

Lopez v MKLizzie, LLC

2025 NY Slip Op 34767(U)

June 12, 2025

Supreme Court, Bronx County

Docket Number: Index No. 25790/2019E

Judge: Kim Adair Wilson

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, NEW YORK: Part IA-12

-----X

NATHALIE LOPEZ,
Plaintiff,

Index No. 25790/2019E

Hon. KIM ADAIR WILSON
Justice Supreme Court

-against-

MKLIZZIE, LLC, WATER STREET FEE LLC and
WATER STREET LEASEHOLD LLC,
Defendants.

-----X

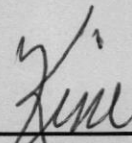
The following papers NYSCEF Doc. No. (29 - 51) read on this SUMMARY JUDGMENT MOTION (Seq. No. 1),
noticed on 6/13/2024 and duly submitted as NYSCEF Doc. No. 29

| | NYSCEF Doc. No. |
|--|-----------------|
| Notice of Motion - Order - Exhibits and Affidavits Annexed | |
| Answering Affidavit and Exhibits | |
| Replying Affidavit and Exhibits | |
| Other: Stipulation | |

Upon the foregoing papers,

This motion is decided in accordance with the annexed Decision and Order.

Dated: June 12, 2025

Hon. 
KIM ADAIR WILSON, J.S.C.

- 1. CHECK ONE.....
- 2. MOTION IS.....
- 3. CHECK IF APPROPRIATE.....

- CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT
- NEXT APPEARANCE DATE: _____

Motion is Respectfully Referred to Justice:
Dated: _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, NEW YORK: Part IA-12

-----X
NATHALIE LOPEZ,

Plaintiff,

-against-

MKLIZZIE, LLC, WATER STREET FEE LLC and
WATER STREET LEASEHOLD LLC,

Defendants.
-----X

Kim Adair Wilson, J.:

DECISION AND ORDER
Index No. 25790/2019E
Motion Seq. #: 001

HON. KIM ADAIR WILSON

“NOTICE OF MOTION” (NYSCEF Doc 29), dated and filed June 13, 2024, respectively, by Timothy J. Layer, Esq. (Ahmuty Demers & Mcmanus), counsel for defendants, Water Street Fee LLC and Water Street Leasehold LLC, (“Water Street”), seeking an Order, “pursuant to CPLR §3212 granting the Moving Defendants summary judgment dismissing Plaintiffs’ Amended Complaint as asserted against the Moving Defendants in its entirety,” is decided as set forth below.

On July 15, 2019, plaintiff Nathalie Lopez filed her amended verified complaint seeking monetary damages for personal injuries allegedly sustained on or about September 4, 2018, when plaintiff became injured when she traversed a defectively designed landscape of decorative rocks at the premises known as 77 Waters Street, New York, New York, owned and/or controlled by defendants MKLizzie, LLC (“MKLizzie”) and Water Street. Plaintiff’s complaint alleges a single cause of action for negligence, as against all defendants. Both Water Street defendants filed their respective answers on December 19, 2019, and March 4, 2020 (NYSCEF Docs 11 and 14), asserting general denials and various affirmative defenses. By stipulation (NYSCEF Doc 39) dated November 22, 2019, plaintiff discontinued her action against defendant MKLizzie without prejudice. On February 15, 2024, plaintiff filed her note of issue (NYSCEF Doc 28) seeking a jury trial of all issues.

Defendant Water Street now moves seeking summary judgment dismissing plaintiff’s complaint. Movant contends that the rock garden into which plaintiff allegedly fell was formerly a fountain which was clearly demarcated along its perimeter by white tiles and benches, and that the feature was open, obvious, and not dangerous. Movant proffers the affidavit of professional engineer Jeffrey J. Schwalje (NYSCEF Doc 38) who attests that the area is illuminated by adequate lighting, and that multiple visual cues alert pedestrians to the presence of the recessed base, including the substantial difference in stone color between the walkway and the base; the difference in texture between the flat white tiles and the dark stones; and the white stone bench across from the entrance doors, along the outer edge of the recessed basin. Schwalje also asserts that the installation was verified to be safe by the

New York City Department of Buildings (“DOB”) on numerous occasions since the building’s completion in 1970, and that no violations had been cited against the building pertaining to that feature in either its fountain or rock garden configurations. Finally, defendant also asserts that the doctrine of *res ipsa loquitur* is inapplicable here, where the accident could conceivably have occurred absent any negligence on the part of the movant.

In opposition, plaintiff argues that movant’s attorney affirmation (NYSCEF Doc 30) fails to include the statutory language required under CPLR 2106 and is therefore inadmissible on summary judgment. Separately, plaintiff avers that she was looking straight ahead when she exited the lobby and fell into the rock garden after stepping around the bench on its perimeter. Plaintiff also asserts that the sudden drop was hidden from her view by the rush hour pedestrian traffic filling the plaza at the time of her fall and insists that the pit’s visibility was obstructed by the bench, that the area was dimly lit, and that the protruding white wall caused her to misjudge the location of the pathway. She maintains that an open and obvious condition could be rendered a trap when a person’s attention is otherwise distracted, and that the question is ultimately one of fact that should be submitted to a jury. In further opposition, plaintiff submits the affidavit of her expert engineer Joseph Farahnik (NYSCEF Doc 47) who cites to a June 3, 2019, violation (NYSCEF Doc 48) issued by the DOB for the removal of the fountain from the building plaza without prior certification by the Chairperson of the City Planning Commission.

In reply, movant posits that the language required under CPLR 2106 is only required when the affirmant asserts personal knowledge, which is inapplicable to defense counsel’s affirmation, which relies on sworn testimony and affirmances by other persons. The additional affirmation of professional engineer Schwalje posits that the 2019 DOB violation, which was issued approximately a year after plaintiff’s accident, pertains solely to the defendant’s failure to obtain the proper permit for the rock garden and not a determination that the installation was hazardous. Schwalje also highlights that the conversion from fountain to rock garden did not implement a change in structural design, only the removal of water and placement of stones. Finally, movant dismisses plaintiff’s affidavit as self-serving in that it contradicts plaintiff’s deposition testimony (NYSCEF Doc 34) wherein she stated that she could not clearly remember the shape, depth, or illumination of the rock garden at the time of her fall.

Effective January 1, 2024, CPLR 2106 was recently amended to require all parties who submit affirmations to swear, not only under penalty of perjury, but also in acknowledgment of the penalties of fine or imprisonment for violation of that oath. In *Grandsard v. Hutchison*, the New York Appellate Division, First Department, affirmed the trial court’s determination that an attorney affirmation lacking the language that CPLR 2106 now requires fails to demonstrate an appreciation of the gravity of its oath and is ultimately not a verification at all. See *Grandsard v. Hutchison*, 227 A.D.3d 491 (1st Dept. 2024), (*aff’g Grandsard v.*

Hutchison, No. 153605/2024, 2024 WL 1957086, at *1 [N.Y. Sup. Ct. 2024]). Accordingly, defendant's affirmation, which attests only under the penalty of perjury, does not sufficiently evoke the reliability of a properly sworn affirmation, and may not be considered by this Court.

Therefore, defendant's motion for summary judgment is **DENIED**.


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

Accordingly, defendant's Water Street's motion for summary judgment is **DENIED** as stated herein.

Defendants Water Street Fee LLC and Water Street Leasehold LLC are directed to serve a copy of this Decision and Order with Notice of Entry, upon plaintiff within thirty (30) days of entry, and to file proof of service with the Court.

This constitutes the Decision and Order of this Court.

**Dated: June 12, 2025
Bronx, New York**



Hon. Kim Adair Wilson, J.S.C.