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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK _____ PART 2

Justice

Index Number : 105338/2010
MASS, LAWRENCE
vs.
CGJG REALTY CORP.
SEQUENCE NUMBER : 004
LEAVE TO INTERVENE

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 ~~the motion of the motion to intervene is denied as moot as the action has been dismissed~~

~~MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION~~

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

Dated: 9/19/12

_____, J.S.C.

LOUIS B. YORK

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

LAWRENCE MASS,

Plaintiff,

Index No. 105338/2010

- against -

CGJG REALTY CORP., and **CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., SANG UI YI** d/b/a **SUPREME DELI**

Defendants.

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LOUIS B. YORK, J.:

Motion sequence numbers 3 and 4 are consolidated for disposition and resolved as follows:

In this personal injury action, plaintiff, Lawrence Mass, alleges injuries to his face and right knee when he tripped and fell on the sidewalk adjacent to a deli supermarket in Queens located at 82-65 Parsons Boulevard. All parties agree that plaintiff fell over a hole depressed half an inch from the sidewalk that was either a hole with metal plating or uncovered metal valve that possibly transported water. Plaintiff contends that three defendants' negligence contributed to the existence of the harmful defect. Defendants are: Sang Ui Yi, d/b/a Supreme Deli ("Supreme Deli"), the managers and commercial lessees of the property adjacent to the site of the incident; CGJG Realty Corp. ("CGJG"), the owner of that property and its commercial lessor; and Consolidated Energy Co. ("Con Ed"), the energy company that allegedly installed and maintained the valve. Plaintiff seeks special damages amounting to $3,000 in hospital expenses and lost earnings, as well as damages for loss of enjoyment of life.

Plaintiff initially commenced two separate actions, one against defendants CGJG and Con Ed in New York County, Mass v. CGJG Realty Corp. and Con. Ed. Co. of NY, Index No. 105338/10 (Sup. Ct. N.Y. Cnty.), and a second against Supreme Deli in Queens County, Mass v. Sang Ui Yi d/b/a Supreme Deli, Index No. 16048/11 (Sup. Ct. Qns. Cnty.). Plaintiff filed the note of issue around October 14, 2011.

Plaintiff also moved to consolidate the two actions in this Court. The motion originally was returnable on November 16, 2011, but after several adjournments it finally reached this Court for oral argument on March 8, 2012. In an order dated April 20, 2012 this Court granted the motion, as the two actions deal with the same incident and facts.

Although the Note of Issue had been filed by this time, the Court also directed the parties to appear for a status conference. The conference, which took place on May 16, 2012, resulted in an order which vacated the note of issue on the consent of all parties and allowed for limited discovery related to the demands to and from Supreme Deli, scheduled a deposition of Supreme Deli for August 16, 2012, extended the discovery deadline to August 30, 2012, and extended the note of issue deadline to September 10, 2012.

Before the issues of consolidation and discovery had been resolved, the parties made additional motions: Supreme Deli, which already had moved to consolidate, now sought to intervene; in addition, its motion sought summary judgment dismissing all claims against it. CGJG separately moved for summary judgment dismissing all claims against it. This opinion addresses the two motions currently before the Court. Plaintiff and Con Ed oppose both of the summary judgment applications.

Initially, the Court finds that the prong of Supreme Deli's motion that seeks to intervene is moot due to the April 20, 2012 order which granted consolidation. The Court already noted this during the oral argument of the current motions. Therefore, all that remains are Supreme Deli and CGJG's requests for summary judgment. For the reasons below, the Court denies both parties' applications.

1. **Standard for Summary Judgment Applied to the Instant Action**:

In support of its request for summary judgment, CGJG argues that plaintiff fails to raise any triable issue of material fact that necessitates a fact-finder. This Court applies the established standard that construes the facts in the light most favorable to the plaintiff in order to prevent inappropriately casual grants of summary judgment motions. See Haseley v. Abels, 84 A.D.3d 480, 482, 922 N.Y.S.2d 393, 395 (1st Dep't 2011); accord Segree v. St. Agatha's Convent, 77 A.D.3d 572, 572-573, 909 N.Y.S.2d 364, 364 (1st Dep't 2010). Any outstanding issues of fact warrant the denial of summary judgment. See Udoh v. Inwood Gardens, Inc., 70 A.D.3d 563, 565, 897 N.Y.S.2d 12, 14 (1st Dep't 2010). However, if there are no triable issues of fact, courts grant summary judgment motions even in negligence cases. See, e.g., Alvord v. Muller Contsr. Co., 46 N.Y.2d 276, 281, 413 N.Y.S.2d 309, 312 (1978); see also Andre v. Pomeroy, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 133 (1974) (policy against categorically barring summary judgment in negligence cases).

For the reasons below, and viewing the facts in the light most favorable for plaintiff, this Court concludes that plaintiff has raised triable issues of fact concerning CGJG's potential liability. Therefore, it denies CGJG's motion for summary judgment. Favorable facts for plaintiff include: that the valve was uncapped for some time before

the incident, that CGJG owed a duty of care and could therefore be liable for negligence, and that CGJG was the owner of the premises where the incident occurred.

2. **Is Summary Judgment premature?**

Plaintiff argues that it would be premature to grant summary judgment at this stage in litigation because he has not had the opportunity to obtain discovery from Supreme Deli. CGJG and Supreme Deli oppose this argument. As CGJG argues, a party that signs a note of issue cannot contest summary judgment motions on the ground that its adversary has not complied with discovery demands because both parties agree that discovery is complete. See Melcher v. City of New York, 38 A.D.3d 376, 377, 832 N.Y.S.2d 186, 187 (1st Dep't, 2007). Therefore, plaintiff is precluded from raising this argument now as it relates to CGJG.

The Court reaches a different conclusion with respect to Supreme Deli. As the Court already explained, plaintiff filed the note of issue pursuant to Court order in October 2011, before this Court granted consolidation. At that time, the Queens County action in which Supreme Deli was defendant was relatively new and no discovery had been conducted. Therefore, as the Court already has stated, the Court scheduled a status conference at which the note of issue was vacated and discovery relating to Supreme Deli was scheduled. As plaintiff explains, the action against Supreme Deli was relatively new and Supreme Deli had not been deposed by the time of the motion. See Blech v. West Park Presbyterian Church, 97 A.D.3d 443, 443, 948 N.Y.S.2d 273, 275 (1st Dept. 2012)(defendants' motions for summary judgment premature where case was in early stage of discovery and depositions had not been held).

Moreover, Supreme Deli's argument – that it could have been named in the original case against CGJG and Con Ed – is insufficient to waive discovery against it. For one thing, there is no suggestion that the action against Supreme Deli was untimely. For another, subsequent to the current motion, the parties agreed to vacate the note of issue and conduct discovery relating to Supreme Deli, including responses to Supreme Deli's demands. For the same reason, the Court finds that Supreme Deli's dispute with CGJG over whether the contract between them intended to place responsibility for repairs such as the one at issue here on Supreme Deli, supplanting the usual rule that the owner is responsible, and these parties' dispute over indemnification issues, is best left for resolution after the deposition of Supreme Deli and the discovery of all pertinent documents relating to its role and its relationship with CGJG. At that point, the parties will be more fully able to articulate and support their arguments.

3. Ownership of the Property with the Defective Condition and Speculation over the Instant Facts based on Evidence:

CGJG and Con Ed continue to disagree with plaintiff and each other about certain factual and legal theories. Their main areas of disagreement concern: ownership of the valve, the duty to maintain the valve, and notice. None of the submitted photographs of link the valve to any of the alleged owners. Speculative issues are insufficient to defeat a summary judgment motion. Quintana v. Votmesh Realty Inc., 31 Misc.3d 61, 62, 922 N.Y.S.2d 910, 912 (App. Term 1st Dep't 2011). Because a fact-finder would not be able to answer which party owned the water valve without speculating, the dispute over ownership is insufficient to deny the grant of summary judgment by itself.

4. Actual and Constructive Notice of the Defective Condition:

CGJG argues that even if it owed a duty to plaintiff, it was not put on notice and therefore could not be liable. See Stryker v. D'Agostino, 88 A.D.3d 584, 585, N.Y.S.2d 293, 294 (1st Dep't 2010). Con Ed and plaintiff oppose this argument. Breach of duty occurs when evidence demonstrates either the creation of a dangerous condition or actual or constructive notice. See Early at 560-561, 904 N.Y.S.2d 368-369. No evidence from the record suggests that CGJG ever had actual notice of the uncapped valve. A CGJG owner testified that he never received a complaint about the uncapped water valve prior to the incident. Plaintiff has failed to rebut defendant's argument with evidence of notice. See Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837, 501 N.Y.S.2d 646, 647 (1986).

