SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO PART 33M
Justice

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LINDA MURPHY,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NYC ONE HOLDING LLC,308 REALTY HOLDING LLC

Defendant.

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INDEX NO. 159044/2019

MOTION DATE 03/23/2023

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 131, 132, 133, 134, 135

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

Upon the foregoing documents, and after oral argument which took place on August 15, 2023 with Joseph Taylor, Esq. appearing for Plaintiff Linda Murphy ("Plaintiff"), Cary Nosowitz, Esq. appearing for Defendant NYC One Holding LLC ("NYC One"), and Stacy I. Malinow, Esq. appearing for Defendant 308 Realty Holding LLC ("308 Realty"), Defendant 308 Realty's motion for summary judgment dismissing Plaintiff's claims and all cross-claims against 308 Realty is granted, without opposition. Plaintiff's cross-motion for summary judgment on the issue of liability against Defendant NYC One is denied.

I. Background

On September 18, 2019, Plaintiff commenced the present action to recover damages for personal injuries allegedly sustained when she tripped and fell on a cellar door located on the sidewalk in front of 306 West 40th Street, New York, New York (the "Property") (NYSCEF Doc. 1). It is undisputed that NYC One is the owner of the Property (NYSCEF Doc. 116 at p. 7). 308 Realty is not an owner of the subject Property, but rather owns the vacant lot located at 308 West

40th Street, New York, New York (NYSCEF Doc. 101 at ¶¶ 10-11). At the time of Plaintiff's alleged accident, 308 Realty's property at 308 West 40th Street did not have a cellar door (NYSCEF Doc. 101 at ¶12).

On March 23, 2023, 308 Realty brought the instant summary judgment motion for an Order dismissing Plaintiff's claims and all cross-claims against 308 Realty (NYSCEF Doc. 100). In support of its motion, 308 Realty filed an Affirmation on March 23, 2023 (NYSCEF Doc. 101). Plaintiff does not oppose 308 Realty's motion.

On April 4, 2023, Plaintiff filed a cross-motion for an Order granting Plaintiff summary judgment on the issue of liability against Defendant NYC One (NYSCEF Doc. 112). Plaintiff filed an Affirmation in support of her cross-motion on April 4, 2023 (NYSCEF Doc. 113). NYC One filed an Affirmation in opposition to Plaintiff's cross-motion on May 18, 2023 (NYSCEF Doc. 131). Plaintiff filed an Affirmation in Reply on May 25, 2023 (NYSCEF Doc. 135).

II. Discussion

A. Summary Judgment Standard

Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact." (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial (*see e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of

law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

B. Defendant 308 Realty's Motion for Summary Judgment is Granted

308 Realty's summary judgment motion requests dismissal of Plaintiff's claims and all cross-claims against 308 Realty (NYSCEF Doc. 100). 308 Realty argues that the "maintenance, repair and responsibility of a defect of the type alleged [by Plaintiff] falls within the exclusive care of the owner of the abutting property" (NYSCEF Doc. 101 at ¶ 7). As it is undisputed that 308 Realty does not own the Property abutting the accident location, 308 Realty contends that summary judgment is warranted.

Section 7-210 of the Administrative Code of the City of New York (the "Administrative Code") states that "[i]t shall be the duty of the owner of real property abutting any sidewalk…to maintain such sidewalk in a reasonably safe condition…Notwithstanding any other provision of law, the owner of real property abutting any sidewalk…shall be liable for any injury to property or personal injury…proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition." Further, the Appellate Division has held that this duty "is an affirmative, non-delegable obligation, and although a landlord can enter into agreements having the tenant perform the work of maintaining the sidewalk, the duty to plaintiff remains exclusively with the landlord" (*Choudhry v Starbucks Corp.* 213 AD3d 521 [1st Dept 2023]).

In this case, Brian Law, the Principal of 308 Realty, alleges in his Affidavit that on the date of Plaintiff's alleged accident 308 Realty "did not own the premises known as 306 West 40th Street, New York, New York 10018" (NYSCEF Doc. 103 at ¶ 5). Mr. Law further alleges in his Affidavit that 308 Realty "has never performed any repairs to the cellar door where the alleged accident occurred, on or before February 23, 2019, or anytime thereafter…[and] has never made

any use, special or otherwise, of the cellar door where the alleged accident occurred on or before February 23, 2019, or anytime thereafter" (NYSCEF Doc. 103 at ¶¶ 10-11). Further, in its Amended Response to Plaintiff's Notice to Admit, NYC One admits to ownership of 306 West 40th Street, New York, New York adjacent to the sidewalk where Plaintiff's accident allegedly occurred (NYSCEF Doc. 116 at p. 7).

As there is no question in the record that 308 Realty did not own, repair, control, maintain or make any use of the location where Plaintiff's accident allegedly occurred, 308 Realty has satisfied its *prima facie* burden of establishing the absence of any material issues of fact. In declining to oppose 308 Realty's summary judgment motion, Plaintiff has failed to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. As such, 308 Realty's motion is granted, and Plaintiff's claims and all cross-claims against 308 Realty are dismissed.

