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| Perez v Soto-Castillo |
| 2021 NY Slip Op 33362(U) |
| September 28, 2021 |
| Supreme Court, Westchester County |
| Docket Number: Index No. 53921/2019 |
| Judge: David F. Everett |
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To commence the 30-day statutory time period for appeals as of right under CPLR 5513(a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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JOSEFA PEREZ,

Plaintiff,

-against-

Index No. 53921/2019
Motion Sequence Nos. 3-4

SANDY SOTO-CASTILLO d/b/a SOTO DELI
GROCERY and AMELINA CORP.,
Defendants.

Decision and Order

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EVERETT, J.

The following papers were considered on the motions:
Notice of Motion/Affidavit/Statement of Material Facts/
Affirmation/Exhibits/Notice of Compliance/Memorandum of Law/
Court Notice/Notice of Cross Motion/Affirmation/ Exhibits/
Statement of Material Facts/Court Notice/Affirmation/ Exhibits/
Response to Statement of Material Facts/Affirmation of Service/
Reply Affirmation/Exhibits/Court Notice/Notices of Appearance
(NYSCEF documents numbered 75-126)

The plaintiff commenced this action to recover damages for personal injuries she allegedly sustained when she slipped and fell on the sidewalk in front of a certain Yonkers premises. In motion sequence number 3, the defendant Amelina Corp. (Amelina) moves for summary judgment dismissing the complaint and cross claims insofar as asserted against it. In motion sequence number 4, the defendant Sandy Soto-Castillo d/b/a Soto Deli Grocery (Soto-Castillo) cross-moves for summary judgment dismissing the complaint and cross claims insofar as asserted against him. For reasons explained below, the Court grants the motion and denies the cross motion.

In moving for summary judgment, Amelina contends that it is an out of possession landlord that did not create the alleged greasy

condition of the sidewalk, that it did not make special use of the sidewalk, and that the Yonkers City Code concerning sidewalk maintenance does not impose liability on an abutting landowner.

In cross-moving for summary judgment, Soto-Castillo contends that he was not the leaseholder of the premises on the date of the alleged incident. He urges that governing lease on the date of the incident was between Amelina, as landlord, and Ignacio Castillo for Soto Deli Grocery I, Inc., as the commercial tenant, but that neither Castillo nor Soto Deli Grocery I, Inc., was named as a defendant in this action. According to Soto-Castillo, the action should be dismissed for failure to name necessary parties.

The plaintiff opposes Soto-Castillo's cross motion, but does not oppose Amelina's motion (see NYSCEF document number 106). According to the plaintiff, the deli caused and created a greasy residue on the sidewalk in front of it by placing garbage there for pick up at the location of the plaintiff's accident. The plaintiff argues that the entity known as Soto Deli Grocery I, Inc., was dissolved years prior to the accident, and that Soto-Castillo admits he has owned the deli for the last 20 years.

In replying, Soto-Castillo contends that the plaintiff's opposition is untimely and cannot be considered. Soto-Castillo urges that, in any event, the plaintiff fails to raise a triable issue of fact. According to Soto-Castillo, he was not the tenant of record responsible for repairs and maintenance pursuant to the

governing lease. He contends that there is no competent evidence that the deli had actual or constructive notice of the alleged condition.

On a motion for summary judgment, the moving party must present prima facie proof demonstrating its entitlement to judgment as a matter of law (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the moving party carries this initial burden, then the nonmoving party must produce evidentiary proof in admissible form to require a trial of material issues of fact (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court must view the evidence in the light most favorable to the nonmoving party (see *Pearson v Dix McBride, LLC*, 63 AD3d 895 [2d Dept 2009]).

On the motion, Amelina establishes its prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that the accident occurred on a public sidewalk and that it did not create the defect, make special use of the sidewalk, or violate any statute or ordinance charging it with a duty to maintain the sidewalk and making it liable for injuries caused by a breach of that duty (see *Lagawo v Myers*, 149 AD3d 1056, 1057 [2d Dept 2017]). In opposition, the plaintiff, who states that she does not oppose Amelina's motion, fails to raise a triable issue of fact. Thus, the Court grants Amelina's motion for summary judgment dismissing the complaint and cross claims insofar as asserted against it.

In contrast, however, the Court denies Soto-Castillo's cross motion for summary judgment dismissing the complaint and cross claims insofar as asserted against him. Soto-Castillo fails to show his prima facie entitlement to judgment as a matter of law. While Soto-Castillo contends that he was not the tenant of record responsible for repairs and maintenance pursuant to the governing lease, other record evidence - such as correspondence regarding a change of responsible party (see NYSCEF document number 87) and Soto-Castillo's deposition testimony wherein he stated that he owned the deli and had a lease agreement with Amelina for the deli (see NYSCEF document number 101) - raises a triable issue of fact in this regard. In any event, even if Soto-Castillo were deemed to have met his prima facie burden (see *e.g. Maltese v Metropolitan Transp. Auth.*, 179 AD3d 780, 783-784 [2d Dept 2019]), the plaintiff, whose untimely opposition papers the Court considers in the exercise of its discretion (see CPLR 2004, 2214; *Lawrence v Celtic Holdings, LLC*, 85 AD3d 874, 875 [2d Dept 2011]), raises triable issues of fact in opposition.

The remaining contentions do not warrant a contrary result.

Accordingly, it is,

ORDERED that the motion of the defendant Amelina Corp. for summary judgment dismissing the complaint and cross claims insofar as asserted against it is granted; and it is further,

ORDERED that the cross motion of the defendant Sandy Soto-Castillo d/b/a Soto Deli Grocery for summary judgment dismissing the complaint and cross claims insofar as asserted against him is denied; and it is further,

ORDERED that the defendant Amelina Corp. must, within ten days of the date of entry, serve on the other parties a copy of this decision and order with notice of entry; and it is further,

ORDERED that the defendant Amelina Corp. must, within ten days after service of the notice of entry, file proof of that service via NYSCEF; and it is further,

ORDERED that the parties will appear in the Settlement Conference Part. Due to the COVID-19 public health emergency, the Clerk of that Part will direct the date, time, and method of the settlement conference.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
September 28, 2021

ENTER:



HON. DAVID F. EVERETT
Justice of the Supreme Court

Filed via NYSCEF