

<b>Torres v 383 Realty Corp.</b>
2020 NY Slip Op 30222(U)
January 30, 2020
Supreme Court, New York County
Docket Number: 160502/2016
Judge: W. Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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WILLIAM TORRES,

Plaintiff,

- v -

383 REALTY CORP., 379 FIRST AVENUE LLC.

Defendant.

-----X

INDEX NO. 160502/2016

MOTION DATE 06/18/2019

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 67, 68, 69, 70, 71, 84, 85

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, the motion for summary judgment is granted.

Plaintiff commenced this action, alleging that he sustained serious injuries and damages after falling on a defective sidewalk portion of a sidewalk adjacent to the premises located at 381 1st Avenue between East 22nd and East 23rd Streets in Manhattan. Plaintiff alleges common-law negligence, and statutory violations of Section 7-210 of the Administrative Code of the City of New York, against defendants 383 Realty Corp., and 379 First Avenue LLC.

Defendant, 383 Realty Corp. ("383") joined issue by service of an answer on May 8, 2017. On April 19, 2018, plaintiff appeared for an examination before trial. Therein, he testified that he tripped and fell on a "hole" in the sidewalk. Specifically, he testified that he tripped and fell on the sidewalk in between a barbershop, "and some type of candy store". Plaintiff identified the place he fell from photographs provided by plaintiff. Those photographs are attached as Exhibit "H" to the motion. Both storefronts appear to have addresses located at 381 1st Avenue, New York.

The record indicates that defendant 383 Realty Corp., owns the building located at 381-838 1<sup>st</sup> Avenue in Manhattan.

Movant, has no ownership interest in 381-383 1<sup>st</sup> Avenue LLC in Manhattan. The movant also does not own the building known as 379 1<sup>st</sup> Avenue in Manhattan. Defendant 379 First Avenue LLC is a limited liability company whose sole member is Kevin T. Dickson. Mr. Dickson started the company for the purposes of owning a condominium unit in 381 1<sup>st</sup> Avenue. He is one of the many unit owners residing in that building. 379 First Avenue LLC does not own the building in which Mr. Dickson lives, nor does he or 379 First Avenue. have any duties related to the sidewalk adjacent to the business in front of the premises.

The Board of Managers of 379 First Avenue Condominium is the owner of the building in front of which plaintiff fell. That Board of Managers issued By-Laws for the Condominium regarding the building. Those By-Laws establish that the Board of Managers which runs the Condominium. The By-Laws also outline the maintenance and repair procedures of the building and who is responsible for such repairs. Section 9 of the By-Laws states in relevant part;

“All maintenance, repairs, and replacements to the Common Element, whether located inside or outside of the Units (unless necessitated by the negligence of a Unit Owner, in which case such expense shall be charged to such Unit Owner), shall be made by the Board of Managers shall be charged to all of the Unit Owners as a common expense.”

The aforementioned demonstrates that the Board of Managers is responsible to maintain and repair the Common Elements of the building. Mr. Dickson is not a member of the Board of Managers and is not responsible for the maintenance of the building's Common Elements, which include the building's exterior.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). The party moving for summary judgment must make a showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact. *Winegrad v. New York Univ Med. Ctr.* 64 NY2d 851 (1985). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Smalls v. AJI Indus. Inc.*, 37 AD3d 324 (2007). Once a prima facie showing has been made, however, “the burden shifts to the nonmoving party to produce proof in evidentiary form sufficient to establish the existence of material issues of fact that require a trial for resolution. *Giuffrida v. Citibank Corp.*, 100 NY2d 81 (2003).

When deciding a motion for summary judgment, the Courts role is sole to determine if triable issues exist, not to determine the merits of any such issues. *Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 (1957). The Court views the evidence in the light most favorable to the nonmoving party and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence. *Negri v. Stop & Shop, Inc.*, 65 NY2d 625 (1985). If there is any doubt as to the existence of a triable issue, summary judgment should be denied. *Rotuba Extruders Inc., v. Ceppos*, 46 NY2d 500 (1978).

It is well established that, before a defendant can be found liable for negligence, the plaintiff must prove that the defendant owed a duty of care and that this duty was breached. *Panso v. Triboro Coach Corp.*, 172 AD 813 (1991). Duty is, “a question of whether a defendant is under any obligation for the benefit of the particular plaintiff.” Whether a defendant owes a duty to the plaintiff.” *Wiera v. Ettco Wire Cabe Corp.*, 172 AD 813 (1994).

In the matter at bar, the evidence presented shows that 379 First Avenue, LLC did not have a statutory or common-law duty to maintain, supervise, repair or control the sidewalk on which plaintiff fell. No issue of fact exists as to who owns the property on which plaintiff fell. That entity is defendant 383 Realty Corp. The documentary evidence, in addition to plaintiff's deposition testimony demonstrate that defendant 379 First Avenue LLC does not own the property in front of 381 1<sup>st</sup> Avenue. The evidence shows that 379 First Avenue, LLC, is an individual unit owner in the Condominium 381 1<sup>st</sup> First Avenue. It is clear from the evidence presented that the entity known as 381 First Avenue, as owner of the property, owes a duty to the public at large. Mr. Dickson bears no duty or responsibility for plaintiff's alleged injuries. Plaintiff in response to the evidence has failed to come forth with any evidence in admissible form to rebut the evidence presented by defendant 379 First Avenue, LLC as to who owns the property and should be held liable for plaintiff's injuries.

There is also no proof, presented in response to defendant's showing that it does not own the premises, that 378 First Avenue, LLC caused, created or exacerbated the condition which allegedly caused plaintiff's injury. Such proof is necessary where a defendant does not have control or ownership over the accident, "to establish a *prima facie* case of negligence against that defendant. *Gordon v. American Museum of Natural History*, 67 NY2d 836 (1986).

Movant further correctly asserts that Administrative Code §7-210 does not apply to it, because 379 First Avenue, LLC is not an adjacent property owner. As noted above, movant is solely an owner of a unit located within the building where plaintiff claims that he fell. As such, this section which attributes liability to an owner of the abutting to maintain the premises in a reasonably safe condition, does not apply to movant.

Plaintiff, in opposition to the motion argues that this motion is premature, as there is “substantial discovery outstanding, including additional depositions of the moving party and post deposition demands which have not been taken or scheduled.” This argument fails as, there is no need for additional discovery. Defendant/movant has shown that it does not own the property, had no statutory duty to maintain and/or monitor the upkeep of the property and did not contribute or cause the defect which occasioned plaintiff’s fall. Plaintiff has not presented any evidence to the contrary. As such there are no issues of fact to be determined by the Court.

ORDERED that defendant 379 First Avenue, LLC’s motion for summary judgment is granted and the complaint is dismissed with costs and disbursements as to this defendant only as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); it is further

ORDERED that the remaining parties are to appear for a Preliminary Conference before this Court on March 24, 2020, at 9:30 am, in Room 307 of 80 Centre Street, NY, NY.

This constitutes the Decision and Order of the Court.

1/30/2020  
DATE



W. FRANC PERRY, J.S.C.

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