

Mckenna-Aguirre v City of New York

2018 NY Slip Op 31478(U)

July 2, 2018

Supreme Court, New York County

Docket Number: 160909/2015

Judge: Margaret A. Chan

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

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|---|------------------------------|------------------------|--------------------|
| PRESENT: | <u>HON. MARGARET A. CHAN</u> | PART | 33 |
| | <i>Justice</i> | | |
| -----X | | INDEX NO. | <u>160909/2015</u> |
| MARIE MCKENNA-AGUIRRE, | | MOTION DATE | _____ |
| Plaintiff, | | MOTION SEQ. NO. | <u>003 005 006</u> |
| - v - | | | |
| THE CITY OF NEW YORK, 36 BLEEKER OWNER, LP, 304 MULBERRY STREET OPERATING COMPANY, L.L.C., | | | |
| Defendants. | | | |

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 90, 91, 92, 99, 126, 128, 132, 133, 134, 135, 136, 137, 138, 141, 145, 190, 191

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 005) 117, 118, 119, 120, 121, 122, 123, 127, 130, 143, 147, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 189

were read on this motion to/for AMEND CAPTION/PLEADINGS

The following e-filed documents, listed by NYSCEF document number (Motion 006) 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 125, 131, 140, 144, 148, 149, 150, 151, 152, 153, 154, 182, 183, 184, 185

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ordered that motion sequence #003 is granted and that motion sequences #005 and #006 are denied.

Plaintiff Marie McKenna-Aguirre sustained personal injuries when she tripped and fell in front of 304 Mulberry Street, in the City, State, and County of New York, on April 11, 2015. Defendant 304 Mulberry Street Operating Company, L.L.C. (304 Mulberry) moves for summary judgment (motion sequence #006) pursuant to CPLR § 3212 to dismiss the complaint and to dismiss the cross-claim of co-defendant 36 Bleeker Owner, LP (36 Bleeker). Co-defendant 36 Bleeker also moves for summary judgment (motion sequence #003) against plaintiff and 304 Mulberry. Plaintiff moves to amend her complaint (motion sequence #005) to add Monadnock Construction, Inc. as an additional defendant. The decision and order on the various motions is as follows:

Relevant Facts

Plaintiff tripped and fell on the south side of Bleecker Street near its intersection with Mulberry Street (NYSCEF Doc. No. 149 – Pl. Aff. in Opp. at ¶6). The accident occurred in front of 304 Mulberry and adjacent to a building under construction, 36 Bleecker, where a temporary wall and a sidewalk shed jugged out into the sidewalk (*id.* at ¶8). It is undisputed that there were cracks on the sidewalk in front of 304 Mulberry’s sidewalk. Plaintiff testified that “something” caught her feet and caused her to trip forward into a wall, striking it, and fall to the ground (*id.*). At her General Municipal Law (GML) §50-h hearing, plaintiff stated that “something tripped me; [s]omething stopped me from walking for some reason” (*id.* at ¶9). Plaintiff, at her deposition, stated that she “fell over the crack and just banged it so fast, it happened so quickly” (*id.* at ¶11).

Plaintiff submitted a photograph of EMTs treating her at the scene of the accident (NYSCEF Doc. No. 152 – Photographs of Scene of Accident). The photograph is dated April 11, 2015, the date of the accident (*id.*). Cracks in the sidewalk are visible in the photograph (NYSCEF Doc. No. 149 – Pl. Aff. in Opp. at ¶14). Plaintiff was also shown photos of the accident location during her deposition where she marked the photo, indicating her direction of travel and the sidewalk crack that allegedly caused her injuries (*id.* at ¶13).

Discussion

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion 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 Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]).

Defendant 304 Mulberry fails to make a prima facie showing that it is entitled to judgment as a matter of law. 304 Mulberry’s motion argues that plaintiff’s testimony at her deposition and GML §50-h hearing is speculative and fails to establish proximate cause (NYSCEF Doc. No. 116 – Def’s Memo at 5). 304 Mulberry points to plaintiff’s repeated utterances that she tripped over “something” to indicate that plaintiff does not actually know the cause of her injury (*id.* at 6). 304 Mulberry also argues that plaintiff’s contention that the cracks caused her fall are predicated on her identification of cracks from post-accident photographs (*id.*).

304 Mulberry’s characterization of the evidence is incorrect. Plaintiff’s photo shows her laying injured on the ground next to cracks on the sidewalk while being treated by EMTs (NYSCEF Doc. No. 152 – Photographs of Scene of Accident).

