

Mule v City of New York
2021 NY Slip Op 30046(U)
January 8, 2021
Supreme Court, New York County
Docket Number: 159835/2017
Judge: Lyle E. Frank
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK PART 52

Justice

-----X

INDEX NO. 159835/2017

JOANNE MULE A/K/A JOANNA MULE,
Plaintiff,

MOTION DATE 01/08/2021

MOTION SEQ. NO. 002

- v -

THE CITY OF NEW YORK, 874 REALTY CORP.,
GREGORYS COFFEE MANAGEMENT LLC D/B/A
GREGORYS COFFEE, GREGORYS COFFEE
MANAGEMENT I LLC D/B/A GREGORYS COFFEE,
GREGORYS COFFEE TRADE LLC D/B/A GREGORYS
COFFEE, K COFFEE & BAKERY, INC., K COFFEE &
BAKERY LLC,

**DECISION + ORDER ON
MOTION**

Defendant.

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874 REALTY CORP.

Third-Party
Index No. 595019/2018

Plaintiff,

-against-

K COFFEE & BAKERY INC., GEORGE ZAMFOTIS

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96

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

This action arises out of injuries allegedly sustained by plaintiff as a result of a trip and fall accident on the sidewalk adjacent to 58 West 31st Street, in the County of New York, City and State of New York. Defendants/third-party defendants¹, Gregory Coffee Management LLC D/B/A Gregorys Coffee, K Coffee & Bakery, Inc., K Coffee & Bakery LLC, and George

¹ The Court deems the entities represented by counsel for defendants/third-party defendants are the tenants. Thus, all remaining "Coffee" defendants are dismissed as fictional entities.

Zamfotis, (“K Coffee & Bakery LLC”) move for summary judgment to dismiss plaintiff’s complaint, all cross-claims and third-party complaint. Defendant/third-party plaintiff, 874 Realty Corp., cross-moves for summary judgment on its cross-claims and third-party action. For the reasons set forth below the defendant/third-party plaintiff’s motion is denied; defendant/third-party defendant’s motion is granted.

Summary Judgment Standard

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 NY2d 557, 562, 427 [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 NY2d 395 [1957]; *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 AD2d 331 [1st Dept 1984] *aff’d* 65 NY2d 732 [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 NY2d 320 [1986]; *Winegrad v New York University Medical Center*, 64 NY2d 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 AD2d 520 [1st Dept 1989]. Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957].

Administrative Code § 7-210

Section 7-210 provides in pertinent part that “the **owner of real property** abutting any sidewalk, including, but not limited to; the intersection quadrant for corner property shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition.” *NY Admin Code* §7-210 (emphasis added).

K Coffee & Bakery LLC argues that as a tenant of the premises it owes no duty to plaintiff and that the location of the accident is not adjacent to its leased premises, thereby alleviating it of any responsibility as to its lease obligations to maintain the sidewalk. In support of these arguments, movants rely on deposition testimony of its CEO, the landlord Mr. Loduca, and a survey of the property.

A plaintiff must establish that a defendant owed a duty of care and then breached that duty to that plaintiff. *Turcotte v Fell*, 68 NY2d 432, 502 [1986]. Furthermore, if a party does not own, control, occupy, or have a special use for the property where the alleged defective or dangerous condition existed, then that party cannot be held liable for injuries caused by the defective or dangerous conditions. *Minot v City of New York*, 230 AD2d 719 [2d Dept 1996]. Lastly, if a movant proffers sufficient evidence to demonstrate an absence of any material issues of fact, then the movant has met their burden to make a *prima facie* showing of entitlement as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].

The Court find that K Coffee & Bakery LLC has established its *prima facie* entitlement to judgment as a matter of law against the plaintiff. K Coffee & Bakery LLC has provided sufficient and undisputed evidence that it did not affirmatively cause or create the alleged defect nor was it the owner of the property in question. Further, the Court finds that the location of the accident is not adjacent to the leased premises as defined in the lease. The Court relies on Mr.

Loduca's testimony as well as NYSCEF DOC. 30, which clearly depicts the location of the accident as well as the location of the leased premises. Specifically, Mr. Loduca testified that "the only portion that would be rented to Gregory would be the portion to the west of that door."² See NYCEF DOC 74, Exhibit O, pg 40:12-17. Defendant/third-party plaintiff's admissions through the deposition testimony of Mr. LoDuca establish that the accident did not happen on a sidewalk "adjacent" to the premises that was occupied the movant. This showing has not been refuted. Based on this testimony, it is apparent that the lease that requires K Coffee and Bakery LLC to maintain the sidewalk adjacent to the demised premises is inapplicable in this matter.

Accordingly, it is hereby

ORDERED that defendants/third-party defendants' motion for summary judgment is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of all defendants and third-party defendants except the City of New York and 874 Realty Corp. as to all claims and cross claims; and it is further

ORDERED that the action is severed and continued against the remaining defendants, The City of New York and 874 Realty Corp. ; 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 parties 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

² The picture referenced in this testimony is NYSCEF DOC 73, previously marked at plaintiff's 50-h hearing.

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).

1/8/2021
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

LYLE E. FRANK, J.S.C.
HON. LYLE E. FRANK
J.S.C.

