

Garrido v 200 Lenox Ave., LLC

2024 NY Slip Op 33750(U)

October 11, 2024

Supreme Court, New York County

Docket Number: Index No. 160673/2020

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER PART 08

Justice

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MADALINA GARRIDO, SONIA LUGO

Plaintiff,

- v -

200 LENOX AVENUE, LLC, BARAWINE LLC,

Defendant.

-----X

INDEX NO. 160673/2020
MOTION DATE 03/19/2024
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that this motion is granted for the reasons that follow.

This personal injury action arises from an alleged trip and fall on a sidewalk. Now, defendant Barawine LLC's ("Barawine") moves for summary judgment in its favor dismissing plaintiffs' complaint with prejudice as against it. Issue has been joined as to Barawine, no answer has been filed by codefendant 200 Lenox Avenue, and note of issue has been filed.

The facts as relevant to this motion are not in dispute. Barawine is a commercial tenant occupying a portion of the building abutting the sidewalk where plaintiff Madalina Garrido's accident occurred. It argues that it was not responsible for maintaining the subject sidewalk. Plaintiffs, however, contend that Barawine has not met its burden on this motion and otherwise that issues of fact exist as to whether Barawine's "special use and obstruction of the public sidewalk constituted a public nuisance and thus diverted plaintiff to the defect that caused her injuries". Specifically, plaintiff Garrido states the following in her affidavit:

On the date of my accident, as to the subject sidewalk where my accident occurred, the first lane abutting the roadway had been eliminated by a tree-well. The third lane of the sidewalk slab adjacent to the building was blocked off to pedestrian traffic by an accumulation of umbrellas, tables and chairs and potted plants admittedly placed there by the defendant. As a result of the tree-well eliminated the first lane and the defendant's obstruction of the third lane, only the middle lane of the three-slab wide sidewalk was open for pedestrians such as my-self (sic).

It was into this middle lane that I was thus diverted and compelled to traverse as a result of the said accumulation of umbrellas, tables and chairs and potted plants placed by the defendant which blocked ½ of the open sidewalk, and created a choke-point which compelled me to walk on the middle lane of the sidewalk containing the raised, uneven, broken, dangerous and defective portion of the public sidewalk.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Barawine bases its motion on the underlying lease agreement which does not shift responsibility for maintenance of repair of the subject to sidewalk to Barawine, the commercial tenant. Thus, contrary to plaintiffs' contention, Barawine has met its burden on this motion and

established that it did not owe a duty to Garrido or otherwise have an obligation under the Sidewalk Law to maintain the subject sidewalk. In turn, plaintiffs have failed to raise a triable issue of fact. There is no dispute that Barawine operated a sidewalk café, which plaintiffs' counsel argues in opposition to the motion caused Garrido to navigate the sidewalk in such a way that she was forced to walk over the defective portion of sidewalk thereby causing and/or contributing to her accident. However, as movant points out, Garrido did not so testify at her deposition. Moreover, Barawine has submitted the affidavit of its expert, Peter Chen, Sr., who opines based in part on his inspection of the accident location that "the sidewalk café and doors of the building were located with sufficient clearance to the tree well and the alleged defect so as to allow pedestrians to walk around the defect. The tree well was located approximately 18 feet away from the sidewalk café." Thus, Chen's nonspeculative opinion based upon an inspection of the accident location rebuts plaintiff's argument that Barawine contributed to her accident.

Moreover, Barawine's special use of one portion of the sidewalk does not necessarily give rise to liability for an accident on another portion of the sidewalk absent facts and circumstances which do not exist here (*see i.e. Taubenfeld v. Starbucks Corp.*, 48 AD3d 310 [1st Dept. 2008] ["While Starbucks made special use of a portion of the sidewalk, by putting out two tables with two chairs each, the special use did not extend beyond the tables and chairs to the tree well where plaintiff fell, or to the people on the crowded sidewalk, some walking and others standing around Starbucks' tables chatting, and around whom, plaintiff asserts, she had to walk, diverting her path to the tree well[]").

Accordingly, it is hereby

ORDERED that Barawine’s motion for summary judgment dismissing plaintiff’s complaint against it is granted, plaintiff’s claims against Barawine are severed and dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that an inquest on plaintiff’s claims against the remaining defendant, 200 Lenox Avenue, LLC, which has not appeared in this action, shall be held in due course.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the decision and order of the court.

10/11/2024
DATE


LYNN R. KOTLER, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE