

Mostafa v City of New York
2023 NY Slip Op 35114(U)
December 13, 2023
Supreme Court, Queens County
Docket Number: Index No. 701312/2023
Judge: Chereé A. Buggs
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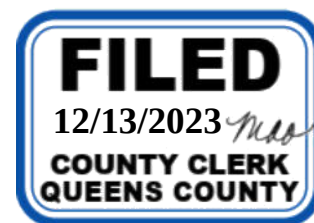
Amended Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: HONORABLE CHEREÉ A. BUGGS

IAS PART 30

Justice

-----X
EHAB MOSTAFA,

Index No.:701312/2023

Motion Date: 10/30/2023

Plaintiff,

Motion Cal. No.: 12

-against-

Motion Sequence No.: 1

THE CITY OF NEW YORK, DEMETRIOS BERTZIKIS
and PANTELINA PAKAKIS,Defendants.
-----X

The following efiled papers numbered 14-21, 23-29, 33-34 submitted and considered on this motion by Defendant Pantelina Pakakis (hereinafter "Pakakis") seeking an Order for summary judgment pursuant to Civil Practice Law and Rules (CPLR) 3212, dismissing Plaintiff Ehab Mostafa's (hereinafter "Mostafa") complaint and all other claims against her as she bears no liability for the subject accident.

Papers
Numbered

Notice of Motion-Affirmation in Support-

Affidavits-Exhibits..... EF 14-21

Affirmation in Opposition-Affidavits-Exhibits..... EF 23-29

Affirmation in Reply-Affidavits-Exhibits..... EF 33, 34

Mostafa initiated the instant litigation to recover for personal injuries he sustained on April 11, 2022. Mostafa alleged that while ambulating on a sidewalk he was caused to trip and fall between real property known as 3077 36th Street and 3079 36th Street, County of Queens, State of New York. Pakakis lives at 3077 36th Street, Queens, New York and co-defendant Demetrios Bertzikis (hereinafter Bertzikis resides at 3079 36th Street, Queens, New York.

Pakakis moves pre-discovery for summary judgment under CPLR 3212. In support of the motion she submitted her affidavit dated July 16, 2023, an attorney affirmation, the pleadings, and photographs allegedly depicting the location where Mostafa's accident occurred. She alleged in her affidavit that she is not responsible for Mostafa's accident because she has lived in her home for 55

years and has not made any repairs to the subject sidewalk. She submitted emails between her son-in-law, Simon Kourinis, a non-party, and the City of New York. She provided photographs of the accident site.

Law and Application

CPLR 3212 provides:

(a) Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

(b) Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion...

(f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

“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” (see *Morejon v New York City Tr. Auth.*, 216 AD3d 134, 136 [2d Dept 2023]; citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Once a prima facie 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” (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; citing *Zuckerman v City of New York*, 49 NY2d at 562 [1980]).

“In 2003, the New York City Council enacted Administrative Code of the City of New York § 7–210, the Sidewalk Law, to shift tort liability for injuries resulting from a defective sidewalk from the City to abutting property owners” (see *Brown v City of New York*, 162 AD3d 731, 732 [2d Dept 2018]; citing *Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 [2008]; *Gelstein v City of New York*, 153 AD3d 604, 605 [2d Dept 2017]; *Johnson v Manley*, 150 AD3d 1210, 1211 [2d Dept 2017]). However, this provision does not apply to “one-, two- or three-family residential real property that are (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes” (Admin. Code of City of NY § 7–210[b]). “The exemption was provided in recognition that it was inappropriate to expose small-property owners in residence, who have limited resources, to exclusive liability with respect to sidewalk maintenance and repair.” (See *Brown v City of New York*, 162 AD3d 731, 732 [2d Dept 2018]; *Coogan v City of New York*, 73 AD3d 613, 614 [1st Dept 2010].)

This Court finds that Pakakis failed to demonstrate a prima facie entitlement to judgment as a matter of law under CPLR 3212 on the papers submitted. Pakakis failed to attach a copy of Mostafa’s Notice of Claim dated May 19, 2022 or his 50-h deposition transcript. (CPLR 3212[b]). The notary signature on Pakakis’ affidavit appears on a separate page following her signature (see CPLR §2309[b]; compare *Collins v AA Trucking Renting Corp.*, 209 AD2d 363 [1st Dept 1994]). Further, the emails submitted between non-party Simon Kourinis were submitted for the truth of their contents and constituted hearsay (see *People v Kass*, 59 AD3d 77 [2d Dept 2008]). Also, photographs of the alleged accident site which were submitted by Pakakis were not confirmed by Mostafa to be the site of the location of the accident, as he has yet appeared for his deposition to state exactly where his accident occurred. And, no one with personal knowledge stated when the photographs were taken and by whom (see generally *Burns v City of Poughkeepsie*, 293 AD2d 435 [2d Dept 2002]; *Gutierrez v Cohen*, 227 AD2d 447 [2d Dept 1996]). Further, procedurally, Pakakis failed to submit a Statement of Material Facts pursuant to (see 22 NYCRR 202.8-g) or word count

as required by 22 NYCRR 202.8-b.

Therefore, defendant Pantelina Pakakis' motion for summary judgment is denied. The denial of this motion is without prejudice to renew upon the completion of depositions.

The foregoing constitutes the decision and Order of the Court.

Dated: December 12, 2023

A handwritten signature in black ink, appearing to read "Chereé A. Buggs", written over a horizontal line.
Hon. Chereé A. Buggs, JSC