

**Conforme v Bel Fratello LLC**

2023 NY Slip Op 33027(U)

August 31, 2023

Supreme Court, New York County

Docket Number: Index No. 159188/2018

Judge: Judy H. Kim

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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. JUDY H. KIM PART 05RCP

Justice

MARIANA CONFORME, Plaintiff,

Plaintiff,

- v -

BEL FRATELLO LLC, MONUMENTS BY EFFIE, INC., THE CITY OF NEW YORK,

Defendants.

INDEX NO. 159188/2018
MOTION DATE 12/30/2022
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 69, 71, 73, 75, 81, 82, 83, 84, 85

were read on this motion for

SUMMARY JUDGMENT

Upon the foregoing documents, Monuments by Effie Inc.'s ("Monuments") motion for summary judgment dismissing this action as against it is denied for the reasons set forth below.

On October 4, 2018, plaintiff commenced this action to recover for injuries allegedly sustained on September 28, 2017, when she tripped and fell over an elevated sidewalk flag abutting the property located at 2240 First Avenue, New York, New York (NYSCEF Doc. Nos. 55 [Compl. at ¶¶52-53], 57 [Bill of Particulars at ¶3], 58 [GML §50-h Tr. at pp. 25-26] and 59 [Conforme EBT at pp. 28-31]). Monuments is the lessor of 2240 First Avenue while co-defendant Bel Fratello, LLC ("Bel Fratello") is the owner of 2240 First Avenue and 2242 First Avenue. Plaintiff alleges that these defendants, along with the City of New York (the "City"), were negligent in causing and creating this defective condition and failing to remedy same (NYSCEF Doc. Nos. 55 [Compl. at ¶¶56-59]). On January 9, 2020, Bel Fratello interposed an answer asserting crossclaims against Monuments for indemnification and contribution (NYSCEF Doc. No. 56 [Crossclaim at ¶1]).

The Lease Agreement (the "Lease") between Monuments and Bel Fratello provides, in pertinent part, that:

Tenant shall, throughout the terms of this lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements, fire or other casualty, excepted.

...

Tenant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance, including reasonable attorneys fees paid . . . or incurred as a result of any breach by Tenant . . . of any covenant or condition of this lease, or the carelessness, negligence or improper conduct of the Tenant

...

Tenant shall, at tenant's expense, keep the demised premises clean and in order to the satisfaction of the owner, and if the demised premises are situated on the street floor, that tenant shall, at tenant's own expense, make all repairs and replacements to sidewalks and curbs adjacent thereto and keep said sidewalks and curbs free from snow, ice, dirt and rubbish.

(NYSCEF Doc. No. 60 [Lease at §§4, 8, 30] [emphasis added]).

Monuments now moves, pursuant to CPLR §3212, for summary judgment dismissing plaintiff's complaint and all crossclaims against it, arguing that it cannot be held liable under Administrative Code §7-210 because: (i) the defect at issue does not abut 2240 First Avenue, and (ii) Monuments, as a commercial tenant, does not owe plaintiff a duty of care such that it may be held liable in this negligence action. In support of its motion, Monuments submits a field survey of the subject location and accompanying affidavit of licensed land surveyor John Toscano, in which he attests that "[t]he expansion joint identified by the plaintiff as being the elevation that caused her to fall" is located one and a quarter inches north of the property line of 2240 First

Avenue and is, in fact, on the property of 2242 First Avenue (NYSCEF Doc. No. 63 [Toscano Aff. at ¶5]).

Bel Fratello opposes Monuments' motion, contending that Monuments has failed to establish that the raised sidewalk flag did not abut 2240 First Avenue and that Monuments' obligation to maintain and repair the sidewalk under the Lease precludes that branch of Monuments' motion for summary judgment dismissing Bel Fratello's crossclaim against Monuments.

Plaintiff also opposes Monuments' motion, arguing that issues of fact exist as to the location of the defect at issue and whether Monuments was responsible for maintaining the subject sidewalk pursuant to the Lease.

#### DISCUSSION

"The proponent of a summary judgment motion 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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]).

Monuments has failed to meet its burden. As an initial matter, it has failed to establish that the defect in question abutted 2242 First Avenue rather than 2240 First Avenue. While Toscano attests that his survey revealed that the "[t]he expansion joint identified by the plaintiff as being the elevation that caused her to fall" abuts 2242 First Avenue, plaintiff does not allege that an

expansion joint caused her to fall. Rather, she alleges that she tripped over a raised sidewalk flag. In addition, photos submitted in connection with this motion show a raised sidewalk flag but no expansion joint. As the survey and affidavit fail to establish that this raised sidewalk flag exclusively abuts 2242 First Avenue, they are insufficient to establish Monuments' entitlement to summary judgment (See e.g. Como v Stable 49 Ltd., 2016 NY Slip Op 31101[U] [Sup Ct, NY County 2016] [field survey referring only to location of sidewalk expansion joint and not any related damage to the sidewalk did not address possibility that broken sidewalk flag in front could have been proximate cause of accident and therefore failed to resolve all material issues of fact]).

Neither has Monuments established a lack of liability under Administrative Code §7-210.

That statute provides, as relevant here, that:

the owner of real property abutting any sidewalk ... shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags ...

(Administrative Code § 7-210[b]).

While, as a rule, Administrative Code of the City of New York §7-210 imposes a non-delegable duty solely on the owner of the abutting premises to maintain and repair the sidewalk, there are three exceptions to this rule. Specifically, a tenant can be held liable to a third party where: (i) the tenant "affirmatively caused or created the defect that caused plaintiff to trip"; (ii) the tenant "put the subject sidewalk to a special use for its own benefit, thus assuming a responsibility to maintain the part used in reasonably safe condition"; or (iii) "the lease was so comprehensive and exclusive as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk" (Abramson v Eden Farm, Inc., 70 AD3d 514, 514 [1st Dept 2010]; Kellogg v All Sts. Hous. Dev. Fund Co., Inc., 146 AD3d 615, 617 [1st Dept 2017]).

Monuments has failed to establish that these exceptions are inapplicable. It does not submit any proof to establish that Monuments did not create the defective condition through its actions or otherwise make any special use of the sidewalk. In addition, Monuments has “entirely failed to address ... [the Lease] provision[s] which required it, at its own expense, to ‘make all repairs and replacements to the sidewalks and curbs adjacent’ to the premises, or the legal issue of whether the lease was so ‘comprehensive and exclusive’ as to sidewalk maintenance as to entirely displace the landowner’s duty to maintain the sidewalk” (Abramson v Eden Farm, Inc., 70 AD3d 514, 514 [1st Dept 2010] [internal citations omitted]; see also Healy v 169 E. 69th St. Corp., 189 AD3d 680 [1st Dept 2020]). “Thus, defendant did not demonstrate an absence of a duty of care owing to the plaintiff pedestrian” (Abramson v Eden Farm, Inc., 70 AD3d 514 [1st Dept 2010]).

To the extent Monuments argues that the Lease was not so comprehensive and exclusive as to create a duty to plaintiff, the cases it relies upon are inapposite, as they involve limited contractual obligations on the part of tenants to keep sidewalks clear of snow and ice (See Bi Fang Zhou v 131 Chrystie St. Realty Corp., 125 AD3d 429 [1st Dept 2015]; Tucciarone v Windsor Owners Corp., 306 AD2d 162 [1st Dept 2003]) or limit the tenant’s obligation to “make all repairs and replacements to the sidewalks and curbs adjacent thereto” to only non-structural repairs (Collado v Cruz, 81 AD3d 542, 542 [1st Dept 2011]). Accordingly, that branch of Monuments’ motion for summary judgment dismissing the complaint as against it is denied.

That branch of Monuments’ motion for summary judgment dismissing Bel Fratello’s crossclaims is also denied. It remains an open question whether Monuments failed to meet its contractual obligation to repair the subject sidewalk flag such that it may be required to indemnify Bel Fratello in the instant action pursuant to paragraph 8 of the Lease (See e.g., Collado v Cruz, 81 AD3d 542 [1st Dept 2011]). Finally, that branch of Monuments motion seeking summary

judgment dismissing the City’s crossclaims as against it is denied as moot in light of the dismissal of the City from this action in motion sequence 002.

Accordingly, it is

**ORDERED** that Monuments by Effie Inc.’s motion for summary judgment is denied in its entirety; and it is further

**ORDERED** that within ten days from the date of this decision and order, counsel for plaintiff shall serve a copy of this order with notice of entry on the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk’s Office (60 Centre St., Rm. 119); 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 this court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the Court.

8/31/2023  
DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE

  
 HON. JUDY H. KIM, J.S.C.