

Hernandez v 38-09 Junc. Realty LLC

2022 NY Slip Op 34770(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

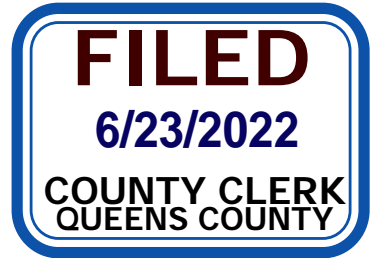
Index No. 714742/2017

Part 6

Motion Date: May 2, 2022

Calendar No. 21

Sequence No. 10



The following papers numbered 1 to 18 read on this motion by defendant NEW YORK CITY TRANSIT AUTHORITY to amend the Answer pursuant to CPLR §3025(b) and for summary judgment and dismissal of plaintiff’s Complaint and all cross-claims against it pursuant to CPLR §3212, and this cross-motion by defendant The City of New York to amend the Answer pursuant to CPLR §3025(b) and for summary judgment and dismissal of plaintiff’s Complaint and all cross-claims against it pursuant to CPLR §3212.

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Upon the foregoing papers, it is ordered that these motions are determined as follows:

Defendant New York City Transit Authority’s motion and defendant The City of New York’s cross-motion to amend their Answers pursuant to CPLR §3025(b) are granted, but their

motion and cross-motion for summary judgment pursuant to CPLR §3212 are denied, as they failed to present competent, admissible evidence that they were not liable for maintaining or repairing 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.

Defendant NYCTA's motion and defendant The City of New York's cross-motion to amend their Answers pursuant to CPLR §3025(b) is granted. CPLR §3025(b) permits amendment to pleadings absent prejudice or surprise to the opposing party, or unless the amendment is palpably insufficient or meritless. (*Ciminello v. Sullivan*, 120 A.D.3d 1176 [2d Dept. 2014].) Defendants argue that collateral estoppel is a valid affirmative defense based upon prior court orders, and while plaintiff and other court orders argue otherwise, amendments to Answers are liberally granted under CPLR §3025(b), and therefore their motions to amend are granted.

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].) As a general rule, a lease that obligates a tenant to repair the sidewalk does not impose on the tenant a duty to a third party. (*Hsu v. City of New York*, 145 A.D.3d 759, 760 [2d Dept. 2016].) However, where a lease agreement is so comprehensive and exclusive as to sidewalk maintenance...the tenant may be liable to a third party. (*Leitch-Henry v. Doe Fund, Inc.*, 179 A.D.3d 655, 656 [2d Dept. 2020].)

Defendants NYCTA and The City of New York failed to establish a prima facie entitlement to summary judgment, as both defendants failed to present competent, admissible evidence that they had no liability to maintain or repair the sidewalk where plaintiff fell. Their argument that it is the law of the case that plaintiff did not identify what caused her to fall is a limited analysis of prior decisions and does not establish defendants are free from liability for plaintiff's accident. The law of the case doctrine applies only to legal determinations that are resolved on the merits in a prior decision. (*Saccoccia v. Greenberg*, 136 A.D.3d 881 [2d Dept. 2016].) Here, the prior court decisions specifically granted summary judgment because the moving defendants were able to establish through affidavits of merit and other documentary evidence that they were not responsible for the maintenance of the area where plaintiff fell. Contrary to defendants NYCTA and City's argument, the court decisions stated that plaintiff could not identify the item upon which she fell, not that she could not identify the location where she fell. The court orders were clearly based upon the determination that plaintiff fell in a location for which the moving defendants were not responsible, and at no time was there a specific determination that plaintiff did not identify the location of her fall. Therefore, the law of the case does not apply to the present motion, and defendants NYCTA and City were still required to submit evidence in support of their motion and cross-motion for summary judgment. (*See Macchio v. Michaels Elec. Supply Corp.*, 149 A.D.3d 716 [2d Dept. 2017].)

Upon reviewing the evidence presented, defendants NYCTA and City failed to establish by competent, admissible evidence that neither defendant had a duty to maintain and repair the sidewalk. Counsels' affirmations are inadmissible hearsay and therefore without probative value to raise an issue of fact. (*See Sugamele v. JPMC Specialty Mtge., LLC*, 204 A.D.3d 1064 [2d Dept. 4/27/2022].) Contrary to the evidence presented in the other summary judgment motions, defendants failed to present an affidavit of merit or sworn deposition testimony that they were not liable for maintenance and repair. As defendants NYCTA and City presented conclusory and speculative arguments, they both failed to establish they did not cause or create the dangerous condition, nor were they responsible to maintain the premises. (*See Castro v. Rodriguez*, 176 A.D.3d 1031, 1033 [2d Dept. 2019].)

Accordingly, defendant New York City Transit Authority's motion to amend its Answer pursuant to CPLR §3025(b) is granted, but its motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is denied. Defendant The City of New York's cross-motion to amend its Answer pursuant to CPLR §3025(b) is granted, but its motion for summary judgment and dismissal of plaintiff's Complaint and all cross-claims against it pursuant to CPLR §3212 is denied.

This constitutes the decision and Order of the Court.

Dated: June 17, 2022

Tracy Catapano-Fox
Tracy Catapano-Fox, J.S.C.

