SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** 58
Justice

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ANA HERNANDEZ,

Plaintiff,

- v -

FRANCESCO NAVARRA, ANGELA NAVARRA, NOWSTAR LUXURY TRANSPORTATION & LIMOUSINES, INC., NOWSTAR TRANSPORTATION, INC., NOWSTAR CONSULTING, INC., FILIPPO NAVARRA

Defendant.

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INDEX NO. 150268/2013

MOTION DATE 1/9/2017

MOTION SEQ. NO. 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 103, 104, 105, 106, 107, 108, 109, 110, 111

were read on this application to/for Judgment - Summary .

Upon the foregoing documents, it is

Decided that Nowstar Luxury Transportation & Limousines, Inc., Nowstar Transportation, Inc., Nowstar Consulting Inc., and Filippo Navarra (known collectively as "Moving Defendants") motion for summary judgment is granted. With respect to this motion, the following facts are uncontested. Ana Maria Hernandez ("Plaintiff") alleges that on March 12, 2011, while lawfully and properly crossing the sidewalk abutting100 McKibbin Street/78 Manhattan Avenue, New York, New York, 11206 (the "Premises"), she was caused to trip, fall, and sustain severe and permanent personal injuries due to the negligence of all defendants. The Premises were not owned by Moving Defendants and Moving Defendants utilized the driveway of the premises, to store a limousine and that a sign advertising Moving Defendants' business was located on the Premises.

Plaintiff alleges that Moving Defendants' have liability as they made special use of the sidewalk by driving over it and could have caused the defective condition. Plaintiff further alleges that at all times it was the duty of all defendants, their agents, servants, and/or employees to maintain the location in a safe and proper condition so as not to cause injury to those persons lawfully thereon. Defendants failed to put warning signs, barricades, close or otherwise render the sidewalk safe for pedestrian traffic.

Moving Defendants moved for summary judgment and argue that as a matter of law, plaintiff fails to establish liability against them because they were not the owners of the Premises and because they were not in exclusive possession and control of the Premises. In support of the motion Moving Defendants attach the affidavits of Filippo Navarra and Angela Navarra that state that Moving Defendants did not use the subject area exclusively and shared it with the owner of the Premises. The affidavit of Angela Navarra also states that the condition of the sidewalk was due to pouring too much salt on sidewalk, as opposed to driving over the sidewalk. Plaintiff argues that existing case in law in the Appellate Division, First Department mandates denial of the motion under a theory of special use of the driveway and because by driving over the sidewalk to get to the driveway Moving Defendants could have caused the defects.

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Integrated Logistics Consultants v. Fidata Corp.*, 131 AD2d 338 [1st Dept 1987]; *Ratner v. Elovitz*, 198 AD2d 184 [1st Dept 1993]). On a summary judgment motion, the court must view all evidence in a light most favorable to the non-moving party (*Rodriguez v. Parkchester South Condominium Inc.*, 178 AD2d 231 [1st Dept 1991]). The moving party must show that as a matter of law it is entitled to judgment (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 324 [1986]). 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 New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). After the moving party has demonstrated its *prima facie* entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

The Court in *Araujo* held that a tenant or other occupant of a premises "is not an "owner" for purposes of Administrative Code of the City of New York § 7-210; thus, it is not liable for injuries sustained as a result of defects in the sidewalk (*Araujo v Mercer Sq. Owners Corp.*, 95 AD3d 624, 624 [1st Dept 2012]; *quoting Rothstein v 400 E. 54th St. Co.*, 51 AD3d 431, 857 [1st Dept 2008]). There is no dispute here that Moving Defendants are not liable under this section as they are not an owner. Further, Filippo Navarra testified at his deposition that Moving Defendants "never rented any portion of the premises at 102 McKibben St, it was just his mother occasionally doing him a favor." He similarly stated in an affidavit that Moving Defendants had no lease or agreement with respect to parking/sidewalk. Angela Navarra testified that Moving Defendants just parked the limousine from time to time in the driveway. The contention that Moving Defendants were not tenants is not disputed by plaintiff. Thus, at best, Moving Defendants are merely invitees or licensees. Plaintiff has cited no support that liability can be imposed on invitees or licensees for defects in the sidewalk in this situation.

Assuming that Moving Defendants were tenants, the Court would nevertheless also grant summary judgment. Generally, a lessee does not owe a duty to maintain an abutting sidewalk in a safe condition, except if the abutting lessee either (1) created the condition, (2) voluntarily but negligently made repairs, (3) caused the condition to occur because of some special use, or (4) violated a statute or ordinance placing upon the lessee the obligation to maintain the sidewalk

and liability for injuries caused by a violation of that duty" (*Martin v Rizzatti*, 142 AD3d 591, 592–93 [2d Dept 2016]). Here, there is no question of whether Moving Defendants voluntarily but negligently made repairs or violated a statute or ordinance. Moving Defendants have also met their *prima facie* burden that they did not create the condition through the affidavit of Angela Navarra which states that the condition of the sidewalk was due to pouring too much salt on sidewalk. Although through this affidavit Moving Defendants have also met their burden that they did not cause the defect to occur through special use plaintiff argues that Moving Defendants could have indeed caused the condition by driving over the sidewalk. The parties also dispute whether a non-owner can be liable under the special use doctrine, if the non-owner does not have exclusive possession and control of the alleged special-use area.

The parties' have not cited to any Appellate Division, First Department authority on this matter. However, the Appellate Division, Second Department has weighed in on this matter[1] and held that "to recover from a tenant which occupies premises abutting a sidewalk under the theory that the tenant has a special use of the sidewalk, the tenant must be in exclusive possession and control of the alleged special-use area, and the plaintiff must demonstrate that the special use caused the defective condition which proximately caused his or her injuries" (*O'Toole v City of Yonkers*, 107 AD3d 866, 867 [2nd Dept 2013]). Thus, Moving Defendants have established their *prima facie* entitlement to judgment as a matter of law by showing, that it did not have the

[1] Since there is no Appellate Division, First Department authority on this issue the authority from other Appellate Division Departments are controlling (*see D'Alessandro v Carro*, 123 AD3d 1, 6 [1st Dept 2014] (holding that "[i]t is axiomatic that Supreme Court is bound to apply the law as promulgated by the Appellate Division within its particular Judicial Department (McKinney's Cons Laws of NY, Book 1, Statutes §72 [b]), and where the issue has not been addressed within the Department, Supreme Court is bound by the doctrine of stare decisis to apply precedent established in another Department, either until a contrary rule is established by the Appellate Division in its own Department or by the Court of Appeals.").

requisite exclusive control over the premises in question, as the driveway was owned and used by co-defendant. Further, it is not disputed that Moving Defendants did not even have a key to the driveway but needed to call defendant Angela Navarra to open the gate for the driveway each time Moving Defendants needed access.

In opposition to this motion, plaintiff cites to *Torres v. City of NY* (32 AD3d 347, 348 [1st Dept 2006]). Plaintiff argues that *Torres* stands for the proposition that "a party who uses a sidewalk as a driveway has a duty to maintain said sidewalk in a reasonably safe condition." However, plaintiff's reliance on *Torres* is misplaced. First, *Torres* and the cases cited by it were decided at a time prior to the current version of Administrative Code of the City of New York § 7-210, which shifted the burden from the City of New York of sidewalk maintenance and liability for failing to maintain to landowners. Prior to the amendment "liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner" (*Torres* at 348.). Courts were forced to rely on the special use doctrine to find landowners liable for sidewalk defects.[2] Second, the defendant in *Torres* "was the record owner of and resided at 1338 Morrison Avenue on the date the accident occurred" (*id.*). The *Torres* Court's holding focuses on an *abutting landowners'* liability in creating a defective condition or causing a defect to occur because of some special use (*id.*), not tenants. Here, however, it is uncontested that the moving defendants did not own the abutting premises.

Additionally, it was not contested that Moving Defendants stopped using the driveway for parking several months prior to the accident. Thus, even if Moving Defendants were tenants, the

[2] The Court notes that O'Toole was also decided prior to the amendment and still found that for a tenant to be held liable for a sidewalk defect under a special use theory, the tenant "must be in exclusive possession and control of the alleged special-use area" (*O'Toole* at 867).

tenancy had ended as did the special use. As there was no special use or even a connection to the property at the time of the accident, Moving Defendants cannot be held responsible. Similarly, in *Rodriguez v. City of New York*, the Second Department held that summary judgment was proper to a former tenant due to the "unrefuted contention" that defendant "had no connection with the subject premises on the date of the accident" having delivered possession of the accident site several months prior to the accident (144 A.D.2d 352, 353 [2d Dept 1988]).

As the ownership of the premises is uncontested, and there is no dispute that the tenant did not have exclusive use or control of the sidewalk area, under controlling Appellate Division authority, Moving Defendants cannot be held liable under the special use doctrine. As there is no other basis of liability, it is therefore

ORDERED, that Moving Defendants' motion for summary judgment is granted and this action as against Nowstar Luxury Transportation & Limousines, Inc., Nowstar Transportation, Inc., Nowstar Consulting Inc., and Filippo Navarra is dismissed.

This constitutes the decision and order of the Court.

12/26/2017
DATE

DAVID BENJAMIN COHEN, J.S.C.

HON. DAVID B. COHEN
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT		REFERENCE