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

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

Lane, Bonnie
Plaintiff (s),

-v-

Glaves House
Defendant(s).

INDEX NO. 108147/09

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

FILED

DEC 20 2011

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, the court's decision on this (these) motion (s) is as follows:

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

ready for trial

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

Dated: December 16, 2011

Hon. Judith J. Gische, *J.S.C.*

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMIT ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------X

BONNIE LANE,

Plaintiff,

-against-

GLAVES HOUSE, L.P., and 127 W. 43RD ST. CHOPHOUSE, INC.,

Defendants.

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Decision and Order
Index № 108147/09
Motion Seq. 001, 002

Present:
Hon. Judith J. Gische, JSC

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Glaves' n/m (seq. 1) (3212) w/LRC affirm, exhs	1
Chophouse partial opp w/MW affirm, exhs	2
Chophouse n/m (seq. 2) (3212) w/MW affirm, exhs	3
Glaves' affirm in support w/LRC affirm	4
Pltf's opp (both motions) w/MSK affirm, exh	5
Glaves' reply to plaintiff opp w/LRC affirm	6
Chophouse reply to plaintiff opp w/MW afirm	7
Glaves' reply to Chophouse partial opp w/LRC affirm	8
Order, Gische J., 8/10/11	9
Steno minutes 10/6/11	10

Upon the foregoing papers, the decision and order of the court is as follows:

JUDITH GISCHE, J.:

In this personal injury action, defendant Glaves House, L.P. (Glaves House) moves, under motion sequence 001, for an order, pursuant to CPLR 3212, granting summary judgment and dismissing the complaint as against it on the ground that it is an out-of-possession owner/landlord, or in the alternative, for an order granting contractual indemnification in its favor and against co-defendant 127 W. 43rd St. Chophouse Inc. (Chophouse Inc.). Under motion

sequence 002, Chophouse Inc. moves for an order, pursuant to CPLR 3212, granting summary judgment against plaintiff on the issue of liability. As indicated at oral argument on October 6, 2011, the motions, under motion sequence numbers 001 and 002, are consolidated for disposition.

Plaintiff Bonnie Lane (Lane) seeks damages for injuries she allegedly sustained on January 6, 2009,[1] at approximately 10:30 A.M., when she fell down an open vault in the sidewalk abutting the building in which she has resided since June 2000. The building, named "Woodstock Hotel," is owned by defendant Glaves House and located at 127 West 43rd Street in Manhattan (the Building or Woodstock Hotel, as appropriate). At all relevant times, Woodstock Hotel has leased space to nonparty Project FIND, also known as FIND Aid for the Aged, Inc. (hereinafter, Project FIND/Aid). Project FIND/Aid is a federal demonstration project, originally established in 1967 by the National Council on Aging, for the purpose of providing low- and moderate-income and homeless senior citizens with needed services, including, among other things, senior centers and supportive housing residences. Woodstock Hotel houses both a senior center and a limited number of residences for qualifying seniors, including plaintiff.[2] Chophouse Inc. leased retail commercial space on either side of the Building's front entrance for use by two of its separate, but related, restaurants, Heartland Brewery and HB Burger (formerly known, at the time of the incident, as Spanky's BBQ). Heartland Brewery and HB Burger share kitchen space, use of the Building's basement, and access to the sidewalk vault and delivery

[1]Despite an apparent misstatement contained in the pleadings, the accident is alleged to have occurred on January 6, 2009, and not on January 1, 2009.

[2]*See* (www. projectfind.org/ mission.html).

chute at issue in this action. The sidewalk vault is located directly in front of Heartland Brewery.

Lane commenced the instant action by filing a summons and complaint in the office of the New York County Clerk on or about June 9, 2009. Issue was joined by service of Glaves House and Chophouse Inc.'s answers on or about July 26, 2009 and July 24, 2009, respectively. Discovery ensued, and the note of issue was filed on December 16, 2010, triggering service of the instant motions for summary judgment. The following facts are taken from the parties' pleadings, deposition transcripts, affidavits and documentary evidence, and are undisputed unless otherwise indicated.

At her deposition, Lane confirmed the location of the two restaurants on either side of the front entrance, the placement of a large flower pot, or planter, on either side of the front entrance, and the existence of the sidewalk vault, which she calls a "garbage chute," directly in front of one of the restaurants. She testified that on the morning of her accident, she left her apartment to walk to a bank located at 42nd Street and Ninth Avenue, and that she recalls noticing that the "garbage chute" was in an open position when she passed it by. She also noticed uniformed maintenance workers bringing garbage out of the chute and that there was a man sweeping in front of the chute.

After she transacted her banking business, Lane walked back to the Woodstock Hotel. She testified that upon reaching the Building, she was temporarily blinded by sun glare, and as a result, was not aware that she had walked by both planters and the front entrance. When she thought she had reached the front entrance, she turned and reached out for the door. However, instead of feeling the door, she felt air and some sort of cloth or curtain, and then, before she got a chance to get her bearings, she fell into the vault. Lane landed directly on the floor of the

basement, missing the delivery chute entirely. Lane described the fall as sudden, and stated that when she fell, her glasses fell off, her head struck the back wall, her dominant right arm hit a concrete wall, and her left foot hit the floor. She remained in a sitting position on the floor of the vault for about five minutes until the Emergency Medical Services (EMS) workers arrived. They took her by ambulance to Roosevelt Hospital where she was examined, x-rayed and admitted. Her arm had broken in three places and was placed into a sling. She was released two days later, on January 8, 2009, and given a cane to help her walk, as she had also injured her foot during her fall. For a two-month period following her return to the Woodstock Hotel, she was provided with a visiting nurse, a housekeeper and physical therapy.

With respect to the sidewalk vault, Lane testified that she did not realize it was open because she did not see any orange cones (Plaintiff's Dep., at 22, 95), nor did she see open doors, the iron gate which "would have to be open for them to bring the garbage out" (*id.* at 85)[3] or the man she saw earlier, sweeping alongside the open vault (*id.* at 83 - 84, 95). Lane was also questioned about the cloth, or drapery she had felt when she reached out for the door. Her answers, however, reveal little more than the fact that she was expecting to feel a door and not something hanging, that she fell just as she touched the cloth, that the cloth was blue or bluish in color, and that she "thought they was cleaning my building, putting up decorations or something at my door. I didn't know I was at the garbage [chute]" (*id.* at 24 - 26, 95).

For its deposition, Chophouse Inc. produced its vice president of operations, Randall McNamara (McNamara). According to McNamara, at the time of plaintiff's accident, he was a

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[3]It is not clear whether Lane is referring to a part of the vault or to an entirely different device when she refers to "iron gates with like criss-cross gates that you slide back and forth" (Lane's Dep., at 84).

manager at Heartland Brewery, working the first shift on the morning of January 6, 2009. Although he did not witness the accident, he did go to see plaintiff upon being informed by his staff that a woman had fallen into the delivery chute. He spoke briefly with Lane, who was sitting up against a wall, and then directed the EMS workers to her location in the basement. McNamara also spoke with a policeman who appeared at the scene and a witness named Mike Rubenstein, who said that he was walking down the street when he suddenly saw a woman fall into the delivery chute. McNamara prepared an incident report about the occurrence as part of his managerial duties (Plaintiff's Aff. in Opp., Exhibit A, and Graves House Notice of Motion, Exhibit J).

