

Calabria v City of New York

2025 NY Slip Op 35362(U)

February 7, 2025

Supreme Court, Queens County

Docket Number: Index No. 708329/2023

Judge: Chereé A. Buggs

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

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ROSARIA CALABRIA,

Index No.:708329/2023

Motion Date: 12/2/2024

Plaintiff,

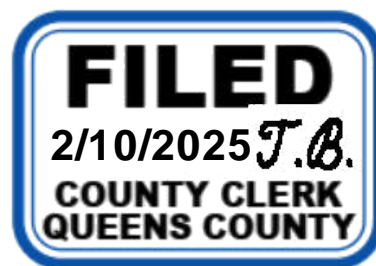
Motion Cal. No.: 1

-against-

Motion Sequence No.: 2

THE CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF TRANSPORTATION,
CLEMENT MUSCO AND BEATRICE MUSCO,

Defendants.



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The following efiled papers numbered EF 33-43 and 45-49 submitted and considered on this motion by Defendant Clement Musco (hereinafter collectively referred to as “Musco”) seeking an Order pursuant to Civil Practice Law and Rules (CPLR) 2221 (a)(e) seeking leave to renew, granting the renewal of Musco’s summary judgment seeking to dismiss Plaintiff Rosaria Calabria’s (hereinafter “Calabria”) verified complaint against him together with all cross- claims asserted.

Papers
Numbered

Notice of Motion-Aff. in Supp.-Exhibits.....	EF 33-40 and 42
Stipulation.....	EF 41
Aff. in Opp.-Aff.-Exhibits.....	EF 45-49

This action was commenced by Calabria to recover for injuries she sustained in a trip and fall accident which occurred on October 10, 2022 on the sidewalk abutting premises located at 60-40 69th Lane, County of Queens, State of New York (hereinafter referred to as the “Premises”). Calabria commenced this action on April 21, 2023 with the filing of her summons and verified complaint. Musco appeared in the action with the filing of a verified answer with affirmative defenses, and asserting cross-claims against co-defendants The City of New York and New York City Department of Transportation (hereinafter collectively referred to as “City”) on June 27, 2023, and City appeared in the action with the filing of its answer with affirmative defenses and cross-claims on May 31, 2023. Calabria alleged, among other things, that Musco and City were responsible for maintaining the sidewalk where her accident occurred.

Musco now seeks an Order granting renewal of his motion for summary judgment pursuant to CPLR 2221(e), dismissing Calabria's verified complaint against him, together with all cross-claims asserted. The Prior Order denied Musco's motion with leave to renew because "Musco failed to demonstrate that at the time of Calabria's accident, the subject premises was owner occupied and used for residential purposes".

Law and Application

CPLR §2221 provides:

(e) A motion for leave to renew:

1. shall be identified specifically as such;
2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
3. shall contain reasonable justification for the failure to present such facts on the prior motion.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221[e][2]) and shall contain reasonable justification for the failure to present such facts on the prior motion." (CPLR 2221[e][3]; *see generally Dudley-Lanier v City of New York*, 210 AD3d 739 [2d Dept 2022]; *Citimortgage, Inc. v Espinal*, 136 AD3d 857 [2d Dept 2016]; *Sanchez v 1710 Broadway, Inc.*, 114 AD3d 748 [2d Dept 2014].) Renewal "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation." (*United Med. Assoc., PLLC v Seneca Ins. Co., Inc.*, 125 AD3d 959, 961 [2d Dept 2015]; quoting *Matter of Catherine V.D. (Rachel G.)*, 100 AD3d 992, 993 [2d Dept 2012]; *see also Oparaji v ABN Mtge. Group, Inc.*, 202 AD3d 988 [2d Dept 2022]; *Braxton v Plaza Housing Dev. Fund Co., Inc.*, 163 AD3d 756 [2d Dept 2018]).

Since the filing of the original motion, Calabria and Musco have been deposed. Those depositions have been annexed to Musco's motion in support.

Musco, who testified that his address was 60-40 69th Lane, Maspeth, New York 11378, further testified as follows, in relevant part:

Q: Now, the address that you just gave us, how long have you lived there?

A: I was born in that address and I been there off and on all of my life.

Q: Explain off and on?

A: Well. I lived in the City for a number of years and then I moved back to the house.

Q: Approximately when did you live in the City, if you can give us an approximation of those time periods?

A: Well, I go back and forth. I have an apartment in the City, also.

Q: For how long of a stretch of time would you live in an apartment in the City?
Would that be for like a month, a few days.

A: I go back and forth every week.

(EF 39 pg 12 lines 7-24)

Q: Now, in October of 2022 would it be fair to say that you lived between both residences then, the apartment in the City as well as this address in Maspeth?

A: Yes, I go back and forth regularly.

(EF 39 pg 13 lines 7-12)

Q: As of October 10, 2022 who owned the address at 60-40 69th Lane in Maspeth?

A: I do. I did. I still do.

Q: When did you first come into ownership interest of that property?

A: About 14 years ago, approximately. It might be 12. I don't recall exactly.

Q: Is it fair to say that on October 10, 2022 you owned that property, correct?

A: Absolutely

Q: Since 12, 14 years ago up until October 10, 2022 has anyone else other than you owned the property?

A: No.

Q: Do you know who Beatrice Musco is?

A: My mother. She died about 12 years ago, 14 years ago when I inherited the house.

(EF 39 pg 14-15 lines 20-25 and 2-17)

Q: Can you describe what type of property 60-40 69th Lane is? Is that a residential, commercial, something else?

A: One-family home.

Q: It's a one-family residential home, correct?

A: Yes.

(EF 39 pg 16 lines 6-12)

Q: Generally, since you owned the property in Maspeth where would you normally receive your mail?

A: I get mail in both places.

(EF 39 pg 19 lines 11-14)

Q: What is the longest stretch of time that you lived at Maspeth address continuously?

A: Well, there were times when I was there probably I would say five days.

(EF 39 pg 21 lines 5-9)

Q: How about you, did you ever operate any business or any office out of that property whether it was during COVID period or any other time?

A: Definitely not.

(EF 39 pg 24 line 14-18)

Q: Since you owned that property up until October 10, 2022 normally who, if anyone would sweep the sidewalk, clean the sidewalk if needed?

A: I would do it and I have a gardener that comes on a weekly basis that usually does it.

(EF 39 pg 27-28 lines 24-25 and 2-6)

Q: Again, prior to October 10, 2022 during the period that you owned that property whom if anyone, would normally shovel the snow and remove ice, if needed?

A: I would do it and sometimes my neighbor would help me, because he has a snow blowing machine and when I'm not there we have kind of a friendly agreement that he would put the salt down if it gets icy or something. He would put the salt down or the calcium carbonate, whatever they would do to melt the salt [sic] and I would also do it for him.

(EF 39 pg 29 lines 6-18)

This Court finds that Musco has presented sufficient evidence to establish that he resided at the Premises, a residential one family dwelling as defined by Administrative Code of City of NY § 7-210[b]), at the relevant time. Thus leave to renew is granted.

“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” (Administrative 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].) “Absent the liability imposed by statute or ordinance, an abutting landowner is not liable to a passerby on a public sidewalk for injuries resulting from defects in the sidewalk unless the landowner either created the defect or caused it to occur by special use” (*see Missirlakis* 735 [2d Dept 2014]; *Crawford v City of New York*, 98 AD3d 935 [2d Dept 2012]; *Romano v Leger*, 72 AD3d 1059, 1059 [2d Dept 2010]; *Farrell v City of New York*, 67 AD3d 859, 860 [2d Dept 2009]). -4-

Musco's has established that he resides at the aforementioned address where the accident occurred and resided there on October 10, 2022. On the date of the accident, he was the owner of the home which he described as a single-family home used for residential purposes only. He stated that at no time prior to Calabria's accident on October 10, 2022 did he hire any entity or contractor to perform any work on the sidewalk or alter the sidewalk abutting the premises, and that he did not cause or create any alleged defective condition on the sidewalk which would have caused Calabria's accident. He never received any notices or violations from the City related to needed repair of the sidewalk and was not aware of any prior similar occurrences. He argues that since the home was used exclusively for residential purposes he is entitled to the statutory exception recognized under New York City Administrative Code § 7-210.

In consideration of all of the evidence presented by Musco, Musco has established prima facie entitlement to judgment as a matter of law.

In opposition, Plaintiff, who failed to oppose the initial summary judgment motion, has failed to raise a triable issue of fact. Plaintiff's assertion that discovery is not complete, in that the remaining defendants have not been deposed and photos indicate that "some type of construction work was performed" is unpersuasive. Plaintiff had the opportunity to depose the owner, Musco and had the opportunity to gather the requisite evidence necessary to determine what, if any, construction was completed at the Premises by Musco. The subsequent depositions of the remaining defendants will not provide further evidence of construction conducted by Musco as that evidence, even if within their possession, could have been elicited from Musco. These assertions amount to mere speculation. "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion." (*Lopez v. WS Distrib., Inc.*, 34 AD3d 759, 760 [N.Y. App. Div. 2006]). Therefore it is,

ORDERED, that the motion is granted in its entirety; and it is further

ORDERED, that the caption shall be amended as follows:

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ROSARIA CALABRIA,

Plaintiff,

-against-

Index No.: 708329/2023

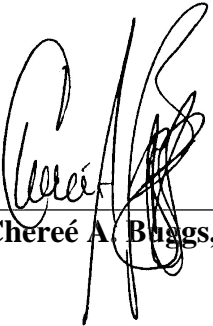
THE CITY OF NEW YORK and NEW YORK CITY
DEPARTMENT OF TRANSPORTATION.

Defendants.

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This constitutes the decision and order of the Court.

Dated: February 7, 2025



Hon. Chereé A. Buggs, JSC

