

<b>Simon v City of New York</b>
2022 NY Slip Op 31702(U)
May 25, 2022
Supreme Court, New York County
Docket Number: Index No. 152298/2019
Judge: Judy H. Kim
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDY H. KIM PART 05RCP

Justice

INDEX NO. 152298/2019
MOTION DATE 02/15/2022, 03/11/2022
MOTION SEQ. NO. 002 003

RACHEL S. SIMON,

Plaintiff,

- v -

THE CITY OF NEW YORK, JANUSZ SENDOWSKI, 65
CARMINE STREET LLC C/O CORNERSTONE
MANAGEMENT, CARMINE PARTNERS LLC, SPUNTO,
INC.,

Defendants.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 101, 102, 103, 104, 105, 131, 132

were read on this motion for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 128, 129, 130

were read on this motion to DISMISS.

On March 5, 2019, plaintiff commenced this action for personal injuries she allegedly sustained on July 11, 2018, as a result of a trip and fall on the public sidewalk on the eastern sidewalk of Seventh Avenue South, between the corner of Leroy and Carmine Street (NYSCEF Doc. No. 1 [Complaint at ¶6]). All defendants answered and asserted cross-claims for indemnity and contribution against their co-defendants.

In motion sequence 002, defendant Carmine Partners LLC ("Carmine Partners") moves, pursuant to CPLR §3212, for an order granting it summary judgment dismissing plaintiff's complaint and all cross-claims asserted against it. In support of its motion, Carmine Partners submits the affidavit of licensed surveyor Saeid Jalilvand attesting to his inspection of the relevant

area which demonstrated that “the alleged sidewalk defect alleged to have caused plaintiff’s accident is entirely outside the [Carmin Partners’s] property boundaries by a distance of 52 feet 10 inches” (NYSCEF Doc. No. 75). Carmin Partners also submits an affidavit from its managing member, Jesse Keyes, attesting that “Carmin Partners LLC has never undertaken any repairs or maintenance of the sidewalk area depicted in the plaintiff’s photo, either before July 11, 2018, or since.” (NYSCEF Doc. No. 76 [Keyes Aff. at ¶3]). Plaintiff and co-defendant Janusz Sendowski submitted their respective opposition to the motion<sup>1</sup>.

Motion sequence 003 filed by defendants 65 Carmine Street LLC c/o Cornerstone Management (“65 Carmine Street”), Carmin Partners and Spunto, Inc. (“Spunto”) is denied as moot, as plaintiff has discontinued this action as to these defendants (See NYSCEF Doc. No. 127). Accordingly, the Court turns to Carmin Partners LLC’s motion for summary judgment dismissing this action as against it.

### DISCUSSION

“[T]he 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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]).

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<sup>1</sup> Defendants 65 Carmine Street and Spunto’s opposition papers (NYSCEF Doc. No. 85) have not been considered by this Court in light of the discontinuance of the complaint against them (See NYSCEF Doc. No. 127).

Section 7–210 of the Administrative Code of the City of New York imposes tort liability upon the owner of real property abutting any sidewalk for any injury to property or personal injury proximately caused by the failure of such owner to maintain the sidewalk in a reasonably safe condition (Administrative Code §7-201[b]). Accordingly, Carmine Partners LLC has made a prima facie showing of its entitlement to summary judgment by submitting evidence—including the Jalilvand affidavit and attached survey—establishing that the sidewalk flag on which plaintiff allegedly tripped did not abut its property and was, in fact, nowhere close to its property line (See e.g., Quinn v City of New York, 113 AD3d 490 [1st Dept 2014]).

In opposition, plaintiff and co-defendant Janusz Sendowski argue that summary judgment is premature because depositions have not yet been held. As Carmine Partners LLC notes, however, neither party opposing this motion identifies any evidence that they expect to be revealed during depositions that would rebut Carmine Partners LLC’s prima facie case. “A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence” (DaSilva v Haks Engineers, Architects and Land Surveyors, P.C., 125 AD3d 480, 482 [1st Dept 2015] quoting Bailey v New York City Transit Authority, 270 AD2d 156, 157 [1st Dept 2000]).

Accordingly, it is

**ORDERED** that Carmine Partners LLC’s motion for summary judgment (mot. seq. 002) is granted and this action is dismissed as to defendant Carmine Partners LLC; and it is further

**ORDERED** that the motion by defendants 65 Carmine Street LLC, Carmine Partners LLC and Spunto, Inc. to dismiss the complaint (mot. seq. 003) is denied as moot; and it is further

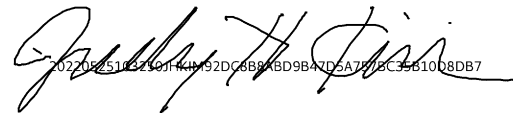
ORDERED that the caption is to be amended to reflect the discontinuance of this action as against 65 Carmine Street LLC c/o Cornerstone Management, Carmine Partners LLC and Spunto, Inc.; and it is further

ORDERED that Carmine Partners LLC shall serve a copy of this decision and order upon all remaining parties, with notice of entry, within fifteen days of the date of this decision and order; and it is further

ORDERED that Carmine Partners LLC shall serve a copy of this decision and order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “efiling” page on this court’s website at the address www.nycourts.gov/suptctmanh).

This constitutes the decision and order of the Court.



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JUDY H. KIM, J.S.C.

5/25/2022  
DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: