not plainly lacking in merit to warrant denial of leave to amend. (*See Shazzi T. v Ernest G.*, 135 AD3d 410, 410 [1st Dept 2016]; *Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept 2005].)

As JEMB indicates, plaintiffs did not comply with CPLR 3025 (b), which now requires that a proposed amended pleading clearly showing

(Continued...)

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the changes or additions to be made. For instance, there is no redlined version of the proposed amendment; nor are the changes indicated in boldface or italicized type. However, this Court exercises its discretion to disregard plaintiffs' nonprejudicial mistake. (CPLR 2001.)

The Court notes that photographs of the area in question would suggest that the concrete platform is something that defendant New York Transit Authority might likely maintain. (See *Kamps v New York City Tr. Auth.*, 89 AD3d 421, 421 [1st Dept 2011]; *Bonzon v City of New York*, 25 Misc 3d 1237(A) [Sup Ct 2009] [Transit Authority's civil engineer testified that hat the concrete platform is in conformity with Transit Authority guidelines and New York State codes].) However, the Court could not resolve this factual issue as a matter of law based on the evidentiary record currently before the Court, and the procedural posture of the motions, which were addressed to the pleadings. A court conference to persuade the parties to narrow the action was to no avail.

Dated: 6/14/16
New York, New York


_____, J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE