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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. Justice

PART 8

Index Number : 102541/2010
SORROZA, JOHN
vs.
GLOBIX CORP.
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. 102541/10

MOTION DATE

MOTION SEQ. NO. 004

The following papers, numbered 1 to 30, were read on this motion to/for Summary Judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits | No(s). 1-26

Answering Affidavits — Exhibits | No(s). 27-29

Replying Affidavits | No(s). 30

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: 9/14/12

JOAN M. KENNEY, 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 8

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John Sorroza,

Plaintiff,

-against-

DECISION AND ORDER
Index Number: 102541/10
Motion Seq. Nos.: 003-004

Globix Corp., Angelo, Gordon & Co.,
L.P., AG Asset Management LLC,
and Woo Centre Street Owner, LLC.

Defendants.

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KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion for summary judgment dismissing the complaint.

Papers (Motion Seq. 003)	**Numbered**
Notice of Motion, Affirmation, and Exhibits	1-12
Opposition Affirmations, and Exhibits	13-16
Reply Affirmation	17

Papers (Motion Seq. 004)	**Numbered**
Notice of Motion, Affirmation, and Exhibits	1-26
Affirmation in Opposition, Exhibits	27-29
Reply Papers	30

Motion Sequences 003 and 004 are consolidated herein for disposition.

In this personal injury action, defendants Globix Corporation (hereinafter "Globix") (Motion Seq. 003), and Anglo, Gordon & Co., L.P. and AG/Woo Centre Street Owner, LLC s/h/a Woo Centre Street Owner, LLC (hereinafter "Woo") (Motion Seq. 004), move for an Order, pursuant to CPLR § 3212, dismissing the complaint and all cross-claims.

Factual Background

On April 21, 2007, at approximately 11:30 a.m., plaintiff John Sorroza was walking on the sidewalk outside 139 Centre Street (the property) carrying a small box of cables and papers when he tripped-and-fell on a hole/cracked portion of the sidewalk (the accident). Although Woo asserts

that the hole/cracked portion of the sidewalk that allegedly caused the accident was trivial, plaintiff avers otherwise. Because of the accident, plaintiff sustained injuries to his right ankle, right hand, and lumbar spine. Plaintiff was taken to the hospital after the accident but was not confined to a hospital bed; rather, plaintiff was confined to his own bed and as a result, took two weeks off from work. Plaintiff experienced further periods of confinement for six months thereafter. Plaintiff then began physical therapy treatment, and continues to be treated on a semi-regular basis (Sorroza deposition pp. 126, 134-140).

At the time of the accident, Woo was the owner of the property, and Globix was the tenant. Briefly, Globix was the former owner of the property, prior to Woo's ownership. Globix sold the property to Woo in September 2006, and then leased the property for "commercial office space only" from September 29, 2006 to May 31, 2007 (the lease agreement; annexed to Woo's motion for summary judgment as Exhibit R) while transitioning out of the space. Woo asserts that the loading dock area and the portion of the sidewalk directly in front of the loading dock was part of the leased premises to Globix. However, Globix maintains the position that they were only leasing the building, and were not responsible for repairing and/or maintaining the sidewalk.

Woo avers that Globix had "complete and exclusive control" of the subject sidewalk and a "special use" of the loading dock area. However, Globix maintains the position that they did not have "complete and exclusive control" nor did they have a "special use" of the loading dock area and/or the adjacent sidewalk. Further, the loading dock area was not specifically created for Globix – it was already there.

Globix maintains the position that the owner of the building is responsible for maintaining and/or repairing the sidewalk, and that there is no evidence that they created the alleged defective condition on the sidewalk.

Woo proclaims that Globix owes them full contractual indemnification based on the unambiguous language in the lease (Woo's Motion for Summary Judgment ¶¶ 37 & 47). Section 51 of the Rider to the Lease, titled "Non-Liability and Indemnification," says in pertinent part:

> Except as otherwise provided herein, Tenant hereby indemnifies and agrees to hold Owner harmless from and against any and all loss, cost liability, claim, damage, fine penalty and expense including reasonable attorneys' fees and disbursements in connection with or arising from (a) any default by Tenant in the performance or observance of any of the terms of this Lease, or (b) the use or occupancy of the Premises by Tenant or any person claiming under Tenant, or (c) any acts, omissions or negligence of Tenant or any such person, or the contractors, agents, employees, invitees or licensees of Tenant or any such person, in or about the Premises or the real property.

Exhibit T of Woo's Motion for Summary Judgment, ¶ 51(b).

Globix, on the other hand, asserts otherwise, claiming they were under no obligation to perform repairs to the subject sidewalk, citing Paragraph 4 of the lease, titled "Maintenance and Repairs," which states in pertinent part:

> Owner shall maintain in good working order and repair the exterior and the structural portions of the building, including the structural portions of the demised premises, and the public portions of the building.

Exhibit R of Woo's Motion for Summary Judgment, ¶ 4.

Arguments

Defendant Globix argues that the action must be dismissed as against them because: (1) the NYC Administrative Code § 7-210 places the burden on the property owner to maintain and/or repair the sidewalks and they were a mere tenant at the time of the accident; (2) they did not cause or create the alleged defect; (3) they did not have a "special use" of the defective sidewalk area; (4) even if they did have a "special use," the special use was not constructed for Globix, it was already there when they entered into the lease agreement; and (5) they were not required to maintain and/or repair the sidewalk, as per the lease agreement.

Defendant Woo contends that the action must be dismissed as against them because the alleged defect that caused plaintiff's accident was trivial and, therefore, not actionable under the law. Further, Woo asserts that summary judgment should be granted in their favor as against co-defendant Globix on the issue of contractual indemnification pursuant to the lease agreement.

Consequently, defendant Globix argues that Woo's cross-claims against them should be dismissed because they were not responsible for maintaining and/or repairing the subject sidewalk pursuant to the lease agreement, and there was no clear indemnification clause stipulating that Globix indemnify Woo.

Lastly, plaintiff contends that the within motions asserted by Woo and Globix should both be denied because: (1) defendant(s) Woo and/or Globix were on constructive notice of the hole/cracked-condition of the sidewalk; (2) the alleged defect was not trivial as a matter of law; and (3) there are triable issues of fact to be considered.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule, the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

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." *(Winegrad v NYU Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 Ad2d 201 [1st Dept. 1999]).

In order to establish a prima facie case of negligence in a trip-and-fall action, a plaintiff must demonstrate that a defendant either created a dangerous condition, or has actual and/or constructive notice of the defective condition alleged (see *Judith D. Arnold v NYC Housing Authority*, 296 AD2d 35 [1st Dept. 2002]). A genuine issue of material fact exists when defendant fails to establish that it did not have actual or constructive notice of a hazardous condition *(Aviles v 2333 1st Corp.*, 66 AD3d 432 [1st Dept. 2009]; *Baez-Sharp v NYC Tr. Auth.*, 38 AD3d 229 [1st Dept. 2007]). In *Baez*, the Court stated that defendant "failed in its initial burden, as movant, to establish, as a matter of law, that it did not create and did not have actual or constructive notice of the watery and hazardous condition." Further "[t]o constitute 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 owners'] employees to discover and remedy it." (*Segretti v Shorenstein Co., E., L.P.*, 256 AD2d 234, 235 [1st Dept. 1998]).

The NYC Administrative Code § 7-210, titled Liability of Real Property Owner for Failure to Maintain Sidewalk in a Reasonably Safe Condition, states as follows:

> a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.
>
> b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe

> condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk... (New York City, N.Y., Code Sec. 7-210).

The Administrative Code § 7-210 imposes a nondelegable duty on the owner of the abutting premises to maintain and repair the sidewalk" (*Collado v Cruz*, 81 AD3d 542, 542 [1st Dept. 2011]). Thus, as a mere lessee of the property at the time of the accident, Globix is not liable per the NYC Administrative Code.

In *Collado* "it was undisputed that the tenant did not create the condition or make special use of the sidewalk," (81 AD3d at 542) whereas here, although there is no evidence that Globix created the defective condition of the sidewalk, Woo asserts that Globix had a "special use" of the subject sidewalk. Although Globix might have been the predominant user of the loading dock area, a "special use" was not created for Globix nor did Globix have complete and/or exclusive control of the loading dock area. Thus, *Collado* applies, and pursuant to the NYC Administrative Code § 7-210, the owner, Woo, would be liable. However, since the parties can contract and stipulate otherwise in their lease agreement, it is unclear as to which party has the burden of maintaining and/or repairing the subject sidewalk, as Woo asserts that the loading dock area and the portion of the sidewalk directly in front of the loading dock was part of the leased premises to Globix, and Globix maintains otherwise.

Although Globix does not dispute that there was a defective sidewalk as a matter of law, Woo asserts that the hole/cracked portion of the sidewalk that plaintiff tripped-and-fell on was trivial. Based on the photos of the defect, Woo asserts that the defect appears to be no more that 5/8 of an inch. However, Woo does not offer any admissible evidence regarding the actual measurement of the defect. In *Joseph v Villages at Huntington Home Owners Association*, 39

AD3d 481, 482-83 (NY 2nd Dept. 2007), the Court found that the defect was trivial because the plaintiff testified that the defect measured at 5/8 of an inch. Here, plaintiff said that the crack in the sidewalk "had to be a four-inch deep crack" (Sorroza deposition 63:16-18). A material issue of fact exists in regards to whether or not the defect is trivial and, thus, cannot be summarily decided herein. Accordingly, it is hereby

ORDERED that defendant Globix's motion for summary judgment, dismissing the complaint, is denied, in its entirety; and it is further

ORDERED that defendant Woo's motion for summary judgment, dismissing the complaint, and its application for contractual indemnification against Globix, is denied, in its entirety; and it is further

ORDERED that the parties proceed to mediation, forthwith.

Dated: 9/14/12

ENTER:

Joan M. Kenney, J.S.C.