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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

PART 2

Gruninger, Susanna
-v-
Gawker Media, LLC

INDEX NO. 108651-2011

MOTION DATE _____

MOTION SEQ. NO. 1

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 decided ~~in~~ with the accordance of the attached Decision.

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

FILED

JUN 15 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/13/12

_____, 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: PART 2

SUSANNA GRUNINGER,

Plaintiff,

Index No.: 108651/11

-against-

DECISION

GAWKER MEDIA, LLC and OSCAR Z. IANELLO ASSOCIATES, INC.,

Defendants.

LOUIS B. YORK, J.:

Defendant Oscar Z. Ianello Associates, Inc. (Ianello) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims as asserted against it.

BACKGROUND

This is an action to recover for personal injuries allegedly sustained by plaintiff as a result of a trip and fall on September 14, 2010, at the deck located on the fourth floor of 210 Elizabeth Street, New York, New York 10012. The accident occurred while plaintiff was attending an event sponsored by defendant Gawker Media, LLC (Gawker), wherein plaintiff tripped and fell on a step of the deck, leading to an exit on the fourth floor of the premises. Plaintiff alleges that the accident occurred because the area was not properly lit. Ianello contends that the action should be dismissed as asserted against it because it did not create the condition that allegedly caused

plaintiff's injuries and because it is owed contractual indemnification by Gawker.

Ianello, the owner of the premises, and Gawker entered into a lease for the fourth floor of the premises at which the accident took place on October 17, 2007. The lease provides, in pertinent part:

> "Tenant's Liability Insurance Property Loss, Damage, Indemnity: 8. Owner or its agents shall not be liable for any ... injury or damage to person or property resulting from any cause of whatsoever nature, unless caused by, or due to the negligence of Owner, its agents, servants or employees ... . Tenant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance ... ." Motion, Ex. C.

The rider to the lease provides, in pertinent part:

> "Insurance (a) Tenant shall carry and keep in force, at its own expense, with respect to the demised premises, a policy or policies of public liability and property damage insurance with an insurance company or companies and in a form reasonably satisfactory to landlord ... personal injury including death in the sum of $1,000,000 for each person ... . Such policy or policies shall include OSCAR Z. IANELLO ASSOCIATES, LLC., OZI MANAGEMENT CORP., OSCAR IANELLO 2006 REVOCABLE TRUST and PETER A. IANELLO named as an interest with Landlord named as an insured ... ."

Id.

Ianello asserts that the deck that is the subject of this litigation was constructed at Gawker's request, that Gawker had a social event on the deck to which it invited plaintiff, and that, pursuant to the lease, Gawker must indemnify Ianello.

In opposition to the instant motion, plaintiff contends that Ianello, as the owner of the premises, has a nondelegable duty to maintain the premises in a reasonably safe condition. In addition, plaintiff says that Ianello's answer to the complaint is unverified and, therefore, it is a nullity, requiring dismissal of the instant motion.

The thrust of plaintiff's argument is that the lease only mentions the fourth floor and makes no mention of a deck. It is plaintiff's position that, if the deck was not part of the leased premises, the duty to maintain it remained with Ianello as the property owner.

Further, the plans submitted to the New York City Department of Buildings for approval of the construction of the deck do not name either defendant, but indicate that the applicant is Synchro Project Management. Opp., Ex. 7. Hence, plaintiff argues that it is possible that Ianello was responsible for the construction of the deck where her accident took place, and that the motion is premature because discovery is needed to determine who actually constructed and maintained the deck. In the pleadings, both defendants deny responsibility for maintaining the fourth floor roof deck.

Gawker has also submitted opposition to Ianello's motion, in which it asserts that Ianello has failed to meet its burden for summary judgment because: (1) the lease is silent with respect to

the roof deck; (2) the moving papers fail to establish who constructed the deck; (3) Ianello has failed to establish that Gawker had a social event to which plaintiff was invited; and (4) the rider to the lease provides that each party thereto releases the other for all claims and liabilities that are covered by insurance. Motion, Ex. C.

Gawker agrees with plaintiff that dismissal of the complaint as asserted against Ianello is premature at this pre-discovery stage, because material questions of fact exist as to who was responsible for constructing and maintaining the roof deck where the incident occurred.

No reply papers have been submitted.

DISCUSSION

"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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary

judgment must be denied. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Ianello's motion is denied.

> "[O]wners of real property onto which members of the public are invited have a nondelegable duty to provide the public with reasonably safe premises and a safe means of ingress and egress [internal citations omitted]." *Sarisohn v 341 Commack Road, Inc.*, 89 AD3d 1007, 1008 (2d Dept 2011); *Roros v Oliva*, 54 AD3d 398 (2d Dept 2008). However, "an out-of-possession landlord will not be held liable for a third party's injuries on its premises unless the landlord has notice of the defect and has consented to be responsible for maintenance and repair." *Pappalardo v New York Health & Racquet Club*, 279 AD2d 134, 140-141 (1st Dept 2000); *see generally Pulliam v Deans Management of N.Y., Inc.*, 61 AD3d 519 (1st Dept 2009).

In the case at bar, the lease is silent with respect to the roof deck area, only referring to fourth floor office space, and the affidavit provided by Ianello's owner was artfully crafted so as to state only that "the deck on the fourth floor ... was constructed at the request of Gawker Media, LLC," (Motion, Ex. D), which does not indicate who constructed the deck or who was responsible for maintaining the deck.

In addition, pursuant to the terms of the lease, Ianello

would not be entitled to any indemnification from Gawker unless its liability exceeded the amount covered by insurance. Ianello has failed to produce any evidence of its insurance coverage, thereby raising an issue of fact as to whether it would be entitled to indemnification from Gawker.

Not only has Ianello failed to "meet its initial burden of establishing its prima facie entitlement to judgment as a matter of law" (*Surujnaraine v Valley Stream Central High School District*, 88 AD3d 866, 867 [2d Dept 2011]), because it has not offered any proof in admissible form that it was not obligated to maintain the fourth floor roof (*see generally Vera v Dance Space Center, Inc.*, 66 AD3d 554 [1st Dept 2009]), but, since no discovery has yet taken place, its motion is premature. *Sportiello v City of New York*, 6 AD3d 421 (2d Dept 2004).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendant Oscar Z. Ianello Associates, Inc.'s motion for summary judgment is denied with leave to renew at the conclusion of discovery.

Dated: 6/13/12

ENTER:

Louis B. York, J.S.C.