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

PRESENT: JAFFE Justice

PART 5

Index Number : 108714/2009
COLON, EUSEBIA
vs.
36 RIVINGTON STREET, INC.
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

CPLR 004

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3
Replying Affidavits	4

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

MAY 17 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 5/14/12

BARBARA JAFFE J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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EUSEBIA COLON,

Plaintiff,

-against-

36 RIVINGTON STREET, INC., HUI'S REALTY, INC., RICH MANSION CONDOMINIUM, INDOCHINA SINO-AMERICAN SENIOR CITIZEN CENTER, OLSON'S CREATIVE LANDSCAPING, INC., DOE CORPORATION, INC. d/b/a OLSON'S CREATIVE LANDSCAPING,

Defendants.

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Index No. 108714/09

Motion Date: 1/10/12
Motion Seq. Nos.: 005,
Motion Cal. Nos.:

DECISION AND ORDER

BARBARA JAFFE, J.S.C.:

For plaintiff:
Frank V. Kelly, Esq.
Law Office of William Gallina
1250 Waters Place
Suite 708
Bronx, NY 10461
718-892-0400

For Hui's:
John J. Bruno, Esq.
Harvey Gladstein & Ptners. LLC
110 Wall Street
New York, NY 10005
212-952-1111

For Olson's:
Daniel Goldfarb, Esq.
Law Office of James Toomey
485 Lexington Ave.
New York, NY 10017
212-440-2350

For Indochina:
Richard O'Connell, Esq.
Law Office of Charles J. Siegel
40 Wall Street
New York, NY 10005
917-778-6600

By notice of motion dated August 10, 2011, defendants Olson's Creative Landscaping, Olson's Creative Landscaping, Inc., and Doe Corporation, Inc. d/b/a Olson's Creative Landscaping (collectively Olson's) move pursuant to CPLR 3212 for an order dismissing the complaint and all cross-claims against it. Defendants Hui's Realty, Inc. and Rich Mansion Condominium (collectively Hui's) and plaintiff oppose.

By notice of motion dated September 1, 2011, defendant Indochina Sino-American Senior Citizen Center (Indochina) moves pursuant to CPLR 3212 for an order dismissing the

complaint. Hui's and plaintiff oppose.

By notice of motion dated September 2, 2011, Hui's moves for an order: (1) compelling Olson's Creative Landscaping, Inc. to respond to their July 22, 2011 notice of discovery; (2) compelling Indochina to produce a witness to give testimony at an examination before trial (EBT) or, in the alternative, to preclude it from offering any testimony at trial; and (3) granting them leave to serve an amended answer asserting cross-claims against Olson's. Olson's and Indochina oppose.

By notice of motion dated September 13, 2011, Hui's moves pursuant to CPLR 3212 for an order dismissing the complaint. Plaintiff opposes.

A party seeking summary judgment must demonstrate, *prima facie*, entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence, demonstrating the existence of factual issues that require trial. (*Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

I. HUI'S MOTION FOR SUMMARY JUDGMENT

Pursuant to New York City Administrative Code § 16-123(a), "[e]very owner, lessee, tenant, occupant, or other person having charge" of any property abutting a sidewalk must remove snow and ice from the sidewalk within four hours after the snow ceases to fall, although the time between 9:00 p.m. and 7:00 a.m. *is not included in the four-hour period.*

Here, at 10:00 a.m. on January 11, 2009, plaintiff slipped on snow and ice on the sidewalk adjacent to 36-38 Rivington Street, also known as 168-170 Forsyth Street, in

