Vasquez v Zion Lutheran Church
2019 NY Slip Op 34886(U)
August 28, 2019
Supreme Court, Kings County
Docket Number: Index No. 505714/2018
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of August, 2019.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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AURELIA VASQUEZ,

Plaintiff,

- against -

ZION LUTHERAN CHURCH a/k/a ZION NORWEGIAN EVANGELICAL LUTHERAN CHURCH, METROPOLITAN NEW YORK SYNOD OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA, LUTHERAN HOSPITAL, PARK RIDGE FAMILY HEALTH CENTER and ALVIN BERGER,

Defendants.

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Index No.: 505714/2018

DECISION AND ORDER

Motion Sequence #2

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	1/2,
Opposing Affidavits (Affirmations)	3, 4,
Reply Affidavits (Affirmations)	5

Upon the foregoing papers, and after oral argument, the Court finds as follows:

The instant action results from a slip and fall incident that allegedly occurred on June 23, 2015. The Plaintiff, Aurelia Vasquez (hereinafter "the Plaintiff") allegedly injured herself on an uneven sidewalk flag located between 6307 Fourth Avenue, Brooklyn, New York, (allegedly

owned by the Defendant Zion Lutheran Church[1] ("Zion Property")) and 6317 Fourth Avenue, Brooklyn, New York (allegedly owned by Defendant Berger and leased to Defendant NYU Langone Health System/Lutheran Hospital[2] (collectively the"NYU Defendants" and "Movants")) (the "Berger Property"). The NYU Defendants, in the instant action are seeking an Order pursuant to CPLR 3212 granting them summary judgment. Defendants, Metropolitan New York Synod of the Evangelical Lutheran Church in America (hereinafter "Defendant Synod") and the Plaintiff each oppose the motion[3]. The Movants contend that the alleged defect was not on the sidewalk that fronts their property and that they did not cause or create the condition which allegedly caused the injury. More specifically, the Movants contend they had no control of the area where the accident purportedly occurred. The Movants rely on deposition testimony that was apparently obtained during discovery in Action 1. Movants point to the depositions of the Plaintiff, Perelle Bohm of PLR Consultants, Inc. (a named Defendant in Action 1) and Qui Bin Guo, a witness on behalf of Chinese Christian Church of Grace (a named Defendant in Action 1). Additionally, the Movants proffer the Affidavits of NYU Langone Facilities Manager, Krist Kamberi (dated October 23, 2018) and Defendant Alvin Berger (dated September 24, 2018) and Affidavits and supporting Exhibits of their Architect, Douglas Peden, R.A.

The opposing parties aver that the motion is premature. Specifically, Defendant Synod indicates that it was not named in the First Action and was therefore not present at any of the

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[1]This Defendant has apparently not appeared in either action, which will be discussed further hereafter.

[2]Defendant Movants contend that NYU Langone Health System is s/h/a Lutheran Hospital.

[3]The Movants contend that the Plaintiff filed a prior action in relation to the same alleged trip and fall, which was apparently marked disposed by the Court on March 26, 2018 (Honorable Paul Wooten, J.S.C.). The prior matter was captioned, *Aurelia Vasquez v. PLR Consultants, Inc., Zion Lutheran Church and Chinese Christian Church of Grace*, Index No. 14503/2015 (hereafter "Action 1"). The Movants were not a party to that action.

depositions relied upon by the Movants, including the Plaintiff's deposition. Additionally, Defendant Synod also opposes the motion on the basis that the Movants rely upon depositions of defendants named in the First Action (referenced above), who are not parties in this action. Plaintiff argues that the subject motion is premature in that the Plaintiffs have not been afforded the opportunity to depose the individuals who present Affidavits in support of the motion, specifically the NYU Langone Facility Manager and named Defendant Alvin Berger. In reply[4], the Movants contend that Defendant Synod has failed to sufficiently demonstrate that 1) additional discovery might lead to relevant information relating to Plaintiff's claims against them or 2) that the information sought is not in the control of the opposing parties. The Movant principally relies on *Brown v. City of New York*, which they contend stands for the proposition that the opposing parties cannot speculate or hope that further discovery may uncover sufficient facts to defeat the underlying motion. See, *Brown v. City of New York*, 162 A.D.3d 731, 79 N.Y.S.3d 258 (2d Dept. 2018).

The Defendant Synod does indicate that there may be material facts to be discovered, which facts are not available to the Defendants. Defendant Synod specifically indicates that none of the prior depositions, other than that of the Plaintiff, were of parties to the instant action. Additionally, Defendant Synod contends that the Movant relies upon Affidavits from parties it has not had the opportunity to depose. The Plaintiff joins Defendant Synod in its opposition. Defendant Synod further contends that its Engineer, Angela DiDomenico (Synod Opposition Exhibit "D") could not determine which of the abutting flagstones were installed first, but found that the abutting flagstones "were not installed at the same time". DiDomenico also states that there "was no evidence, based on observations and property records, as to the order in which the

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[4]The Court notes that the Reply is specifically in Reply to Defendant Metropolitan New York Synod' opposition and does not specifically address Plaintiff's opposition. Notwithstanding, the Court will consider the Reply in relation to the opposition of the Plaintiff as well.

sections of the sidewalk were installed." (DiDomenico Affidavit, ¶¶14-15, Exhibit "P"). The opposing Defendants argue that this creates a material issue of fact as to which property owner may be responsible for causing and creating the condition. See, *Harrison v. 4919 Church, Inc.*, 136 A.D.3d 749, 24 N.Y.S.3d 737 (2d Dept. 2016) [Court found that a *prima facie* showing must be established as to both the issue of ownership and causation].

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

In light of the foregoing, the Court finds that there is sufficient support for a finding that the subject motion is premature. Although there is hope on the part of the opposition, it is not based upon speculation but rather, a reasonable theory. Accordingly the motion is denied pursuant to CPLR 3212(f). The opposing parties have not been afforded the ability to obtain,

through proper discovery, including depositions, facts that could be available but cannot be stated because they have not been obtained, in order to properly oppose the motion. See, *Baron v. Incorporated Vil. of Freeport*, 143 A.D.2d 792, 533 N.Y.S.2d 143 (2d Dept, 1988), *James v. Aircraft Serv. Intern. Group.*, 84 A.D.3d 1026, 924 N.Y.S.2d 114 (2d Dept, 2011) and *Valdivia v. Consol Resistance Co. of Am.*, 54 A.D.3d 753, 863 N.Y.S.2d 720 (2d Dept, 2008).

Based on the foregoing, it is hereby ORDERED as follows:

The Defendants' motion (motion sequence #2) is denied as premature with leave to renew upon good cause shown after the completion of discovery.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.