

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. Justice

PART 8

Index Number : 158000/2012
AIKEN, KRISTEN
vs
132132 LLC
Sequence Number : 002
SUMMARY JUDGEMENT

INDEX NO. 158000/12
MOTION DATE 7/17/14
MOTION SEQ. NO. 002

The following papers, numbered 1 to 13, were read on this motion to/for Sj motion
Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 1-9
Answering Affidavits — Exhibits No(s) 10-11
Replying Affidavits No(s) 12-13

Upon the foregoing papers, it is ordered that this motion is

Motion Sequences 002 and 003 are consolidated for disposition herein.
This is a personal injury matter wherein plaintiff alleges that while bike riding, her bike slid on water and/or oil which caused her to fall off her bike and injure herself. The accident occurred in front of a residential building owned and/or operated by defendant, 132132 LLC (the residential building) and in front of a restaurant managed and operated by defendant, AJD-NYC Inc. (the restaurant).

Defendant, AJD-NYC Inc., (the restaurant), seeks an Order, pursuant to CPLR 3212, dismissing the complaint on grounds that movant did not create that alleged hazard, nor owed a duty to plaintiff to maintain the bike lane (Motion Sequence 002). Defendant, 132132 LLC (the residential building), also seek an Order, pursuant to CPLR 3212, dismissing the complaint against them on grounds that they had no duty to maintain the bike lane and that its employees did not create the alleged hazardous condition that caused the accident (Motion Sequence 003). Defendants applications are denied.

Plaintiff testified at her deposition that the substances that caused her bike to slip was water and/or cooking oil. Additionally, plaintiff testified that she observed someone spraying water from a hose (presumably cleaning the sidewalk) as she approached the location of the accident.

The defendants in this action have pointed fingers at each other. The restaurant claims that the man spraying water with the hose was employed by the residential building and the residential building claims that the restaurant uses a hose to clean the sidewalk. This factual dispute cannot be resolved by the within dispositive motion. Moreover, plaintiff was never able to identify who the man that was spraying the water onto the street. Additionally, a firefighter who witnessed the accident testified at the deposition that she never witnessed anyone dumping grease/oil into the street, nor did she witness someone with the restaurant's logo uniform using a

Dated: September 22, 2014

JMK J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

- 1. CHECK ONE: [ ] CASE DISPOSED [x] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE: [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

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hose, but that rather it was the superintendent of the residential building that was using a hose to spray water onto the sidewalk. Again, these are factual issues that cannot be resolved here.

It is noted that a motion for summary judgment is a drastic measure to be used sparingly and should only be granted when there are no issues of triable fact (*Mandel v Michael O'Conner, Indep. Professional Servs.*, \_NY2d\_, 2001 NY Slip Op 40052U [February 7, 2001]). "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied" (*Dalienda v Johnson*, 147 AD2d 312, 316 [2d Dept 1989]). Moreover, it is hornbook law that only the trier of fact can determine the proximate cause of the accident (see *Peter McKinnon v Bell Security*, 268 AD2d 220 [1st Dept 2000]). Consequently, the moving parties here are not entitled to the reliefs sought (see *Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; and *Tortarello v Carlin*, 260 Ad2d 201 [1st Dept 1999]). Lastly, the very question of whether or not defendants were negligent is itself a question for the trier of fact to determine (see *Eliseo Carrozzi, et al. v Gotham Meat Corp., et al.*, 181 AD2d 587 [1st Dept 1992]). Accordingly, it is

ORDERED that the within motions for summary judgment, dismissing the complaint, are denied; and it is further

ORDERED that the parties proceed to mediation/trial forthwith.

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9/22/14  
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J.S.C.