

Suazo v Friedman's 31st St., LLC

2021 NY Slip Op 30532(U)

February 26, 2021

Supreme Court, New York County

Docket Number: 155028/2019

Judge: Lyle E. Frank

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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. LYLE E. FRANK

PART IAS MOTION 52EFM

Justice

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ADA SUAZO,

Plaintiff,

- v -

FRIEDMAN'S 31ST STREET, LLC, PHILLIPS FOOD 35
LLC, PHILLIPS FOODS LLC, VANBARTON GROUP
LLC, VANBARTON SERVICES LLC, VANBARTON
SERVICES NY LLC, VBGO PENN PLAZA FEE LLC, VBGO
PENN PLAZA LLC, THE CITY OF NEW YORK, NEW YORK
CITY DEPARTMENT OF TRANSPORTATION,

Defendant.

-----X

VANBARTON GROUP LLC, VANBARTON SERVICES LLC,
VANBARTON SERVICES NY LLC, VBGO PENN PLAZA FEE
LLC, VBGO PENN PLAZA LLC

Plaintiff,

-against-

QUALITY BUILDING SERVICES CORP.

Defendant.

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**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595794/2019

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 48, 49, 50, 51, 52, 54, 55, 56

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the decision of the Court is as follows:

This action arises out of injuries allegedly sustained by plaintiff on February 22, 2018.

Plaintiff alleges she slipped and fell on the sidewalk adjacent to Friedman's Restaurant located at 132 West 31st Street in New York County. Defendant/Third-party plaintiff moves for summary judgment on the grounds that the condition that plaintiff alleges caused her accident is not

actionable. Plaintiff opposes the instant motion. Based on the reasons set forth below, the motion is granted, and the complaint is dismissed in its entirety.

Summary Judgment Standard

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].

The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Weiner v Ga-Ro Die Cutting, Inc.*, 104 AD2d 331, [1st Dept 1984] *aff'd* 65 NY2d 732 [1985].

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]. Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized in a light most favorable to the non-moving party. *Assaf v Ropog Cab Corp.*, 153 AD2d 520 [1st Dept 1989]. Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957].

Facts

Plaintiff testified at a hearing, pursuant to General Municipal Law §50-h. See NYSCEF doc. 40. Plaintiff testified in relevant part that at the time of the incident it was lightly raining. *Id*

at 7:10-14. Plaintiff further testified that the sidewalk where she fell was caused to be slippery by water, and that her body was wet after the fall. Id at 15:14-18, 16:3-4.

Discussion

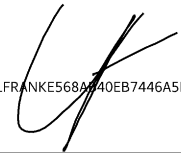
In support of its motion defendant/third-party plaintiff, cites to plaintiff's 50h testimony to establish its *prima facie* case. Movant contends that a wet sidewalk, while it is raining is not an actionable condition. The Court agrees, as "the mere fact that the driveway apron was wet from the rain is insufficient to establish a dangerous condition" *Richardson v Campanelli*, 297 AD2d 794 [2d Dept 2002] internal citations omitted.

Contrary to plaintiff's contentions at oral argument, movant was not required to attach a climatological report to prove that it was in fact raining; plaintiff's own testimony was sufficient to establish that fact. In opposition, plaintiff attempt to dispute her own testimony with an uncertified record from timeanddate.com, is insufficient to create a question of fact. Although not raised in the opposition papers, during oral argument, plaintiff attempted to create an issue of fact by citing to her Notice of Claim and Verified Complaint, wherein among a plethora of other allegations, plaintiff claims black ice caused her accident. The Court does not find that plaintiff's pleadings create an issue fact as her testimony, which was taken for the purpose to amplify her pleadings, specifically identifies the cause of her accident. Plaintiff has failed to rebut movants initial showing that condition is not a dangerous condition as a matter of law.

It is well established that the Court "may search the record and grant summary judgment to any nonmoving party without the necessity of a cross motion" (*Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621, 628 [1st Dept 2015]). After searching the record, the non-movants are equally entitled to judgment as a matter of law as it is established that the condition complained of is actionable.

Accordingly, it is hereby

ORDERED that the plaintiff's complaint is dismissed in its entirety, and the Clerk of the Court is directed to enter judgment accordingly.


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2/26/2021

DATE

LYLE E. FRANK, J.S.C.

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