

Isaacs v 305 E. 40th Owners Corp.

2017 NY Slip Op 32144(U)

October 10, 2017

Supreme Court, New York County

Docket Number: 152791/2015

Judge: Debra A. James

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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**

PRESENT: HON. DEBRA A. JAMES

PART 59

Justice

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BARBARA ISAACS,

INDEX NO. 152791/2015

Plaintiff,

MOTION DATE _____

- v -

305 EAST 40TH OWNERS CORP., GRISTEDES 59
LLC,GRISTEDES FOODS INC.

MOTION SEQ. NO. 001 002

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 98

were read on this application to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97

were read on this application to/for SUMMARY JUDGMENT(AFTER JOINDER

Upon the foregoing documents, it is

ORDERED that the motion for summary judgment of defendants Gristedes 59 LLC and Gristedes Foods Inc. (Motion Seq. No. 002) is granted to the extent that the cross claims of defendant 305 East 40th Owners Corp. against such defendants are dismissed, but as to the complaint, the motion is denied as untimely; and it is further,

ORDERED that the motion for summary judgment of defendant 305 East 40th Owners Corp. dismissing all claims (Motion Seq. No. 001) is denied.

In Collado v Cruz, 81 AD3d 542 (2011), the First Department held that the "Administrative Code of the City of New York § 7-210 imposes a nondelegable duty on the owner of the abutting premises to maintain and repair the sidewalk." Collado further ruled that, unless there is evidence that the tenant caused or created the defective sidewalk condition, "provisions obligating the tenant to repair the sidewalk do not impose on the tenant a duty to a third party, such as plaintiff" Collado, supra, at 543. The appellate court in Collado also found while not responsible to third parties, the tenant may be held liable to the owner for damages for breach of the lease. Searching the record on defendant 305 East 40th Owners' (Owners) motion, no evidence that the Gristedes tenant defendants created or caused the raised flagstone has been submitted. In addition, under the clear terms of Section 6.02 of the Lease, defendant Owners, as landlord, had the responsibility to "make all repairs and replacements, structural and otherwise, necessary or desirable in order to keep in good order and repair...the public portions of the Building", which includes the sidewalk. Any repairs to the alleged deviation in the elevation of the flagstones of the sidewalk, as alleged by the plaintiff herein, would not be the responsibility of the tenant Gristedes under Section 6.01 of the Lease, whose responsibilities were limited to non-structural

repairs. Thus, the indemnification provisions of Section 11.02 of the Lease, under which the Gristedes tenants would have to indemnify the Owners are not triggered, and the Gristedes defendants are entitled to judgment dismissing the cross claims of Owners against it.

However, as there can be no search of the record with respect to defendant Gristedes' motion to dismiss the complaint since plaintiff has not sought summary judgment relief in its favor against such defendant, and Gristedes moved more than 60 days after the service and filing of the note of issue in contravention with this court's preliminary conference order of November 10, 2015, Gristedes motion as to the complaint must be denied as untimely. See Kershaw v Hospital for Special Surgery, 114 AD3d 75 (1st Dept. 2013).

As to defendant 305 East 40th Owners motion for summary judgment, it has not established its prima facie defense that the alleged defect did not exist, as any conflict in plaintiff's testimony raises issues of credibility that must be resolved by a fact finder at trial. Although she equivocated in her deposition, plaintiff testified that "part of the area was raised...and it grabbed my foot," which is distinguishable from Siegel v City of New York, 86 AD3d 454 (1st Dept. 2011) where plaintiff was unable to identify the actual path that he followed or to identify any defect itself, but only circled an

area on a photograph. Furthermore, in this case, the non-party witness, who is a friend of plaintiff, also observed the height differential of the flagstones that plaintiff identified as the area where she was caused to fall when he found her at the time of her injury.

Finally, defendant Owner argues that plaintiff provided no evidence of the dimensions of the differential, but to the extent that defendant owner is contending that such condition was trivial, it is Owners' burden to prima facie establish that such defect is de minimus, not plaintiff's to establish that it is actionable.

10/10/2017
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: