Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D76887
Y/htr

_____AD3d_____ Argued - January 6, 2025

FRANCESCA E. CONNOLLY, J.P.
CHERYL E. CHAMBERS
HELEN VOUTSINAS
JAMES P. MCCORMACK, JJ.

2022-05534 DECISION & ORDER

Zorayda Hernandez, plaintiff-respondent,
v 38-09 Junction Realty, LLC, defendant-respondent,
City of New York, et al., appellants, et al., defendants.

(Index No. 714742/17)

Anna J. Ervolina, New York, NY (Timothy J. O'Shaughnessy and Theresa Frame of counsel), for appellant New York City Transit Authority.

Muriel Goode-Trufant, Corporation Counsel, New York, NY (Jane L. Gordon and MacKenzie Fillow of counsel), for appellant City of New York.

Asher & Associates, P.C. (Hasapidis Law Offices, South Salem, NY [Annette G. Hasapidis], of counsel), for plaintiff-respondent.

In an action to recover damages for personal injuries, the defendant New York City Transit Authority and the defendant City of New York separately appeal from an order of the Supreme Court, Queens County (Tracy Catapano-Fox, J.), entered June 23, 2022. The order, insofar as appealed from by the defendant New York City Transit Authority, denied that branch of that defendant's motion which was for summary judgment dismissing the complaint and all cross-claims insofar as asserted against it. The order, insofar as appealed from by the defendant City of New York, denied that branch of that defendant's motion which was pursuant to CPLR 3211(a)(5) to dismiss the complaint insofar as asserted against it.

ORDERED that the order is reversed insofar as appealed from by the defendant New York City Transit Authority, on the law, and that branch of that defendant's motion which was for summary judgment dismissing the complaint and all cross-claims insofar as asserted against it is granted; and it is further,

ORDERED that the order is affirmed insofar as appealed from by the defendant City

of New York; and it is further,

ORDERED that one bill of costs is awarded to the defendant New York City Transit Authority, payable by the plaintiff, and one bill of costs is awarded to the plaintiff, payable by the defendant City of New York.

The plaintiff allegedly was injured in August 2016 when she tripped and fell on a raised tile or brick while walking toward the subway station located at the corner of Junction Boulevard and Roosevelt Avenue in Queens. Thereafter, the plaintiff commenced this action to recover damages for personal injuries against, among others, the defendants City of New York, New York City Transit Authority (hereinafter NYCTA), and 38-09 Junction Realty, LLC (*see Hernandez v 38-09 Junction Realty, LLC*, _____ AD3d _____ [Appellate Division Docket No. 2022-05006; decided herewith]). After the completion of discovery, NYCTA moved, inter alia, for summary judgment dismissing the complaint and all cross-claims insofar as asserted against it, contending, among other things, that the plaintiff was unable to identify the cause of her fall. Subsequently, the City moved, inter alia, pursuant to CPLR 3211(a)(5) to dismiss the complaint insofar as asserted against it. In an order entered June 23, 2022, the Supreme Court, among other things, denied those branches of the motions. NYCTA and the City separately appeal.

For the reasons set forth in the related appeal (*see Hernandez v 38-09 Junction Realty, LLC*, _____ AD3d _____), NYCTA established its prima facie entitlement to judgment as a matter of law dismissing the complaint and all cross-claims insofar as asserted against it by submitting, among other things, transcripts of the plaintiff's deposition testimony and related exhibits which demonstrated that she could not identify the cause of her fall without engaging in speculation (*see Barretta v Michaels Stores, Inc.*, 230 AD3d 1208, 1209). In opposition, the plaintiff failed to raise a triable issue of fact (*see Gaither-Angus v Adelphi Univ.*, 180 AD3d 875, 876; *Fortune v Raritan Bldg. Servs. Corp.*, 175 AD3d 469, 470). Accordingly, the Supreme Court should have granted that branch of NYCTA's motion which was for summary judgment dismissing the complaint and all cross-claims insofar as asserted against it.

The City's sole argument on appeal was not advanced before the Supreme Court in support of that branch of its motion which was pursuant to CPLR 3211(a)(5) to dismiss the complaint insofar as asserted against it. As this argument does not present a pure question of law appearing on the face of the record that could not have been avoided if raised at the proper juncture, it is improperly raised for the first time on appeal (*see English v Wainco Goshen 1031, LLC*, 218 AD3d 444, 445; *Matter of Ray v County of Suffolk*, 204 AD3d 807, 807). We decline the City's request, made for the first time in its reply brief, to search the record and award summary judgment in its favor.

CONNOLLY, J.P., CHAMBERS, VOUTSINAS and MCCORMACK, JJ., concur.

