

<b>Goodman v 6 W. 57th St. Realty</b>
2021 NY Slip Op 31139(U)
April 9, 2021
Supreme Court, New York County
Docket Number: 151379/2017
Judge: W. Franc Perry
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

STANLEY GOODMAN,

Plaintiff,

- v -

6 WEST 57TH STREET REALTY, SOLOW REALTY AND  
DEVELOPMENT COMAPNY, LLC, SOLOW REALTY  
COMPANY, LLC, CLUB MONACO

Defendant.

INDEX NO. 151379/2017  
MOTION DATE 01/20/2021  
MOTION SEQ. NO. 002

DECISION + ORDER ON  
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71

were read on this motion to/for

JUDGMENT - SUMMARY

In this personal injury action, plaintiff is seeking to recover damages for injuries allegedly sustained when he tripped and fell on a metal object on November 23, 2016 while walking on the public sidewalk adjacent to defendant Club Monaco U.S., LLC i/s/h/a Club Monaco, located at 6 West 67<sup>th</sup> Street, New York, New York. In motion sequence number 002, defendant Club Monaco seeks an order pursuant to CPLR §3212, granting it summary judgement and dismissing plaintiff's complaint because there is no proof that Club Monaco owed plaintiff a duty of care, based on the lease agreement between Club Monaco and defendant Solow Realty and Development Company, LLC (Solow) and pursuant to Administrative Code Section 7-210, which provide that the owner of the building is responsible to maintain such sidewalk in a reasonably safe condition. Plaintiff opposes the motion.

## BACKGROUND

On November 26, 2016, plaintiff was walking along 57<sup>th</sup> Street between Fifth and Sixth Avenues in New York, New York, intending to go tango dancing at the Argentinian Embassy located on 56<sup>th</sup> Street between Fifth and Sixth Avenues. (NYSCEF Doc No. 57, pp. 12 – 16). While he was traveling west on 57th Street, he allegedly tripped and fell over a metal grated object on the sidewalk adjacent to the premises located at 6 West 57th Street, New York, New York. (NYSCEF Doc Nos. 57, pp. 20 – 27; and 64).

Plaintiff alleges that defendant Club Monaco was negligent in failing to properly maintain the sidewalk and was otherwise negligent in failing to remove the piece of metal from the sidewalk. (NYSCEF Doc. Nos. 54, 62). At the time of the alleged incident, Club Monaco occupied the ground floor and portions of the basement at 6 West 57<sup>th</sup> Street, pursuant to a lease agreement between Solow Management Corporation as Agent, (landlord) and Club Monaco, U.S. LLC, (tenant), for the subject premises. (NYSCEF Doc. Nos. 59, p. 9, and 67). Section 4.1 of the lease provides, in pertinent part, that the “[l]andlord shall operate, maintain, and make all necessary repairs (both structural and non-structural) to the part of Building Systems which provide service to the Premises (but not to the distribution portions of such Building Systems located within the Premises) and the public portions of the Building, both exterior and interior”. (NYSCEF Doc. No. 67, § 4.1).

The assistant property manager who testified on behalf of the owner, Solow Realty and Development Company, LLC, confirmed that the owner, was responsible for monitoring the sidewalk and would perform all cleaning, sweeping, snow and ice removal, and repairs. (NYSCEF Doc. No. 59, p. 18). He testified that neither defendant Solow, nor the City ever

made any complaints to Club Monaco regarding putting its garbage out for disposal. (Id., at p. 22).

Club Monaco's Vice President of Visual Merchandising and Store Design testified that Club Monaco did not put the metal grate on the sidewalk at any point before plaintiff's alleged incident, nor did he recall that type of metal grate ever being used by Club Monaco inside the store. (NYSCEF Doc. No. 60, pp. 54, 56).

### STANDARD OF REVIEW/ANALYSIS

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]; see *Zuckerman v New York*, 49 NY2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]; *Ocean v Strivers Gardens Condominium Assn.*, 2019 NY Slip Op 31482[U], 2019 NY Misc LEXIS 2827, \*4 [Sup Ct, NY County 2019]). "Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action" (*Swede v 46 W. 21st St., LLC*, 2019 NY Slip Op 33521[U], 2019 NY Misc LEXIS 6369, \*4 [Sup Ct, NY County 2019] [citation omitted]).

Generally, "liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control or special use of the property" (*Welwood v Association for Children with Down Syndrome*, 248 AD2d 707, 708, 670 N.Y.S.2d 556 [2d Dept 1998] [internal quotation marks and citation omitted]). Pursuant to New York City Administrative Code § 7-210, often referred to as the "sidewalk law," owners of real property

have a nondelegable duty to maintain the sidewalk in a reasonably safe condition (see *Baghban v City of NY*, 140 AD3d 586, 586, 33 N.Y.S.3d 695 [1st Dept 2016]; *Wolfe v Gallery Partners, LLC*, 2012 NY Slip Op 32301[U], 2012 NY Misc LEXIS 4299, \*12 [Sup Ct, NY County 2012]).

In an action for personal injuries arising from a dangerous sidewalk condition, a tenant demonstrates its entitlement to summary judgment by submitting evidence that it neither negligently repaired the sidewalk nor caused the dangerous condition by some special use of the sidewalk or otherwise. (*Taubenfeld v Starbucks Corp.*, 48 AD3d 310, 311, 851 N.Y.S.2d 512 [1st Dept 2008]). Moreover, since repairs to a public sidewalk are considered structural in nature (see *Cucinotta v City of New York*, 68 AD3d 682, 684, 892 N.Y.S.2d 352 [1st Dept 2009]; *Mahon v David Ellis Real Estate, L.P.*, 2016 NY Slip Op 31750[U], 2016 NY Misc LEXIS 3363, \*14 [Sup Ct, NY County 2016]; *Hand v City of New York*, 2015 NY Slip Op 30076[U], 2015 NY Misc LEXIS 141, \*17-18 [Sup Ct, NY County 2015]), a tenant is not responsible for any such repairs unless specifically implied or imposed by the lease (see *Mahon v David Ellis Real Estate, L.P.*, 2016 NY Misc LEXIS 3363 at \*14).

In opposing the motion, plaintiff has failed to demonstrate that defendant Club Monaco owed him a duty of care, pursuant to New York City Administrative Code § 7-210. Despite plaintiff's conclusory arguments to the contrary, the lease between Club Monaco and Solow provides that the landlord is solely responsible for sidewalk maintenance. (NYSCEF Doc. No. 67, § 4.1).

Additionally, there is no proof that the condition of the sidewalk where the metal object was located, was caused or created by Club Monaco. Club Monaco's Vice President of Visual Merchandising and Store Design, Mr. Seibly, testified that the store did not use the type

of grating plaintiff alleges caused him to trip and fall, for displays or stock or any other purpose whatsoever. (NYSCEF Doc. No. 60, p. 19). Mr. Seibly also testified that to his knowledge, a Club Monaco employee did not put the metal grate on the sidewalk at any point before the incident, nor did he recall that type of metal grate ever being inside the store. (NYSCEF Doc. No. 60, pp. 54, 56).

Plaintiff's speculative assertion that the type of grating found outside the Club Monaco store is the type of metal grating used in retail clothing stores, ignores the testimony of Mr. Seibly establishing that Club Monaco did not use the type of metal grate plaintiff allegedly tripped on, for any purpose whatsoever, and is insufficient to defeat summary judgment. Additionally, plaintiff has failed to offer an evidentiary basis to suggest that additional non-party 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]).

A party opposing a motion for summary judgment may not rely upon conclusory allegations, but must present evidentiary facts sufficient to raise a triable issue of fact. *Mallad Construction Corp. v. County Federal Savings & Loan Assoc.*, 32 N.Y.2d 285, 290 (1973); *Tobron Office Furniture Corp. v King World Productions*, 161 A.D.2d 355,356 (1st Dept. 1990); *Polanco v. City of New* 244 AD2d 322 (2d Dept. 1997) ("a shadowy semblance of an issue or bald conclusory allegations, even if believable, are insufficient to defeat a motion for summary judgment"). "[R]ank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact" (*Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599, 909 N.Y.S.2d 452 [1st Dept 2010]; see also *Kane v Estia Greek Rest., Inc.*, 4 AD3d 189, 190, 772 N.Y.S.2d 59 [1st Dept 2004]).

Based on the evidence submitted by defendant, summary judgment should also be granted in favor of Club Monaco because it did not cause the condition or make special use of the sidewalk (see *Kellogg v. All Saints Hous. Dev. Fund Co.*, 146 AD3d 615, 46 N.Y.S.3d 30 [1st Dept 2017] [finding that a tenant cannot be held liable to a third party in tort absent a showing that it affirmatively caused or created the defect which caused the plaintiff to trip or the tenant made a "special use" out of the sidewalk for its own benefit]). Accordingly, it is hereby

ORDERED that the motion for summary judgment of defendant Club Monaco U.S., LLC i/s/h/a Club Monaco, is granted and the complaint is dismissed against said defendant; and it is further

ORDERED that the claims against the remaining defendants 6 West57th Street Realty, Solow Realty & Development Company, LLC and Solow Realty Company, LLC, (named erroneously) are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant Club Monaco U.S., LLC i/s/h/a Club Monaco, dismissing the claims made against it in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.



4/9/2021  
DATE

\_\_\_\_\_  
W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: