

**McKenzie v Junius-Liberty Dev. LLC**

2021 NY Slip Op 33882(U)

July 6, 2021

Supreme Court, Kings County

Docket Number: Index No. 517518/2018

Judge: Devin P. Cohen

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Supreme Court of the State of New York  
County of Kings

Index Number 517518/2018

Seq #001, 002 & 003

Part 91

**DECISION/ORDER**

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

BRENDA MCKENZIE,

Plaintiff,

against

JUNIUS-LIBERTY DEVELOPMENT LLC, COALITION FOR THE HOMELESS INC., AND NICOLE SMITH A/K/A EBONY NICOLE SMITH A/K/A EBONY JACKSON,

Defendants.

**Papers**

Numbered	
Notice of Motion and Affidavits Annexed.....	1, 2, 3
Order to Show Cause and Affidavits Annexed...	
Answering Affidavits.....	3-7
Replying Affidavits.....	4, 7
Exhibits.....	
Other .....	

Upon the foregoing papers, defendant Coalition for the Homeless's summary judgment motion (Seq. 001), defendant Junius-Liberty Development's summary judgment motion (Seq. 002), and plaintiff's motion to amend (Seq. 003) are decided as follows:

**Factual Background**

Plaintiff Brenda McKenzie commenced this action against defendants Junius-Liberty Development LLC, Coalition for the Homeless Inc., and Nicole Smith a/k/a Ebony Nicole Smith a/k/a Ebony Jackson ("Ms. Smith"), for injuries she alleges she suffered as a result of an accident on August 29, 2015 (complaint at 19). In her complaint, Ms. McKenzie, a nurse, alleges that she visited Ms. Smith at 51 Junius Street, Apartment 604A, Brooklyn, New York to provide nursing services (*id.* at 20). She alleges that, during her visit, she was injured when she fell from a chair that broke in the apartment (*id.*).

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**Analysis****Defendant Coalition for the Homeless's Summary Judgment Motion**

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

David Giffen, the Coalition for the Homeless's Executive Director, states in his affidavit that the organization is a homeless advocacy group (Giffen affidavit at ¶¶ 3, 8-9). He states that it does not own, and is not responsible for, the premises where the alleged accident occurred, nor does it have any responsibility for the furnishings in those premises (*id.* at ¶¶ 16-17). He states that the Coalition for the Homeless has the right to enter homeless shelters in order to make recommendations to New York City government or the Department of Homeless Services (*id.* at ¶¶ 9-12). He also states that the Coalition for the Homeless has no involvement in the assignment of nursing staff to homeless shelters, and was not involved in Ms. McKenzie's visit to Ms. Smith (*id.* at ¶¶ 13-14). In addition, he states that the Coalition for the Homeless has no role in maintenance or repair of shelters (*id.* at ¶ 15).

Only Ms. McKenzie opposes the motion. She argues that summary judgment is premature because the Coalition for the Homeless has not been deposed and has not responded to all of plaintiff's discovery demands. To defeat a motion as premature, Ms. McKenzie must show that the evidence sought will be "sufficient to defeat [the] motion for summary judgment" (*Haidhaqi v Metro. Transp. Auth.*, 153 AD3d 1328, 1329 [2d Dept 2017]).

Ms. McKenzie identifies only the possibility that a deposition of the Coalition for the Homeless might show that "an agent of Defendant created or exacerbated the dangerous condition". Notably, Ms. McKenzie is not arguing that the Coalition for the Homeless itself has a duty of care to keep the subject premises safe. Instead, Ms. McKenzie speculates that she might uncover evidence that a Coalition of the Homeless representative caused the chair to be defective. This is not sufficient reason to deny the motion (*Haidhaqi*, 153 AD3d at 1329). Accordingly, the Coalition for the Homeless' motion for summary judgment is granted.

Junius-Liberty Development's Summary Judgment Motion  
and Ms. McKenzie's Cross-Motion to Amend Her Complaint

In support of its motion, Junius-Liberty Development submits the affidavit of Steven Berger, a member of the limited liability company (Berger affidavit at ¶ 1). He states as follows: Junius-Liberty Development is the owner of the premises located at 51 Junius Street, Brooklyn, New York (*id.* at ¶ 4). The building at that location does not contain a unit numbered "604A" (*id.* at ¶ 6). Junius-Liberty Development never received any complaints regarding a defective chair at 51 Junius Street on, or prior to, the date of the subject accident (*id.* at ¶ 8).

