SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Index Number : 106978/2009
JONES, CAROLYN
vs.
OLAMAR FOOD CORP
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
APR 17 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 4/12/12

LBY
LOUIS B. YORK, J.S.C.
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 2

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CAROLYN JONES,

Plaintiff,

INDEX NO.
106978/09

-against-

OLAMAR FOOD CORP., MORTON WILLIAMS ASSOCIATED SUPERMARKETS, INC., ASSOCIATED SUPERMARKET, OLAMAR FOOD CORP. d/b/a ASSOCIATED SUPERMARKET, MORTON WILLIAMS ASSOCIATED SUPERMARKETS, INC. d/b/a ASSOCIATED SUPERMARKET, 1968 SECOND REALTY CORP., 1968 SECOND AVENUE REALTY CORP., 1968 2ND AVENUE REALTY LLC and 1968 REALTY CORP.,

Defendant.

----------X

LOUIS B. YORK, J.:

Motions seq. nos. 006 and 007 are consolidated ~~herein~~ for disposition.

In motion seq. no. 006, defendant Olamar Food Corp. d/b/a Associated Supermarket ("Olamar") moves for summary judgment pursuant to CPLR 3212.

In motion seq. no. 007, defendant 1968 2nd Avenue Realty LLC ("Realty") moves for summary judgment pursuant to CPLR 3212 dismissing the complaint and "any and all cross-claims."

Plaintiff brought this action to recover for personal injuries she allegedly sustained as a result of a fall on the evening of December 18, 2006, when she tripped on a raised crack in the sidewalk outside the Associated Supermarket on Second Avenue and 101st Street in Manhattan. The two-story building on which the supermarket was located was owned by Realty. Olamar, which did business as Associated, leased the first floor of the building pursuant to a written lease

with Realty dated August 31, 1999. Plaintiff had shopped at the supermarket. She exited the store carrying two bags of groceries and turned left on Second Avenue where she tripped and fell.

Olamar premises its motion for summary judgment (seq. no. 006) solely on the contention that plaintiff's current injuries were not proximately caused by her fall in December 2006.

During the 1990's plaintiff had sustained various sports-related injuries which resulted in her having surgery on both knees. At her deposition, plaintiff testified that those earlier injuries caused her right knee to buckle approximately once a month. According to plaintiff, the fall in 2006 caused further injury to the right knee, which plaintiff avers caused her severe pain and made her right knee buckle much more frequently after the accident. In July 2008, her right knee gave way and she fell, landing on her left knee, which required arthroscopic surgery as a result of that fall. In this action, plaintiff seeks to recover damages for the injuries she sustained to her left knee in the July 2008 fall, which she contends was a direct result of the injuries she sustained to her right knee in the December 2006 fall.

Olamar argues that the injuries to plaintiff's left knee are too remote to be proximately caused by a fall which occurred more than a year and a half earlier, and that plaintiff has failed to meet her burden of proving that causation. Olamar, relying on *Southwell v Riverdale Transit Corp.* (149 AD2d 385 [1st Dept 1989]), further argues that it is for the court, not the jury, to decide whether Olamar's act or omission in December 2006 caused plaintiff to fall in July 2008.

The court disagrees with Olamar's basic premises. Plaintiff has the burden of proving causality at trial, not in this motion. Although the grant of summary judgment is the procedural equivalent of a trial (see *Falk v. Goodman*, 7 NY2d 87, 91 [1959]), when a defendant moves for

summary judgment dismissing the plaintiff's complaint, it is the defendant, not plaintiff, who bears the burden of proof. "The rule governing summary judgment is well established: The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case ..., and such showing must be made by producing evidentiary proof in admissible form.... [R]egardless of the sufficiency of the opposing papers, in the absence of admissible evidence sufficient to preclude any material issue of fact, summary judgment is unavailable" (*Tortorello v. Carlin*, 260 AD2d 201, 205 [1st Dept 1999], citations omitted). Not until the movant meets that initial burden does the opposing party acquire the burden "to produce sufficient evidence of the existence of a material issue of fact requiring a trial of the action" (see *Grossman v. Amalgamated Housing Corporation*, 298 AD2d 224, 226 [1st Dept 2002]).

It is also for the jury, not the court, to decide the question of proximate cause in this case. The court may find as a matter of law that injuries are caused by a second, intervening act in clear-cut cases of two separate and independent events such as the two distinct car accidents in *Southwell v Riverdale Transit Corp., supra*, or a burn caused by spilled hot water which was boiled because the landlord failed to provide heat or hot water (see *Horn v Hires*, 84 AD3d 1025 [2d Dept 2011]). However, this is not such a case. Here, no reason other than plaintiff's injured right knee is given for the second fall, and at any rate "foreseeability and causation ... are issues generally and more suitably entrusted to fact finder adjudication" (*Palka v Servicemaster Management Services Corporation*, 83 NY2d 579, 585 [1994]).

"[S]ummary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue" (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231

[1978]; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). In view of the medical evidence submitted by plaintiff, this court cannot say as a matter of law that plaintiff's second injury was not caused by the first any more than Olamar can prove in this motion that there is no material question of fact with respect to the issue of causation.

Realty's motion for summary judgment is grounded on the argument that Realty was an out-of possession owner and its tenant, Olamar, had explicitly assumed responsibility for maintenance and repair of the abutting sidewalk in its written lease for the property (see Realty's exhibit H). Realty contends that since it had not effected any repairs to the sidewalk and had no actual or constructive notice of any defect thereon, there is no basis for it to be liable to plaintiff. Finally, Realty adopts Olamar's reasoning and argument with respect to proximate cause.

In opposition, plaintiff argues that the duty to maintain an abutting sidewalk placed on the building's owner by Section 7-210 of the Administrative Code of the City of New York is a non-delegable duty which Realty cannot elude by transferring it to Olamar in the lease.

Section § 7-201 of the Administrative Code shifts the common-law tort liability for failure to maintain the sidewalk in a reasonably safe condition away from the City and onto abutting landowners with respect to sidewalk accidents occurring on or after September 14, 2003. Nonetheless, plaintiff is only partially correct in arguing that an owner cannot avoid liability because its duty is non-delegable. The general rule is that an owner may transfer its liability to a tenant if the lease between the parties does not contain a right of re-entry. "[L]iability will attach to a landlord out of possession ... where the owner of a leased commercial building, who retains the right to reenter and inspect and to make needed repairs at the tenant's expense, had a statutory duty to properly maintain the premises" (*Russo v 491 West Street Corp.*, 176 AD2d 672, 672 [1st

Dept 1991], citations omitted). In the lease at bar, Realty retained the right to re-enter to inspect and effect repairs (Realty's exhibit H, ¶ 13), so it may still be held liable to plaintiff.

To state a *prima facie* case of negligence against Realty, plaintiff must demonstrate the traditional tort elements, a duty owed to her by Realty, breach of that duty and a resulting injury (see *Gaeta v. City of New York*, 213 AD2d 509, 510 [2d Dept 1995]). As discussed above, Realty's duty to plaintiff flows from Admin. Code § 7-210. To establish a breach of that duty plaintiff must show that Realty either created the sidewalk condition which caused plaintiff's accident or had actual or constructive notice of that condition (*id.*; see also *Voss v D&C Parking*, 299 AD2d 346 [2d Dept 2002]) or that it negligently failed to perform its affirmative duty to remedy that condition (Administrative Code § 7-210).

There is no indication that Realty had actual knowledge of the defect. Plaintiff, a regular customer of Associated, averred that she had not noticed the sidewalk crack before her fall. Realty's deponent, its principal Azam Mohammed, testified that Realty had never made repairs to the sidewalk abutting the building and had not received any complaints about it prior to plaintiff's accident, and he personally had never noticed the sidewalk defect (see EBT at Realty's exhibit G). Plaintiff has not adduced any evidence to the contrary, and her argument that Realty cannot meet its moving burden by proving a negative is at best speculative. Thus, in order to establish liability against Realty, plaintiff must show that it had constructive notice.

"Constructive notice requires that the defect be visible and apparent, and it must exist for a sufficient length of time prior to the incident so as to permit a defendant's employees to discover and remedy it" (*Meyers v. Haskins*, 140 AD2d 923, 924 [3d Dept 1988], citing *Gordon v. American Museum of Natural History*, 67 NY2d 836, 837 [1974]). Plaintiff again argues that

Realty's mere denial of any kind of notice about the sidewalk defect cannot meet its moving burden, especially since according to Realty prior to plaintiff's accident it never conducted regular inspections of the sidewalk (see *Werny v Roberts Plywood Co.*, 40 AD3d 977 [2d Dept 2007]; *Ferrara v JetBlue Airway Corp.*, 27 AD3d 244 [1st Dept 2007]). Plaintiff contends that the only way for Realty to meet its burden on this motion is to show through a regular inspection that the sidewalk defect did not exist a relatively short time prior to plaintiff's accident. In support of her contention that Realty had constructive notice of the defect plaintiff proffers a Big Apple Pothole map showing the sidewalk depression existed three years prior to her fall, which is a sufficient period togo to the jury on the issue od constructive notice (see plaintiff's exhibit K). Based on the foregoing, the court finds that there is a triable issue of fact as to whether Realty had constructive notice of the sidewalk defect.

In the second branch of its motion, Realty seeks relief against Olamar. The notice of motion states that Realty seeks dismissal of "any and all cross-claims." Similarly, Realty's counsel concludes her supporting affidavit with the request that the court grant Realty's motion "dismissing ... any and all counterclaims asserted herein." The problem is that Olamar has asserted no cross-claims or "counterclaims" against Realty. Not surprisingly, Olamar has not opposed Realty's motion. It appears that what Realty is really seeking is affirmative relief - the grant of summary judgment on its own cross-claims for breach of contract and a claimover against Olamar. Given the aforementioned infirmities in Realty's moving papers, however, such relief will not be granted at this juncture.

Accordingly, Olamar's motion (seq. no. 006) for summary judgment pursuant to CPLR 3212 is denied in its entirety. Realty's motion (seq. no. 007) for summary judgment is

denied to the extent that it seeks dismissal of plaintiff's complaint as against Realty. That branch of Realty's motion which seeks relief against Olamar is denied without prejudice to renewal at the appropriate time upon proper papers.

This decision constitutes the order of the court.

DATED: April 12, 2012

J.S.C.

LOUIS B. YORK
J.S.C.

FILED
APR 17 2012
NEW YORK
COUNTY CLERK'S OFFICE

LOUIS B. YORK
J.S.C.