Moreover, there is no issue of fact as to constructive notice. "To 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 defendant's employees to discover and remedy it." Id. at 837, 501 N.Y.S.2d 646, 647. A party cannot have been placed on constructive notice of a defect if no evidence shows that the condition existed for enough time before the accident that it could have been sufficiently repaired and the accident avoided. E.g., Daniely v. County of Westchester, 297 A.D.2d 654, 655, 747 N.Y.S.2d 239, 241 (2nd Dep't 2002). CGJG demonstrated that its adversaries argued this contested issue insufficiently and plaintiff's argument that CGJG had actual or constructive notice of the defect is unpersuasive. CGJG's adversaries have not submitted any evidence indicating when the valve fell into the defective condition. All of the photographs of the defective condition were taken after the incident and there is no way to conclusively

determine when the valve became defective. Thus, CGJG's argument on constructive notice prevails.

5. Are half-inch Sidewalk Depressions Actionable as a Matter of Law?

CGJG argues that the sidewalk depression is not legally actionable because it is trivial. While there is no per se standard that establishes actionability, New York Courts consider factors such as "width, depth, elevation, irregularity and appearance of the defect" in each case along with the "time, place and circumstance of the injury" to determine if depressions in the ground are small enough to be deemed trivial. Trincere v. Cnty. of Suffolk, 90 N.Y.2d 976, 977-978, 665 N.Y.S.2d 615, 615-616 (2nd Dep't 1997) aff'd, 90 N.Y.2d 976, 665 N.Y.S.2d 615 (1997). A half-inch depression in the ground was considered trivial when the plaintiff failed to establish that there had been a dangerous condition. Santiago v. United Artists Communications, 263 A.D.2d 407, 693 N.Y.S.2d 44 (1st Dep't 1999). Plaintiff never concretely established the existence of a dangerous condition here, so Santiago applies to the instant depression and this Court finds that the depression was trivial under Trincere. However, because issues of material fact remain, triviality does not warrant the grant of summary judgment. This case cannot be dismissed at least until a fact-finder determines that CGJG is not liable based on special use or Administrative Code § 7-210.

6. Applicability of Administrative Code § 7-210:

Plaintiff argues that under New York City Administrative Code § 7-210, CGJG failed to perform its duty to maintain the sidewalk surrounding its property. Administrative Code of the City of New York § 7-210 mandates that out of possession landlords have a duty to maintain their property in reasonably safe condition and can be

held liable for negligence and injuries incurred by third parties should they have created a danger or had actual or constructive notice of the danger. E.g., Early v. Hilton Hotels Corp., 73 A.D.3d 559, 560, 904 N.Y.S.2d 367, 368 (1st Dep't 2010); Martinez v. Khaimov, 74 AD3d 1031, 1032, 906 N.Y.S.2d 275, 275 (2nd Dep't 2010). Plaintiff argues that the statute applies on its face here. CGJG responds that the statute cannot apply, primarily because the defect is not legally actionable. While this argument shows how § 7-210 might be irrelevant should the entire action have no legal foundation, it does not address the language of the statute and analyze why the statute cannot apply. Because CGJG does not confront the substance of plaintiff's argument, its response here is weak and its argument unconvincing. Based on the facts before the Court, a fact-finder may find that, under this provision, CGJG is liable for plaintiff's injuries. Therefore, plaintiff raises an issue of fact and summary judgment is improper.

7. Duty Owed by Out of Possession Landlords:

CGJG argues that neither the plaintiff nor Con Ed has demonstrated that CGJG, an out of possession landlord, had any duty to maintain the water valve.

> An out-of-possession landlord is generally not liable for the condition of the demised premises unless the landlord has a contractual obligation to maintain the premises, or right to re-enter in order to inspect or repair, and the defective condition "a significant structural or design defect that is contrary to a specific statutory safety provision." Ross. v. Reader Revocable Trust, 86 A.D.3d 419, 420, 927 N.Y.S.2d 49, 51 (1st Dep't 2011) (quoting, Babich v. R.G.T. Rest. Corp., 75 A.D.3d 439, 440, 906 N.Y.S.2d 528 (1st Dep't 2010).

The relative flexibility of this standard often results in the grant of summary judgment to out of possession landlords. For example, one out of possession landlord was granted summary judgment when a customer complained to a supermarket manager about a mat multiple times before she fell and injured herself because the commercial lessee had been

put on notice and plaintiff failed to show that the defect had been a structural hazard that violated a statute. Stryker v. D'Agostino, 88 A.D.3d 584, 585, N.Y.S.2d 293, 294 (1st Dep't 2010). CGJG agrees that it is an out of possession landlord, that it had contractual obligations to maintain Supreme Deli property, and that it re-entered the property to inspect it on a few occasions. However, the parties dispute CGJG's exact maintenance duties under the contract. Even if plaintiff assumes that CGJG was contractually obligated to maintain the premises and failed to do so, CGJG's adversaries do not identify a specific statutory provision that the defect violated; the only provision cited is Administrative Code § 7-210, which deals with duty, and does not prohibit specific defects.

CGJG argues based on Belmonte v. Metropolitan Life Ins. Co., Belmonte v. Metropolitan Life Ins. Co., 304 A.D.2d 471, 759 N.Y.S.2d 38 (1st Dep't 2003), that this Court should grant summary judgment. Like Mass, in Belmonte the plaintiff claimed to have injured herself on a defective part of the sidewalk depressed approximately half-inch into the ground when her foot got stuck while she was walking on a sunny day. Id. at 472, 759 N.Y.S.2d at 39. In Belmonte, however, one engineer testified on behalf of the plaintiff that that the space was a hazard. In the instant case, on the other hand, plaintiff has introduced no expert testimony or other evidentiary support. Like CGJG, Metropolitan Life Insurance (Met Life), the out of possession landlord in Belmonte, argued that it owed no duty because it had made no special use of the property, had no notice, and there was no evidence that it created the condition. Id. at 473, 759 N.Y.S.2d at 41. Met Life, like CGJG, also noted the trivial nature of that sidewalk depression. Id. at 473, 759 N.Y.S.2d at 41. The Belmonte Court granted summary judgment and agreed

with Met Life, the out of possession landlord, that the defect was "at best, trivial." Id. at 474, 759 N.Y.S.2d at 40. Despite many similarities between Belmonte and the instant case, differences between them regarding special use render the Belmonte decision inapplicable here, as will be discussed below.

8. Special Use:

Even if the Court did not find an issue of fact under Administrative Code §7-210, it would deny summary judgment under the special use doctrine. The First Department defined special use as:

> ... [A] narrow exception to the general rule, [that] imposes an obligation on the abutting landowner, where he puts part of a public way to a special use for his own benefit and the part used is subject to his control, to maintain the part so used in a reasonably safe condition to avoid injury to others. Special use cases usually involve the installation of some object in the sidewalk or street or some variance in the construction thereof. Balsam v. Delma Eng'g Corp., 139 A.D.2d 292, 298, 532 N.Y.S.2d 105, 109 (1st Dep't 1988).

Plaintiff argues that CGJG derived a special use from the valve and could accordingly be liable for the valve's defective condition. Plaintiff cites an affidavit from a Con Ed employee, James O'Brien, who testifies that the "circular metal valve" aligns to a box associated with the New York City Department of Environmental Protection, located on the exterior wall of 82-65 Parsons Boulevard. A reasonable fact-finder could conclude that CGJG derives a special use by the valve supplying its property with water based on this evidence.

Disagreement over whether special use applies to CGJG's potential use of and benefit from the valve is enough to warrant the denial of CGJG's summary judgment motion because whether a special benefit existed and whether CGJG was a beneficiary of special use are typically questions of fact. E.g., Melamed v. Rosefsky, 291 AD3d 602,

602, 737 NYS2d 410, 411 (2nd Dep't 2002). Furthermore, "the issue concerning the causal connection between the owner's special use of a portion of the public walkway and the defective condition that caused the injury is an issue for the trier of fact and precludes the granting of summary judgment." NY-PJI 2:111, (citing Granville v. New York, 211 A.D.2d 195, 627 N.Y.S.2d 4 (1st Dep't 1995)); Weiskopf v. New York, 5 A.D.3d 202, 773 N.Y.S.2d 389 (1st Dep't 2004). Therefore, the relationship between plaintiff's injuries from the uncapped metal valve and CGJG's benefits from the water that the valve may have helped supply to its property cannot be determined as a matter of law. Instead, these material issues along with the issue concerning § 7-210 of the New York City Administrative Code create genuine disputes of fact that bar the grant of summary judgment and preclude CGJG from being discharged from this action.

In its analysis of Belmonte, plaintiff stated that the Court relied on Met Life's argument that it received no special use, whereas CGJG does not successfully rebut special use here and the Court has no parallel basis to rely on. Plaintiff's argument is persuasive. This difference mandates that the Court rule differently here. Because special use is a basis for out of possession landlord liability, CGJG, unlike Met Life in Belmonte, cannot be granted summary judgment despite the many factual similarities between the two cases that suggest identical decisions would be appropriate.

Plaintiff argues that liability does not depend on whether the defect arose during CGJG's ownership or prior to it, because special use runs with the land. See, e.g., Katz v. New York, 18 A.D.3d 818, 819, 796 N.Y.S.2d 639, 640-641 (2nd Dep't 2005) (landowner's summary judgment motion denied because driveway was special use regardless of whether current owner created driveway). Plaintiff and Con Ed are correct

that even though plaintiff fell on a City street, the abutting landowner, CGJG, may still be liable for his injuries. D'Ambrosio v. City of New York, 55 N.Y.2d 454, 457, 450 N.Y.S.2d 149, 150 (N.Y. 1982). While a fact-finder could definitively determine if the water valve in this case constituted a special use, similar devices have been classified as special use utilities in New York. See Mahar v. City of Albany, 303 N.Y. 825, 826 (N.Y. 1950) (water valve considered special use in trip and fall); See also Romano v. Cnty. of Monroe, 149 A.D.2d 952, 540 N.Y.S.2d 83 (4th Dep't 1989) (liable defendants breached duty to maintain special use valves and valve covers on City street); Smith v. City of Corning, 14 A.D.2d 27, 29 217 N.Y.S.2d 149, 151-152 (4th Dep't 1961) (water shutoff valve considered special use and landowner liable). Plaintiff stresses that Con Ed's James O'Brien affidavit raises the possibility that the water valve might be connected to CGJG's property, and that this fact must be determined by a fact-finder.

CGJG rejects plaintiff's special use argument without responding to O'Brien's affidavit. CGJG cites two cases in its argument. The first, Balsam v. Delma Eng'g, 139 A.D.2d 292, 523 N.Y.S.2d 105 (1st Dep't 1988), states that a landowner must benefit from a special use exclusively. CGJG connects this rule to the sidewalk though, and not the water valve. This misplaced emphasis overlooks where special use applies in this case. The second case CGJG cites that states that duty and ownership questions in this action can only be determined speculatively. Andre v. Pomeroy, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 133 (1974). CGJG then links plaintiff's special use argument to this point and suggests that special use can similarly only be determined through speculation. The affidavit that plaintiff submitted as well as its reasonable arguments that cite case law provide a very concrete basis through which a fact-finder could reach a conclusion about

the existence of special use. In its rebuttal, CGJG fails to establish that it did not make special use of the valve in the sidewalk and does not meet its burden to rebut plaintiff's opposing arguments. See Pacheco v. Keyspan Corp. 28 A.D.3d 729, 729, 814 N.Y.S.2d 674, 675 (2nd Dep't 2006).

CGJG's argument dismissing special use jumps to conclusions. While CGJG's arguments regarding duty and ownership may be well founded, its gloss over plaintiff's argument for special use overlooks the decisive issue in this decision. It is up to a fact-finder to determine if: (1) CGJG used water from the valve to benefit its property and accordingly, (2) if the defect constituted a dangerous condition that (3) substantially caused plaintiff's injury and that CGJG created or contributed to and (4) which CGJG should have discovered and corrected. NY-PJI 2:111 (2011).

V. Conclusion:

For the reasons above, triable issues of fact exist which prevent summary judgment against CGJG. This does not mean plaintiff shall prevail – and, in fact, plaintiff has presented limited proof. However, this proof meets plaintiff's burden and it is in the Court's interest to let him have his day in court. The Court concludes there are no issues of fact regarding ownership, duty or notice. Special use and Administrative Code § 7-210 are the sole bases for denying CGJG's motion for summary judgment. These issues are best answered by a trier of fact and are therefore a bar to the grant of summary judgment.

In addition, because at the time the parties made these motions no discovery had been conducted involving Supreme Deli, summary judgment for or against it is premature. In light of this, the Court deems it prudent to wait and address all arguments

relating to Supreme Deli's liability, including its contractual liability, until discovery is complete.

Based on the above, therefore, it is

ORDERED that CGJG's motion for summary judgment and dismissal is denied; and it is further

ORDERED that the prong of Supreme Deli's motion seeking intervention is denied as moot, and the prong of the motion seeking summary judgment is denied.

Dated: 9/19/12

ENTER:

LOUIS B. YORK, J.S.C.