

Rivera v New York City Tr. Auth.
2020 NY Slip Op 33257(U)
October 5, 2020
Supreme Court, New York County
Docket Number: 151606/2016
Judge: Suzanne J. Adams
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SUZANNE J. ADAMS

PART IAS MOTION 21

Justice

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INDEX NO. 151606/2016

LYDIA RIVERA,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 010

- v -

THE NEW YORK CITY TRANSIT AUTHORITY, CAPITAL
ONE BANK N.A., 123 THIRD CONDOMINIUM, BLDG 123
THIRD AVE LLC, YUKON 123, LLC, TOP 8
CONSTRUCTION CORP., CONSOLIDATED EDISON

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 010) 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 290, 311, 312, 313, 326, 356

were read on this motion to/for DISMISSAL

Upon the foregoing documents, it is ordered that defendant Capital One Bank N.A.'s ("Capital One") motion for summary judgment is granted. This is a personal injury action in which plaintiff alleges that on May 9, 2015, she tripped and fell on a portion of the sidewalk abutting the building 123 Third Avenue, near the southeast corner of East 14th Street and Third Avenue in Manhattan. The building's owner was Defendant 123 Third Condominium ("123 Third Condo"), and defendants BLDG 123 Third Avenue LLC ("BLDG 123") and Yukon 123, LLC ("Yukon"), owned a commercial storefront unit on the ground floor of the building immediately adjacent to the sidewalk area at issue. Capital One leased the commercial unit pursuant to a lease with BLDG 123 as the landlord.

Capitol One now moves for summary judgment pursuant to CPLR 3212 on the grounds that under its lease with BLDG 123 for the ground floor retail space (Exhibit ZA to the moving

papers), it had no responsibility to inspect, maintain or repair the sidewalk adjacent to the premises. According to the supporting affidavit of James Masker, Capital One's National Facilities Director of Retail Banks, sworn to May 11, 2020 (Exhibit X to the moving papers), Capital One did not cause any defect in the sidewalk at issue, was not involved in any construction or other activity affecting the sidewalk, and did not employ any special use of the sidewalk. Mr. Masker's deposition testimony (Exhibit W to the moving papers) is consistent with his affidavit.

Capitol One has made a *prima facie* showing of entitlement to judgment as a matter of law, having tendered sufficient evidence to demonstrate the absence of any material issues of fact. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986) (citing *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985)). Thus, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure...to do [so]." *Zuckerman v. City of New York*, 49 N.Y.2d 557, 560 (1980). *See also Winegrad*, 64 N.Y.2d at 853. Plaintiff and defendants 123 Third Condo, BLDG 123 and Yukon oppose Capital One's motion. However, they fail to raise any triable issues of fact sufficient to defeat the motion. Their opposition rests solely on a mischaracterization of Mr. Masker's deposition testimony with respect to Capital One's purported hiring of outside vendors to inspect and repair "defects" or "issues" discovered outside the bank branch and on the sidewalk area in question. (Affirmation in Opposition of Victor Bota, Esq., ¶ 5; Affirmation in Opposition of Rebecca J. Rosedale, Esq., ¶ 3) Mr. Masker in fact testified that Capital One hires a facilities management company to carry out Capital One's responsibilities at its bank branches, which responsibilities vary from location to location, based upon whether Capital One owns or leases the premises, and pursuant to the type of lease.

(Exhibit W, pp. 11-12, 15, 19-20) Mr. Masker testified that with respect to the premises at issue, Capital One's responsibilities were for the interior only, with the only exterior work it performed being window cleaning. (Exhibit W, pp. 25-26, 32) He also testified that Capital One's facilities manager would inspect the exterior of the premises twice a year, and that if there is an issue that is the landlord's responsibility, the facilities manager brings it to the landlord's attention. (Exhibit W, pp. 27-29) Nothing in his testimony as cited by plaintiff and those defendants opposing the instant motion creates an issue of fact as to whether Capital One undertook to inspect or repair the sidewalk at issue. Nor do those opposing the motion proffer any other documentary or testimonial evidence to defeat Capital One's motion.

Accordingly, it is hereby

ORDERED that Capital One's motion for summary judgment dismissing the complaint herein is granted and the complaint and all cross-claims and counterclaims are dismissed in their entirety as against Capital One, with costs and disbursements to Capital One as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of Capital One; and it is further

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 Capital One 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).

This constitutes the decision and order of the court.



SUZANNE J. ADAMS, J.S.C.

10/5/2020

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE