

Kharpak v JMVP Realty, LLC

2023 NY Slip Op 31778(U)

May 25, 2023

Supreme Court, New York County

Docket Number: Index No. 152917/2017

Judge: Suzanne J. Adams

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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. SUZANNE J. ADAMS PART 39TR

Justice

-----X

ANNA KHARPAK,

Plaintiff,

- v -

JMVP REALTY, LLC, CLARENCE PROPERTY
LLC, BROOKS ATKINSON THEATER, NEW YORK CITY
TRANSIT AUTHORITY, METROPOLITAN
TRANSPORTATION AUTHORITY, SHERWOOD 48
ASSOCIATES, SHERWOOD EQUITIES, INC.,

Defendant.

-----X

JMVP REALTY, LLC

Plaintiff,

-against-

SHERWOOD 48 ASSOCIATES, SHERWOOD EQUITIES, INC.

Defendant.

-----X

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595890/2020

The following e-filed documents, listed by NYSCEF document number (Motion 002) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 120, 124

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

Upon the foregoing documents, it is

ORDERED that defendant, BROOKS ATKINSON THEATER's, (hereinafter "BROOKS") motion for summary judgment is granted.

This is an action for personal injuries allegedly stemming from two falls. The first fall, allegedly occurred on the sidewalk abutting two premises, the BROOKS ATKINSON THEATER located at 256 West 47th Street, New York, NY and 254 West 47th Street, New York, NY owned by defendant, JMVP REALTY, LLC. Thereafter, plaintiff fell a second time while descending the

staircase leading to the mezzanine of the “Q” train subway station entrance located on the north side of 47th Street between Broadway and 7th Avenue, New York, NY.

Defendant, BROOKS now moves for summary judgment pursuant to CPLR 3212 on the grounds that it did not owe plaintiff a duty of care, because the sidewalk defect identified as the cause of plaintiff’s first fall is located in front of 254 West 47th Street, New York, NY. Said premises is owned by defendant JMVP REALTY, LLC, not defendant BROOKS. Defendant BROOKS further argues that it is not responsible for said area of the sidewalk. It is only responsible for the sidewalk in front of 256 West 47th Street, New York, NY.

BROOKS has made a *prima facie* showing of entitlement to judgment as a matter of law, by attaching the survey and affidavit of a professional land surveyor, Barry M. Fahrer, L.S.P.C. In opposition, defendant, JMVP REALTY, LLC argues that plaintiff’s 50H testimony is inconsistent with her deposition testimony and that the photograph shown and marked by plaintiff at her deposition is unauthenticated and inadmissible. The court does not find this argument compelling as the plaintiff testified at both the 50H and her deposition that she fell in front of a theater. The survey attached to the motion papers of defendant, BROOKS, reflects the measurements and data in relation to the delineation of the property line and construction site boundaries between the two properties.

BROOKS 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)). The burden thus shifts to the parties 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. However, the opponents to BROOKS' motion fail to raise any triable issues of fact that would defeat the motion. BROOKS does not "own, maintain, operate or control" the sidewalk in question; nor is there any evidence that BROOKS "benefitted from this portion of the sidewalk in a manner different from that of the general populace such to impute liability based upon a theory of 'special use'." *Pantazis v. City of New York*, 211 A.D.2d 427, 427-28 (1st Dep't 1995).

Accordingly, it is hereby

ORDERED that BROOKS' 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 BROOKS, with costs and disbursements to BROOKS, as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of BROOKS; 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 BROOKS 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.

5/25/2023

DATE

SUZANNE J. ADAMS, 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