[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE J.S.C. Justice

PART 10

Index Number : 100706/2011
SELIGMAN, DEBBIE
VS.
TANGER FACTORY OUTLET
SEQUENCE NUMBER : 001
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

motion (s) and cross-motion decided in accordance with the annexed decision/order of even date.

FILED

AUG 06 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 8/1/12

HON. JUDITH J. GISCHE 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

---------- x

DEBBIE SELIGMAN,

Plaintiff,

-against-

TANGER FACTORY OUTLET CENTERS, INC., TANGER PROPERTIES LIMITED PARTNERSHIP AND POLO RALPH LAUREN CORPORATION

Defendants.

---------- x

Decision/Order
Index No.: 100706/11
Seq. No.: 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in review of this (these) motion(s):

Papers	**Numbered**
Polo n/m (3215) w/CS affirm, exhs	1
Pltf's opp w/SF affirm, exhs	2
Def's reply w/CS affirm, exhs	3

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is a personal injury action brought by Debbie Seligman ("plaintiff") to recover damages for injuries sustained after she allegedly tripped while shopping at the Tanger Outlet in Riverhead, New York, on Long Island. The plaintiff alleges that as she was walking by the Polo Ralph Lauren factory outlet store, she tripped and suffered injuries due to a misleveling of the sidewalk. Issue was joined by defendants, Tanger Factory Outlet Centers, Inc., Tanger Properties Limited Partnership (collectively "Tanger"), and Polo Ralph Lauren Corporation (Polo). Polo now moves for summary judgment before the plaintiff has filed the note of issue. Since summary judgment relief is available once

issue has been joined, the court has before it a timely motion. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2004). The plaintiff and Tanger oppose the motion.

Facts and Arguments

Polo argues that it owed no duty to the plaintiff to keep the sidewalk in safe condition. Specifically, Polo asserts that under the "Lease Between Tanger Properties Limited Partnership (Landlord) and Polo New York, LLC (Tenant)", dated 11/23/98 ("lease"), Tanger is exclusively responsible for maintaining the common areas of the shopping center and keeping the sidewalks in good repair. Moreover, Polo also relies on the testimony of Tanger's Vice President for Operations, Bruce Fry ("Fry"), who testified at his deposition that Tanger alone was responsible for maintaining and repairing the sidewalks. In addition, Fry also testified that pursuant to the lease, Polo would not be responsible to repair a defective condition in the abutting sidewalk outside the store.

In opposition, neither the plaintiff nor Tanger disputes any of Polo's contentions. However, they both aver that Polo's motion is premature because there is outstanding discovery. The motion is premature, plaintiff argues, because it has not taken the deposition of the Polo manager or statements from Polo employees working at the store on the day of the incident. Furthermore, the plaintiff also asserts that Polo failed to comply with, and respond to, court-ordered discovery demands. Plaintiff claims this additional discovery is "critical and necessary" to determining whether "Polo did any inspection or maintain of the subject sidewalk". For its part, Tanger adopts the arguments raised by plaintiff's counsel and only adds that Polo has failed to produce a witness "with knowledge of the operations actually conducted" at this particular Polo Ralph Lauren store.

Discussion

Summary judgment is appropriate when the moving party demonstrates the absence of any dispute of material fact, establishing its entitlement to judgment as a matter of law. CPLR § 3212; Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985). If the moving party establishes that there is no issue of material fact, the burden then shifts to the non-moving party to proffer admissible evidence sufficient to raise a triable issue of fact. Zuckerman v. City of New York, 49 N.Y.2d 257 (1980). In a motion for summary judgment, all ambiguities and inferences will be resolved in the light most favorable to the non-moving party. Ortiz v. Varsity Holdings, LLC, 18 N.Y.3d 335 (2011).

Polo has established its *prima facie* entitlement to summary judgment as a matter of law because Polo cannot be liable for any injuries that the plaintiff may have suffered. First, while it is true that an out-of-possession landlord is generally not liable for injuries to third parties that occur on the property (Colurls v. Harbor Boat Realty, Inc., 31 A.D.3d 686 [3rd Dept. 2006]), it is important to note that the plaintiff's alleged injuries did not occur inside the Polo Ralph Lauren store but rather on the sidewalk outside, abutting the store. Moreover, the lease between Tanger and Polo expressly provides that the "landlord shall keep and maintain the common areas of the shopping center in good condition and repair"... and sidewalks level" (lease ¶ 1.5). It is well-settled that when the terms of an agreement are clear and unambiguous, the courts will not look beyond the four corners of the agreement and will enforce the agreement in accordance with the plain meaning of its terms. W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157 (1990). Here, Tanger expressly contracted with Polo that Tanger would be responsible for maintaining and repairing the shopping center sidewalks. Therefore, Tanger has made its *prima facie* showing of entitlement to judgment as a matter of law.

Contrary to the plaintiff's and Tanger's contentions, Polo's motion for summary judgment is not premature. A motion for summary judgment is premature when there is an evidentiary basis to suggest that discovery may lead to relevant evidence and facts essential to opposing the motion are exclusively within the knowledge or control of the movant. Pina v. Merolla, 34 A.D.3d 663 (2nd Dept. 2006). The information sought must be clearly specified and relevant to the issues raised by the moving party. Kracker v. Spartan Chemical Co., Inc., 183 A.D.2d 810 (2nd Dept. 1992). The mere hope or speculation that evidence to defeat the motion may be uncovered upon further discovery is insufficient to deny the motion. Campbell v. City of New York, 220 A.D.2d 476 (2nd Dept. 1995).

As the record indicates, the plaintiff sent Polo an extensive list of discovery demands, dated April 13, 2011 ("discovery demands") to which Polo responded. Amongst the information sought in those discovery demands, plaintiff requested a record of any complaints filed regarding the defective condition of the sidewalk and surveillance taken on the day of the purported incident. On October 6, 2011, Polo replied to those inquiries by stating that it had no documentation or records responsive to the plaintiff's requests. The plaintiff has also taken the deposition of Polo's corporate representative. Although the plaintiff served subsequent discovery demands, dated April 18, 2012, to which Polo has not yet responded, the information sought there is not only redundant but largely irrelevant..

The plaintiff also seeks a deposition of the Polo store manager as well as statements from the employees who were working when the alleged incident occurred. However, even if the plaintiff were to depose the Polo store manager and obtain statements from Polo's employees, all it might possibly learn is something about what

occurred on the day of the plaintiff's alleged accident, assuming these Polo witnesses possess such knowledge. These witnesses cannot, as a matter of law, alter the legal relationship between Polo and Tanger. The lease between the two parties unambiguously provides that Tanger is responsible for maintaining and repairing the common areas of the shopping center. Furthermore, Tanger's Vice President for Operations, Bruce Frye, testified at his deposition that not only was Tanger responsible for maintaining the sidewalk where plaintiff purportedly fell but also that Tanger performed repairs on the defective sidewalk subsequent to the alleged incident. Both the express terms of the lease and Tanger's course of conduct evincing its commitment to abide by those terms cannot be controverted and any additional information that the store manager and employees might provide would not have any bearing on the issue of liability in this case.

For the forgoing reasons, the motion is granted.

Conclusion

In accordance herewith, it is hereby:

ORDERED defendant Polo Ralph Lauren Corporation's motion for summary judgment is granted and all claims and cross claims against Polo Ralph Lauren Corporation are dismissed; and it is further

ORDERED that any relief not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
August 1, 2012

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.