

Hernandez v 38-09 Junc. Realty LLC

2022 NY Slip Op 34769(U)

June 17, 2022

Supreme Court, Queens County

Docket Number: Index No. 714742/2017

Judge: Tracy Catapano-Fox

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This opinion is uncorrected and not selected for official publication.

Short Form Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
ZORAYDA HERNANDEZ,

Plaintiff,

-against-

38-09 JUNCTION REALTY LLC, JUNCTION
SPORTS PLUS INC., PECA REALTY CORP.,
C.E.E. MANAGEMENT INC., ABZ FUNDINGS
CORP., THE CITY OF NEW YORK and NEW YORK
CITY TRANSIT AUTHORITY,

Defendants.
-----X

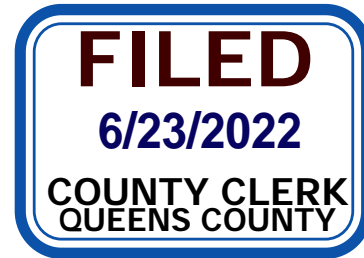
Index No. 714742/2017

Part 6

Motion Date: May 2, 2022

Calendar No. 20

Sequence No. 11



The following papers numbered 1 to 20 read on this motion by defendant 38-09 JUNCTION REALTY LLC for summary judgment and dismissal of plaintiff's Complaint and all cross-claims against it pursuant to CPLR §3212, and for summary judgment against defendant Junction Sports Plus Inc.

Papers
Numbered

Notice of Motion, Affirmation, Exhibits.....	1-4
Junction Sports' Affirmation in Partial Opposition, Exhibits.....	5-7
NYCTA's Affirmation in Partial Opposition.....	8-9
Plaintiff's Affirmation in Opposition, Exhibits.....	10-12
City's Affirmation in Partial Opposition.....	13-14
Reply Affirmation.....	15-16
Reply Affirmation.....	17-18
Reply Affirmation.....	19-20

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendant 38-09 Junction Realty LLC's motion for summary judgment pursuant to CPLR §3212 is granted, as it presented sufficient competent, admissible evidence that it did not cause or

create, nor have notice of a dangerous condition on the sidewalk where plaintiff fell. (*See McClean v. National Ctr. For Disability Servs.*, 30 A.D.3d 383 [2d Dept. 2006].)

Plaintiff commenced this action for personal injuries sustained on August 11, 2016, when she fell on raised brick on the sidewalk adjacent to 38-09 Junction Boulevard and 38-11 Junction Boulevard, Queens, New York. Plaintiff filed her Summons and Complaint on October 23, 2017, and issue was joined by all defendants.

Pursuant to CPLR 3212, “[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” (CPLR 3212 [b]; *Rodriguez v. City of New York*, 31 N.Y.3d 312 [2018].) The motion for summary judgment must also “show that there is no defense to the cause of action.” (*Id.*). The party moving for summary judgment must make a *prima facie* showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; *see Jacobsen v New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *Brill v City of New York*, 2 N.Y.3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 [2012].) Once a *prima facie* showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980].)

In a premises liability case, a defendant real property owner, or a party in possession or control of real property who moves for summary judgment can establish its *prima facie* entitlement to judgment as a matter of law by showing that it neither created the allegedly dangerous or defective condition nor had actual or constructive notice of its existence. (*Chang v. Marmon Enters., Inc.*, 172 A.D.3d 678-679 [2d Dept. 2019].) An out-of-possession landlord is not liable for injuries that occur on premises unless the landlord retained control over the premises and has a ‘duty imposed by statute or assumed by contract or course of conduct.’ (*Vaughan v. Triumphant Church of Jesus Christ*, 193 A.D.3d 1104, 1105 [2d Dept. 2021].)

Defendant 38-09 Junction Realty LLC established a prima facie entitlement to summary judgment, by establishing it did not cause or create a dangerous condition, nor did it have actual or constructive notice of the dangerous condition. (*See Xiang Fu He v. Troon Mgt., Inc.*, 34 N.Y.3d 167 [2019].) Defendant presented the pleadings, photographs, prior court orders, and depositions of the parties in support of its motion. Plaintiff testified that she fell while walking on the

sidewalk near the elevator to the 7 train but did not know whether she fell on brick or tile or an object. Defendant presented the deposition testimony Reynoldo Pena, one of its members, who testified that it was the responsibility of the tenant under the lease to keep the sidewalk clean and free of debris. He further testified that defendant 38-09 Junction Realty LLC received no complaints about the sidewalk prior to plaintiff's accident, and that it was an out-of-possession landlord. Although defendant was an out-of-possession landlord with a lease giving the tenant control over the premises, that alone would be insufficient to establish defendant was not liable for maintenance of the premises. (*See Xiang Fu He, supra.*) However, defendant 38-09 Junction Realty LLC also established it did not cause or create a dangerous condition, nor did it have notice of the dangerous condition. Pena testified that defendant 38-09 Junction Realty LLC never performed construction on the sidewalk, but further asserted that in years past, a big construction project took place involving installing the elevator and fixing the curb for the bus stop, and said project involved the City of New York, NYCTA, Consolidated Edison and MTA. Defendant also presented the deposition testimony of Omar Codling, record searcher for the New York City Department of Transportation, who testified that there were two prior complaints in the area where plaintiff fell, but were not related to the elevator area. Based upon the evidence presented, defendant 38-09 Junction Realty LLC established it had no notice of, nor did it create or cause the dangerous condition of which plaintiff alleged caused her accident. Defendant 38-09 Junction Realty LLC also established prima facie entitlement to summary judgment against co-defendant Junction Sports Plus Inc., as it was entitled to contractual indemnification and procurement of insurance by tenant Junction Sports pursuant to the terms of the lease.

Defendants Junction Sports and NYCTA failed to raise a triable issue of fact, as neither defendant presented an affidavit of merit from someone with personal knowledge of the facts in support of their opposition. Counsel's affirmations is hearsay and without probative value, and therefore cannot raise a triable issue of fact in dispute. (*See Sugamele v. JPMC Specialty Mtge., LLC*, 204 A.D.3d 1064 [2d Dept. 4/27/2022].) Plaintiff also failed to raise a triable issue of fact in dispute. Plaintiff's argument that as owner of the premises, defendant 38-09 Junction Realty LLC is not exempt from liability under *Xiang Fu He* is correct. However, defendant 38-09 Junction Realty LLC established it did not cause or create the condition, nor have notice of the dangerous condition, which is sufficient under *Xiang Fu He* to demonstrate prima facie entitlement to summary judgment. Plaintiff's evidence was insufficient to rebut defendant's prima facie case, as she failed to demonstrate defendant was aware of, or caused the dangerous condition.

Accordingly, defendant 38-09 Junction Realty LLC's motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is granted, and plaintiff's Complaint

and all cross-claims against it are dismissed.

This constitutes the decision and Order of the Court.

Dated: June 17, 2022

Tracy Catapano-Fox

Tracy Catapano-Fox, J.S.C.

