

Yu Lian Feng v 6023 Realty LLC

2022 NY Slip Op 32720(U)

August 2, 2022

Supreme Court, New York County

Docket Number: Index No. 158256/2017

Judge: Leslie A. Stroth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LESLIE A. STROTH PART 52

Justice

-----X	INDEX NO.	<u>158256/2017</u>
YU LIAN FENG,	MOTION DATE	<u>05/05/2022</u>
Plaintiff,	MOTION SEQ. NO.	<u>004</u>

- v -

6023 REALTY LLC, ABDUL AWAN, BAKHAT AWAN, THE
CITY OF NEW YORK

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 135

were read on this motion to/for SUMMARY JUDGMENT

Defendant, the City of New York (the City) moves for an order granting summary judgment and dismissing plaintiff's complaint and all cross-claims against it. In the instant case, Plaintiff alleges that she tripped and fell due to a raised and/or uneven portion of sidewalk on Fourth Avenue, in front of the premises located at 6019 Fourth Avenue and 6023 Fourth Avenue, New York, NY on April 16, 2017.

In the instant motion, the City argues that it is not liable for plaintiff's injuries, because it is not the record owner of the properties located at 6019 Fourth Avenue or 6023 Fourth Avenue, and that the owners of those premises are not exempt from the liability shifting provision of New York City Administrative Code § 7-210. Furthermore, the City maintains that it did not cause and create the alleged defective condition that caused Plaintiff's incident.

Although all parties entered into a stipulation adjourning the motion on consent from March 16, 2022 to May 5, 2022, no opposition was filed by either Yu Lian Feng (plaintiff) or the non-municipal remaining defendants, Abdul.Awan and Bakhat Awan.¹

It is a well-established principle that the “function of summary judgment is issue finding, not issue determination.” *Assaf v Ropog Cab Corp.*, 153 AD2d 520 (1st Dept 1989) (quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of issues of fact. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted. *See Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dept 1990), citing *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989).

Administrative Code § 7-210, provides in pertinent part that “the owner of real property abutting any sidewalk...shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition.” Further, “[n]otwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one, two, or three-family residential real property that is (i) in whole or in part, owner-occupied, and (ii) used exclusively for residential

¹ The action has been discontinued against defendant 6023 Realty LLC. (See NYSCEF doc. no. 101).

purposes) in a reasonably safe condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.” *Id.*

The City establishes through admissible evidence that the sidewalk adjacent to 6019 Fourth Avenue and 6023 Fourth Avenue was not owned by the City on the date of incident. Plaintiff’s pleadings, testimony, and photographs consistently identified the sidewalk in front of 6019 and 6023 Fourth Avenue as the location of her incident. (*See Exhibits A, B, D, G, I, J, and K*). Regarding ownership of the real properties at the location, the City submits the EBT testimony of Kim Wan Cheung (Exhibit L) and defendant Abdul Awan (Exhibit M), who testified that they owned the properties at 6023 and 6019 Fourth Avenue, respectively, at the time of the alleged accident.

The City also submits the affidavit of David Atik, New York City Department of Finance Employee. (*See Defendants’ Exhibit P*). Mr. Atik attests that on the date of the alleged accident, 6019 Fourth Avenue was not owned by the City and that he conducted a search of the Property Tax System database which revealed that the City owned neither 6019 nor 6023 Fourth Avenue at the time of the accident. (*Id.*) Mr. Atik also affirms that on the date of the alleged accident, 6019 Fourth Avenue was classified as “store building” and 6023 Fourth Avenue was classified as “walk-up apartments, over six families with stores.” (*Id.*) Mr. Atik’s search revealed that 6019 and 6023 were not classified as a one-, two-, or three- family solely resided property at the time of the alleged accident. (*Id.*)

Therefore, the City demonstrates *prima facie* entitlement to summary judgment by establishing: (1) the non-City ownership of the real property that abuts the sidewalk where the alleged accident occurred, and (2) the non-exempt building classification of the abutting property,

pursuant to Administrative Code § 7-210. Neither of the remaining non-municipal defendants, Abdul Awan and Bakhat Awan, submit opposition or raise any material issues of fact.

While the City has no burden to establish its prima facie entitlement to summary judgment in order to prove its freedom from liability due to affirmative negligence or special use, the City has tendered evidence proving that it neither caused or created the subject sidewalk condition nor made a special use of it, such as the affidavits of Lester Payawal, an employee of the Department of Transportation, (Exhibit O) and Chrisitina Badillo, an Principal Administrative Associate of the Department of Parks and Recreation (Exhibit S) . Therefore, the City is not liable for any sidewalk defects which may have caused plaintiff's accident.

Accordingly, upon the foregoing documents, it is

ORDERED that the motion of defendant the City of New York seeking summary judgment to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that this action, including any pending motions, is transferred to a general IAS Part, as corporation counsel no longer represents any parties to this action; and it is further

ORDERED that counsel for the moving party shall serve a copy of this 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 mark the court's records to reflect the change in the caption herein; 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 "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.

8/2/2022

DATE


LESLIE A. STROTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE