SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS **PART** 58

Justice

NILSA FIGUREROA,

Plaintiff,

-v-

WOODROW COURT, INC., et al.,

Defendants.

INDEX NO. 400551/12

MOTION DATE

MOTION SEQ. NO. 002, 003

MOTION CAL NO.

The following papers, numbered 1 to _____ were read on this motion _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1, 2
Answering Affidavits– Exhibits	3, 4
Replying Affidavits	5

CROSS-MOTION: _____ YES ✓ NO

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

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

FILED
DEC 12 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/11/13

J.S.C.
DONNA M. MILLS, J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

NILSA FIGUEROA,

Plaintiff,

- against -

WOODROW COURT, INC., WENTWORTH PROPERTY MANAGEMENT INC., WENTWORTH GROUP, COOPER SQUARE REALTY INC., RADIOSHACK CORPORATION, and TANDY CORPORATION,

Defendants.

INDEX NO.
400551/12

DECISION/ORDER

DONNA M. MILLS, J.:

Motion sequence numbers 002 and 003 are consolidated for disposition.

In motion sequence number 002, defendants Woodrow Court, Inc. ("Woodrow"), Wentworth Property Management, Inc., and Wentworth Group (jointly "Wentworth"), and Cooper Square Realty Inc. ("Cooper") move for summary judgment dismissing the complaint in addition to all cross claims as against them.

In motion sequence number 003, defendant RadioShack Corporation ("RadioShack") moves for summary judgment dismissing the complaint in addition to all cross claims as against it.

BACKGROUND

This action seeks to recover monetary damages for personal injuries allegedly sustained by the plaintiff as a result of a trip and fall type accident which occurred on February 4, 2011. Plaintiff alleges that the accident occurred around 5:00 PM, between 169th and 170th Streets in New York County in front of the defendant RadioShack's store. Plaintiff contends there was a lot of snow on the sidewalk in front of the store which appeared dirty and of a grayish color. Plaintiff further estimated that the snow was 2 to 3

inches deep in front of the store, and that it did not appear that a pathway had been shoveled for pedestrian use.

Woodrow admits ownership of the premises, located at 565 West 169th Street, in which the subject RadioShack store is located. Cooper is managing agent of the subject premises. RadioShack, is a tenant of the subject premises pursuant to a lease, dated February 16, 1999, between Woodrow and defendant Tandy Corporation. RadioShack alleges that Tandy Corporation is an inactive corporation and that RadioShack exercised Tandy Corporation's five-year option to renew the lease on July 1, 2009. Any relationship between Wentworth and the premises is denied in the Verified Answer submitted by the Woodrow Defendants.

RadioShack admits, and there appears to be no dispute, that it undertook snow removal operations in the days and weeks prior to the accident, but denies being negligent in causing the plaintiff's accident.

Applicable Law & Discussion

CPLR § 3212(b) requires that for a court to grant summary judgment, the court must determine if the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit." It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (Vamattam v Thomas, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant's entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce

evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial, the case should be summarily decided (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

In support of its motion for summary judgment, RadioShack store manager Alexandra Baez testified at her deposition that the store personnel clears the sidewalk of snow and ice during the work day. Ms. Baez testified that although she could not recall February 4, 2011 specifically, she was certain that the sidewalks were clear of ice and snow because it had not snowed for a week to two before and when it does snow, she and her staff clear the sidewalks of snow and ice. Ms. Baez further testified that she inspects the sidewalk every morning and afternoon. Ms. Baez maintained, that on the basis of RadioShack's custom and practice, that the sidewalk would have been cleared after the last snowfall prior to the plaintiff's accident.

RadioShack also relies on the affidavit of its meteorologist expert, Thomas E. Downs, who stated in his affidavit that at the time of plaintiff's fall, 12 to 14 inches of snow remained on undisturbed, un-cleared ground surfaces from the snowstorm on January 27, 2011, which dropped 19.0 inches of snow at New York Central Park and 17.3 inches of snow at New York La Guardia. Mr. Downs further stated that based on the official weather data and the testimony of the plaintiff regarding the alleged depth of snow on February 4, 2011, it was clear to him that snow removal had been undertaken at some point prior to the accident.

In opposition to RadioShack's motion, plaintiff relies on RadioShack's expert Mr. Downs, together with testimony of Ms. Baez that the Store did not have its own ice removal equipment and plaintiff's testimony that the sidewalk was covered by 2 to 3 inches of snow mixed with ice. Plaintiff contends that RadioShack failed to clear the sidewalk completely of snow and ice in a non-negligent manner.

A defendant may be held liable for a slip-and-fall incident involving snow and ice on its property only upon a showing that the defendant created a dangerous condition or had actual or constructive notice of it (see Cody v. DiLorenzo, 304 A.D.2d 705, 757 N.Y.S.2d 789; Mahoney v. Affrunti, 297 A.D.2d 717, 747 N.Y.S.2d 397; Mejia v. City of New York, 272 A.D.2d 453, 708 N.Y.S.2d 308). Once a defendant undertakes snow removal efforts, it must do so in a reasonable manner and may be held liable for creating or exacerbating a dangerous condition (see Rugova v. 2199 Holland Ave. Apt. Corp., 272 A.D.2d 261, 263, 708 N.Y.S.2d 390; Suntken v. 226 W. 75th St., 258 A.D.2d 314, 315, 685 N.Y.S.2d 217).

Under the circumstances presented here, RadioShack failed to establish that its snow-removal efforts did not create or exacerbate a dangerous condition in the area where the plaintiff fell (see Karalic v. City of New York, 307 A.D.2d 254, 762 N.Y.S.2d 271; see also Artis v. City of New York, 24 A.D.3d 477, 808 N.Y.S.2d 291; Chaudhry v. East Buffet & Rest., 24 A.D.3d 493, 808 N.Y.S.2d 239; Kasem v. Price–Rite Off. Home Furniture, 21 A.D.3d 799, 800 N.Y.S.2d 713).

The Court now will address the Woodrow defendant's motion for summary judgment on the grounds that it was an out of possession owner and therefore not liable for plaintiff's accident. Contrary to this contention, Administrative Code § 7–210 is designed for the safety and protection of the public and imposes upon the landowner a

positive non-depletable duty. The violation of which is evidence of negligence (Elliott v. City of New York, 95 N.Y.2d 730,724 N.Y. (2001); see, e.g. Smulczeski v. City Center of Music & Drama, 3 N.Y.2d 498 (1957); Reider v. Whitebrook Realty Corp. 23 A.D.2d 691 [1965]). Nothing in the Administrative Code permits an out of possession landowner the right to assign and/or delegate its obligations under the Code to the tenant in possession (compare, DiNatale v.State Farm Mutual Automobile Insurance Company, 5 AD3d 1123[2004] applying Amherst Town Code § 83–9–5[5–1]).

Nothing in the record however implicates any liability amongst the other Woodrow defendants. Fact issues however, regarding actual or constructive notice preclude summary judgment for the other defendants.

Accordingly it is

ORDERED that the motions for summary judgment on the complaint is granted only as to the defendants Wentworth Property Management, Inc., Wentworth Group, and Cooper Square Realty Inc., and the complaint and cross claims is dismissed and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in

the caption herein.

Dated: 12/11/13

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.