

Corley v Extell Dev.
2023 NY Slip Op 35111(U)
December 1, 2023
Supreme Court, Bronx County
Docket Number: Index No. 22679/2020E
Judge: Veronica G. Hummel
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This opinion is uncorrected and not selected for official publication.

To commence the statutory
time for appeals as of right
(CPLR 5513[a]), you are
advised to serve a copy
of this order, with notice
of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 20

DELDARTO CORLEY,

Plaintiff,

-against-

EXTCELL DEVELOPMENT, 267-269 WEST 45TH
STREET, LLC., IMPERIAL THEATER, LLC., 458
NY LLC., and EXG 159W48 LLC.,
Defendants.

Index No. 22679/2020e

Motion No. 4

HON. VERONICA G. HUMMEL, A.S.C.J.

In accordance with CPLR § 2219(a), the decision herein is made upon consideration of all of the papers filed by the parties in NYSCEF relevant to the motion [Mot. Seq. 4] of defendants 267-269 WEST 45TH STREET, LLC. (267-269 West) and IMPERIAL THEATER, LLC. (Imperial) (jointly movants) seeking an order, pursuant to CPLR § 3212, granting movants summary judgment dismissing the complaint, all counterclaims, and all cross-claims as against them.

This personal injury action is based on claims that plaintiff Deldarto Corley, on September 3, 2019, sustained injuries after tripping and falling on a defect in the sidewalk adjacent to a vacant property located near or about 251 West 45th Street, New York, New York. It is undisputed that plaintiff fell on the sidewalk in front of a vacant lot which had no typical address designation such as physical building or residence. The vacant lot was comprised of more than one lot. The lot was separated from the sidewalk by tall green wood boarding. When plaintiff was walking along the sidewalk, the green boarding was on his right. Plaintiff could not see over the green boarding.

Plaintiff testified that he fell because his foot went into a hole in the sidewalk. At deposition, plaintiff identified the hole and its location in the sidewalk on several photographs and marked the location ("the defect location"). The photographs are exhibits. He confirmed that they fairly and accurately depicted the condition of the sidewalk as it existed on the date of loss.

At the time of the subject accident, defendant 267-269 West owned a vacant lot at Block 1017, Lot 9. Defendant Imperial owned a vacant lot at Block 1017, Lot 10.

Block 1017, Lot 6 was owned by 45th Street Company, LLC.

In support of the motion, movants submit an attorney affirmation, the pleadings, deposition transcripts, photographs, court orders, expert and officer affidavits with supporting documentation, and a statement of material facts. Movants also submit reply affirmations.

At oral argument, plaintiff and co-defendant Extell Development (Extell) stated that they do not oppose the motion as directed to Imperial. Accordingly, that part of the motion that seeks summary judgment dismissing the complaint, counterclaims and cross-claims as against Imperial is granted without opposition.

In opposition to the motion as directed against defendant 267-269 West, plaintiff submits an attorney affirmation, the pleadings, a response to the statement of facts, and a property address report and deed concerning Lot 9.

Extell opposes the motion as directed to 267-269 West. In support of the opposition, defendant Extell submits an attorney affirmation, a property deed for Lot 9, and a ACRIS search result for the 251 West 45th Street address.

The moving party is entitled to summary judgment only if it tenders evidence sufficient to eliminate all material issues of fact from the case. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). If the moving party fails to meet its *prima facie* burden, the motion

is denied and there is no need to consider the opposition papers. *Mendoza v. Sterling Properties, Inc.*, 162 A.D.3d 879 (2d Dep't 2018); *see, Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986); *Zuckerman v. City of New York*, *supra*.

If a party makes a *prima facie* showing of its entitlement to summary judgment, the opposing party bears the burden of establishing the existence of a triable issue of fact. *Zuckerman v. City of New York*, *supra*; *Alvarez v. Prospect Hosp.*, *supra*. Only bona fide material issues raised by evidentiary facts in admissible form are sufficient to defeat a motion for summary judgment; bald, conclusory, irrelevant assertions are not enough. *See MTGLO Investors, L.P. v. Vazquez*, 190 A.D.3d 616 (1st Dep't 2021). A shadowy semblance of an issue of fact is not adequate to defeat the motion. *S.J. Capelin Assoc., Inc. v. Globe Manufacturing Corp.*, 34 N.Y.2d 338 (1974). Hence, mere conjecture, suspicion, or speculation, is insufficient to defeat a motion for summary judgment. *Sanchez v. City of New York*, 190 A.D.3d 999 (2d Dep't 2021).

