

Quick v SMSR Realty LLC
2023 NY Slip Op 30066(U)
January 6, 2023
Supreme Court, New York County
Docket Number: Index No. 451609/2020
Judge: J. Machele Sweeting
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

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DOREEN MATTHEWS QUICK,
Plaintiff,

INDEX NO. 451609/2020

MOTION DATE 04/05/2022

MOTION SEQ. NO. 001

- v -

SMSR REALTY LLC, JACOB AVID,
Defendants.

**DECISION + ORDER ON
MOTION**

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SMSR REALTY LLC, JACOB AVID
Plaintiffs,

Third-Party
Index No. 595190/2021

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL
PROTECTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 52-75, 77, 81-95
were read on this motion to/for SUMMARY JUDGMENT.

In the underlying action, plaintiff alleges that she sustained personal injuries when she tripped and fell due to a defect on the sidewalk located in front of the premises located at 155 West 83rd Street New York, New York (the “subject premises”).

Pending now before the court is a motion filed by plaintiff seeking an order:

(a) pursuant to CPLR § 3212, granting summary judgment against first-party defendants SMSR REALTYLLC and JACOB AVID (referred to herein, collectively, as the “Owner”), on the issue of liability; and

(b) dismissing all of Owner’s affirmative defenses as to liability; and

(c) pursuant to CPLR § 603 and §1010, severing the third-party claim by the Owner against third-party defendants CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. (“Con Edison”) and THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION (the “City”).

Arguments Made by the Parties

With respect to summary judgment, plaintiff argues that defendant JACOB AVID owned defendant SMSR REALTY LLC, and defendant SMSR REALTY LLC. owned and managed the subject premises in front of which plaintiff fell. Plaintiff argues that the Owner failed in its non-delegable statutory duty to keep the sidewalk in front of 155 West 83rd Street in a reasonably safe condition for pedestrians. In support of this argument, plaintiff submits four photos (NYSCEF Document #93), that were marked at plaintiff’s EBT as Defendant’s A-D. Plaintiff argues that these photos clearly show that the sidewalk defect that caused her to trip and fall was on defendant’s premises and that the subject defect is substantial. Plaintiff also argues that the Owner had four years of constructive notice of an open and obvious sidewalk flag crumbling trip hazard defect. In support of this argument, plaintiff submits Google Streetview photos from the period of time between 2009 and 2017 (NYSCEF Documents #62, 65-72), which plaintiff alleges show “gradual deterioration” of the sidewalk where plaintiff fell.

With respect to the Owner’s affirmative defenses, plaintiff argues that all such defenses, including those alleging culpable conduct, should be dismissed because, “It is unfathomable that Plaintiff could have contributed to the happening of this incident in any way.” Specifically, plaintiff argues that she “was an innocent pedestrian from out-of-town” who “tripped and fell on

a substantial flag trip hazard defect,” and that “there are no competing inferences to be drawn on this issue.”

With respect to severance of the third-party claim against third-party defendants, plaintiff argues that this is warranted because the Owner waited two years to commence the third-party action despite having exclusive control of the information upon which the Owner’s third-party action is based. Plaintiff argues that the two-year delay is extremely prejudicial to plaintiff and that any delay caused by the Owner should not be at the expense of plaintiff.

In opposition, the Owner argues that the photographs plaintiff had marked at her deposition raise questions of fact as to where and how plaintiff fell. The Owner argues that plaintiff’s testimony was that she had fallen in front of a lamppost, and that the photos show “at least two and a half sidewalk slabs” between the alleged defect and the lamppost. The Owner argues that the photos show that the lamppost is located not on the subject premises located at 155 West 83 Street, but in fact on the adjacent premises located at 157 West 83rd Street (the “adjacent premises”). Accordingly, the Owner argues, plaintiff may have fallen on the adjacent premises and not on the subject premises.

With respect to affirmative defenses, the Owner argues, first, that plaintiff failed to set forth any case law, facts, legal reason or competent evidence that would warrant dismissal of any of the affirmative defenses. The Owner argues, second, that their affirmative defense of culpable conduct has a clear basis in the record, as plaintiff had testified in her EBT that the accident occurred while she was walking and talking to any employee from the Enterprise car rental company; that she was looking at her receipt that the Enterprise employee was holding in his hand; and that she was also looking across the street at the Thrifty car rental office where she was headed.

Finally, with respect to the severance of the third-party claim, the Owner argues that they brought the third-party action against the third-party defendants Con Edison and the City as soon as the Owner became aware of the work performed in the area by the third-party defendants. The Owner argues that plaintiff has failed to show how she is prejudiced by allowing discovery to go forward in the third-party matter to determine the issues of liability, as no note of issue has been filed and a final discovery conference has not been conducted.

Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). 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 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, “We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Here, with respect to the key issue of location, the various photos submitted into evidence (e.g. NYSCEF Document #62, 66, 67, 68, 69, 70, 72, 83, 94, etc.), when viewed in totality, appear to show that on the north side of West 83rd Street, the following buildings exist (running from east to west): An Enterprise car rental office; A parking garage (where Thrifty parks their cars; discussed further below); A brown building (not relevant to this motion); The subject premises (155 West 83rd Street); and The adjacent premises (157 West 83rd Street) (a Hertz car rental office)

Plaintiff and Mr. Avid also each testified, in their respective EBTs, that a Thrifty car rental office is on the other side of West 83rd Street (i.e. on the south side of West 83rd Street). This Thrifty car rental office is located across from the subject premises.

Plaintiff's EBT testimony (transcript at NYSCEF Document #57) sets forth the following:

Plaintiff resides in North Carolina, but had been coming to New York City for over a year, to be a caregiver to her elderly mother.

The week before the accident, plaintiff had rented a car from Thrifty. The day plaintiff went to return the rental car to Thrifty was the day plaintiff had her accident. On that day, plaintiff pulled the rental car over to the side of the street where the Thrifty garage was, then exited the car and headed to the Thrifty rental office. By accident, plaintiff mistakenly entered the Enterprise car rental office instead. There, an Enterprise employee took her receipt, explained that she was in the wrong rental office, and offered to show her where the Thrifty office was.

Plaintiff and the Enterprise employee exited the Enterprise office and began walking down the sidewalk, with the intention of heading to the Thrifty office. As plaintiff walked, she was talking to the Enterprise employee, and they were both looking at her receipt, which the Enterprise employee had in his hand. At some point, they started to walk under scaffolding.

Suddenly, and without warning, plaintiff fell. While falling, she attempted to grab onto the scaffold, but missed. Instead, she was able to fall towards the lamp pole and "held on it for dear life."

Afterwards, plaintiff noticed that the cement on the sidewalk was "crumbled" and "torn up."

Some portions of her testimony include:

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Q. And is that when your accident occurred?

A. Yes.

Q. So tell me what happened.

A. We was walking, and as I was walking I fell, he [the Enterprise employee] was still standing, there had to be about this much cement was off (indicating), and my feet came over the cement (indicating), and the scaffolding.

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Q. And did any part of your body come into contact with the sidewalk?

A. My ankle, when my ankle came in, it came in off that slab that wasn't there, and that's why my foot turned over, and then when I hit that lamp pole, that's when my shoulder and my knee hit that lamp pole with force.

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Q. So when your fall was completed, what position were you in?

A. More or less drawn up in a fetal position holding onto that lamp pole waiting for the adrenalin to kick in.

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Q. So you were in a fetal position. And how did you get up?

A. I had to crawl up the pole with my right side of my body.

Q. Did the gentleman help you?

A. No, he didn't.

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Q. Is that light pole, that you had mentioned earlier, depicted in the photograph¹ at all?

A. That was my friend, that was the light pole, yes, that I grabbed onto.

The court notes, first, that this is not the Owner's motion to dismiss, but is instead plaintiff's motion for summary judgment. Therefore, the Owner is entitled to all favorable inferences that can be drawn from the evidence submitted, and summary judgment will only be granted to plaintiff if there are no material, triable issues of fact.

¹ The transcript of plaintiff's EBT shows that plaintiff reviewed and marker certain photos during said EBT. However, it does not appear that these photos were ever submitted onto the record in this case.

Here, despite plaintiff's assertion that she fell in front of the subject premises, the court agrees with the Owner that the photos submitted by plaintiff raise an issue of fact as to whether this is indeed the case. It is clear from the photos that the subject defect plaintiff alleges caused her to fall is located on the subject premises owned by the Owner, whereas the lamp pole is located on the adjacent premises. It is also clear from plaintiff's testimony that she fell at, or extremely close to, the light pole. In fact, plaintiff's testimony was that she "hit that lamp pole;" that her shoulder and knee "hit that lamp pole with force;"; that when her fall was completed, she was "more or less drawn up in a fetal position holding onto that lamp pole." However, the photos, particularly the ones at NYSCEF Document #94, depict at least two and a half sidewalk slabs between the alleged defect on the Owner's property and the light pole on the adjacent property. Accordingly, it is unclear on this record how plaintiff could have tripped on the alleged defect but fallen onto the light pole. As the Owner correctly argues, the record raises questions of fact as to whether it was the subject defect that caused plaintiff to fall, or whether plaintiff somehow recovered from her initial trip at the subject defect, and then tripped again near the lamppost for an unrelated reason. Therefore, the court finds that summary judgment is not appropriate in this case.

Owner's Affirmative Defenses

In its Answer (NYSCEF Document #6), the Owner sets forth the following Affirmative

Defenses:

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

6) The culpable conduct of the plaintiff caused any injuries and/or damages sustained by the plaintiff.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

7) Defendants allege that plaintiff's injuries, however described, resulted solely and proximately from conditions and/or conduct for which defendant is not liable or responsible, and defendants have no liability in the premises.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

8) Plaintiffs alleged injuries, if any, were proximately and solely caused by an independent, superseding and/or intervening cause or causes, for whom or for which these defendants are neither liable nor responsible.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

9) Plaintiffs alleged injuries and damages, if any, were proximately and solely caused by the acts of omissions of others for whom this defendant is neither liable nor responsible.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

10) In the event the plaintiff recovers a verdict or judgment against answering defendants, said verdict or judgment should be reduced pursuant to CPLR 4545(c) by those amounts which have been or will, with reasonable certainty, replace or indemnify plaintiff in whole or in part for any past or future claimed economic loss, from any collateral source.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

11) That if the plaintiff was damaged as alleged in the complaint, all of which is denied by answering defendants, then such damage was caused wholly or in part by the negligence of plaintiff, and in the event any judgment is recovered herein against answering defendants for such damages, such award shall be reduced by plaintiff's comparative fault.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

12) That the plaintiff failed to take reasonable precautions to mitigate damages

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

13) The action is barred by plaintiffs express assumption of the risk for the activity plaintiff was doing at the time of the occurrence.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

14) The action is barred by plaintiffs implied assumption of risk for the activity plaintiff was doing at the tune of the occurrence in that said risks and dangers were open, obvious and apparent and known to the plaintiff.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE

15) That the plaintiff has failed to state a cause of against answering defendant upon which relief may be granted.

“On a motion to dismiss affirmative defenses, pursuant to CPLR 3211(b), the plaintiff bears the burden of demonstrating that the defenses are without merit as a matter of law [...]. In deciding a motion to dismiss a defense, the defendant is entitled to the benefit of every reasonable intendment [sic] of the pleading, which is to be liberally construed [...]. A defense should not be stricken where there are questions of fact requiring trial” (534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick, 90 AD3d 541 (1st Dept 2011)).

Here, contrary to plaintiff’s contentions, this court does not conclude that the Owner’s affirmative defenses are without merit. As noted above, plaintiff’s testimony was that she walked from the Enterprise office to the Thrifty office. She was talking to the Enterprise employee, and they were both looking at her receipt, which the Enterprise employee had in his hand. Plaintiff could have, as surmised by the Owner, fallen in front of the adjacent premises. Given these facts, that branch of plaintiff’s motion seeking to dismiss the Owner’s affirmative defenses as to liability is denied.

Severing the Third-Party Claim


The First Department has made clear that related actions should be tried together when possible, and that, as plaintiff argues, the presumption is one against severance, unless there is some clear utility to doing so. See Sichel v. Cmty. Synagogue, 256 A.D.2d 276 (Sup. Ct. App. Div. 1st Dept. 1998) (“Where two actions arise from a common nucleus of facts, a trial court should only sever the actions to prevent prejudice or substantial delay to one of the parties [...]. To avoid the waste of judicial resources and the risk of inconsistent verdicts, it is preferable for related

actions to be tried together such as in a tort case where the issue is the respective liability of the defendant and the third-party defendant for the plaintiff's injury [...]. That is exactly the situation here. Significantly, plaintiffs do not oppose consolidation and have not asserted any prejudice resulting from the third-party action.”); and Range v. Trustees of Columbia Univ. in City of New York, 150 A.D.3d 515 (Sup. Ct. App. Div. 1st Dept. 2017) (“The note of issue was filed April 23, 2015. The second third-party complaint was filed on September 22, 2015, after it ‘became evident’ to defendants’ counsel, on September 9, 2015, when they received expert disclosure from plaintiffs’ counsel, that they had a cause of action against City Safety. Even if there was a delay, it did not rise to the level of the knowing and deliberate delay by the defendants [. . .]. Moreover, the issues of law and fact involved in the main and second third-party actions are intertwined, since the inspection of the job site by second third-party defendants was integral to plaintiffs’ liability claims. It is also likely that almost all the same witnesses will be required”).

Here, there is no dispute that the claims alleged in both the main action and the third-party action arise out of a common nucleus of facts. Further, it is also undisputed that no note of issue has been filed and a final discovery conference has not been conducted. Other than arguing generally that she is being “prejudiced,” plaintiff does not otherwise specify how she is injured if these actions should remain consolidated. Accordingly, the court finds that severance is not necessary here.

Conclusion

It is hereby **ORDERED** that plaintiff's motion (Motion Sequence No. 001) is denied in its entirety.

<u>1/6/2023</u> DATE		 _____ J. MACHELLE SWEETING, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE