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| <b>Kalnit v 141 E. 88th St., LLC</b>   |
| 2020 NY Slip Op 31989(U)   |
| March 16, 2020   |
| Supreme Court, New York County   |
| Docket Number: 155832/2018   |
| Judge: Laurence L. Love  |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE L. LOVE PART IAS MOTION 62

Justice

-----X

INDEX NO. 155832/2018

CHARLOTTE KALNIT,
Plaintiff,

MOTION DATE 02/24/2020

MOTION SEQ. NO. 005

- v -

141 EAST 88TH STREET, LLC, PHILIP HOUSE
CONDOMINIUM, ROCK GROUP NY CORP., DJM NYC,
LLC,

DECISION + ORDER ON
MOTION

Defendant.

-----X

DJM NYC, LLC
Plaintiff,

Third-Party
Index No. 595014/2020

-against-

THE CITY OF NEW YORK, DEPARTMENT OF PARKS AND
RECREATION OF THE CITY OF NEW YORK

Defendant.

-----X

ROCK GROUP NY CORP.
Plaintiff,

Second Third-Party
Index No. 595227/2020

-against-

MAGA CONTRACTING CORP.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 82, 83, 84, 85, 86,
87, 88, 89, 90, 91, 92, 93, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114,
115, 125

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion is decided as follows:

The instant action arises out of an alleged accident that occurred on March 31, 2018 on the sidewalk adjacent to the premises 141 East 88th Street, a/k/a 1331 Lexington Avenue in New York County. It is alleged that the accident occurred by a tree well outside the commercial retail space entitled "FIKA." Plaintiff commenced this personal injury action by service of a Summons and Verified Complaint dated June 20, 2018. Issue was joined by the service of a Verified Answer on or about September 4, 2018. An amended summons and complaint were served by plaintiff on or about January 14, 2019 and an answer to the amended complaint was served on or about January 24, 2019. Plaintiff's bill of particulars alleges that the defendants were negligent in their placement of scaffolding, sidewalk maintenance and tree well maintenance. Defendant, 141 East 88<sup>th</sup> Street, LLC now moves for summary judgment, dismissing the action.

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980).

The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d 331, 479 N.Y.S.2d 35 (1<sup>st</sup> Dept., 1984) *aff'd* 65 N.Y.2d 732, 429 N.Y.S.2d 29 (1985). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most

favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

In support of its motion, movant submits the affidavit of Victor Polanco, the property manager for movant, the condominium bylaws, the contract between defendants Philips House Condominium and DJM NYC, LLC to perform work on the exterior of the building and the contract between DJM NYC, LLC and Rock Group NY Corp. for the installation of a sidewalk shed at the premises, which establish as follows: 141 East 88<sup>th</sup> Street, LLC are the owners of six commercial units located at 141 East 88<sup>th</sup> Street, and do not own, manage or operate any of the residential units. Pursuant to the condominium bylaws, movant has no obligation to maintain or repair the exterior of the building and the Condominium Board solely controls the installation of scaffolding or sidewalk bridges. The affidavit further establishes that movant did not erect any scaffolding at the time of plaintiff's alleged accident nor did they or their management company contract for same. The documents further establish that defendant, Philip House Condominium, contracted defendant, DJM NYC, LLC to perform exterior work on the subject building and that defendant, Rock Group NY Corp was contracted to install a sidewalk shed and that Maga Contracting was subcontracted to do the scaffolding work. Furthermore, movant is not an "owner" within the meaning of Administrative Code of the City of New York § 7-210 and owed no other duty thereunder to maintain the sidewalk (see, *Fayolle v East W. Manhattan Portfolio LP.*, 108 A.D.3d 476 [1<sup>st</sup> Dept 2013]; *Araujo v Mercer Sq. Owners Corp.*, 95 AD3d 624, 624 [1st Dept 2012]). As movant has established that they did not maintain the sidewalk, and were not under a duty to maintain the sidewalk, movant has established a prima facie entitlement to summary judgment.

Defendants, DJM NYC, LLC, Philip House Condominium, Rock Group NY Corp and plaintiff all submitted opposition to the motion. The oppositions argue that the motion is premature as depositions are outstanding, that Philip House Condominium may not have assumed all responsibility for the exterior of the building, that movant may be responsible for maintaining the sidewalks pursuant to the New York Administrative Code, and that movant had special use of the sidewalk as the commercial tenants had an easement for use of the subject sidewalk.

The motion is not premature as defendants failed to offer an evidentiary basis to suggest that discovery may lead to relevant evidence or that facts essential to opposing the motion were exclusively within the movant's knowledge and control (see CPLR 3212[f]; *Espada v. City of New York*, 74 A.D.3d 1276, 1277 (2d. Dept. 2010)). Specifically, all defendants have failed to submit an affidavit establishing that movant possesses any relevant evidence which would be produced in discovery and defendants DJM NYC, LLC and Philip House Condominium are fully aware of the identity of the legal owner of the building as they are parties to a contract establishing that Philip House Condominium is the owner of the building for said purposes and that they hired DJM NYC, LLC for the relevant work. DJM NYC, LLC also only named Philip House Condominium as an additional insured under the contract. Similarly, Philip House Condominium's speculation that movant's agents may have voluntarily maintained the exterior of the building is pure unsupported speculation and would be within the knowledge of Philip House Condominium.

DJM NYC, LLC's arguments that Philip House Condominium may not have assumed all responsibility for the exterior of the building and that movant may be responsible for maintaining the sidewalks pursuant to the New York City Administrative Code are meritless as movant has established that they have no responsibility to maintain the sidewalk and are not considered an owner for the purposes of the New York City Administrative Code (*Fayolle v East W. Manhattan*

*Portfolio LP.*, 108 A.D.3d 476 [1<sup>st</sup> Dept 2013]; *Araujo v Mercer Sq. Owners Corp.*, 95 AD3d 624, 624 [1st Dept 2012]).

The argument that movant had special use of the sidewalk as the commercial tenants had an easement for use of the subject sidewalk is similarly meritless. An easement can be created only by one who has title to, or an estate in, the servient estate, so that one who has neither cannot create an easement (see *Stilbell Realty Corp. v Cullen*, 43 AD2d 966, 967, [1974]; *Fred F. French Inv. Co., Inc. v Jetter*, 270 AD 1048, 1048 [1946]). Because neither the condominium, nor its sponsor, held title to the public sidewalk, it cannot not grant an easement to the LLC (See, also, *Jerdonek v 41 W. 72 LLC*, 143 A.D.3d 43 [1<sup>st</sup> Dept 2016]). As such, the oppositions fail to establish an issue of fact overcoming movant's prima facie case.

ORDERED that the motion of defendant 141 East 88<sup>th</sup> Street, LLC seeking summary judgment dismissing the complaint herein and any counterclaims or cross-claims asserted against same is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

3/16/2020  
DATE

  
LAURENCE L. LOVE, J.S.C.

|                       |                                     |                            |                                     |                       |
|-----------------------|-------------------------------------|----------------------------|-------------------------------------|-----------------------|
| CHECK ONE:            | <input type="checkbox"/>            | CASE DISPOSED              | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION |
|                       | <input checked="" type="checkbox"/> | GRANTED                    | <input type="checkbox"/>            | GRANTED IN PART       |
|                       | <input type="checkbox"/>            | DENIED                     | <input type="checkbox"/>            | OTHER                 |
| APPLICATION:          | <input type="checkbox"/>            | SETTLE ORDER               | <input type="checkbox"/>            | SUBMIT ORDER          |
| CHECK IF APPROPRIATE: | <input type="checkbox"/>            | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/>            | FIDUCIARY APPOINTMENT |
|                       |                                     |                            | <input type="checkbox"/>            | REFERENCE             |