

**Guo Ping Li v Overseas Partnership Co., Inc.**

2018 NY Slip Op 32904(U)

November 14, 2018

Supreme Court, New York County

Docket Number: 156029/2016

Judge: Arlene P. Bluth

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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. ARLENE P. BLUTH PART IAS MOTION 32

Justice

-----X

INDEX NO. 156029/2016

GUO PING LI,

MOTION DATE 10/30/2018

Plaintiff,

MOTION SEQ. NO. 003

- v -

OVERSEAS PARTNERSHIP CO.,INC.,

DECISION AND ORDER

Defendant.

-----X

OVERSEAS PARTNERSHIP CO., INC.,

Third-Party Plaintiff

-v-

J2 GAO, INC. and YUN HUA GAO,

Third-Party Defendants

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88

were read on this motion to/for

JUDGMENT - SUMMARY

The motion for summary judgment by defendant dismissing the complaint is denied.

**Background**

This action arises out of an accident that allegedly occurred on June 20, 2015 on the sidewalk near 41 Monroe Street in Manhattan. Plaintiff worked for a restaurant on the ground floor at 41 Monroe Street. On the date of the accident, he was taking out the garbage around 10 p.m. when he tripped and fell on a purportedly uneven portion of the sidewalk. Plaintiff claims that he fractured his left knee.

Defendant (the building owner) moves for summary judgment dismissing the complaint on the ground that plaintiff cannot identify the cause of his fall. Defendant contends that this failure compels the Court to dismiss plaintiff's claims.

In opposition, plaintiff claims that he identified what caused him to fall at his deposition. Plaintiff also alleges that defendant's expert inspected the location three years after the accident and *after* the allegedly defective condition was corrected.

### Discussion

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec*,

*Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The main question in this opinion is whether plaintiff sufficiently articulated what caused him to trip and fall. In his deposition, plaintiff testified that he fell while taking the garbage out (NYSCEF Doc. No. 74 at 47-49). “[A]t that time when the accident happened, the garbage bag was still in my hand, and then my foot, this foot, stepped and I got and then I lost my balance (indicating). I lost my balance” (*id.* at 52). Plaintiff added that “I step on, because there’s a metal – there’s uneven surface, the metal about this uneven, it’s about this deep (indicating). And when I stepped on that, I sprained my ankle” (*id.* at 56). When asked where the metal was on the sidewalk, plaintiff answered that “On the sidewalk. On the sidewalk, because it was uneven about this kind of deep. It’s deep like this (indicating)” (*id.* at 57). Plaintiff emphasized that the accident occurred on the sidewalk rather than the curb (*id.*).

Plaintiff testified that “Well to be honest with you, I don’t know. I mean, I don’t know about the uneven surface. I don’t know what caused the uneven surface. If you really want to find out, the answer is not from me. You need to go there. You need to go where I fell to find out what caused that uneven surface” (*id.* at 58). After more questioning, plaintiff affirmed that the uneven surface was the sidewalk (*id.* at 58-59). “What I’m trying to tell you, it is uneven sidewalk” (*id.* at 59).

When asked about the height differential between the two sidewalk sections, plaintiff answered that “Because I don’t have any concept or inches or foot or something like that. Something like that” (*id.* at 60). After being pressed, plaintiff indicated the height differential and the attorneys for plaintiff and defendant suggested that it was about an inch (*id.* at 61).

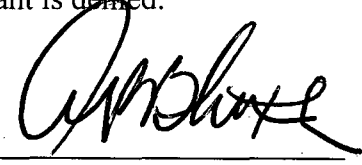
Clearly, plaintiff's deposition transcript offers conflicting versions of what caused him to trip. Contrary to defendant's claim, however, this does not demonstrate that plaintiff was incapable of describing the defective condition that allegedly caused his accident. And plaintiff offered an account of his accident where he tripped over an uneven sidewalk with a height differential between the two sidewalk flags of about an inch. That provides an issue of fact—if a jury credits this account, then defendant might be found liable. While a jury may have to reconcile plaintiff's conflicting testimony that first referenced some type of uneven metal surface before denying that he fell on a piece of metal, that does not mean defendant's motion should be granted because the Court cannot make credibility determinations on summary judgment.

Defendant's submission of an expert report does not change the outcome. Defendant's expert reviewed the site on June 4, 2018 (NYSCEF Doc. No. 78, ¶5 [Pitera aff]), nearly 3 years after the accident and after repairs were made to the sidewalk. Although defendant contends that the area of the sidewalk where plaintiff fell was not part of the repairs, defendant did not submit evidence sufficient to support that conclusion as a matter of law. Put another way, an expert reviewing a defective condition after it was purportedly fixed does not compel the Court to grant a motion for summary judgment.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant is denied.

11.14.18



DATE

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION  OTHER

APPLICATION:  GRANTED  SUBMIT ORDER  FIDUCIARY APPOINTMENT

CHECK IF APPROPRIATE:  SETTLE ORDER  INCLUDES TRANSFER/REASSIGN  REFERENCE