Although he did not recall what type of delivery was being made at the time of the accident, or recall any information about that particular delivery, McNamara was able to report that the vault was, in fact, open, and that he observed one cone by the "exterior" (McNamara Dep., at 43). He was also able to explain the procedures followed by the restaurant's staff for a typical delivery, namely, that when a delivery is being made, the delivery person offloads his merchandise onto a pallet jack or hand truck, brings it over to the delivery vault and rings a bell (*id.* at 18 - 19). The on-duty receiving porter would then manually open the vault doors, put out cones and start the motorized conveyor belt so that he could receive the merchandise in the basement which is six feet below the sidewalk, and check the merchandise against the written invoice (*id.* at 19, 20). McNamara identified the on-duty receiving porter the morning of January 6, 2009, as an individual named Theirno Timboudou (Timboudou), who no longer works for Chophouse Inc. He recalled speaking with Timboudou about the incident, but he does not recall what Timboudou said (*id.* at 36 - 37).

Although Chophouse Inc. does not dispute that Lane sustained physical injuries when she fell, Chophouse Inc. argues that the complaint must be dismissed because it had no duty to warn pedestrians, including plaintiff, of the opened sidewalk vault because it, and the fact that it was in use, was both open and obvious, and "readily observable by those 'employing the reasonable use of their senses'" (*Pinero v Rite Aid of N.Y.*, 294 AD2d 251, 252 [1st Dept], *affd* 99 NY2d 541 [2002] [citation omitted]; *Paulo v Great Atl. & Pac. Tea Co.*, 233 AD2d 380 [2nd Dept 1996]; *Tarricone v State of New York*, 175 AD2d 308, 309 [3rd Dept], *lv denied* 78 NY2d 862 [1991]). Not only does Chophouse Inc. deny any negligence, but it specifically asserts that the proximate cause of Lane's accident and injuries was her inability to accurately see her surroundings due to her severely limited vision, and her failure to have an aide or other sighted person assist her on her walk to the bank.

Chophouse Inc. offers portions of Lane's testimony in which she acknowledged that she had seen the doors in an open position approximately 10 - 15 times previously, including earlier that morning, and argues that her testimony establishes not only that the condition of the vault at the time of her accident was open and obvious, but that Lane knew to look out for this precise situation. Chophouse Inc. also offers portions of her testimony in which she stated that she did not see any cones, and that she had passed both planters and the front entrance as evidence of her seriously limited vision. Defendant points to Lane's testimony in which she stated that she had been going to her eye doctor, Dr. Friedland, because she had been having problems with her eyes and that they might have discussed the possibility of cataracts or glaucoma, she was not quite sure (Plaintiff's Dep., at 103). Lane's worsening eye problems, defendant explains, are why Lane was unable to distinguish between the Building's front entrance and the open doors of the

sidewalk vault, and the real reason she fell on the day of her accident.

Next, Chophouse Inc. argues that Lane's repeated refusal to allow an aide or other person to act as a visual guide outside her home, when she walked outside her home, meets the standard for finding that her conduct fell below any permissible standard of reasonable care as a matter of law. Chophouse Inc. supports this argument with Lane's own acknowledgment that her granddaughter had suggested, maybe a year prior to the accident, that she needed someone to travel around with outside her apartment (*id.* at 108 - 109), as well as with notes contained in the Roosevelt Hospital record pertaining to the January 6, 2009 admission, and progress notes contained in the social work records maintained at the Woodstock Hotel, pertaining to Lane's visits with social workers between the period of July 25, 2006 and July 25, 2008.

The chart contained in the Roosevelt Hospital record contains notations to the effect that Lane is a 79-year old woman with legal blindness who, at the time of admission, could not see fingers which were held up, approximately, one foot from her face (Chophouse Inc., Notice of Motion, Exhibit I). The social work progress notes provide, in relevant part:

> October 30, 2006: It appears that her eyes are problematic.
>
> August 14, 2007: The worker observed that Ms. Lane was unable to find her way out of the SW office on her own. Ms Lane's vision was impaired to the extent that she was unable to find my arm to hold for guidance. SW escorted Ms. Lane to the elevator. Ms. Lane reported that she has difficulty navigating unfamiliar surroundings. She also stated that she goes onto the street on her own and walks slowly. SW asked Ms. Lane if she would be interested in being referred for services for the vision impaired. Ms. Lane agreed to discuss this with her assigned SW.
>
> December 24, 2007: Ms. Lane stated that she may need assistance in riding the subway. SW asked Ms. Lane how she was [sic] been managing. Ms. Lane stated that she will ask people on the subway to guide her and let her know when it is her stop.