ENTER:

Darrell M. Joseph
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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ZORAYDA HERNANDEZ, Index No.: 714742/2017

Plaintiff,

-against-

ORDER WITH NOTICE OF ENTRY

38-09 JUNCTION REALTY LLC, JUNCTION SPORTS PLUS INC., PECA REALTY CORP., C.E.E. MANAGEMENT, INC., ABZ FUNDINGS CORP., THE CITY OF NEW YORK and NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

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C O U N S E L O R S :

PLEASE TAKE NOTICE that the within is a true copy of the Order duly filed and entered in the office of the Clerk of the Supreme Court, County of Queens, by Honorable Tracy Catapano-Fox, J.S.C., on June 23, 2022.

Dated: New York, New York
June 28, 2022

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Short Form Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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ZORAYDA HERNANDEZ,

Plaintiff,

-against-

38-09 JUNCTION REALTY LLC, JUNCTION SPORTS PLUS INC., PECA REALTY CORP., C.E.E. MANAGEMENT INC., ABZ FUNDINGS CORP., THE CITY OF NEW YORK and NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

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Index No. 714742/2017

Part 6
Motion Date: May 2, 2022

Calendar No. 21

Sequence No. 10

FILED
6/23/2022
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 to 18 read on this motion by defendant NEW YORK CITY TRANSIT AUTHORITY to amend the Answer pursuant to CPLR §3025(b) and for summary judgment and dismissal of plaintiff's Complaint and all cross-claims against it pursuant to CPLR §3212, and this cross-motion by defendant The City of New York to amend the Answer pursuant to CPLR §3025(b) and for summary judgment and dismissal of plaintiff's Complaint and all cross-claims against it pursuant to CPLR §3212.

	Papers Numbered
Notice of Motion, Affirmation, Exhibits	1-4
Notice of Cross-Motion, Affirmation, Exhibits	5-8
38-09's Affirmation in Partial Opposition	9-10
Plaintiff's Affirmation in Opposition, Exhibits	11-13
Plaintiff's Affirmation in Opposition, Exhibits	14-16
Reply Affirmation	17-18

Upon the foregoing papers, it is ordered that these motions are determined as follows:

Defendant New York City Transit Authority's motion and defendant The City of New York's cross-motion to amend their Answers pursuant to CPLR §3025(b) are granted, but their

motion and cross-motion for summary judgment pursuant to CPLR §3212 are denied, as they failed to present competent, admissible evidence that they were not liable for maintaining or repairing the sidewalk where plaintiff fell. (*See McClean v. National Ctr. For Disability Servs.*, 30 A.D.3d 383 [2d Dept. 2006].)

Plaintiff commenced this action for personal injuries sustained on August 11, 2016, when she fell on raised brick on the sidewalk adjacent to 38-09 Junction Boulevard and 38-11 Junction Boulevard, Queens, New York. Plaintiff filed her Summons and Complaint on October 23, 2017, and issue was joined by all defendants.

Defendant NYCTA's motion and defendant The City of New York's cross-motion to amend their Answers pursuant to CPLR §3025(b) is granted. CPLR §3025(b) permits amendment to pleadings absent prejudice or surprise to the opposing party, or unless the amendment is palpably insufficient or meritless. (*Ciminello v. Sullivan*, 120 A.D.3d 1176 [2d Dept. 2014].) Defendants argue that collateral estoppel is a valid affirmative defense based upon prior court orders, and while plaintiff and other court orders argue otherwise, amendments to Answers are liberally granted under CPLR §3025(b), and therefore their motions to amend are granted.

Pursuant to CPLR 3212, "[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR 3212 [b]; *Rodriguez v. City of New Yor*k, 31 N.Y.3d 312 [2018].) The motion for summary judgment must also "show that there is no defense to the cause of action." (*Id*.). The party moving for summary judgment must make a *prima facie* showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; *see Jacobsen v New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *Brill v City of New York*, 2 N.Y.3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp*., 18 N.Y.3d 499, 505 [2012].) Once a *prima facie* showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980].)

In a premises liability case, a defendant real property owner, or a party in possession or control of real property who moves for summary judgment can establish its *prima facie* entitlement to judgment as a matter of law by showing that it neither created the allegedly dangerous or defective condition nor had actual or constructive notice of its existence. (*Chang v. Marmon*

Enters., Inc., 172 A.D.3d 678-679 [2d Dept. 2019].) As a general rule, a lease that obligates a tenant to repair the sidewalk does not impose on the tenant a duty to a third party. (*Hsu v. City of New York*, 145 A.D.3d 759, 760 [2d Dept. 2016].) However, where a lease agreement is so comprehensive and exclusive as to sidewalk maintenance...the tenant may be liable to a third party. (*Leitch-Henry v. Doe Fund, Inc.*, 179 A.D.3d 655, 656 [2d Dept. 2020].)

