

Conforme v Bel Fratello LLC

2023 NY Slip Op 33026(U)

August 31, 2023

Supreme Court, New York County

Docket Number: Index No. 159188/2018

Judge: Judy H. Kim

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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. JUDY H. KIM PART 05RCP

Justice

-----X

MARIANA CONFORME,

Plaintiff,

- v -

BEL FRATELLO LLC, MONUMENTS BY EFFIE, INC., THE CITY OF NEW YORK

Defendants.

-----X

INDEX NO. 159188/2018

MOTION DATE 12/09/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 64, 65, 66, 67, 68, 70, 72, 74, 76, 77, 78, 79, 80, 86 were read on this motion for SUMMARY JUDGMENT.

Upon the foregoing documents, the City of New York's motion for summary judgment is granted for the reasons set forth below.

Plaintiff alleges that on September 28, 2017, she tripped and fell over a raised sidewalk flag abutting the property located at 2240 First Avenue, New York, New York, sustaining injuries (NYSCEF Doc. Nos. 55 [Compl. at ¶¶52-53] and 57 [Bill of Particulars at ¶3]). She further alleges that defendants Bel Fratello, LLC ("Bel Fratello"), Monuments by Effie ("Monuments"), and the City of New York (the "City") negligently created this defective condition and failed to remedy same (NYSCEF Doc. No. 40 [Complaint at ¶56-59]).

The City now moves, pursuant to CPLR §3212, for summary judgment dismissing plaintiff's complaint and all crossclaims against it on the grounds that it is exempt from liability under Administrative Code §7-210 and did not cause or create the subject defect. In support of its motion, the City submits: (i) the affirmation of David Atik, an employee of the New York City

Department of Finance (“DOF”), attesting that his search of the DOF’s Property Tax System database revealed that 2240 First Avenue was not owned by the City on the date of plaintiff’s accident and that 2240 First Avenue is not classified as a one-, two-, or three-family residential property (NYSCEF Doc. No. 48 [Atik Affirm. at ¶¶5-6]); (ii) the affidavit of New York City Department of Transportation (“DOT”) employee Sharabanti Aich detailing the results of her search of DOT records for the sidewalk of First Avenue, between East 115th Street and East 116th Street (NYSCEF Doc. No. 47 [Aich Aff. at ¶¶1-4]); and (iii) the records produced by Aich’s search (NYSCEF Doc. No. 46 [DOT Records]).

Only Monuments opposes the motion, submitting a physical survey of the subject location and the accompanying affidavit of licensed land surveyor John Toscano, in which he attests that “[t]he expansion joint identified by the plaintiff as being the elevation that caused her to fall” is located one and a quarter inches north of the property line of 2240 First Avenue and is, in fact, on the property of 2242 First Avenue (NYSCEF Doc. No. 63 [Toscano Aff. at ¶5]).

In reply, the City argues that Monuments is precluded from asserting that the subject defect is in front of 2242 First Avenue, since plaintiff’s pleadings and testimony have consistently stated that she fell in front of 2240 First Avenue. The City also argues, alternatively, that even assuming the subject defect abuts 2242 First Avenue, it would still bear no liability under Administrative Code §7-210, submitting: (i) another affirmation from David Atik, in which he attests that the DOF’s Property Tax System database reveals that 2242 First Avenue is classified as a Building Class S5 and not a one-, two-, or three-family residential property (NYSCEF Doc. No. 78 [Atik Affirm. at ¶¶4, 6]); and (ii) the affidavit of David of Schloss, Senior Title Examiner for the New York City Law Department, attesting that a title search revealed that Bel Fratello owned 2242 First Avenue at the time of plaintiff’s fall (NYSCEF Doc. No. 79 [Schloss Aff. at ¶¶1-3]).

DISCUSSION

“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. 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, 324 [1986] [internal citations omitted]). The City has carried its burden here.

The City has established that it is exempt from liability under Administrative Code §7-210. This statute shifts tort liability for injuries caused by a defective sidewalk from the City to the owner of the property abutting that sidewalk, except where the abutting property in question is a one-, two-, or three-family residential property that is both owner occupied and used exclusively for residential purposes (See Santos v City of New York, 59 Misc 3d 1211[A] [Sup Ct, Bronx County 2018]; Vucetovic v Epsom Downs, Inc., 10 NY3d 517, 520 [2008]). The City’s submission of the Atik affirmation establishes that the City did not own 2240 First Avenue and that 2240 First Avenue was not a one-, two-, or three-family residential property (NYSCEF Doc. Nos. 48 [Atik Aff. at ¶¶4-6]).

To the extent Monuments asserts that the defect in question abutted 2242 First Avenue rather than 2240 First Avenue, it has failed to establish same. While Toscano attests that his survey revealed that the “[t]he expansion joint identified by the plaintiff as being the elevation that caused her to fall” abuts 2242 First Avenue, plaintiff does not allege that an expansion joint caused her to

fall. Rather, she alleges that she tripped over a raised sidewalk flag, which the survey and Toscano affidavit do not address.

In any event, even assuming, for the sake of argument, that the subject defect was located in front of 2242 First Avenue, the City's submission of the Atik affirmation and Schloss affidavit in its reply papers¹ establishes that the City does not bear any liability under Administrative Code §7-210, because it did not own 2242 First Avenue on the date of plaintiff's accident and 2242 First Avenue was not a one-, two-, or three-family residential property on the date of the accident (NYSCEF Doc. Nos. 78 [Atik Aff. at ¶¶4-6] and 79 [Schloss Aff. at ¶¶2-3]).

Finally, the City has also established, through the Aich affidavit and DOT records attached thereto, that it did not cause or create the defective condition, regardless of whether the subject defect is located in front of 2240 First Avenue or 2242 First Avenue (See Rizzo v City of New York, 178 AD3d 503, 503-04 [1st Dept 2019]).

Accordingly, it is

ORDERED that the motion for summary judgment by defendant the City of New York, is granted and the complaint and all crossclaims as against it are dismissed; and it is further

ORDERED that within thirty days from entry of this decision and order, counsel for the City of New York shall serve a copy of this decision and order, with notice of entry, on plaintiff as well as the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk's Office (60 Centre St., Rm. 119) who are directed to enter judgment accordingly; and it is further

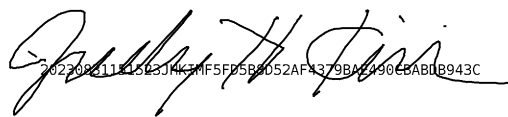
ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the

¹ The Atik and Schloss affidavits were properly submitted in reply, as they directly respond to the evidence and arguments set forth in Monuments' opposition (See Dias v City of New York, 110 AD3d 577, 578 [1st Dept 2013]).

“Efiling” page on this court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that since the City of New York is no longer a party to this action, the Clerk of the Court shall reassign this action to the inventory of a non-City Part.

This constitutes the decision and order of the Court.



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8/31/2023

DATE

HON. JUDY H. KIM, 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