Penhaskashi v EQR - E. 27th St. Apts., LLC
2017 NY Slip Op 31704(U)
August 14, 2017
Supreme Court, New York County
Docket Number: 151965/2015
Judge: Kelly A. O'Neill Levy

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: KELLY O'NEILL LEVY JSC Justice PART 19

Index Number : 151965/2015
PENHASKASHI, MICHELLE
vs
EQR - EAST 27TH STREET
Sequence Number : 003
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

Decided in accordance
with the accompanying
memorandum decision/order

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

Dated: 8/14/17

Kelly O'Neill Levy J.S.C.
KELLY O'NEILL LEVY JSC

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
NEW YORK COUNTY

PRESENT: **HON. KELLY O'NEILL LEVY** **PART** **19**
Justice

----------X

MICHELLE PENHASKASHI,

Plaintiff,

- v -

EQR - EAST 27TH STREET APARTMENTS, LLC, EQUITY RESIDENTIAL MANAGEMENT, LLC, DUANE READE, INC, DUANE READE INTERNATIONAL, LLC, WALGREEN CO,

Defendants.

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INDEX NO. 151965/2015

MOTION DATE _____

MOTION SEQ. NO. 003 and 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120

were read on this application to/for _____

Upon the foregoing documents, it is

Defendants EQR-East 27th Street Apartments, LLC and Equity Residential Management, LLC (together, "Parc East") move under motion sequence 003, pursuant to CPLR 3211 and 3212, for an order granting summary judgment dismissing plaintiff Michelle Penhaskashi's ("Plaintiff") complaint against them. Defendants Duane Reade, Inc. ("Duane Reade"), Duane Reade International, LLC. and Walgreen Co. move under motion sequence 004, pursuant to CPLR 3212, for an order granting summary judgment dismissing Plaintiff's complaint and all cross-claims against them. Plaintiff and Parc East oppose. The motions are consolidated for disposition.

BACKGROUND

This personal injury action arises out of an incident on January 28, 2015 at approximately 9:00 a.m. in which Plaintiff allegedly slipped and fell on "black ice" on a sidewalk abutting the building known as 240 East 27th Street in Manhattan ("240 East").[1] Parc East is the owner of 240 East, which occupies the west side of Second Avenue from East 26th Street to East 27th Street, with its main tenants' entrance on East 27th Street. Duane Reade is the first-floor commercial tenant in the same building, and its store fronts Second Avenue between East 26th Street and East 27th Street.

Plaintiff, a resident of 240 East, alleges that she was walking along 27th Street when she reached the corner of 27th Street and Second Avenue, made a turn onto Second Avenue, and was caused to slip and fall on a patch of black ice. Plaintiff argues that the ice that caused her to slip and fall formed as a result of negligent snow removal from either the 27th Street sidewalk or from the Second Avenue sidewalk, each of which abut 240 East. Parc East does not deny that it was responsible for snow and ice removal from the 27th Street sidewalk but contends that Duane Reade was responsible for snow and ice removal from the Second Avenue sidewalk. Duane Reade argues that Parc East was responsible for snow and ice removal from both sidewalk areas.

Plaintiff's Testimony

At her examination before trial, Plaintiff testified that she "slipped on something that was slippery," but did not see what she slipped on, nor did she identify the cause of the incident while she was on the ground, and only determined that the cause of her slip and fall was ice when she was told so by a passerby shortly after the incident (Tr. Penhaskashi at 28-29). Plaintiff testified that within a minute from the time of the incident and while she was still lying on the spot where she

[1] Although the address for the Duane Reade entrance to the building is known as 465-479 Second Avenue, the court refers to the premises as 240 East.

slipped and fell, the passerby approached Plaintiff, told Plaintiff that Plaintiff had slipped on ice, and used Plaintiff's cellphone to take photographs of Plaintiff and the ice where Plaintiff slipped and fell (*Id.* at 29-33). Plaintiff was shown a photograph taken by the passerby and testified that the leg and foot in the photograph were her own (*Id.* at 31-32). Plaintiff further described the photograph as depicting "something that looked like water" and that "[i]t may have been a white area," and that she understood that depiction to be black ice (*Id.* at 117-118).

Plaintiff also offered an affidavit in which she states that the photograph she testified about at her examination before trial "fairly and accurately depicts the area" where she was caused to slip and fall as it existed at the time of the incident (Aff. of Michelle Penhaskashi, Ex. 2). In addition, Plaintiff stated that she informed ambulance personnel that she slipped and fell on ice.

Testimony of Gregory Franck, Property Manager for 240 East

At his examination before trial, Mr. Franck testified that Parc East was responsible for snow removal from the 27th Street sidewalk abutting 240 East and that Duane Reade was responsible for snow removal from the Second Avenue sidewalk abutting 240 East (Tr. Franck at 17, 43). He testified that he was told that Duane Reade was responsible for said snow removal along Second Avenue, but he did not know who first told him of this and could not recall whether that person was employed by Parc East (*Id.* at 43). He also testified that the only person he could recall with certainty with whom he discussed snow removal from the Second Avenue sidewalk was Hiran Santiago, the maintenance manager employed by Parc East, but Mr. Franck did not know Mr. Santiago's basis for believing that Duane Reade was responsible for snow removal from the Second Avenue sidewalk (*Id.* at 43-45).

Testimony of Ahmad Eid, Duane Reade's Store Manager

At his examination before trial, Mr. Eid testified that Parc East was responsible for snow and ice removal from the Second Avenue sidewalk (Tr. Eid at 14). He testified that he was told as much

by a Hispanic Parc East employee whose name he could not remember and that during the winter of 2014 into 2015, he observed Parc East employees using snow blowers, shovels, and rock salt to remove snow and ice from the Second Avenue sidewalk on more than two occasions (*Id.* at 17-18, 40). He also testified that Duane Reade does not have any snow removal equipment at its store for use by staff except for what was sold to customers but that Duane Reade employees did sometimes place rock salt by the front doors as "an extra thing" (*Id.* at 24, 43-44). Mr. Eid further testified as to the photograph shown to Plaintiff discussed above and stated that it depicted a "blue" color, which indicates rock salt placed by Parc East because Parc East used blue rock salt and Duane Reade only used white rock salt (*Id.* at 44-45).

ARGUMENTS

Motion Sequence 003

Parc East argues that it is entitled to summary judgment because Plaintiff was unable to identify the cause of her fall. Furthermore, Plaintiff's affidavit directly contradicts Plaintiff's testimony, and Plaintiff's affidavit cannot be used to authenticate the above-mentioned photograph presented at her deposition purportedly depicting an ice condition at the time of Plaintiff's fall because Plaintiff never testified that ice caused her to fall. Additionally, any statements made by a passerby to Plaintiff regarding the cause of her fall or any statements as to "cause" or "fault" in the ambulance call report or emergency room record are inadmissible hearsay.

Plaintiff contends that notwithstanding Parc East's arguments, her testimony and contemporaneous photographic evidence demonstrate a nexus between the condition of the sidewalk and the circumstances of Plaintiff's fall sufficient to establish proximate causation and thus provide sufficient evidence to defeat summary judgment.

Motion Sequence 004

Duane Reade argues that it is entitled to summary judgment because Parc East, as owner of the building which the subject sidewalks abut, including the Second Avenue sidewalk, has a statutory responsibility under New York City Administrative Code Section 7-210 to maintain said sidewalks; and, per the affidavit of Richard Steiner, Esq., Director and Managing Counsel of Walgreen Co., the owner/parent company of Duane Reade, Inc., there was no delegation of snow and ice removal to Duane Reade under the terms of the lease agreement dated July 1, 1998 (the "lease") (Aff of Steiner, Ex. H). Indeed, Duane Reade argues that while commercial leases can and often do delegate responsibilities for snow and ice removal to a commercial tenant, in the instant matter, the parties chose not to do so, and thus any obligations imposed by New York City Administrative Code 7-210 remain with Parc East.

Duane Reade further argues that Mr. Eid's testimony that he observed Parc East employees perform snow and ice removal from the Second Avenue sidewalk and that Duane Reade was not responsible for snow and ice removal, never performed such removal, never hired contractors to do so, and did not even possess snow and ice removal equipment demonstrates that Duane Reade had no responsibility for snow and ice removal from the Second Avenue sidewalk.

Finally, Duane Reade argues that regardless of any claims asserted against it, all claims asserted against Duane Reade International, LLC. and Walgreen Co. must be dismissed as a matter of law. Duane Reade argues that Duane Reade International, LLC. and Walgreen Co. do not have any leasehold or ownership interest in the subject property and did not engage in possession, operation, management, inspection, supervision, or control thereof. Duane Reade offers the affidavit of Mr. Steiner, in which he states the same (Aff. of Richard Steiner, Ex. H).

Plaintiff and Parc East contend that Duane Reade's motion for summary judgment should be denied because Mr. Franck's testimony raises a question of fact as to whether Duane Reade was responsible for snow and ice removal from the Second Avenue sidewalk abutting 240 East.

Parc East additionally contends that (1) e-mails sent from Matt McCullough, Duane Reade District Manager, to Duane Reade store locations throughout Manhattan stating that Duane Reade must perform snow and ice removal raise a question of fact as to whether Duane Reade was responsible for snow and ice removal from the Second Avenue sidewalk and (2) the lease raises a question of fact concerning Duane Reade's contractual duty to perform snow and ice removal from the Second Avenue sidewalk because Section 4.05 of the lease requires compliance "with all laws, ordinances, rules, orders, and regulations . . . of any governmental authority," which therefore requires that Duane Reade comply with the requirements to remove snow or ice under Administrative Code Section 16-123 (a).

Parc East further contends that the testimony of Mr. Eid at best raises a question of fact as to whether Duane Reade was responsible for snow and ice removal from the Second Avenue sidewalk and that Mr. Eid's affidavit, in which he states that he began working at the subject store in "late 2014," contradicts his deposition testimony that he had managed the subject store for "one year and few months" prior to the incident on January 28, 2015 and that he had been the store manager during two winters (Aff. of Ahmad Eid, Ex. K); (Tr. Eid at 9, 15).

ANALYSIS

As a preliminary matter, the court addresses Duane Reade's contention that Duane Reade International, LLC. and Walgreen Co. are not proper parties to the instant litigation. Plaintiff and Parc East did not oppose Duane Reade's arguments concerning the lack of affiliation or nexus of Duane Reade International, LLC. and Walgreen Co. to 240 East and the abutting sidewalks. Accordingly, the court finds that summary judgment should be granted as to Duane Reade

International, LLC. and Walgreen Co. and the claims against them dismissed as a matter of law. Thus, the defendants that remain are Parc East and Duane Reade.

On a motion for summary judgment, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that there exist material factual issues. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or findings of fact. *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503, 505 (2012).

A property owner may be liable for injuries due to a defective or dangerous condition on a public sidewalk abutting the owner's property if it is shown either that (1) the defective condition was created by the owner or caused through the owner's special use, or (2) both an obligation on the part of the property owner to maintain the sidewalk and liability for injuries resulting from the owner's failure to do so are imposed by statute. *Richter v. Duane Reade*, 303 A.D.2d 232, 232–33 (1st Dep't 2003); *Solarte v. DiPalmero,* 262 A.D.2d 477 (2d Dep't 1999). The property owner need not have actually created the dangerous or defective condition in order for liability to be imposed. Rather, liability may flow from the owner's failure to maintain the sidewalk despite having both actual and constructive notice of such condition and an adequate opportunity to remedy the same. *Early v. Hilton Hotels Corp.*, 73 A.D.3d 559, 561 (1st Dep't 2010); *Danielson v. Jameco Operating Corp.*, 20 A.D.3d 446 (2d Dep't 2005).

Where liability against a property owner is premised upon Section 7-210 of the New York City Administrative Code, the above-described standard of liability applies to slip and fall sidewalk accidents arising from an accumulation of snow or ice. *Early v. Hilton Hotels Corp.*, 73 A.D.3d 559, 560 (1st Dep't 2010); *Martinez v. City of New York,* 20 A.D.3d 513 (2d Dep't 2005). Section 7-210 imposes a duty upon a property owner to maintain, in a reasonably safe condition, the public sidewalks abutting its property and imposes liability on the property owner for personal injuries resulting from its failure to do so, specifically including "the negligent failure to remove snow [and] ice." New York City Administrative Code Section 7-210; *Mcmikle v. Patti*, 2016 WL 7014744 (N.Y. Sup. Ct., Queens County 2016), 2. Furthermore, pursuant to Section 16-123 of the New York City Administrative Code, a property owner has four hours from the time precipitation ceases to remove snow or ice from the public sidewalk abutting its property. *Rodriguez v. New York City Hous. Auth.*, 52 A.D.3d 299, 300 (1st Dep't 2008).

Summary judgment for a defendant may be appropriate when a plaintiff cannot identify the cause of the accident. *Tomaino v 209 E. 84th St. Corp.*, 72 A.D.3d 460 (1st Dep't 2010); *Burnstein v Mandalay Caterers,* 306 AD2d 428 (2d Dep't 2003). A plaintiff must identify a specific defect or defects that caused the incident. *See Raghu v New York City Hous. Auth.*, 72 A.D.3d 480, 482 (1st Dep't 2010); *Telfeyan v City of New York,* 40 A.D.3d 372, 373 (1st Dep't 2007); *Kane v Estia Greek Rest.*, 4 A.D.3d 189, 190-191 (1st Dep't 2004). However, a plaintiff may identify the defect through inference and need not provide positive or direct proof of causation. *Gramm v State of New York,* 28 A.D.2d 787, 788 (3d Dep't 1967), *affd on the majority opinion of the App Div,* 21 N.Y.2d 1025, 1026 (1968) (plaintiff not required to establish "precise condition of the particular step upon which she fell, as respected one or more of the negligent conditions found applicable to the stairway generally"). While there may be multiple proximate causes of an accident and a plaintiff is not required to identify and rule out all possible alternative causes unrelated to a defendant's negligence,

liability nevertheless cannot rest on conjecture and so "the record must render the other possible causes sufficiently remote to enable the trier of fact to reach a verdict based upon the logical inferences to be drawn from the evidence ..." *Lynn v Lynn,* 216 A.D.2d 194, 195-196 (1st Dep't 1995) (internal quotation marks and citation omitted); *Manning v 6638 18th Ave. Realty Corp.*, 28 A.D.3d 434, 435 (2d Dep't 2006); *Kane,* 4 A.D.3d at 190-191.

Parc East's Motion for Summary Judgment (Mot. Seq. 003)

In the instant case, Plaintiff has proffered sufficient evidence to raise an issue of fact for trial as to the cause of her fall. Plaintiff testified that she slipped on something "slippery" and that she knew she slipped on ice because someone at the site of the accident told her so while she was waiting for the ambulance. Plaintiff also produced photographic evidence, which Plaintiff testified depicted her legs and feet, and which she stated by affidavit depicted a fair and accurate representation of the area where she slipped and fell. At her examination before trial, Plaintiff described the picture as depicting "something that looked like water" and that "may have [had] a white area," which she understood to be black ice; and, in her affidavit, Plaintiff stated that the photograph depicted the ice she slipped on. Based on the collateral and circumstantial evidence presented, a jury could conclude that that ice resulting from negligent snow removal caused Plaintiff's fall. *See Lakins v. 171 E. 205th St. Corp.*, 118 A.D.3d 451 (1st Dep't 2014) (reasoning that "[c]ontrary to defendant's contention that it was entitled to summary judgment because plaintiff could not identify the cause of her fall, she testified that she knew she slipped on ice because '[w]hen I was laying on the ground it was cold and wet that night' [and] [s]uch testimony may be fairly interpreted that plaintiff felt the ice on the ground after she fell, as she consistently stated in her affidavit submitted in opposition to the motion"); *see also Pol v. Gjonbalaj*, 125 A.D.3d 955, 955–56 (2d Dep't 2015) (explaining that "[i]f a plaintiff is unable to

identify the cause of a fall, any finding of negligence would be based upon speculation [and] [t]hat does not mean that a plaintiff must have personal knowledge of the cause of his or her fall. Rather, it means only that a plaintiff's inability to establish the cause of his or [her] fall—whether by personal knowledge or by other admissible proof—is fatal to a cause of action based on negligence") (internal quotation marks omitted) (internal citations omitted); *Frenza v. Montgomery Trading Co.*, 2009 WL 3100204 (N.Y. Sup. Ct., New York County 2009) ("There is sufficient collateral and circumstantial evidence from which a jury could conclude that his fall was caused by defective … wet and greasy … and lighting … conditions"). Furthermore, Parc East does not deny that it was responsible for snow and ice removal from the 27th Street sidewalk and it does not provide sufficient evidence to make a prima facie showing that it was not negligent in its removal of snow or ice at said location. *See Ingleton v. Brooks Shopping Centers, L.L.C.*, 122 A.D.3d 413, 414 (1st Dep't 2014) (finding that Defendant "failed to proffer sufficient evidence showing that the staircase was properly constructed or inspected in a reasonable and prudent manner prior to the accident"); *Prenderville v. Int'l Serv. Sys., Inc.*, 10 A.D.3d 334, 337–38 (1st Dep't 2004).

Duane Reade's Motion for Summary Judgment (Mot. Seq. 004)

Duane Reade has proffered sufficient evidence to show there is no material triable issue of fact as to whether it was responsible for snow and ice removal from the Second Avenue sidewalk between 26th Street and 27th Street, and Parc East and Plaintiff have failed to offer sufficient evidence in rebuttal to raise an issue of fact. Notwithstanding inconsistencies in Mr. Eid's testimony as to when he began working at the subject store, Mr. Eid testified consistently regarding the subject winter of 2014 into 2105. Moreover, on a summary judgment motion, the court does not make credibility determinations. *See Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503, 505 (2012). Mr. Eid is the only witness to have provided testimony of having observed individuals performing snow and ice removal from the Second Avenue sidewalk, whom he testified were Parc East

employees. In addition, Administrative Code 16-123 (a), to which Parc East refers, also imposes an obligation to "owners" to clear abutting sidewalks. There is no evidence that Parc East delegated its duties to Duane Reade via the lease agreement, and Duane Reade has provided the affidavit of Mr. Steiner confirming as much.

Mr. Franck's testimony and the e-mails sent by Mr. McCullough are insufficient to raise an issue of fact for the jury regarding Duane Reade's responsibility over the Second Avenue sidewalk. Mr. Franck never observed anyone perform snow and ice removal on the Second Avenue sidewalk, he did not know who first told him that Duane Reade was responsible for snow and ice removal from the Second Avenue sidewalk or even whether it was a Parc East employee, and he was not familiar with the terms of the lease. Although Mr. Franck testified regarding a conversation with Mr. Santiago in which they discussed snow removal from the Second Avenue sidewalk, Mr. Franck did not know Mr. Santiago's basis for believing that Duane Reade was responsible for removing snow therefrom and Parc East did not submit an affidavit or testimony from Mr. Santiago himself. *See Leggio v. Gearhart*, 294 A.D.2d 543, 544 (2d Dep't 2002) (citing *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]) ("Where the moving party has established prima facie that it is entitled to summary judgment, the party opposing the motion must demonstrate the existence of a factual issue requiring a trial of the action by admissible evidence, not mere conjecture, suspicion, or speculation"); *See Acosta v. Trinity Lutheran Church*, 12 Misc. 3d 1175(A), 4 (N.Y. Sup. Ct., Kings County 2006) (citing *Shipman v. Mount Sinai Hosp.*, 290 A.D.2d 294, 295 [1st Dep't 2002]) (finding that defendant failed to offer proof sufficient to create a material issue of fact because it "did not produce a witness with first-hand personal knowledge regarding the snow removal procedures that had taken place immediately prior to [plaintiff's] accident"). Mr. Eid testified that the e-mails sent by Mr. McCullough were general e-mails sent to all District 355 stores in Manhattan. *See Blackwood v. New York City Transit Auth.*, 36 A.D.3d 522, 523 (1st Dep't 2007)

(holding that "liability cannot be based on an alleged breach of [] internal rules, which may impose a duty higher than that actually owed to the public, namely, to exercise ordinary care commensurate with existing circumstances"). Without more, Plaintiff and Parc East cannot meet their burden. It follows then that Parc East would be responsible for snow and ice removal from the Second Avenue sidewalk, and it has not proffered sufficient evidence to show it was not negligent in its snow removal of that site.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that Defendants EQR-East 27th Street Apartments, LLC and Equity Residential Management, LLC's motion for an order granting summary judgment (mot. seq. 003) is denied; and it is further

ORDERED that Defendants Duane Reade, Inc., Duane Reade International, LLC. and Walgreen Co.'s motion for an order granting summary judgment dismissing plaintiff Michelle Penhaskashi's complaint and all cross-claims against them (mot. seq. 004) is granted.

The clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

8/14/2017
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.
HON. KELLY O'NEILL LEVY
J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED			[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ]	DENIED	[ ]	GRANTED IN PART	[X] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
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