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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 402985/2010
BOOSO, MIRIAM
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

CAL: #11

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____
FOR THE FOLLOWING REASON(S): _____

Dated: 8-8-13

HON. KATHRYN FREED, J.S.C.
JUSTICE OF SUPREME COURT

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

----------X

MIRIAM BOOSO,

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORKER PICTURE FRAMES, LLC, DOUGLAS TAUSIK and DAVID TAUSIK,

Defendants.

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DECISION/ORDER
Index No. 402985/2010
Seq. No. 001

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED	1-2
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED	
ANSWERING AFFIDAVITS	3
REPLYING AFFIDAVITS	4
EXHIBITS	
OTHER	

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendant New York Picture Frames LLC ("New Yorker"), moves for an Order granting it summary judgment dismissing the complaint and any cross-claims against it. Plaintiff opposes. No opposition has been received by any other co-defendant. It is important to note that co-defendants' Douglas and David Tausik have never appeared in this action. However, no default judgment has been sought against them.

After a review of the papers presented, all relevant statutes and case law, the Court denies the instant motion without prejudice.

Factual and procedural background:

Plaintiff seeks monetary damages for personal injuries she allegedly sustained on April 21, 2009, on a sidewalk in front of 366 2nd Avenue, in New York County. As she was exiting her vehicle, she observed a tree well which was in her way. In an effort to get to the sidewalk, she was compelled to walk across bricks wherein her shoe got stuck, causing her to fall. As a result, she commenced the instant action in April 2010 in Supreme Court, Kings County. Venue was subsequently changed to Supreme Court, New York County.

Plaintiff's deposition was held on April 26, 2012. Also on that day, the deposition of Mr. David Marom was conducted. Mr. Marom testified that he was self-employed as the sole member of New Yorker, which in April of 2009, was located at 366 Second Avenue between 21st and 22nd Streets in Manhattan. (See Exhibit "G," pp. 7 & 11). He also testified that at that time, he had a lease agreement with the Tausik brothers, which permitted New Yorker to occupy the premises at 366 Second Avenue. (*Id.* p. 12 & 13, lines 18 & 25). Said lease agreement was marked into evidence at the deposition. Mr. Marom also testified that his company was responsible for sweeping the sidewalk and shoveling snow. (*Id.* p. 18, lines 15-25). He further testified in the twelve years that his company occupied the subject premises, he made no repairs to the exterior front of the store, including the sidewalk, curb, or the area where a tree existed. (*Id.* p. 20, lines 8-14).

The deposition of William Steyer, representing co-defendant the City of New York was conducted on January 22, 2013. Mr. Steyer testified that he is employed by the New York City Department of Parks in the capacity of Director of Forestry for the borough of Manhattan, wherein he supervises tree maintenance crews that work on trees in the City including trees located at curbside and in City Parks. (See Exhibit "I," pp. 5-6, lines 15 & 17-21). He defined a "tree well,"

as an open soil area which has been cut out of sidewalk concrete in which trees are planted (*Id.* p. 37, lines 6-13). After being shown a photograph of the scene, he testified that the area of cobblestones surrounding a tree trunk is a tree well. (*Id.* at p. 37, lines 14-25).

Position of the parties:

New Yorker argues that it is entitled to summary judgment because it did not owe any duty to plaintiff with respect to the area wherein she allegedly tripped and fell. It argues that as it was merely a tenant and not the owner of the abutting property, it cannot be held liable pursuant to Section §7-210 of the Administrative Code of the City of New York. Additionally, New Yorker argues that the language of the lease specifically excludes structural repairs to the sidewalk as a responsibility of the tenant. Lastly, it argues that courts have held that tree wells within sidewalks are not considered part of the sidewalks, so section §7-210 is not applicable to tree wells.

Plaintiff argues that New Yorker's motion is procedurally defective for several reasons. First, she argues that New Yorker relies solely upon a purported lease agreement between it and the Tausik brothers to support its claim that it was not responsible for maintaining and/or repairing the sidewalk adjacent to its leased store where the accident occurred. However, she argues that while New Yorker attaches a portion of said Lease as well as an unexecuted "Modification and Extension of Lease," covering the date of the subject accident, it conveniently fails to provide a complete copy of said Lease, including the Rider.

Plaintiff also argues that since the Lease attached to New Yorker's motion does not include Articles 36-38, it fails to satisfy its prima facie burden of negating all issues of material facts as said Rider may modify and supercede the Lease, such that New Yorker is required to inspect, maintain and repair the sidewalk and installations appurtenant to its store. Additionally, plaintiff argues that

New Yorker has failed to provide an affidavit from an individual with personal knowledge and not merely an affirmation from its attorney and incomplete portions of deposition transcripts.

Conclusions of law:

"The proponent of a summary judgment motion must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 [1st Dept. 2007], citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]). Once the proponent has proffered evidence establishing a prima facie showing, the burden then shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (see *Zuckerman v. City of New York*, 49 N.Y.3d 557 [1989]; *People ex rel Spitzer v. Grasso*, 50 A.D.3d 535 [1st Dept. 2008]). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture or speculation" (*Morgan v. New York Telephone*, 220 A.D.2d 728 [2d Dept. 1985]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978]; *Grossman v. Amalgamated Hous. Corp.*, 298 A.D.2d 224 [1st Dept. 2002]).

In the case at bar, since defendant relies exclusively on its Lease with the Tausik brothers, it is extremely important that the Court be afforded the opportunity to review it in its entirety. Indeed, a review of the Lease annexed to the moving papers as Exhibit "H," reveals that plaintiff's allegation is correct in that Articles 38-64 are not contained therein. Since it is impossible to discern if these missing articles would shed light on the issue of whose responsibility it was to attend to the tree well and surrounding area, this missing information unto itself, raises a triable issue of material fact, precluding the granting of summary judgment.

Moreover, the Court also notes that the two photographs of the subject location which are annexed to the moving papers as Exhibits "F" and "J," indicate the presence of scaffolding. This raises an additional issue as to who was responsible for erecting said scaffolding, and whether it was in place because of construction. If so, did said scaffolding cause or contribute to the uneven piece of sidewalk which plaintiff circled as the area she fell on in the photograph annexed as Exhibit "J?"

Indeed, in consideration of the various questions which require definitive answers, the granting of summary judgment cannot occur at this juncture in the proceedings.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendant New Yorker Picture Frames LLC's motion for summary judgment is denied without prejudice; and it is further

ORDERED that the parties shall appear for a conference on September 10, 2013 at 2:00 pm in Room 103 at 80 Centre Street; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: August 8, 2013

AUG 08 2013

FILED

AUG 13 2013

COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT