

Then v Meridian Realty Inc.

2025 NY Slip Op 30958(U)

March 7, 2025

Supreme Court, New York County

Docket Number: Index No. 450869/2019

Judge: Nicholas W. Moyne

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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. NICHOLAS W. MOYNE PART 41M

Justice

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ALEYDA THEN,

Plaintiff,

- v -

MERIDIAN REALTY INC.,L&L 2085 AMSTERDAM REALTY
LLC,KENNEDY CHICKEN & GRILL INC.,LA RUBIA DELI
CORP.

Defendant.

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INDEX NO. 450869/2019

**MOTION DATE 03/03/2023,
03/03/2023**

MOTION SEQ. NO. 003 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 236, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 259, 262, 265, 267, 271, 273, 275, 278, 280, 281, 282, 283

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 238, 251, 252, 253, 254, 260, 263, 266, 268, 269, 270

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

Motion sequences 003 and 004 are consolidated for disposition. Motion sequence 003 is a motion by defendants L & L 2085 AMSTERDAM REALTY, LLC (“L & L”) and LA RUBIA DELI CORP. (“La Rubia”) for summary judgment dismissing the claims against them. Motion sequence 004 is the motion of defendant MERIDIAN REALTY, INC. (“Meridian”) for summary judgment dismissing the complaint against them and, pursuant to CPLR § 3126, granting spoliation sanctions. Plaintiff opposes the motions.

This case involves a trip and fall on a sidewalk abutting 2083 and 2085 Amsterdam Avenue, New York, NY on August 29, 2018 (see Bill of Particulars, NYSCEF Doc. No. 256). The premises at 2083 Amsterdam Avenue, New York, NY is owned by defendant Meridian and the premises at 2085 Amsterdam Avenue is owned by defendant L&L. Kennedy Chicken is the commercial tenant occupying one of three ground floor storefronts at 2083 Amsterdam Avenue. La Rubia was the commercial tenant at 2085 Amsterdam Avenue at the time of the alleged accident.

Summary Judgment

“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 eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of any material issues of fact or where the issue is arguable (*Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]). “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” (CPLR § 3212[b]). “In considering a summary judgment motion, evidence should be analyzed in the light most favorable to the party opposing the motion” (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). “In opposing a motion for summary judgment, once a prima facie showing has been made, it is incumbent upon a defendant to come forward with matters of an evidentiary nature to demonstrate the presence of triable issues. General averments do not suffice. The defendant is required to assemble, lay bare, and reveal his proofs in order to show that his defenses are real and capable of being established upon a trial” (*Steingart Assoc., Inc. v Sandler*, 28 AD2d 801, 802-03 [3d Dept 1967]).

NYC Administrative Code 7-210

Pursuant to New York City Administrative Code § 7-210, it is the duty of the owner of real property abutting any sidewalk to maintain such sidewalk in a reasonably safe condition and the owner shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition.

“Section 7-210 unambiguously imposes a duty upon owners of certain real property to maintain the sidewalk abutting their property in a reasonably safe condition, and provides that said owners are liable for personal injury that is proximately caused by such failure” (*Sangaray v W. Riv. Assoc., LLC*, 26 NY3d 793, 797 [2016]). “To be sure, the location of the alleged defect and whether it abuts a particular property is significant concerning that particular property owner's *duty* to maintain the sidewalk in a reasonably safe condition. That does not, however, foreclose the possibility that a neighboring property owner may also be subject to liability for failing to maintain its own abutting sidewalk in a reasonably safe condition where it appears that such failure constituted a proximate cause of the injury sustained” (*Sangaray v W. Riv. Assoc., LLC*, 26 NY3d 793, 798-99 [2016]).

The motions for summary judgment of L&L, La Rubia, and Meridian are granted

The defendants have made a prima facie showing of entitlement to summary judgment dismissing the complaint. “It is well settled that a defendant is entitled to summary judgment as a matter of law when a plaintiff provides testimony that he or she is unable to identify the defect that caused his or her injury” (*Siegel v City of New York*,

86 AD3d 452, 454 [1st Dept 2011]). A “plaintiff’s inability to identify the cause of a fall is fatal to an action because a finding that the defendant’s negligence proximately caused a plaintiff’s injuries would be based on speculation. However, this simply requires that the evidence identifies the defect or hazard itself and provides sufficient facts and circumstances from which causation may be reasonably inferred” (*Haibi v 790 Riverside Dr. Owners, Inc.*, 156 AD3d 144, 147 [1st Dept 2017] [citations omitted]). In this case, the defendants have demonstrated that the condition that the plaintiff identified as the cause of her trip and fall did not exist at the time of the accident. At her deposition, the plaintiff testified that she stepped on a hole and fell down (see Then March 12, 2020 Tr at p. 75 In 20-21, NYSCEF Doc. Nos. 177, 191, 219). The plaintiff was shown several photographs, which had previously been provided to the defendants by the plaintiff in response to discovery demands. Plaintiff stated that these photos (NYSCEF Doc. Nos. 192, 220) accurately depicted the area where she fell at the time of her accident (Then March 12, 2020 Tr at p. 88 In 10, NYSCEF Doc. Nos. 177, 191, 219). However, she indicated that she did not know who took the photograph or when she first saw it (*Id.* at p. 87 In 2-8). Plaintiff was asked to mark the photograph by circling the hole she claims caused her to fall, and plaintiff complied (*Id.* at p. 89). The circled area shows a gap between two sidewalk pavers (see NYSCEF Doc. No. 192).

Evidence produced by the defendants shows that the defect plaintiff alleges caused her to trip did not exist at the time of her alleged accident. The defendants have introduced Google Street View images dated May of 2016 - before the plaintiff’s fall, and September of 2019 - after the plaintiff fell (NYSCEF Doc. Nos. 196, 234). These images indicate on their face the month and year they were produced. Accordingly, they are admissible pursuant to CPLR § 4532-b. The Google images clearly show the location where the plaintiff indicated that she fell. The images further show that the defect or hole in the concrete that plaintiff contends caused her to fall had been patched over with concrete and no longer existed at the time she alleges that her accident occurred. This is further bolstered by the deposition testimony of Paul Lee, an owner of defendant L & L, who testified regarding repairs were made to the sidewalk in 2015, stating “so partially between the property, it wasn’t big, but there were small cracks so we repair those areas. And about the levels, the levels were not even. To make them more even, we reinforce them with concrete” (Lee January 27, 2022 Tr at p. 73 In 15-21, NYSCEF Doc. No. 193). Accordingly, by providing reliable evidence that the defect plaintiff alleges to have caused her to trip did not exist at the time of the accident, the defendants have shown that the plaintiff cannot identify the defect that caused her fall. Thus, the defendants have made a prima facie showing of entitlement to summary judgment dismissing the action. The plaintiff has failed to come forward with matters of an evidentiary nature sufficient to demonstrate the presence of triable issues.

The photographs plaintiff relies upon are insufficient to demonstrate an issue of fact. Pursuant to a so-ordered stipulation dated October 21, 2022 (NYSCEF Doc. No. 173), the plaintiff was required to provide additional digital files for the photographs, or if no digital files were found, the plaintiff was to provide a Jackson Affidavit. In response, the plaintiff failed to provide any digital files or metadata for the photographs, and instead provided affidavits from plaintiff Aleyda Then (NYSCEF Doc. No. 198) and Jamie Castillo (NYSCEF Doc. No. 199), a paralegal employed by plaintiff’s counsel,

Subin Associates LLP. The plaintiff's affidavit states that about two to three days after the accident, she went to the scene to take photos of the defective sidewalk, on or about September 5, 2018 she transmitted the photos to Jamie Castillo through her WhatsApp account. Plaintiff then indicates that she no longer has the phone used to take the photos because it became damaged and was discarded. She also states that she no longer has the WhatsApp account as it was linked to a prior cell phone number and T-Mobile account that she no longer has access to, and that she no longer knows the old phone number. Therefore, she has no way of retrieving the photographs in digital form. This is directly contradicted by the plaintiff's deposition testimony wherein she stated that she didn't know who took the photographs or when she first saw them (Then March 12, 2020 Tr at p. 87 In 2-8, NYSCEF Doc. Nos. 177, 191, 219), and that she never went back and took photographs of the area where she fell (*Id.* at p 109 In 2-4). "A party's affidavit that contradicts his prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment" (*Alston v Elliott*, 159 AD3d 575, 576 [1st Dept 2018] [citation omitted]). Accordingly, the plaintiff has failed to demonstrate the existence of an issue of fact to defeat the defendants' showing of entitlement to summary judgment.

The affidavit of Jamie Castillo (NYSCEF Doc. No. 199) is insufficient to create an issue of fact in that it does not indicate that he has personal knowledge of who took the photos, or when they were taken. Castillo states that "On or about September 5, 2018, I received thirteen (13) photos of a defective sidewalk from the client, and some photos of her injuries, through my WhatsApp account." He does not state whether he has knowledge of if the client (plaintiff) took the photographs, or when they were taken. Castillo also states that upon receipt, he transferred the photos to his email and uploaded them to their case management system. He states that he no longer has the photos in his WhatsApp account because they have been deleted, and he no longer has the photos in his email account because he does not have access to emails from 2018. As such, in light of the plaintiff's deposition testimony that she did not take the photos, and in the absence of any metadata showing when the photos were taken, the photos, and plaintiff's testimony that a defect shown in them caused her fall, do not create an issue of fact. As the plaintiff alleged that a specific defect identified in these photos was the cause of her fall, and the admissible evidence submitted by the defendants proves that the defect did not exist at the time of the plaintiff's accident, the plaintiff's identification of the cause of her fall cannot be said to be anything other than speculative. Accordingly, the defendants' motions for summary judgment must be granted.

For the reasons set forth hereinabove, it is hereby


ORDERED that the motion (motion sequence 003) of defendants L & L 2085 AMSTERDAM REALTY, LLC and LA RUBIA DELI CORP for summary judgment dismissing the complaint as to them is granted; and it is further

ORDERED that the motion (motion sequence 004) of defendant MERIDIAN REALTY, INC. for summary judgment dismissing the complaint as to it is granted; and it is further

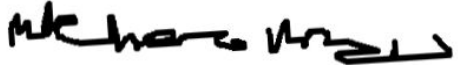
ORDERED that the complaint is dismissed in its entirety.

This constitutes the decision and order of the court.

Motion Sequence 003

<u>3/7/2025</u> DATE			 NICHOLAS W. MOYNE, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE

Motion Sequence 004

<u>3/7/2025</u> DATE			 NICHOLAS W. MOYNE, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE