

<b>Cartagena v W 54-7 LLC</b>
2022 NY Slip Op 30132(U)
January 13, 2022
Supreme Court, Kings County
Docket Number: Index No. 517871/2018
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 9**

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**JUDITH CARTAGENA,**

**Plaintiff,**

**DECISION / ORDER**

**-against-**

**Index No. 517871/2018  
Motion Seq. No. 2, 3  
Date Submitted: 12/9/21**

**W 54-7 LLC and RAYMANGANO 7<sup>th</sup> AVENUE PIZZA  
CORP. d/b/a FAMOUS ORIGINAL RAY'S PIZZA,**

**Defendants.**

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***Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion to consolidate this matter with 506659/21 and defendant's cross motion for summary judgment.***

<b>Papers</b>	<b>NYSCEF Doc.</b>
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>45-48</u>
Notice of Cross Motion, Affirmation and Exhibits Annexed.....	<u>49-54</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>60-61</u>
Reply Affirmation.....	<u>64-66</u>

**Upon the foregoing cited papers, the Decision/Order on these motions is as follows:**

This is a personal injury action which arises from a trip and fall accident. In the original complaint [Doc 2], plaintiff states that the accident took place on May 2, 2017, inside the premises at 831 Seventh Avenue, New York, NY, which is a pizza restaurant called "Famous Original Ray's Pizza." The action was commenced on September 2, 2018. Both defendants answered the complaint and the parties commenced discovery. On September 12, 2019, Justice Colon decided Motion Seq. #1, filed by defendant owner W 54-7 LLC, and therein states in part "plaintiff shall provide a supplemental bill of particulars verifying the accident date as complaint and BP list different accident dates." Instead of supplementing the bill of particulars as directed, plaintiff amended the complaint, without leave of court, by electronically filing an amended complaint [Doc 27] on

September 30, 2019, which changed the accident date to December 1, 2017.

About a year later, the parties stipulated to amend the caption to correct defendant's name, from "Famous Original Ray's Pizza," to "RayMangano 7<sup>th</sup> Avenue Pizza Corp. d/b/a/ Famous Original Ray's Pizza," the correct name of the corporation, with a "doing business as" name filed with the New York State Department of State Division of Corporations in 2011, according to their website. The so-ordered stipulation was electronically filed on 11/20/20 [Doc 37]. It also provides that plaintiff would discontinue her second action, against "RayMangano 7<sup>th</sup> Avenue Pizza Corp. d/b/a/ Famous Original Ray's Pizza," under index number 521498/2020 with prejudice. The stipulation makes no mention of any amendments to the complaint other than substituting the correct corporate name for the defendant in the caption as well as all references to that entity.

Plaintiff, in addition to the above, also electronically filed another amended complaint, "Second Amended Verified Complaint", also without leave of court, on 11/9/20 [Doc 33], which seems to have been considered by the reviewing clerk as the embodiment of the so-ordered stipulation to amend the caption. In this document, it is unclear what, if anything, was changed from the first amended complaint, other than the correction of the defendant's name pursuant to the so-ordered stipulation.

Plaintiff, apparently still not sure she had sued the right entity, then brought a third action for this accident, commenced on March 19, 2021, under index number 506659/2021 [Doc 1-2], against one defendant, "49<sup>th</sup> Street Pizza Corp. d/b/a Famous Original Ray's Pizza", and alleges in that complaint that her trip and fall accident took place on December 1, 2017, but inside the pizza restaurant by that name located at 736 Seventh Avenue, New York, NY. The court notes that this corporation has not filed any "doing business as" certificate, but is a valid and active NY corporation, according to the website of the New

York State Department of State, Division of Corporations. This 2021 action is still “pre-RJI” but defendant has answered the complaint. The court notes that the parties stipulated to add another defendant, “Farmore Realty, Inc.,” presumably the owner of 736 Seventh Avenue, NY, NY, [Doc 9 in that action], which was not so-ordered, as no judge has been assigned (again, it is “pre-RJI”), and this time the stipulation does provide that the plaintiff may file and serve a Supplemental Summons and Amended Complaint, as a party is added. Plaintiff did so [Docs 10-11], and the new defendant, Farmore Realty, Inc., represented by Eustace, Prezioso & Yapchanyk, has answered the complaint and asserted crossclaims [Doc 15 in index number 506659/2021]. Defendant 49<sup>th</sup> Street Pizza Corp. amended its answer in that action after the new defendant was added, and has asserted crossclaims against Farmore Realty, Inc. [Doc 16]

Plaintiff subsequently discontinued all claims against the co-defendant W 54-7 LLC, the property owner in this action, by stipulation of partial discontinuance e-filed 7/26/21 [Doc 59].

In Motion Sequence #2 in this action, plaintiff seeks to consolidate the two cases. Defendant opposes, and cross-moves, in Mot. Seq. #3, for summary judgment dismissing the complaint, on the grounds that plaintiff has sued this defendant in error.

There is no affidavit of service filed for motion sequence #2, thus the court can only conclude that the motion was only served by electronically filing it. E-filing the motion in this action only constitutes service of the motion on the parties in this action, not on the attorneys for the parties in the other action. In particular, the defendant property owner in the other action, Farmore Realty, Inc., is represented by Eustace, Prezioso & Yapchanyk. This firm does not represent anyone in this action. Thus, the court is constrained to deny the motion as it was not served on the attorneys for all parties in the two actions.

Defendant's cross motion [Doc 50] asserts that the place where plaintiff had her accident is not part of the premises which was leased by defendant at 831 Seventh Avenue, and that defendant does not own the premises either. Document 53 provides photos alleged by movant to have been taken of the place where plaintiff claims she tripped, a "hidden step" and Doc 54 is an affidavit from Annette Angulo, an "administrative assistant" for the pizza restaurant, which states that the photos do not depict the space at 831 Seventh Avenue which they lease for their restaurant. Neither she nor defendant's counsel explains how she obtained the photos or who took them. There is no indication that plaintiff was shown the photos at an EBT and authenticated them. No EBTs have been held as yet. Defendant's counsel states that the photos are the photos of the accident location, but he does not explain how he knows that, or where they came from, and Ms. Angulo just says the photos are not of the space their restaurant leases. The defendant contends that, based upon those photos and Ms. Angulo's affidavit, the complaint should be dismissed.

The court does not agree that unauthenticated photos of a staircase, combined with an affidavit from a person alleged to be employed by the defendant, which states that the area depicted in the photos "was never part of the . . . location leased at 831 Seventh Avenue on and prior to December 1, 2017" make a prima facie case for dismissal. Under the law, the motion should be denied without regard to the plaintiff's papers in opposition.

Here, plaintiff argues that the motion is premature as depositions have not been held. He states that the photos were exchanged during discovery, presumably by him. But he does not try to clear up the issue of which of the two pizza restaurant locations is the one where plaintiff had her accident, instead stating:

“Clearly the defendants are related. Both businesses are doing business as "FAMOUS ORIGINAL RAY'S PIZZA" and have signage outside of their establishments stating same. Also, a promotional poster that that was recently observed and posted in the windows of both business locations clearly show that the FAMOUS ORIGINAL RAY'S PIZZA located at 831 Seventh Avenue and the one located at 736 Seventh Avenue are just two of several locations of the same company. (See photo of promotional poster attached hereto as Exhibit "1") Both locations even share the same attorneys in this action. It is respectfully submitted that there clearly is ample evidence to show that there is definite relationship between the two locations of FAMOUS ORIGINAL RAY'S PIZZA. The full extent of that relationship is unknown at this time because no or very limited discovery has taken place, with no depositions held to date.” [Doc 60]

In reply, defendant states “Despite Plaintiff’s assertion to the contrary, plaintiff did not fall at the location of 831 Seventh Avenue, New York, New York. If she did, why didn’t she annex an affidavit rebutting defendant’s affidavit attached to its cross-motion annexed as Exhibit C?” While the court notes that the plaintiff does not need to restate the allegations in her complaint to oppose a motion for summary judgment, she can only have fallen in one of the two locations. Which is the correct one will have to wait for another day.

Accordingly, it is **ORDERED** that both motions are denied.

This constitutes the decision and order of the court.

Dated: January 13, 2022

ENTER:



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Hon. Debra Silber, J.S.C.