SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

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MANUEL PAGUAY,

Plaintiff,

- against -

MILTON FISCHEL, ANA FISCHEL, PETER STATHATOS, 32-06 30th AVENUE REALTY, LLC., JIN CHAO LIU, QIAO FANG LIU, G W FISH MARKET INC., LILLY CHINESE KITCHEN, INC. and QIAO MEI LIU individually and d/b/a LILLY CHINESE KITCHEN,

Defendants.

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Index No.: 22532/2011

Motion Date: 05/10/12

Motion No.: 15

Motion Seq.: 2

The following papers numbered 1 to 11 were read on this motion by defendants, Milton Fischel, Ana Fischel, Peter Stathatos and 32-06 30th Avenue Realty LLC for an order, pursuant to CPLR 3212, granting summary judgment dismissing the plaintiff's complaint; and the cross-motion of defendants Qiao Mei Liu d/b/a/ Lilly Chinese Kitchen s/h/a Lilly Chinese Kitchen, Inc., for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint:

Papers Numbered

32-06 30th Avenue Notice of Motion-Affidavits- .....1 - 6
Lilly Chinese Notice of Cross Motion.....7 - 11
Plaintiff's Affirmations in Opposition to Motion and Cross-Motion(2).....12 - 16
32-06 30th Avenue Reply Affirmation.....17 - 19
Lilly Chinese Reply Affirmation.....20 - 22

This is an action for damages for personal injuries sustained by plaintiff, Manuel Paguay, on January 20, 2009, when he allegedly slipped and fell on an icy condition on a public sidewalk adjacent to the commercial premises owned by the defendants MILTON FISCHEL, ANA FISCHEL, PETER STATHATOS, 32-06 30th AVENUE REALTY, LLC., located at 32-06 30th Avenue, Queens County, New York. Defendants JIN CHAO LIU, QIAO FANG LIU, GW FISH MARKET INC., LILLY CHINESE KITCHEN, INC. and QIAO MEI LIU individually and d/b/a LILLY CHINESE KITCHEN are tenants who occupy the ground floor premises.

Plaintiff commenced an action by filing a summons and complaint on September 28, 2011 and an amended complaint on November 29, 2011. Issue was joined by service of an answer to the supplemental summons by Lilly Chinese Kitchen on January 13, 2012 and by 32-06 30th Avenue Realty on December 22, 2011.

In his amended verified complaint, the plaintiff states that the defendants negligently permitted the sidewalk in front of the their premises to become slippery, icy, dangerous, defective, unsafe and hazardous. Plaintiff contends that as a result of the negligence of the defendants in failing to maintain the sidewalk in a safe and proper condition, plaintiff slipped on ice, fell, and sustained serious injuries. Plaintiff claims that defendants had actual notice of the hazardous condition. Plaintiff also claims that the defendants had constructive notice of the hazardous condition in that the condition existed for such period of time that defendants, in the exercise of due care, should have recognized and remedied it.

Counsel for defendant, 32-06 30th Avenue Realty now moves, prior to the completion of discovery, for an order granting summary judgment and dismissing the plaintiff's complaint on the ground that said defendant bears no liability for negligence due to the icy sidewalk condition. Counsel contends that the plaintiff has failed to demonstrate that defendants caused or created the icy condition complained of or had actual or constructive notice of the condition. Defendant also claims that as the owner of the building he entered into a lease with defendant GW Fish Market which provides that said tenant is responsible for the maintenance of the adjacent sidewalk including snow and ice removal and cleaning of all debris.

In support of the motion, Peter Stathatos, owner of 32-06 30th Avenue Realty, submits an affidavit stating that at the time of the accident, the ground floor of the premises was leased to GW Fish Market which was owned by defendants Jin Chao Liu and his daughter Qiuo Fang Liu. He states that at the time of the

plaintiff's accident GW Fish Market sublet a portion of its space to Lilly Chinese Kitchen. He states that he was never notified of a dangerous condition on the sidewalk and he never received any complaints from any tenants or third parties. Stathatos states that pursuant to paragraph 55 of the rider to the lease, GW Fish Market is solely responsible for snow and ice removal of the sidewalk and, therefore, plaintiff's action should be dismissed against him and his company as an out-of-possession owner of the building. Counsel states that the defendant's affidavit is sufficient to show that the defendant did not create the condition nor that he had actual or constructive notice of the icy condition which allegedly caused the plaintiff's fall. Counsel contends that plaintiff has not offered any evidence at this point as to the origin, or length of time the ice or snow was on the sidewalk prior to the accident. Thus, counsel argues it would be pure speculation to find that the condition existed for a long enough time for defendant to discover and remedy it. Lastly, the defendant argues that as an out-of-possession landlord he was not liable for personal injuries sustained on the premises as he did not retain control of the property and was not contractually obligated to perform sidewalk maintenance (citing Sparozic v Bovis Lend Lease LMB, Inc., 50 AD3d 1121[2d Dept. 2008][an out-of-possession landlord is not liable for personal injuries sustained on the premises unless the landlord retains control of the property or is contractually obligated to perform maintenance and repairs]).