On the motion, movants submit an expert affidavit by Frank S. Ferrantello. Ferrantello is the president of Ferrantello Land Surveying P.C. and is a licensed Land Surveyor in New York State. Ferrantello avers that he conducted a land survey of the relevant vacant lot. By performing the land survey and reviewing the two photographs marked by plaintiff wherein plaintiff marked the defect location, he was able to determine that the defect location was "in front of/ adjacent to an empty lot fenced by green colored plywood, and that this empty lot is known as Block 1017 Lot 6." He further conducted a search and determined that the owner of the Lot 6 is 45th Street Company, LLC. Movants, who own Lots 9 and 10, do not own Lot 6. In his expert opinion as a land surveyor, based on the defect location identified by plaintiff, the accident occurred on a sidewalk located in front of / adjacent to Lot 6 and movants were not the owners of that lot.

In addition, Gilbert C. Hoover, IV, Senior Vice-President and General Counsel for movants avers that 267-269 West. is a company whose business is to hold title to real property. On the day of the accident, 267-269 West held title to the real property located

at Lot 9, a vacant lot. Moreover, Imperial is a company whose business is to hold title to real property. On the day of the accident, Imperial held title to the real property located at Lot 10. Hence, movants did not own the Lot 6, which was the property on which the defect was located.

Movants make a *prima facie* showing that they did not maintain or own the property where the defect was located and plaintiff fell. Based on the evidence, including the affidavit from a professional surveyor and plaintiff's own testimony, movants demonstrate that plaintiff fell in front of Lot 6 and that movants did not own that lot. Hence the burden shifted to plaintiff and co-defendant to demonstrate an issue of material fact.

In opposition to the motion, plaintiff and co-defendant fail to generate an issue of fact. While the attorneys submit vague, broad arguments focused on Lot 9 and a purported easement, the contentions that the accident occurred in front of Lot 9 or was at the location of and was the result of an undefined easement are pure speculation. Of note, an attorney affirmation submitted in opposition to the motion has no evidentiary value. *Conti v. City of Niagara Falls Water Bd.*, 82 A.D.3d 1633, 1634 (1st Dep't 2011). In fact, neither opposing party submits any competent evidence to contradict movants' showing. The opposition's speculative assertions are insufficient to raise a triable issue of fact warranting denial of the motion. *Duran Cardona v. Fiorentina*, 149 A.D.3d 495 (1st Dep't 2017).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by a party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the part of the motion [Mot. Seq. 4] of defendants 267-269 WEST 45TH STREET, LLC. (267-269 West) and IMPERIAL THEATER, LLC. (Imperial) (jointly movants) that seeks an order, pursuant to CPLR 3212, granting Imperial summary judgment dismissing the complaint, counterclaims and cross-claims against it is granted

without opposition; and it is further

ORDERED that the part of the motion [Motion Seq. 4] by movants that seeks an order, pursuant to CPLR 3212, granting defendant 267-269 West summary judgment dismissing the complaint, all counterclaims, and cross-claims as against it is granted; and it is further

ORDERED that the Clerk shall enter judgment dismissing the complaint, counterclaims and cross-claims as against movants and severing the remaining action; and it is further

ORDERED that the caption shall henceforth read as:

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DELDARTO CORLEY,

Plaintiff,

-against-

EXTCELL DEVELOPMENT, 458 NY LLC., and

EXG 159W48 LLC.,

Defendants.

-----x

;and it is further

ORDERED that plaintiff shall upload a NYSCEF form EF22¹ to NYSCEF by January 10, 2024, to facilitate the amendment of the caption; and it is further

ORDERED that the Clerk shall mark motion sequence 4 decided in all court records.

¹ NYSCEF Form EF22 can be found at:

<https://iappscontent.courts.state.ny.us/NYSCEF/live/forms/notice.to.county.clerk.pdf>

The foregoing constitutes the Decision/Order of the court.

Dated: December 1, 2023

Hon.



HON. VERONICA G. HUMMEL, A.J.S.C.

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|-------------------|---|--|
| 1. CHECK ONE..... | CASE DISPOSED IN ITS ENTIRETY | ☒ CASE STILL ACTIVE |
| 2. MOTION IS..... | ☒ GRANTED | DENIED ☐ GRANTED IN PART ☐ OTHER |
| | ☒ Amend caption | |