Plaintiff's testimony was not speculative. She stated that she "tripped on the – sidewalk, the – whatever was – the cracks;" not that she fell over "something" as defendant claims (NYSCEF Doc. No. 109 – Pl's Depo. Transcript at 19, ln 24-25). Even if there are inconsistencies in a plaintiff's testimony regarding how she fell, if plaintiff makes a statement regarding the accident that is consistent with photographic evidence, it is for a jury to resolve the credibility dispute (*see Aller v City of New York*, 72 AD3d 563, 564 [1st Dept 2010]). Therefore, summary judgment is inappropriate, based on plaintiff's testimony and corroborating photographic evidence (*see id.*).

Defendant 304 Mulberry relies on *Smith v. City of New York*, 91 AD3d 456 [1st Dept. 2012] and *Almonte v. City of New York*, N.Y. Misc. LEXIS 5040 [Sup Ct NY Cty 2009] for the proposition that when a plaintiff cannot identify the cause of her fall, proximate cause cannot be established (NYSCEF Doc. No. 116 – Def's Memo at 4). *Smith* is inapt to the case at bar because the plaintiff in *Smith* testified that she had "no idea" how she fell, whereas plaintiff here testified that "cracks" caused her fall. *Almonte* is also distinguishable because, in that matter, contemporaneous photographic evidence showing cracks in the sidewalk was not available, whereas in this case, photos clearly show cracks existing at the time of plaintiff's accident. Moreover, plaintiff's testimony is not purely speculative as she claimed a crack caused her fall and photographic evidence corroborates the plausibility of her account.

As to defendant 36 Bleecker's motion for summary judgment, it is granted. 36 Bleecker makes out a prima facie showing that the sidewalk cracks were not on its property. Plaintiff argues that 36 Bleecker's sidewalk shed extends to the site of the accident and that the sidewalk shed directed plaintiff into the hazard (NYSCEF Doc. No. 149 – Pl's Opp. Memo at 6). While plaintiff's injuries occurred when she hit the sidewalk shed after tripping, the sidewalk shed itself was not the cause of her accident, and therefore there is no valid claim against 36 Bleecker. The photographic evidence and plaintiff's markings indicate that the sidewalk shed did not direct plaintiff into the hazard (NYSCEF Doc. No. 152 – Photographs of Scene of Accident), thereby resolving plaintiff's claim related to the sidewalk shed.

Co-defendant 304 Mulberry likewise fails to raise a triable issue of fact to defeat 36 Bleecker's prima facie showing. 304 Mulberry claims that the cracks were caused by the construction work of co-defendant 36 Bleecker, but its claim is speculative and belied by its own superintendent, Pedro Diaz, who testified that the cracks were caused by tree root damage (NYSCEF Doc. No. 112 – Diaz Deposition at 40, 44). As such, 304 Mulberry has not met its burden to defeat 36 Bleecker's entitlement to summary judgment (*Sow v Fedcap Rehabilitative Services*, 160 AD3d 604 [1st Dept 2018]). The branch of its motion seeking summary judgment dismissing the cross-claim is moot.

Regarding plaintiff's motion to add defendant Monadnock Construction, Inc. – 36 Bleecker's construction company – it is denied. While leave to amend is freely granted, plaintiff must show that the proffered amendment is not palpably insufficient or clearly devoid of merit (*see MBLA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). Evidence proffered by all parties showed that the cause of the injury was a crack in the sidewalk, and that it was speculative to blame the origin of the crack on 36 Bleecker's construction workers. As 36 Bleecker is discharged from this matter, it would be inappropriate to add this additional party that would make the same defenses.

Accordingly, it is hereby ORDERED that defendant 36 Bleecker Owner, LP's motion for summary judgment (motion sequence #003) is granted; it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendant 36 Bleecker Owner, LP, as written; it is further

ORDERED that defendant 304 Mulberry Street Operating Company LLC's motion for summary judgment (motion sequence #006) is denied in its entirety; it is further

ORDERED that plaintiff's motion to amend the complaint (motion sequence #005) is denied; and it is further

ORDERED that remaining parties appear in Part 33 for a compliance conference on August 15, 2018, at 10:00 a.m.

This constitutes the decision and order of the court.

7/2/2018
DATE


MARGARET A. CHAN, J.S.C.

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| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | <input type="checkbox"/> | OTHER |
| APPLICATION: | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | GRANTED IN PART | <input checked="" type="checkbox"/> | OTHER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | SUBMIT ORDER | <input type="checkbox"/> | REFERENCE |
| | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> | REFERENCE |
| | | | <input type="checkbox"/> | DENIED | | |