> March 10, 2008: SW communicated to [] Ms. Lane that a while back she communicated to SW that she needed assistance in riding the subway. SW again suggested the idea of obtaining a home attendant, which Ms. Lane refused. SW communicated to Ms. Lane that the home attendant will be helpful in escorting her to all of her doctor appointments and with other things, but Ms. Lane refused

(Chophouse Inc. Notice of Motion, Exhibit L).

Defendant cites to *Andre v Pomeroy* (35 NY2d 362 [1974]) and *Diem v Adams* (266 App Div 307 [1st Dept], *app granted* 266 AD 948 [1943]) for the proposition that where one's conduct falls below a permissible standard of care, another cannot be held liable for injuries sustained as a result of that first party's negligent actions or omissions. This, Chophouse Inc. contends, provides a basis for finding, as a matter of law, that it was Lane's refusal to have an aide to guide her on her walk to the bank which was the proximate cause of her accident, and not any action or omission on its part.

The facts in *Andre v Pomeroy* are distinguishable from the facts in the instant action, rendering that court's holding irrelevant to the resolution of this motion (plaintiff Andre, who was a passenger in defendant's vehicle, sustained injuries when the defendant driver took her eyes off of the road in heavy traffic in order to look for something in her purse, and drove into the car in front of her. Not only are the facts very different from those involving Lane, but there was no claim that the plaintiff was contributorily negligent, and plaintiff was granted summary judgment in her favor).

While the underlying facts in *Diem v Adams* are not altogether dissimilar from Lane's circumstances, reliance on the holding in that action is, nevertheless, misplaced. The plaintiff, Oscar Diem, who had a physical limitation to his right leg, was driving his vehicle and the co-plaintiff, his wife, was a sleeping passenger, when they were involved in a collision with

defendant's vehicle. Both plaintiffs were injured in the accident. During the trial of this action, Oscar Diem acknowledged that his physical limitation required him to take additional steps in order to brake his vehicle. Following a substantial jury verdict in favor of plaintiff and his wife, the trial court granted a motion to set aside the verdict, and plaintiffs appealed. In affirming the action taken by the trial court with respect to Oscar Diem (and reversing with respect to his wife), the appellate court determined only that, by driving with his particular physical limitation, Oscar Diem was not free from contributory negligence, a prerequisite for the specific verdict rendered by the jury in that action (*id.* at 310). Notwithstanding defendant's argument, the appellate court's affirmance as to Oscar Diem does not serve as a basis for preventing a jury, if appropriate, from evaluating the comparative fault of the parties in this action.

It is well settled that on a motion for summary judgment, the proponent of the 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, 853 [1985]). It is also well settled that "the court should draw all reasonable inferences in favor of the nonmoving party" (*Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 [1st Dept 1989]).

To this end, neither Lane's knowledge that the sidewalk vault was operational, nor her knowledge that it had been in use earlier that morning, requires a finding as a matter of law, that her visual acuity, even if limited, and/or her failure to have an aide, was the sole and proximate cause of her accident. Contrary to Chophouse Inc.'s assertion, the testimony of McNamara regarding routine procedures and his testimony that on the date of the accident, he saw one cone at the "exterior" (McNamara Dep., at 43 - 44), does not eliminate questions of material fact as to

precisely what procedures and precautions were taken and by whom, with respect to the open sidewalk vault on the day and at the time of plaintiff's accident. McNamara acknowledged that he did not witness Lane fall, or Timboudou receive the delivery (*id.* at 18 - 20), yet absent from the motion papers is testimony, oral or written, from either of the two individuals McNamara identified as possible witnesses to this accident, Mike Rubenstein and Timboudou, confirming what, if any, precautions were taken (presumably by Timboudou) to warn pedestrians that the sidewalk vault doors were open, and to prevent the type of accident which ultimately occurred. Assumptions based upon routine procedure and upon McNamara's recollection of one cone at the "exterior," are inadequate, for the purpose of summary judgment, to prove that Chophouse Inc. was not negligent in its use of the vault at or about the time of plaintiff's accident. Additionally, any issues related to whether the open sidewalk vault was inherently dangerous, or in violation of Administrative Code of the City of N.Y. §§ 19-117 and 19-119, not previously rejected by this court during oral argument, are, like the issues pertaining to why plaintiff fell into the sidewalk vault, best left to the trier of fact.

Finally, the motion must be denied for the reasons set forth in *Saretsky v 85 Kenmare Realty Corp.* (85 AD3d 89 [1st Dept 2011]), a slip and fall action in which the motion court granted defendant's motion for summary judgment on the ground that an allegedly dangerous portion of sidewalk was "open and obvious." In reversing the decision and order, the Appellate Division stated "[i]n this personal injury action, we reiterate the well-established principle that a finding of 'open and obvious' as to a hazardous condition is never fatal to a plaintiff's negligence claim. It is relevant only to plaintiff's comparative fault" (*id.* at 90). Accordingly, while the evidence offered by defendant may raise issues of comparative negligence, it does not preclude a

finding by the trier of fact that Chophouse Inc. was, in whole or in part, liable for Lane's fall and resulting injuries.

With respect to that aspect of motion sequence 001 in which Glaves House seeks a summary judgment dismissal of the plaintiff's case against it on the grounds that it had no duty to repair or maintain the premises on which Lane sustained her injuries, or in the alternative, for an order granting contractual indemnification in its favor and against Chophouse Inc., that motion is denied without prejudice to renew upon proper papers.

Glaves House submits a sworn affidavit from John Calvert (Calvert), the Section Head for housing services at Project FIND/Aid, who states that Glaves House leased the Building to Project FIND/Aid, that Project FIND/Aid, in turn, leased space to Chophouse Inc., and that the lease between Project FIND/Aid and Chophouse Inc. was in full force and effect at the time of plaintiff's accident (Glaves House Notice of Motion, Exhibit H). However, in its Affirmation in Support of its Notice of Motion, Glaves House states, at paragraph 7, in relevant part "GLAVES HOUSE leased a portion of the property to Co-Defendant CHOPHOUSE." No explanation is provided for this discrepancy in Glaves House's papers.

Furthermore, an examination of the motion papers reveals, at Exhibit G, a copy of a lease agreement between Project FIND/Aid and Chophouse, a copy of a lease agreement between Glaves House and an entity identified as Lee Family Food Corp., and a document entitled "Collateral Assignment of Lease for premises . . . on the ground floor of the building located at 127 West 43rd Street, New York, New York," involving entities identified as Commerical Capital Corporation, Woodstock Housing Development Fund Corporation for Senior Citizens, and Rio Churrascaria, Inc., without further explanation. While both defendants reference a lease

agreement between Glaves House and Project FIND/Aid, neither defendant annexed a copy of this document, preventing this court from reviewing all documents relevant and necessary for the resolution of the Glaves House motion under motion sequence 001.

Accordingly, it is hereby

ORDERED that the aspect of the consolidated motions which seeks a summary judgment dismissal of plaintiff's complaint is denied; and it is further

ORDERED that the balance of the consolidated motions is denied without prejudice to renew upon proper papers; and it is further

ORDERED that this case is ready to be tried; plaintiff shall serve a copy of this decision and order on the Office of Trial Support so that the trial may be scheduled.

This constitutes the decision and order of the court.

Dated: New York, New York
December 16, 2011

So Ordered:

Hon. Judith J. Gische, J.S.C.