

<b>Kremins v Family Dollar Stores of N.Y., Inc.</b>
2020 NY Slip Op 31610(U)
April 21, 2020
Supreme Court, Bronx County
Docket Number: 21534/17E
Judge: Robert T. Johnson
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 12**

**Decision and Order**

**MICHAEL KREMINS,**

**Plaintiff,**

**Index No. 21534/17E**

**-against-**

**FAMILY DOLLAR STORES OF NEW YORK, INC.,  
70 REALTY PARTNERS, LP.,  
70 REALTY ASSOCIATES, INC.,  
AUBURN EQUITIES INC,  
PINSTRIPE COLLECTIBLES, LLC d/b/a  
YANKEE SHOP, SNOW AWAY, INC., BROIS CORP.  
and ERICK BROIS d/b/a SNOW AWAY**

**Defendants.**

**The following papers, numbered 1-4, were considered on the motion to dismiss:**

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion, Exhibits, Affirmation and Exhibits.....	1
Affirmation in Opposition and Exhibits and .....	2
Affirmation in Opposition.....	3
Reply Affirmation in Further Support.....	4

**Upon the foregoing papers, it is ordered that the motion for summary judgment and dismissal is decided as follows:**

This action arises out of an alleged accident with injury to Plaintiff, Michael F. Kremins, which occurred on February 27, 2014 when Plaintiff, allegedly, slipped and fell on ice or snow on the sidewalk located at 910 and/or 920 River Ave., Bronx, New York.<sup>1</sup> On February 24, 2017 Plaintiff sued Family Dollar Stores, a business located at 910 River Ave.; 70 Realty Partners, a

<sup>1</sup> The complaint and Bill of Particular make no mention of 920 River Ave., other than as Pinstripe’s place of business. Otherwise Defendant Pinstripe Collectible is mentioned as an owner, operator etc. of 910 River Ave. In Opposition, by affidavit and exhibits, they deny any connection with 910 but, acknowledge that they are a business at 920 River Ave.

business at 910 River Ave.; Auburn Equities, owner of 910 River Ave.; Pinstripe Collectibles, LLC. *d/b/a* Yankee Shop (Pinstripe), a business at 920 River Ave.; and Snow Away Inc., Brois Corp. and Erick Brois, as contractors responsible for maintaining the premises at 910 River Ave.; for negligence which resulted in his injury.

Now, Defendant, Pinstripe Collectibles, moves under CPLR 3212(a) for summary judgment and dismissal of the complaint as against Pinstripe. Pinstripe argues that plaintiff in the Complaint alleges that the accident occurred on the sidewalk adjacent to 910 River Ave. and; pursuant to the affidavit of their owner, Yasser Ahmed, that Pinstripe, a business located at 920 River Ave., did not own, lease, operate or maintain the 910 River Ave. location nor the abutting sidewalk. Mr. Ahmed further attests that the photos submitted by plaintiff show no snow or ice on the sidewalk adjacent to 920 River Ave., Pinstripe's property. In addition, Pinstripe denies ever having hired Snow Away for snow removal.

In opposition, Plaintiff for the first time raising the possibility of 920 River Ave. being the situs of the accident; submits, by attorney affirmation, that Pinstripe's motion to dismiss is premature and, that Pinstripe has attached their purported lease for, but fails to submit proof of the metes and bounds of 920 River Ave. Plaintiff also argues that summary judgment is inappropriate, in that there is a viable cause of action. He avers, also by attorney affirmation, that photographic evidence depicts a defective condition in violation of New York City regulations, at least partially, on defendant Pinstripe's property.

The complaint alleges that Pinstripe's principle place of business is 920 River Ave. and, also alleges that they operated, owned, leased, managed and controlled 910 River Ave. It further alleges that "while Plaintiff Michael Kremins was legally traversing on the public sidewalk,

curbs, walkway and or lot adjacent to the property located at 910 River Avenue, County of Bronx, City and State of New York, said plaintiff was caused to slip and fall due to the slippery, icy, depressed, broken, cracked, uneven, holed and out of repair sidewalk/curb at the aforementioned location, due to the negligence of defendants as set forth herein.” It does not cite 920 River Ave. as having any nexus to the alleged accident. Plaintiff’s Bill of Particulars places the situs of the accident as “The sidewalk, pathways, curbs, walkways, and/or lot and surrounding structures at, in front of, around or near or adjacent to 910 River Avenue, Bronx, NY.”

The defendants 70 Realty Partners LP, 70 Realty Associates, Inc. and Auburn Equities (collectively, “70 Realty”) Inc. oppose. They take the position that the motion is pre discovery and pre-Note of Issue. They posit that plaintiff has not delineated the specific location of the accident at a deposition. 70 Realty also asserts that plaintiff and all non-moving defendants are entitled to examine Pinstripe at an EBT.

70 Realty Partners LP also filed a separate opposition arguing that plaintiff did not yet demarcate the exact location of the accident in relation to 910 River Ave and therefore, deposing Pinstripe is necessary.

In reply, Pinstripe emphasizes the fact that there is no affidavit submitted from plaintiff that factually disputes Pinstripe’s denials. According to Pinstripe, plaintiff did not allege the necessary facts to show Pinstripe’s control of the premises or role in causation of the accident.

In order to prevail on a motion for summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d

320, 324 [1986][citations omitted]). Once this showing has been made, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact” on which the party rests his or her claim, or must demonstrate an “acceptable excuse” for having failed to do so (*Zuckerman v City of New York*, 49 N.Y.2d 557, 560 [1981]; see also *Alvarez v Prospect Hosp.*, 68 NY2d at 324).

Here, Pinstripe has satisfied its prima facie burden of demonstrating its entitlement to judgment as a matter of law. However, Plaintiff fails to proffer any evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.

Notwithstanding the fact that Defendants’ motion is pre-note of issue, the court finds that Plaintiff’s allegations are devoid of any connection between Pinstripe and the accident herein. Plaintiff’s speculative assertions are insufficient to raise a triable issue of fact. “[R]ank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable issue of material fact” (*Castore v Tutto Bene Rest. Inc.*, 77 AD3d 599, 599 [1st Dept 2010]).

The mere introduction of an unsubstantiated, boilerplate allegation of Pinstripe’s “connection” to 910 River Ave. is not enough, without raising a triable issue of fact, to support, even, Plaintiff’s request to defer until further discovery has taken place. The mere hope of uncovering some evidence during discovery is insufficient to deny summary judgment (*Zuckerman v City of New York*, 49 NY2d 557; *Perez v. Brux Cab Corp.*, 251 Ad 2d 157 [1st Dept 1998], *160 Rinzler v Jafco Assocs.*, 21 AD3d 360 [2d Dept 2005]).

Accordingly, it is hereby

ORDERED, that the motion of defendant Pinstripe Collectibles, LLC d/b/a Yankee Shop for summary judgment granted; and it is further


ORDERED, that the complaint and all cross-claims against defendant Pinstripe Collectibles, LLC d/b/a Yankee Shop are dismissed; and it is further

ORDERED, that the clerk is directed to enter judgment in favor of defendant Pinstripe Collectibles, LLC d/b/a Yankee Shop dismissing the complaint and the cross-claims against said defendant; and it is further

ORDERED, that the action is severed and continued against the remaining defendants.

This constitutes the Decision and Order of the Court

**Dated: April 21, 2020**

  
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**Robert T. Johnson, J.S.C.**