Defendants NYCTA and The City of New York failed to establish a prima facie entitlement to summary judgment, as both defendants failed to present competent, admissible evidence that they had no liability to maintain or repair the sidewalk where plaintiff fell. Their argument that it is the law of the case that plaintiff did not identify what caused her to fall is a limited analysis of prior decisions and does not establish defendants are free from liability for plaintiff's accident. The law of the case doctrine applies only to legal determinations that are resolved on the merits in a prior decision. (*Saccoccia v. Greenberg*, 136 A.D.3d 881 [2d Dept. 2016].) Here, the prior court decisions specifically granted summary judgment because the moving defendants were able to establish through affidavits of merit and other documentary evidence that they were not responsible for the maintenance of the area where plaintiff fell. Contrary to defendants NYCTA and City's argument, the court decisions stated that plaintiff could not identify the item upon which she fell, not that she could not identify the location where she fell. The court orders were clearly based upon the determination that plaintiff fell in a location for which the moving defendants were not responsible, and at no time was there a specific determination that plaintiff did not identify the location of her fall. Therefore, the law of the case does not apply to the present motion, and defendants NYCTA and City were still required to submit evidence in support of their motion and cross-motion for summary judgment. (*See Macchio v. Michaels Elec. Supply Corp.*, 149 A.D.3d 716 [2d Dept. 2017].)

Upon reviewing the evidence presented, defendants NYCTA and City failed to establish by competent, admissible evidence that neither defendant had a duty to maintain and repair the sidewalk. Counsels' affirmations are inadmissible hearsay and therefore without probative value to raise an issue of fact. (*See Sugamele v. JPMC Specialty Mtge., LLC*, 204 A.D.3d 1064 [2d Dept. 4/27/2022].) Contrary to the evidence presented in the other summary judgment motions, defendants failed to present an affidavit of merit or sworn deposition testimony that they were not liable for maintenance and repair. As defendants NYCTA and City presented conclusory and speculative arguments, they both failed to establish they did not cause or create the dangerous condition, nor were they responsible to maintain the premises. (*See Castro v. Rodriguez*, 176 A.D.3d 1031, 1033 [2d Dept. 2019].)

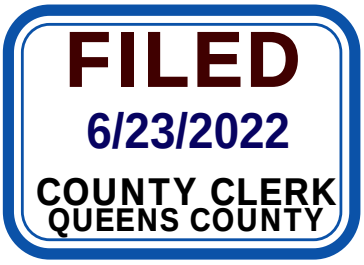
Accordingly, defendant New York City Transit Authority's motion to amend its Answer pursuant to CPLR §3025(b) is granted, but its motion for summary judgment and dismissal of plaintiff's Complaint pursuant to CPLR §3212 is denied. Defendant The City of New York's cross-motion to amend its Answer pursuant to CPLR §3025(b) is granted, but its motion for summary judgment and dismissal of plaintiff's Complaint and all cross-claims against it pursuant to CPLR §3212 is denied.

This constitutes the decision and Order of the Court.

Dated: June 17, 2022

Tracy Catapano-Fox

Tracy Catapano-Fox, J.S.C.



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

----------X

ZORAYDA HERNANDEZ,

Plaintiff,

-against-

38-09 JUNCTION REALTY LLC, JUNCTION SPORTS PLUS INC., PECA REALTY CORP., C.E.E. MANAGEMENT, INC., ABZ FUNDINGS CORP., THE CITY OF NEW YORK and NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

----------X

Index No.: 714742/2017

AFFIDAVIT OF SERVICE BY ELECTRONIC FILING

STATE OF NEW YORK
COUNTY OF NEW YORK

DANIELLE SEVERE, being duly sworn, says:

I am not a party to the action; I reside in Kings County, and I am over 18 years of age.

On **June 28, 2022**, I served the within **ORDER WITH NOTICE OF ENTRY** upon the following attorney(s), who have each filed a consent to participation in e-filing with the NYSCEF (New York State Courts Electronic Filing), by uploading a true copy hereof with the NYSCEF under the proper index number and by depositing a true copy thereof, enclosed in a post-paid wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within New York State, addressed to the following at the last known address set forth below:

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Index No. 714742/2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

ZORAYDA HERNANDEZ,

Plaintiff,

-against-

38-09 JUNCTION REALTY LLC, JUNCTION SPORTS PLUS INC., PECA REALTY CORP., C.E.E. MANAGEMENT, INC., ABZ FUNDINGS CORP., THE CITY OF NEW YORK and NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

ORDER WITH NOTICE OF ENTRY

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