Junius-Liberty Development also submits the affidavit of Ms. Smith, who states: On the day of the subject accident, she did not live at, nor did she visit, 51 Junius Street (Smith affidavit at ¶¶ 8 and 9). She previously lived at that location, but moved from there to 361 Fenimore Street, Brooklyn, New York in March 2015 (*id.* at ¶¶ 10, 13). She provides the lease for her apartment at 361 Fenimore Street. When she lived at 51 Junius Street, she did not live in unit 604A, but rather lived in a unit on the third or fourth floor (*id.* at ¶ 11). When she lived at 51 Junius Street, a nurse never came to visit her or provided nursing services to her (*id.* at ¶ 12).

Based on this evidence, Junius-Liberty Development has shown that Ms. McKenzie's alleged accident did not occur at 51 Junius Street, as alleged in the complaint. Furthermore, as will be discussed below, the alleged accident did not occur at any property owned by defendants. Accordingly, Junius-Liberty Development has made a prima facie showing that it is not liable for the alleged accident (*Penny v County of Suffolk*, 191 AD3d 692 [2d Dept 2021] ["Liability for a dangerous condition on real property is generally predicated upon ownership, occupancy, control, or special use of the property"]).

In opposition to Junius-Liberty Development's motion, Ms. McKenzie does not submit any evidence to rebut Junius-Liberty Development's prima facie showing. Instead, she cross-moves to amend her complaint and bill of particulars. In the proposed amended pleadings, plaintiff now alleges that the accident took place at a new location – 25 Junius Street. Plaintiff continues to allege that the accident occurred in Ms. Smith's apartment, but at this new address. Leave to amend a complaint and bill of particulars should be liberally granted absent prejudice to the opposing party, and when the proposed amendment is not palpably insufficient or devoid of merit (*Blanco Gomez v Principe*, 186 AD3d 466, 466 [2d Dept 2020]; *Lipari v Babylon Riding Ctr., Inc.*, 18 AD3d 824, 826 [2d Dept 2005]).

In support of her cross-motion, Ms. McKenzie states in her affidavit that, on the day of the accident, she visited Ms. Smith at Ms. Smith's apartment at 25 Junius Street, on the third floor of the building (McKenzie affidavit at 5). Of course, this address is still contrary to the evidence presented by both Junius-Liberty Development and Ms. Smith, which shows that Ms. Smith lived only at 51 Junius Street and 361 Fenimore Street. Ms. McKenzie also submits a

purported printout from ACRIS of documents involving 25 Junius Street. This printout indicates that the owner of that property might be Junius Development LLC.

In its reply, Junius-Liberty Development LLC submits the deed for 25 Junius Street. Junius-Liberty Development correctly argues that the deed, like the printout, shows that Junius Development LLC, and not Junius-Liberty Development, is the owner of 25 Junius Street. Because none of the defendants have any ownership or possessory interest in 25 Junius Street, the proposed amended complaint is without merit.

Separately, Ms. McKenzie argues that dismissal on summary judgment is premature because the parties have not conducted discovery. However, there is no basis to engage in discovery of claims against Junius-Liberty Development, who is not the owner of the premises. Furthermore, plaintiff provides no other basis for any belief that Junius-Liberty Development had any duty to keep 25 Junius Street in safe condition.


As a consequence of this decision and order, the only remaining defendant would be Ms. Smith. Ms. Smith, who appears *pro se* in this matter, has submitted an affidavit and a lease showing that she does not reside at 51 Junius Street, the alleged accident location from the original complaint, or 25 Junius Street, the alleged accident location from the proposed amended complaint. Plaintiff has not submitted any evidence to rebut Ms. Smith's documentary proof. Upon this evidentiary showing, the court searches the record and grants summary judgment dismissing plaintiff's claims against Ms. Smith (*Pagan v Jordan*, 163 AD3d 978, 980 [2d Dept 2018] [pursuant to CPLR 3212{b}], the court "has the authority to search the record and award summary judgment to a nonmoving party with respect to an issue that was the subject of the motion before the Supreme Court").

**Conclusion**

For the reasons stated above, the Coalition for the Homeless's summary judgment motion (Seq. 001) and Junius-Liberty Development's summary judgment motion (Seq. 002) are both granted, and plaintiff's motion to amend (Seq. 003) is denied. Additionally, plaintiff's claims against Ms. Smith are also dismissed. The action is dismissed in its entirety.

This constitutes the decision and order of the court.

July 6, 2021  
**DATE**



**DEVIN P. COHEN**  
Justice of the Supreme Court

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