

**Melendez v 5400-06 Myrtle Ave., LLC**

2021 NY Slip Op 34198(U)

October 1, 2021

Supreme Court, Queens County

Docket Number: Index No. 704666/2017

Judge: Maurice E. Muir

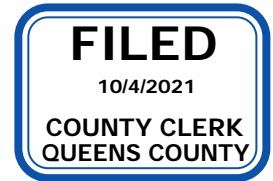
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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR  
Justice



LUZ MELENDEZ,

Plaintiff,

-against-

5400-06 MYRTLE AVENUE, LLC

Defendant.

IAS Part - 42

Index No.: 704666/2017

Motion Date: 3/25/21

Motion Cal. No. 19

Motion Seq. No. 3

5400-06 MYRTLE AVENUE, LLC,

Third-Party Plaintiff,

-against-

MYRTLE LOTTO SHOP, INC. and MYRTLE  
AVE. SHOP, INC.,

Third-Party Defendants.

MYRTLE LOTTO SHOP, INC. s/h/a MYRTLE  
AVE. SHOP, INC.,

Second Third-Party Plaintiff,

-against-

GAMAL SHERHAN and M & J DELI I INC.,

Second Third-Party Defendants.

The following electronically filed (“EF”) documents read on this motion by Myrtle Avenue Shop, Inc. s/h/a Myrtle Ave. Shop, Inc. (“Myrtle Avenue Shop” or “Second Third-Party

Plaintiff”) for order: (1) pursuant to CPLR § 3212, granting summary judgment to Myrtle Avenue Shop dismissing plaintiff’s complaint; (2) pursuant to CPLR § 3212, granting summary judgment to Myrtle Avenue Shop dismissing the Third-Party Complaint; and (3) granting such other and further relief as to this Court may deem just and proper.

	Papers
	<u>Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	EF 29 - 48
Affirmation in Support.....	EF 49
Plaintiff’s Affirmation in Opposition-Service.....	EF 54 - 55
Reply Affirmation-Service.....	EF 56 - 57

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is an action to recover damages for personal injuries allegedly sustained by Luz Melendez (“Ms. Melendez” or “plaintiff”). The plaintiff alleges that on January 22, 2016, she tripped and fell on the sidewalk abutting the premises known as 5400-5406 Myrtle Avenue, Queens, New York (“subject premises”), which is owned by 5400-5406 Myrtle Avenue LLC (“5400 Myrtle Avenue” or “owner”). As a result, on April 5, 2017, the plaintiff commenced the instant action against 5400 Myrtle Avenue; and on June 7, 2017, issue was joined. Thereafter, on December 19, 2017, 5400 Myrtle Avenue commenced a third-party action against its tenant, Myrtle Lotto Shop, Inc. and Myrtle Ave. Shop, Inc. (collectively, “Myrtle Avenue Shop” or “Third-Party Defendants”). Thereafter, on March 22, 2019, Myrtle Avenue Shop commenced a second third-party action against its sub-tenant, Gamal Sherhan and M & J Deli, Inc. (collectively, the “Deli”). Now, Myrtle Avenue Shop moves for the above-described relief.

On or about July 31, 2015, 5400 Myrtle Avenue leased the subject premises to Myrtle Avenue Shop for a term of nine (9) years, wherein the latter agreed to utilize the subject premises for retail sale of food products, magazines, lottery tickets, coffee, beverage, etc. Furthermore, pursuant to article 4 of the lease, it states, in relevant part, the following:

Owner shall maintain and repair the public portions of the building, both exterior and interior, except that if Owner allows tenant to erect on the outside of the building a sign or signs, or a hoist, lift or sidewalk elevator for the exclusive use of tenant, tenant shall maintain such exterior installations in good appearance and shall cause the same to be operated in a good and workmanlike manner and shall make all repairs thereto necessary to keep same in good order and condition, at tenant’s own cost and expense, and shall cause the same to be covered by the insurance provided for hereafter in Article 8. *Tenant shall, throughout the term of this lease, take good care of the demised premises . . . and the sidewalk adjacent thereto as and when needed to preserve them in good working*

order and condition, reasonable wear and tear, obsolescence and damage from the elements, fire or other casualty, excepted.

It is well settled law that “[s]ummary judgment is a drastic remedy made in lieu of a trial which resolves the case as a matter of law” (*Reyes v. Arco Wenworth Mgt. Corp.*, 83 AD3d 47, 54 [2d Dept 2011], citing *Andre v. Pomeroy*, 35 NY2d 361, 364 [1974]; see also *Vega v. Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). A summary judgment movant must show *prima facie* entitlement to judgment as a matter of law by producing sufficient admissible evidence demonstrating the absence of any material factual issues (CPLR § 3212)(b); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1984]). Failure to make such a showing requires denying the motion, regardless of the sufficiency of any opposition (*Vega*, 18 NY3d at 503). The opposing party overcomes the movant’s showing only by introducing “evidentiary proof in admissible form sufficient to require a trial of material questions” (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). Furthermore, considering a summary judgment motion requires viewing the evidence in the light most favorable to the motion opponent (*Vega*, 18 NY3d at 503). Nevertheless, “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to defeat a summary judgment motion (*Zuckerman*, 49 NY2d at 562). “The court’s function on a motion for summary judgment is to determine whether material factual issues exist, not to resolve such issues” (*Ruiz v. Griffin*, 71 AD2d 1112, 1115 [2d Dept 2010] [internal quotations marks omitted]).

It is of particular importance that the court addresses the Administrative Code of the City of New York § 7-210, which shifted tort liability for injuries arising from a defective sidewalk from the City of New York to the abutting property owner (see *Pevzner v. 1397 E. 2nd, LLC*, 96 AD3d 921, 922 [2d Dept. 2015]). The exceptions to the shifting of liability are one, two and three family residential property where the property (1) is owner-occupied, and (2) is used exclusively for residential purposes, which is not applicable in the case at bar (see *Meyer v. City of New York*, 114 AD3d 734 [2d Dept. 2014]). Furthermore, the Administrative Code of the City of New York § 7-210 imposes a nondelegable duty on a property owner to maintain and repair the sidewalk abutting its property, and specifically imposes liability upon certain property owners for injuries resulting from a violation of the code provision. (*Hsu v. City of New York*, 145 AD3d 759, 759-760 [2d Dept 2016]). Thus, regardless of any lease provisions requiring the tenant to maintain the sidewalk, the owner of the abutting premises has a statutory duty to the pedestrians to maintain the sidewalk in a reasonably safe condition (see *Xiang Fu He v Troon*

*Mgmt, Inc.*, 34 NY3d 167 [2019]; *Fajardo v. City of New York, et al*, 197 AD3d 456 [2d Dept 2021]). “However, Administrative Code of the City of New York § 7–210 does not impose strict liability upon the property owner, and the injured party has the obligation to prove the elements of negligence to demonstrate that an owner is liable” (*Xiang Fu He v. Troon Mgmt, Inc.*, 34 NY3d 167 [2019]; see also *Muhammad v. St. Rose of Limas R.C. Church*, 163 AD3d 693, 693 [2d Dept 2018]).

It is well settled law that “a lessee of property which abuts a public sidewalk owes no duty to maintain the sidewalk in a safe condition, and liability may not be imposed upon it for injuries sustained as a result of a dangerous condition in the sidewalk, except where the abutting lessee either created the condition, voluntarily but negligently made repairs, caused the condition to occur because of some special use, or violated a statute or ordinance placing upon the lessee the obligation to maintain the sidewalk which imposes liability upon the lessee for injuries caused by a violation of that duty” (*Martin v Rizzati*, 142 AD3d 591, 592 -593 [2d Dept 2016]). In the case at bar, the superintendent for 5400 Myrtle Avenue, George Shaw (“Mr. Shaw”), testified that the tenants did not do any work on the sidewalk or street areas depicted in the photos, and denied that the tenants had any cleaning obligations for the street. Moreover, Mr. Shaw testified that nobody affiliated with the Third-Party Defendant or Second Third-Party Defendant performed any repair work to the subject sidewalk, its curb or adjacent roadway; and he testified that his responsibilities included walking the sidewalk in front of the subject property and if there were a problem with the sidewalk, to get it fixed. Moreover, the owner of Myrtle Avenue Shop, Fadel Sherhan (“Mr. Sherhan”), testified that it was not his responsibility to either replace or repair the sidewalk. As such, the court finds that Myrtle Avenue Shop, Inc. did not have any responsibility to either repair or maintain the sidewalk. Moreover, there is no evidence that they either altered or caused the alleged condition (i.e., pit hole) to occur. The court also notes that neither 5400 Myrtle Avenue nor the plaintiff raised a triable issue of fact. In fact, the plaintiff did not file a complaint against Myrtle Avenue Shop, Inc. s/h/a Myrtle Ave. Shop, Inc.

Accordingly, it is hereby

ORDERED that the motion of by Myrtle Avenue Shop, Inc. s/h/a Myrtle Ave. Shop, Inc. for summary judgment, pursuant to CPLR 3212, is granted in its entirety; and it is further

ORDERED that the clerk of the Court shall enter a judgment in favor Myrtle Avenue Shop, Inc. s/h/a Myrtle Ave. Shop, Inc. dismissing the complaint, the third-party complaint and cross claims made against them only in this action with prejudice; and it is further,

ORDERED that Myrtle Avenue Shop, Inc. s/h/a Myrtle Ave. Shop, Inc. shall serve a copy of this decision and order with notice of entry upon all parties and the clerk of this court on or before October 30, 2021.

The foregoing constitutes the decision and order of the court.

Dated: October 1, 2021

  
MAURICE E. MUIR, J.S.C.