

**Curtis v Fulton 2004, LLC**

2024 NY Slip Op 33925(U)

October 31, 2024

Supreme Court, Kings County

Docket Number: Index No. 526806/2022

Judge: Wavny Toussaint

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 31<sup>st</sup> day of October, 2024.

P R E S E N T :  
HON. WAVNY TOUSSAINT,  
Justice

VALENCIA CURTIS,

Plaintiff,

Index No.: 526806/2022

- against -

ORDER

MS # 3 & 4

FULTON 2004, LLC and FULL GOSPEL  
TABERNACLE OF FAITH CHURCH, INC.,

Defendants.

The following papers numbered 1 to read herein  
Notice of Motion/Order to Show Cause/  
and Affidavits (Affirmations) Annexed  
Cross Motion and Affidavits (Affirmation) Annexed  
Answers/Opposing Affidavits (Affirmations)  
Reply Affidavits (Affirmations)  
Affidavit (Affirmation)  
Other Papers

Papers Numbered

46-68; 69-80

81-106

114

Upon the foregoing papers, defendant Full Gospel Tabernacle of Faith Church, Inc. (Full Gospel) moves (Seq. 03) for an order, pursuant to CPLR § 3212, granting summary judgment dismissing the complaint and all cross claims asserted against it. Plaintiff moves (Seq. 04) for an order, pursuant to CPLR § 3212, granting summary judgment as to liability against defendants Full Gospel and Fulton 2004, LLC and to strike defendants' affirmative defense asserting the culpable conduct of plaintiff. Motion Seq. 03 is denied as moot, as plaintiff has discontinued the action against Full Gospel. Motion Seq. 04 is denied as moot

as to defendant Full Gospel and also with respect to remaining defendant Fulton 2004, LLC for the reasons stated more fully below.

In this personal injury action, plaintiff alleges that on January 13, 2020, she sustained serious injuries when she slipped and fell due to a crack in the sidewalk adjacent to the property located at 2004 Fulton Street, Brooklyn, NY, owned by defendant Fulton 2004, LLC. As to Motion Seq. 04, plaintiff's proof included plaintiff's Bill of Particulars, deposition transcript, and affidavit, in addition to various photographs, among other things.

The proof shows that some of the exhibited photographs were taken of the sidewalk condition on the date of the accident and others were Google photographs from 2022. Plaintiff did not take any of the photographs, instead confirming the non-Google photographs were taken by "some lady" who frequented the accident location. It appears from the record that the said "lady" was never called to authenticate the photographs. In any event, plaintiff did not testify that the condition depicted in the photographs was substantially the same as the condition on the date of the accident (*Lustenring v 98-100 Realty, LLC*, 1 AD3d 574, 577 [2d Dept 2003]). Plaintiff did not submit evidence to establish the length of time the condition of the sidewalk existed prior to the accident; and plaintiff's own deposition testimony established she had passed the alleged defective sidewalk condition on prior occasions, without incident.

Together, the submitted proof failed to establish, prima facie, that defendant Fulton 2004, LLC was liable as a matter of law for causing plaintiff's accident. Material questions of fact are raised regarding the authenticity of the various photographs (*Sattar v City of New York*, 201 AD3d 756, 757 [2d Dept 2022]); whether defendant Fulton 2004, LLC had

actual or constructive notice of any alleged defective sidewalk condition in sufficient time to remedy it (*Arbit v Costco Wholesale Corp.*, 218 NYS3d 125, 126 [2d Dept. 2024]; whether the sidewalk condition was open and obvious, a potential barrier to imposing liability (*Sonera v 147-16 Hillside Avenue Corp.*, 207 AD3d 588, 590 [2d Dept 2022]); and on the facts here and in the context of plaintiff having moved to strike defendant Fulton 2004, LLC's affirmative defense asserting the culpable conduct of plaintiff, whether plaintiff was comparatively negligent in causing the accident (*Sapienza v Harrison*, 191 AD3d 1028, 1029, 1031 [2d Dept 2021]; *Shashaty v Gavitt*, 158 AD3d 830, 832 [2d Dept 2018]).

Resolution of these issues warrant a jury's determination, as they are not resolved on plaintiff's proof (*Herrin v Airborne Freight Corp.*, 301 AD2d 500, 500-501 [2d Dept 2003]). Under these circumstances, the Court need not consider the sufficiency of defendant Fulton 2004, LLC's opposition papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). For the foregoing reasons, the motion is denied.

The action is severed and continued as to remaining defendant Fulton 2004, LLC, and the caption is amended to read as follows:

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VALENCIA CURTIS,

Plaintiff,

Index No.: 526806/2022

- against -

FULTON 2004, LLC,

Defendant.

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The parties' remaining arguments have been considered by the Court and are denied.

This constitutes the decision and order of the Court.

E N T E R

  
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J.S.C.

**HON. WAVNY TOUSSAINT**  
**J. S. C.**

2024 NOV -4 A 10:46  
KINGS COUNTY CLERK  
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