Valencia v MBM Assoc. LP
2022 NY Slip Op 32009(U)
June 16, 2022
Supreme Court, Kings County
Docket Number: Index No. 501782/2019
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 16th day of June 2022.

PRESENT:

CARL J. LANDICINO, J.S.C.

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CARIDAD VALENCIA, Index No.: 501782/2019

Plaintiffs,

-against- DECISION AND ORDER

MBM ASSOCIATES LP and AUTOZONE NORTHEAST, INC., Motion Sequence #2

Defendants.

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

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	31-45,
Opposing Affidavits (Affirmations)	50-54,
Reply Affirmation or Affidavit	55, 56, 58-62,
Memoranda of Law	46, 57

After a review of the papers and oral argument, the Court finds as follows:

This is an action for personal injuries allegedly caused by a trip and fall accident on September 29, 2018, at a property located at 975 Pennsylvania Avenue in Brooklyn, New York (hereinafter referred to as the "Property"). The Plaintiff, Caridad Valencia (hereinafter the "Plaintiff"), alleged that she was injured after she tripped and fell on a cement curb separating the sidewalk and the parking lot adjacent to the Property.

Defendants MBM Associates LP and Autozone Northeast, Inc. (hereinafter referred to as the "Defendants"), move (motion sequence #2) for an order pursuant to CPLR 3212, granting summary judgment and dismissing the complaint. The Defendants contend that the complaint

should be dismissed as the cement curb that the Plaintiff tripped over is an open and obvious condition and as a result was not inherently dangerous.

The Plaintiff opposes the motion and argues that it should be denied. The Plaintiff contends that the motion is untimely, and that it is otherwise defective in that it fails to annex either a statement of material facts (Uniform Rule 202.8-g) or a word count certification (Uniform Rule 202.8-b(c)). The Plaintiff also argues that the motion should be denied as there is an issue of fact regarding whether the condition at issue was in fact open and obvious and not inherently dangerous.

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2d Dept 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The party seeking the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure on the part of the movant to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520,

824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

Turning to the merits of the Defendants' motion, the Court finds that the Defendants have failed to provide good cause for the untimely motion for summary judgment. Pursuant to the Kings County Supreme Court Civil Term rules, "post note of issue summary judgment motions, where the City of New York is not a defendant. . . must be made no later than sixty (60) days after the filing of the note of issue." "'In the absence of a showing of good cause for the delay in filing a motion for summary judgment, the court has no discretion to entertain even a meritorious, nonprejudicial motion for summary judgment.'" *Bargil Assocs., LLC v. Crites*, 173 A.D.3d 958, 958, 100 N.Y.S.3d 897 [2d Dept 2019], quoting *Bivona v. Bob's Disc. Furniture of NY, LLC*, 90 A.D.3d 796, 935 N.Y.S.2d 605, 606 [2d Dept 2011]; see also *Brill v. City of New York*, 2 N.Y.3d 648, 651, 814 N.E.2d 431, 433 [2004].

In the instant proceeding, the note of issue was filed on December 8, 2020 and the motion was served and filed on March 3, 2021, more than 60 days after plaintiff's filing of the Note of Issue. The Defendant did not attempt to provide good cause for this late filing in the motion itself, but instead addressed the lateness in its Attorney Affirmation in Reply. Defendants argued that the lateness was a product of law office failure. In its Attorney Affirmation in Reply (Paragraph 8), counsel states that "[b]ecause none of the prior orders set forth a dispositive motion deadline, and because neither Judge Landicino or Judge Knipel's part rules contained any dispositive motion deadline, I believed in good faith that I had 120-days in which to make my motion for summary judgment pursuant to CPLR § 3212(a), and I calendared the deadline accordingly." This is insufficient to constitute good cause.

"Although the court has discretion to accept law office failure as a reasonable excuse where the claim is supported by a detailed and credible explanation of the default, under the facts and circumstances here, the defendant's excuse amounted to a perfunctory claim of law office failure." *Lanza v. M-A-C Home Design & Constr. Corp.,* 188 A.D.3d 855, 856, 135 N.Y.S.3d 495 [2d Dept 2020]; *see also Navarro v. Damac Realty, LLC*, 202 AD3d 1100, 1101, 159 N.Y.S.3d 887 [2d Dept 2022]. Also, the Defendants, having raised their excuse for the first time in their reply, deprived the Plaintiff an opportunity to address the Defendants' purported good cause explanation. *See Cabibel v. XYZ Assocs., L.P.,* 36 A.D.3d 498, 498, 828 N.Y.S.2d 341, 342 [1st Dept 2007]. Accordingly, the Defendants' motion is denied.

Based on the foregoing, it is hereby ORDERED as follows:

Defendants' motion (motion sequence #2) for summary judgment is denied.

This Constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

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KINGS COUNTY CLERK
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