Manhattan. (Affirmation of John J. Bruno, Esq. [Bruno Aff.], dated Sept. 13, 2011, Exhs. A, F, G). The certified climatological data submitted by Hui's, which constitute *prima facie* evidence of the weather conditions before plaintiff's accident (CPLR 4528), reflect that rain and freezing rain fell on January 6 and 7, that temperatures rose above freezing and there was no precipitation on January 8 and 9, that freezing rain, rain, and snow fell between 1:00 and 11:00 p.m. on January 10, and that rain and freezing rain fell between 2:00 and 7:00 a.m. on January 11. (*Id.*, Exh. I). Hui's has thus demonstrated, *prima facie*, that it had no obligation to remove the ice and snow until 11:00 a.m. and may not be held liable for plaintiff's injuries. (*See Krinsky v Fortunato,* 82 AD3d 409 [1st Dept 2011] [defendants not liable for plaintiff's injuries where she testified that snow had stopped falling 30 to 45 minutes before accident]; *Rodriguez v New York City Hous. Auth.*, 52 AD3d 299 [1st Dept 2008] [where plaintiff, who slipped on snow and ice on sidewalk at 8:20 a.m., testified that snow was not falling at that time, defendant not obligated to remove snow and ice until 11:00 a.m.]; *Karpilovskaya v Badiner*, 2009 WL 6700535 [Sup Ct, Kings County 2009] [even if plaintiff's weather report reflecting that snow stopped falling at 7:00 a.m. is credited, as accident occurred at 10:30 a.m., defendant not liable]).

Plaintiff's testimony that the snow and ice had been on the sidewalk for "the whole weekend" raises no triable factual issues, as she subsequently clarified that it had been more than a week since she had been to the accident site, that she saw no ice or snow then, that she did not notice the snow and ice until after she fell, and that the snow was "fresh." (Bruno Aff., Exh. G). In any event, the climatological data demonstrate an intervening thaw between the storm on January 6 and 7 and the storm that occurred just before plaintiff's accident, and plaintiff only speculates as to whether the snow and ice on which she slipped was from the previous storm.

(*See Lenti v Initial Cleaning Servs.*, 52 AD3d 288 [1st Dept 2008] [where plaintiff slipped at 7:45 a.m., and climatological data reflected that snow fell at 2:00 a.m. and between 4:00 and 6:00 a.m., snowfall earlier in week and plaintiff's testimony that he saw patches of ice three days earlier insufficient to raise triable factual issue as to notice]; *Bonney v City of New York*, 41 AD3d 404 [2d Dept 2007] [plaintiff's speculation as to whether ice on which she slipped was longstanding insufficient to raise triable factual issues as to whether City had notice of ice, as City offered climatological evidence demonstrating intervening thaw between snow storm and accident]).

In light of this determination, whether Hui's is entitled to summary judgment based on the accident location need not be considered.

II. OLSON'S MOTION FOR SUMMARY JUDGMENT

To state a *prima facie* claim of negligence, a plaintiff must show a duty owed, a breach, and proximate cause. (*Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept 2006]). "Liability for a dangerous condition is generally predicated on [ ] ownership, control or a special use of the property." (*Lopez v Allied Amusement Shows, Inc.*, 83 AD3d 519, 519 [1st Dept 2011]; *Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296 [1st Dept 1988]). Nonetheless, an independent contractor that performs work at an accident location may owe a duty to a non-contracting plaintiff if, as relevant here, it fails to exercise reasonable care in the performance of its duties, thereby "launch[ing] a force or instrument of harm." (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 [2002]). Consequently, in determining whether a contractor owed a duty to a plaintiff, whether the contractor negligently created or exacerbated a dangerous condition must be determined. (*Id.* at 142).

Here, plaintiff fell in or around a tree well on which Olson's performed repairs pursuant to a contract with City, which included the installation of a tree gator, a device that facilitates watering. A witness for Olson's testified, however, that documentation related to its contract with City reflects that there existed no problems with the tree well and that Olson's was fully paid for its work under the contract. (Affirmation of Daniel M. Goldfarb, Esq., dated Aug. 10, 2011, Exh. J). Absent any evidence that Olson's otherwise failed to exercise reasonable care in completing its contractual obligations, it has demonstrated, *prima facie*, that it owed no duty to plaintiff. As the witness for Olson's testified that tree gators are filled with water between May and October 31 only (*id.*), plaintiff's assertion that the tree gator contributed to the ice and snow accumulation is speculative and does not raise a triable issue of fact. (*See Fernandez v 707, Inc.*, 85 AD3d 539 [1st Dept 2011] [where abutting property owner hired contractor to build sidewalk and tree well, and plaintiff tripped over tree well, contractor entitled to summary judgment, as its representative testified tree well was level with sidewalk when work was complete, property owner had no problem with work, and no evidence offered demonstrating that contractor breached its contractual obligations]).

In establishing that it may not be held liable for plaintiff's injuries, Olson's has also demonstrated entitlement to summary judgment on any cross-claims for common law indemnification and contribution. (*Jaikran v Shoppers Jamaica, LLC*, 85 AD3d 864 [2d Dept 2011] [where contractor demonstrated that it did not owe duty to plaintiff pursuant to *Espinal*, and thus, that the accident was not due solely to its own negligence, contractor entitled to summary judgment on property owner's cross-claim for common law indemnification]).

III. INDOCHINA'S MOTION FOR SUMMARY JUDGMENT

As an occupant of the building, Indochina is subject to the obligation set forth in Administrative Code § 16-123(a). Therefore, it is entitled to summary judgment on plaintiff's claims regardless of whether it was contractually obligated to remove snow and ice from the sidewalk. (*See supra*, I).

IV. HUI'S MOTION TO COMPEL AND TO AMEND

A. Compel Olson's response to July 22, 2011 notice of discovery

As Olson's provides evidence that it served Hui's with its response on September 27, 2011 (Affirmation of Daniel M. Goldfarb, Esq., in Opposition, dated Sept. 26, 2011, Exh. A), absent any argument that its response is insufficient, this portion of the motion is denied as moot.

B. Compel Indochina's witness to appear for examination before trial

As both Hui's and Indochina have demonstrated entitlement to summary judgment, this portion of Hui's motion is denied as moot.

C. Leave to amend answer

Pursuant to CPLR 3025(b), a party may amend its pleadings at any time by leave of court, "which shall be freely given upon such terms as may be just . . . ." It is well-settled that leave to amend pleadings under this section should be liberally granted unless the amendment plainly lacks merit or would prejudice or surprise the other parties. (*MBIA Ins. Corp. v Greystone & Co.*, 74 AD3d 499, 499 [1st Dept 2010]). As Olson's has demonstrated entitlement to summary judgment on all cross-claims against for common law indemnification and contribution (*see supra*, I.), Hui's amendment is meritless.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants Hui's Realty, Inc. and Rich Mansion Condominium's motion for an order dismissing the complaint is granted, and the complaint is hereby severed and dismissed as against defendants Hui's Realty, Inc. and Rich Mansion Condominium; and it is further

ORDERED, that defendants Olson's Creative Landscaping, Olson's Creative Landscaping, Inc., and Doe Corporation, Inc. d/b/a Olson's Creative Landscaping's motion for an order dismissing the complaint and all cross-claims against them is granted, and the complaint is hereby severed and dismissed as against defendants Olson's Creative Landscaping, Olson's Creative Landscaping, Inc., and Doe Corporation, Inc. d/b/a Olson's Creative Landscaping; and it is further

ORDERED, that defendant Indochina Sino-American Senior Citizen Center's motion for an order dismissing the complaint is granted, and the complaint is hereby severed and dismissed as against defendant Indochina Sino-American Senior Center; and it is further

ORDERED, that defendants Hui's Realty, Inc. and Rich Mansion Condominium's motion for an order compelling Olson's to respond to their July 22, 2011 notice of discovery is denied as moot; and it is further

ORDERED, that defendants Hui's Realty, Inc. and Rich Mansion Condominium's motion for an order compelling Indochina to produce a witness to give testimony at an EBT is denied as moot; and it is further

ORDERED, that defendants Hui's Realty, Inc. and Rich Mansion Condominium's

motion for an order granting them leave to serve an amended answer asserting cross-claims against Olson's is denied.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: May 14, 2012
New York, New York