Defendant Qiao Mei Liu d/b/a Lilly Chinese Kitchen also moves for summary judgment on similar grounds as the owners of the building, asserting that Lilly Chinese Kitchen, a subtenant of GW Fish Market also had no responsibility for the removal of snow and ice because that responsibility belonged to GW Fish Market pursuant to the provisions of its lease with the landlord. In addition, defendant Lilly Chinese Kitchen contends that plaintiff has not shown that Lilly caused or created the icy condition or had actual or constructive knowledge of the alleged condition. Counsel claims that Lilly is entitled to summary judgment for the same reasons as the owners, to wit, that defendant Liu is also not contractually responsible for the maintenance of the sidewalk.

In opposition to the owner's motion for summary judgment, plaintiff submits an affidavit from the plaintiff, Manuel Paguay, who states that at the time of the accident he was employed by GW Fish Market, where he had been working for fifteen years without being provided with Workers' Compensation coverage. He states that the accident occurred as he was attempting to bring a load of fish from a truck parked in front of the fish store using a

hand truck. He states that the fish store is located to the left of Lilly Kitchen as one faces the building. As he attempted to bring the hand truck in, loaded with fish, he slipped and fell on ice/snow in front of the premises. He states that the fish store and the Chinese restaurant are both owned by Jin Chao Liu. He also states that in the fifteen years he was working at the fish store he observed one of the owners of the building, who he knew as "Pete," occasionally shoveling snow and clearing the sidewalk of snow and ice in front of the premises. He also states that there has not been any discovery at this time to determine how snow and ice was removed from the sidewalk area in front of the premises despite the lease provisions.

Plaintiff's counsel contends that despite the lease provision, NYC Administrative Code §7-210 imposes a non-delegable duty upon owners of property abutting the public sidewalk to maintain the sidewalk and makes the owner liable for injuries arising out of the breach of that duty. With respect to the motion by Lilly, plaintiff contends that GW Fish and Lilly are owned by the same tenant and that the same people worked in the fish store and the Chinese restaurant. Counsel submits that if there was an obligation in the lease for the GW Fish Market to clear snow and ice that such provision binds the Lilly Chinese Restaurant as well. In support of this contention plaintiff submits a portion of the lease which states that the tenant was to use the premises as both a retail Chinese food take-out restaurant and as a fish store. Thus, plaintiff claims the named tenants in the lease are both the occupants of the fish store and the Chinese restaurant. In reply , Lilly submits documents from the NYS Secretary of State purporting to show that Lilly was not in existence until May 23, 2008 and was subsequently dissolved as a corporate entity on January 8, 2009 prior to the subject accident and therefore, was not in existence as a corporation at the time of the plaintiff's accident.

However, as stated by this court in its prior decision dated May 14, 2012, "a corporation may be held liable on a cause of action that accrues after dissolution if the corporation continued its operations, operated its premises, and held itself out as a de facto corporation, notwithstanding its dissolution" (Bruce Supply Corp. v New Wave Mech., Inc., 4 AD3d 444 [2d Dept. 2004]; see Ludlum Corp. Pension Plan Trust v Matty's Superservice, 156 AD2d 339 [2d Dept. 1989]). The plaintiff's affidavit in the prior motion was sufficient to show that the corporation was still continuing its operations on the date of the occurrence.

In addition, plaintiff submits that the defendants failed to submit evidence sufficient to demonstrate, prima facie, that defendants were not negligent as a matter of law as each moving defendant failed to provide evidence that it did not create the icy condition or have actual or constructive notice of the slippery condition on the sidewalk.

A movant for summary judgment must make a prima facie showing of entitlement by demonstrating that there are no material issues of fact (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). Once the movant satisfies this burden, then the burden shifts to the opposing party to present evidence in admissible form raising a triable issue of material fact (see Zuckerman v City of N.Y., 49 NY2d 557 [1980]). All reasonable inferences will be drawn in favor of the non-moving party (see Dauman Displays v Masturzo, 168 AD2d 204 (1st Dept. 1990). "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied" (Daliendo v Johnson, 147 AD2d 312 [2d Dept. 1989]).

A landowner may be held liable for injuries caused by a dangerous or defective condition on the public sidewalk abutting its property if it created the defect or if there is a statute or ordinance expressly imposing liability on the abutting landowner for failure to maintain the sidewalk (see Smirnova v City of New York, 64 AD3d 641 [2d Dept. 2009]; James v Blackmon, 58 AD3d 808 [2d Dept. 2009]; see also Vucetovic v Epsom Downs, Inc., 10 NY3d 517 [2008]). Section 7-210 of the Administrative Code of the City of New York requires a commercial landowner to maintain the sidewalk abutting the land in a reasonably safe condition and expressly imposes liability on the landowner for injuries caused as a result of a failure to do so (id). A lease provision placing a duty on the tenant to maintain the premises does not affect the landowner's statutory nondelegable duty and does not provide a defense to a claim based upon section 7-210 (see James, James v Blackmon, 58 AD3d 808 [2d Dept. 2009] ; Reyderman v Meyer Berfond Trust #1, 90 AD3d 633 [2d Dept. 2011]). Thus, the fact that there is a lease in existence between the owner 32-06 30th Avenue Realty and tenants Jin Chao Liu and Qiao Fang Liu requiring the tenants to maintain the sidewalk abutting the premises is not per se a defense to the plaintiff's action (see Buroker v. Country View Estate Condominium Ass'n, 54 AD3d 795 [2d Dept. 2008]).

However, under the Administrative Code, the plaintiff must still prove that the defendant either created the condition or had actual or constructive notice of its existence. An owner of real property, or a party in possession or control thereof, may

be liable for a hazardous snow or ice condition existing on the property as a result of the natural accumulation of snow or ice only upon a showing that it had actual or constructive notice of the hazardous condition and that a sufficient period of time elapsed since the cessation of the precipitation to permit the party to remedy the condition" (Lee-Pack v 1 Beach 105 Assoc., LLC, 29 AD3d 644 [2d Dept. 2006]; Salvanti v Sunset Indus. Park Assocs., 27 AD3d 546 (2d Dept. 2006). To provide constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendants to discover and remedy it (see Gordon v American Museum of Natural History, 67 NY2d 836 [1986]; Scott v Redl, 43 AD3d 1031 [2d Dept. 2007]). Here, the defendants failed to establish, prima facie, that they did not have actual or constructive notice of the allegedly icy condition since they failed to present any evidence as to the condition of the premises or any evidence showing that they lacked constructive notice of the icy condition in the area where the injured plaintiff allegedly fell (see Lattimore v. First Mineola Co., 60 AD3d 639 [2d Dept. 2009]; Wheaton v East End Commons Assoc., LLC, 50 AD3d at 675 [2d Dept. 2008]; Amidon v Yankee Trails, Inc., 17 AD3d 835 [3rd Dept. 2005]. To place defendants on constructive notice, the dangerous condition must have existed for a sufficient length of time before the accident as to allow defendants to discover and remedy it (see Gordon v. Am. Museum of Natural History, 67 NY2d 836 (1986). Defendants failed to submit any evidence as to how long the icy condition existed prior to the plaintiff's fall.

Accordingly, this court finds that the defendants failed to establish, prima facie, that it lacked constructive notice of the defective condition that allegedly caused the plaintiff to slip and fall (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). Since the defendants did not meet their prima facie burden, it is not necessary to consider the sufficiency of the plaintiff's opposition papers (see Anastasio v Berry Complex, LLC, 82 AD3d 808 [2d Dept. 2011]; Gerbi v Tri-Mac Enters. of Stony Brook, Inc., 34 AD3d 732 [2d Dept. 2006]; Tchjevskaia v Chase, 15 AD3d 389 [2d Dept. 2005]).

Accordingly, based upon the foregoing it is hereby,

ORDERED, that the motion by defendants MILTON FISCHEL, ANA FISCHEL, PETER STATHATOS, 32-06 30th AVENUE REALTY, LLC., and the cross-motion by defendants Qiao Mei Liu d/b/a/ Lilly Chinese Kitchen s/h/a Lilly Chinese Kitchen, Inc. for an order granting summary judgment dismissing plaintiff's complaint is denied.

Dated: August 20, 2012
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.