C. Plaintiff's Cross-Motion for Summary Judgment against Defendant NYC One Holding LLC is Not Premature

Pursuant to CPLR 3212(f), a motion for summary judgment may be denied where it "appear[s] from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated." While the Appellate Division has held that "a motion for summary judgment should be denied as premature where the movant has yet to be deposed" (*Figueroa v City of New York*, 126 AD3d 438, 439 [1st Dept 2015]), it is well settled that "[a] grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*Bailey v New York City Transit Auth.*, 270 AD2d 156 [1st Dept 2000]).

Here, NYC One argues that Plaintiff's cross-motion "is premature as depositions have not taken place and Plaintiff failed to address the vast comparative negligence she has for the

happening of this accident" (NYSCEF Doc. 131 at ¶ 24). In an effort to meet its burden of showing some evidentiary basis to suggest that discovery may lead to relevant evidence, NYC One further asserts that depositions and post-deposition demands will lead to relevant evidence in this matter to establish unequivocally that Plaintiff was comparatively negligent (NYCEF Doc. 131 at ¶ 25).

However, the Court of Appeals has held that "to obtain partial summary judgment on defendant's liability [a plaintiff] does not have to demonstrate the absence of his own comparative fault" (*Carlos Rodriguez, Appellant, v City of New York, Respondent.*, 31 NY3d 312, 323 [1st Dept 2018]). The Court of Appeals has further held a plaintiff may be entitled to summary judgment on the issue of a defendant's liability "even assuming there is an issue of fact regarding his comparative fault" (*Id.*). Accordingly, even were the Court to accept NYC One's argument that further depositions are needed to address the issue of Plaintiff's comparative negligence, any comparative negligence on Plaintiff's part would have no bearing on the issue of liability. As such, in claiming that Plaintiff's summary judgment motion is premature, NYC One has failed to meet its burden of showing an evidentiary basis to suggest that discovery may lead to relevant evidence.

D. Plaintiff's Cross-Motion for Summary Judgment against Defendant NYC One Holding LLC is Denied

It is well settled that "[t]o subject a property owner to liability for a dangerous condition on its premises, a plaintiff must demonstrate that the owner created, or had actual or constructive notice of the dangerous condition that precipitated the injury" (*Ceron v Yeshiva Univ.* 126 AD3d 630, 631 [1st Dept 2015]). While it is true that a landowner's duty to maintain their property in a safe condition "includes protecting against or warning of dangerous conditions on the premise" (*Piluso v Bell Atl. Corp.*, 305 AD2d 68, 70 [1st Dept 2003]), "a landowner has no duty to warn

of an open and obvious danger" (*Tagle v Jakob*, 97 NY2d 165 [2001]). The Appellate Division has held that "[a] condition that is visible to one reasonably using his or her senses is not inherently dangerous" (*Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597 [1st Dept 2012]). Further, it is well settled that "whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]).

Here, Plaintiff contends that NYC One is "fully liable for Plaintiff's incident and resulting injuries because it caused and created a dangerous condition, had knowledge that the condition was dangerous, took inadequate measures to warn and protect pedestrians of the dangerous condition, and allowed the dangerous condition to exist for a period of years upon the sidewalk." (NYSCEF Doc. 113 at ¶ 9).

In opposition, NYC One proffers the Expert Report of Dr. Vasiliki Kefala, Ph.D, a senior Bio-Mechanical Engineer, which opines that Plaintiff "should have observed, perceived, and reacted to [the] condition on the sidewalk and been able to avoid a fall related to interacting with the elevated plywood surface on the sidewalk" (NYSCEF Doc. 132 at p. 10). Further, Dr. Kefala's report asserts that "[t]he plywood surface on the ground cellar door would have been visible to an attentive pedestrian" (*Id.*).

NYC One has presented material issues of fact as to whether the conditions giving rise to Plaintiff's accident would be visible to one reasonably using their senses, therefore raising further questions of fact regarding whether the condition that allegedly caused Plaintiff's accident was dangerous. As the question of whether or not a dangerous condition exists is

generally a question of fact for the jury, Plaintiff's cross-motion for summary judgment is denied.

Accordingly, it is hereby,

ORDERED that Defendant 308 Realty Holding LLC's motion for summary judgment dismissing Plaintiff Linda Murphy's claims and all cross-claims against 308 Realty Holding LLC, is granted; and it is further

ORDERED that Plaintiff Linda Murphy's cross-motion for summary judgment against Defendant NYC One LLC on the issue of liability is denied; and it is further

ORDERED that within ten (10) days of entry, counsel for Defendant 308 Realty Holding LLC shall serve a copy of this Decision and Order, with notice of entry, on all parties wo this case; and it is further

ORDERED that on or before February 13, 2024, the remaining parties in the case shall submit a proposed Status Conference Order via e-mail to SFC-Part33-Clerk@nycourts.gov. If the parties are unable to agree to a proposed Status Conference Order, the parties are directed to appear for an in-person status conference on February 14, 2024 at 9:30 a.m. in Room 442, 60 Centre Street, New York, New York; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

11/20/2023
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:		CASE DISPOSED			x	NON-FINAL DISPOSITION	
		GRANTED		DENIED	x	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

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