SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

x

MARCELINA VAZQUEZ,

Plaintiff,

-against-

200 TILLARY REAL ESTATE HOLDINGS, LLC, 200 TILLARY LLC, YYY BROOKLYN NY LLC, and INSTITUTE FOR COMMUNITY LIVING, INC.,

Defendants.

x

DECISION/ORDER

Index No. 518502/2019
Motion Seq. No. 1-4
Date Submitted: 6/2/22

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of these motions and cross motions for summary judgment

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Affidavits and Exhibits …..……	40-54; 61 - 80
Notice of Cross Motion Affirmations, Affidavits and Exhibits……	81-104; 117-132
Affirmations and Affidavits in Opposition and Exhibits.....	56-59; 105;106-110;137-139
Reply Affirmations.....	111-114; 115-116;133;140

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

This action arises from a trip and fall accident on the sidewalk in front of 200 Tillary Street, Brooklyn, NY. The accident took place on February 17, 2019. In Motion Sequence #1, plaintiff moves for summary judgment on the issue of liability against defendants 200 TILLARY REAL ESTATE HOLDINGS, LLC (mis-described as "Inc." in the notice of motion and affirmation in support) and INSTITUTE FOR COMMUNITY LIVING, INC. In Motion Seq. #2, defendant YYY BROOKLYN NY LLC moves for summary judgment dismissing the complaint and any cross claims as against it. In Motion Seq. #3, defendant

INSTITUTE FOR COMMUNITY LIVING, INC., moves for summary judgment dismissing the complaint and any cross claims as against it. In Motion Seq. #4, plaintiff cross-moves (presumably to MS #2) for summary judgment against defendant YYY BROOKLYN NY LLC.

This plethora of motions indicates a total lack of understanding of the sidewalk law which applies in New York City. A property owner has a non-delegable duty to maintain its sidewalk so that it is reasonably safe for pedestrians. This is true even if the owner is an out-of-possession owner. The Court of Appeals has made it clear that "nothing in [NYC Admin Code] section 7-210 prevents a landowner from entering into a maintenance agreement with tenants and third parties. While an owner can shift the work of maintaining the sidewalk to another, the owner cannot shift the duty, nor exposure and liability for injuries caused by negligent maintenance, imposed under section 7-210" (see Xiang Fu He v Troon Mgt., Inc., 34 NY3d 167, 174 [2019]; *Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517 [2008]).

Therefore, the complaint and any cross claims must be dismissed as against all defendants who are not the property owner. Thus, Motion Seq. #2 and 3 are granted, and the complaint and any cross claims are dismissed as against defendants YYY BROOKLYN NY LLC and INSTITUTE FOR COMMUNITY LIVING, INC. Plaintiff's motions for summary judgment (part of #1 and #4) against these defendants are denied.

This leaves the branch of the plaintiff's motion (MS #1) for summary judgment against the property owner, 200 TILLARY REAL ESTATE HOLDINGS LLC. As the motion is not made against defendant 200 TILLARY LLC, an entity which was the property owner until 2003, a party who has not answered or appeared and the plaintiff has failed to take a default against it, the court dismisses the complaint and any cross claims asserted against

it as having been abandoned.

Plaintiff supports her motion with the pleadings, her EBT and exhibits [photos], an EBT of defendant (Doc 49) by its "owner's rep" Jacob Shafran, and an expert's affidavit from Steven Zalben, an architect. Her attorney avers that she makes out a prima facie case for summary judgment against this defendant, and even if there is an issue of fact as to her comparative negligence, the law permits the court to grant her summary judgment and her negligence could still be determined by the jury, citing *Rodriguez v City of New York,* 31 NY3d 312 (2018).

Mr. Zalben states that he reviewed various items, including the photos which are exhibits to plaintiff's EBT, and concludes that plaintiff tripped on a raised sidewalk flag, a substantial defect, on the sidewalk in front of 200 Tillary Street, Brooklyn, NY. He points out that NYC Admin Code §19-152 §states that if the height differential is one-half inch or more, it is a violation, and that §7-210 states that the property owner is liable if it fails to maintain the sidewalk in a reasonably safe condition. He provides Google map photo May 2018 to establish that the condition had existed for at least that long before plaintiff's accident. He also provides photos which he took on September 2, 2019, which indicate that the sidewalk had not been repaired yet, and which include rulers and levels demonstrating that the height differential at the time of his photographs was more than a half inch.

In opposition to the motion, the property owner provides an attorney's affirmation (Doc 56), mis-named "Affirmation in Opposition to Cross-Motion", and nothing else. Therein, he argues that "plaintiff has failed to establish the precise location of the alleged accident, and therefore has failed to establish the existence of a substantial defect at said location." The photographs provided, and the plaintiff's testimony that plaintiff fell on the

elevated part" of the sidewalk as her left foot hit it, which caused her to trip and fall [EBT Doc 47, Pages 26-27] is insufficient, in counsel's opinion. He also concludes that there is an issue of material fact as to the "actual measurement of the height differential between the adjoining sidewalk flags as of the time of the alleged accident." This is not the law. Between a de minimis defect and an actionable one there is no required measurement. At her EBT she was shown the photos and identified the place where she fell [Page 30].

Counsel also argues "The mere existence of a sidewalk defect or trip hazard does not, without a sufficiently particular allegation of the precise location of the alleged trip/fall or of the location of the condition causing the alleged trip/fall, establish that said defect or trip hazard contributed to or caused the alleged trip/fall." His next argument (Point II) is that "plaintiff has failed to establish the existence of a substantial defect at the time of her alleged accident." The court disagrees.

Plaintiff's motion for summary judgment on the issue of liability as against defendant 200 Tillary Real Estate Holdings LLC is granted. The plaintiff was not required to establish the absence of her own comparative fault (see *Rodriguez v City of New York,* 31 NY3d 312 (2018). Whether plaintiff was also negligent still must be determined by the jury (see *Vailes v Molloy Coll.*, 175 AD3d 1348 [2d Dept 2019]; *Chavez v Prana Holding Co. LLC*, 200 AD3d 449 [1st Dept 2021]).

This shall constitute the decision and order of the court.

Dated: June 6, 2022

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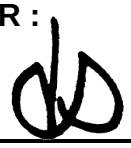

Hon. Debra Silber, J.S.C.