

<b>Galas v Thor 1231 Third Ave. LLC</b>
2020 NY Slip Op 30856(U)
March 26, 2020
Supreme Court, New York County
Docket Number: 150675/2016
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

*Justice*

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CAROL ANN GALAS,

Plaintiff,

- v -

THOR 1231 THIRD AVENUE LLC and ALLEN  
REALTY CO. LLC,

Defendants.

-----X

INDEX NO. 150675/2016

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 005

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 98-105, 107-118 were read on this motion for summary judgment.

In this personal injury action, defendant Allen Realty Co., LLC (Allen) moves pursuant to CPLR 3212 for an order summarily dismissing the complaint as against it. Plaintiff opposes.

I. UNDISPUTED FACTS

From December 1, 1998 through April 8, 2013, Allen owned and managed the building at 1237 Third Avenue in Manhattan. In front of the building was a tree well containing a tree stump surrounded by a grate. On April 8, 2013, plaintiff tripped on the stump, incurring physical injury, and on January 27, 2016, she commenced this action. (NYSCEF 1). On February 25, 2016, plaintiff served defendant Thor with process (NYSCEF 4). Thor never appeared.

In her bill of particulars dated August 29, 2019, 2019 (NYSCEF 92), plaintiff asserted that the cause of her accident was the tree stump sticking up in the middle of the sidewalk grate on a sidewalk “narrowed by a popup from the store . . .” (NYCSEF 103).

## II. CONTENTIONS

### A. Allen (NYSCEF 98-105)

By affidavit, Jeffrey Allen states that on behalf of Allen, he personally managed the building and that Allen had never installed, repaired, maintained, pruned, trimmed or removed the tree or any part of the tree well or metal grating. Nor did Allen control or maintain the storefront of the retail business at the building or specially use the sidewalk or tree well on or before April 8, 2013. (NYSCEF 105). Allen argues that the City bears the burden of maintaining the tree well in which plaintiff tripped.

### B. Plaintiff (NYSCEF 108)

By affidavit, plaintiff alleges that the stump on which she tripped was “not discernible” to her and that given the presence of other people “in the area at the time of [her] fall,” she had “no choice but to walk in the area in which [she] encountered the tree grate because of the narrowed condition of the sidewalk caused by the extension of the building’s sidewalk popout/shed halfway into the sidewalk.” She claims that she did not see the tree stump because other people were walking in front of her. (NYSCEF 111).

Plaintiff observes that although she alleged in her bill of particulars that the presence of Allen’s sidewalk shed had directed her into the tree well, Allen chose to seek summary judgment before depositions were held and thus, notwithstanding its awareness of plaintiff’s position, Allen offers no facts or expert evidence in contradiction, thereby failing to demonstrate its *prima facie* entitlement to summary judgment. She also asserts that as Allen does not address the issue, it fails to eliminate all factual issues. (NYSCEF 108).

### C. Allen’s reply (NYSCEF 113)

Allen reiterates its denial of responsibility for the store’s display, again disclaims

having made any special use of the sidewalk, and argues that in any event, special use of part of a sidewalk is insufficient evidence of liability absent proof that the special use caused the accident or that the area specially used was not maintained in a reasonably safe manner.

#### D. Oral argument (NYSCEF 120)

At oral argument, Allen reiterated its denial of having made special use of the sidewalk or responsibility for the tree well.

In opposition, plaintiff argued that Jeffrey Allen's self-serving denial of responsibility for the sidewalk pop-out constitutes insufficient *prima facie* evidence of a lack of liability and counsel observed that Allen had offered no evidence as to who had created the popup, when and why it was created, its measurements, or how much space there was on the sidewalk. Absent such evidence, plaintiff contended that the motion is premature. Moreover, counsel observed, the case had been litigated for the previous four years, three-and-a-half years of which Allen did not appear due to its failure to notify the Secretary of State that its address for service of process had changed.

Allen responded that Jeffrey Allen's affidavit is sufficient and that it is plaintiff who bears the burden of proof. Counsel denied that defendant had tried to avoid process as process was not served at the right address.

Absent a copy of the lease, which plaintiff lacks, plaintiff's counsel denied that defendant meets its burden on the motion.

### III. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the

absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). “Conclusory and self-serving affidavits” do not constitute *prima facie* evidence sufficient to warrant judgment as a matter of law” (*TDS Leasing, LLC v Tradito*, 148 AD3d 1079, 1081 [2d Dept 2017]), especially where, as here, defendant owner and manager of the building offers no explanation for failing to offer supportive evidence, and it is undisputed that depositions have not yet been held and that plaintiff lacks pertinent documentary evidence.

Additionally, as plaintiff never sought a default judgment against defendant Thor, the complaint is dismissed as against it. (CPLR 3215[c]).

Accordingly, it is hereby

ORDERED, that defendant Allen Realty Co., LLC’s motion for summary judgment is denied; it is further

ORDERED, that the complaint is severed and dismissed as to defendant Thor 1231 Third Avenue, LLC, and the clerk is directed to enter judgment accordingly; and it is further

ORDERED, that to the extent that the parties are unable to conduct their depositions as scheduled in their last conference order due to the current COVID-19 (coronavirus) crisis, they may reschedule them at the next conference to be held on June 3, 2020.

  
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**BARBARA JAFFE, J.S.C.**

<b>3/26/2020</b>				
<b>DATE</b>	<b>BARBARA JAFFE, J.S.C.</b>			
<b>CHECK ONE:</b>	<input type="checkbox"/> <b>CASE DISPOSED</b>	<input type="checkbox"/> <b>DENIED</b>	<input checked="" type="checkbox"/> <b>NON-FINAL DISPOSITION</b>	
	<input type="checkbox"/> <b>GRANTED</b>		<input type="checkbox"/> <b>GRANTED IN PART</b>	<input checked="" type="checkbox"/> <b>OTHER</b>
<b>APPLICATION:</b>	<input type="checkbox"/> <b>SETTLE ORDER</b>		<input type="checkbox"/> <b>SUBMIT ORDER</b>	
<b>CHECK IF APPROPRIATE:</b>	<input type="checkbox"/> <b>INCLUDES TRANSFER/REASSIGN</b>		<input type="checkbox"/> <b>FIDUCIARY APPOINTMENT</b>	<input type="checkbox"/> <b>REFERENCE</b>