

German v 401 E. 58th St., LLC

2020 NY Slip Op 35726(U)

July 20, 2020

Supreme Court, New York County

Docket Number: Index No. 154776/18

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHERRY KLEIN HEITLER
Justice

PART 30

JOSEFINA GERMAN,

INDEX NO. 154776/18

Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 01

401 EAST 58TH ST. LLC, 58 ASIAN CORP., and
STATEWIDE OIL AND HEATING CO., INC.

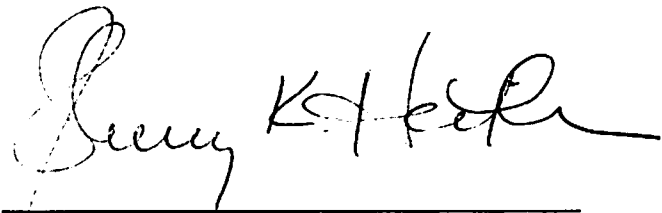
MOTION CAL. NO. _____

Defendants.

Motion Sequence 01 is decided in accordance with
the annexed memorandum decision dated July 20, 2020

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

Dated: 7-20-20



SHERRY KLEIN HEITLER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

-----X
JOSEFINA GERMAN,

Plaintiff,

-against-

401 EAST 58TH STREET, LLC, 58 ASIAN CORP., and
STATEWIDE OIL AND HEATING CO, INC.

Defendants.
-----X

SHERRY KLEIN HEITLER, J.S.C.

Index No. 154776/18
Motion Sequence 01

DECISION AND ORDER

Plaintiff Josefina German alleges that she was injured when she tripped and fell over a gas cap or oil “fill port” protruding from the sidewalk adjacent to the building located at 401 East 58th Street in Manhattan. Plaintiff sued the owner of the building, defendant 401 East 58th Street, LLC (Building), and the company that delivers heating oil to the building, defendant Statewide Oil & Heating, Co., LLC (Statewide). Plaintiff alleges that the fill port should have been embedded in and flush with the sidewalk, but that both the sidewalk and the fill port were raised, thereby constituting a tripping hazard.

During her deposition, Plaintiff testified that she tripped when her foot made contact with the fill port (NYSCEF Doc. 32, pp. 18-19, 45, 98-99):

Q. What caused you to fall down?

A. I tripped.

Q. What did you trip on?

A. On the sidewalk, over some metal that was there.

* * * *

Q. What is it about that area that caused you to trip?

A. When I went to see it afterwards, I saw that thing there, like, that gas thing.

* * * *

Q. So, did the tip of your sneaker come into contact with the cement or the metal gas cap or something else?

[1]

A. With the gas cap.

Statewide moves for summary judgment pursuant to CPLR 3212 on the ground that it did not install, maintain, repair, damage, or otherwise alter the fill port in any way. In support, Statewide submits the deposition transcript of the Building's representative who testified that no one from Statewide ever made any alterations to the fill port or the sidewalk (NYSCEF Doc. 33, pp. 27-28):

Q. Did you ever give any direction to Statewide Oil and Heating Company with regard to work they did at the building?

A. I didn't give them any direction because it was not the situation to give them direction or to talk to them because they were very correct and filled with experience and good collaboration not only with this building, but this company has also contract with two other buildings.

Q. Have you seen anyone from Statewide ever make any repairs to the area on the sidewalk...

A. No. It's not their right to work on the sidewalk.

Statewide's own representative confirmed that his company did not install or maintain the fill port, and that the Building never hired Statewide to repair the fill port (NYSCEF Doc. 44, pp. 9-12):

Q. What is a fill port?

A. Where the oil enters into the building.

Q. Who maintains the fill port?

A. The building. . . .

Q. Your company didn't install the fill port?

A. No.

Q. And your company doesn't maintain the fill port?

A. No.

Q. I am sure at some point you have come across situations where the fuel port needs to be repaired in some way, correct?

A. Yes.

Q. What do you do in that situation – call the building owner?

A. We will contact the building owner, advise them of what is going on, and either hire a subcontractor to do the work, or we can do the work. . . .

Q. Did you perform any of the work on this fill port?

- A. Not that I recall.
- Q. From the service records?
- A. Yes. . . .
- Q. Do you see the concrete, the raised concrete around the fill cap?
- A. Yes.
- Q. Do you know if your company did that?
- A. . . . No, I don't know, but we didn't do it.

In opposition, Plaintiff contends that Statewide could have somehow altered the fill port and/or sidewalk by using it to transfer heating oil to the building. This theory of liability is entirely speculative. As for Plaintiff's argument that the fill port should have been flush with the ground, this would implicate the Building as the owner of the premises, not Statewide. Finally, Plaintiff makes several procedural arguments about the admissibility of the deposition transcripts, but these are without merit.

In light of the foregoing, it is hereby

ORDERED that Statewide's motion for summary judgment is granted; and it is hereby

ORDERED that all claims and cross-claims against Statewide are severed and dismissed.

Counsel for the remaining parties are hereby directed to appear for a virtual conference on August 17, 2020 at 10:30AM.

The Clerk of the Court is directed to mark his records and enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 7 - 20 . 20


SHERRY KLEIN HEITLER, J.S.C.

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