[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. PART 8

Justice

Index Number : 111185/2008
MARTORAL, TERESA L.
vs.
KAUFMAN MANAGEMENT
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. 111185/08
MOTION DATE 11/15/12
MOTION SEQ. NO. 004

The following papers, numbered 1 to 18, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ No(s). 1-14
Answering Affidavits — Exhibits ____ No(s). 15-17
Replying Affidavits ____ No(s). 18

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: 3/20/12

JOAN M. KENNEY J.S.C.

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: IAS Part 8

----------X

Teresa L. Martoral,

Plaintiff,

-against-

DECISION AND ORDER
Index Number: 111185/08
Motion Seq. Nos.: 03 and 04

City of New York, Kaufman Management Co. LLC, 450 7th Ave. Associates, and Starbucks Corporation,

Defendant.

----------X

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of these motions to dismiss.

Papers (Motion Seq. 3)	**Numbered**
Notice of Motion, Affirmation	1-2
Exhibits	3-11
Opposition, Exhibits	12-15
Reply	16
(Motion Seq. 4)	
Notice of Motion	1
Affirmation, Exhibits	2-14
Opposition, Exhibits	15-17
Reply	18

Motion Sequences 003 and 004 are consolidated herein for disposition.

In this personal injury action, defendants, Kaufman Management Co. LLC, 450 7th Ave. Associates (Motion Seq. 004), and Starbucks Corporation (Motion Seq. 003), move for an Order, pursuant to CPLR § 3212, dismissing the complaint.

Factual Background

On May 24, 2007 Teresa Martoral was walking out of a Starbucks Coffee Shop (Starbucks), when she tripped and fell on a part of damaged sidewalk in front of Starbucks.

Defendant, Starbucks Corporation, is a lessee of the space for one of their retail stores at 450 7th Ave., New York, NY (the property). Defendant Kaufman Management Co. is an out-of-possession managing agent of the property. Defendant 450 7th Ave. Associates is the owner of the property.

There is no dispute that the lease agreement that Starbucks had with 450 7th Ave. does not place any responsibility on Starbucks for the repair and/or maintenance of the sidewalk area. The lease specifically states that, "Landlord shall maintain and repair the exterior of and the public portions of the building...and the structural components of the premises." (Store lease ¶ 4).

Arguments

Defendant Starbucks Corporation argues that they are not liable to plaintiff because: (1) the NYC Administrative Code, Section 7-210; (2) because it did not construct, repair, and/or maintain the sidewalk in question; and (3) nor were they required to, as per the lease agreement.

Defendants 450 7th Ave. Associates and Kaufman Management Co. claim that the action must be dismissed because the plaintiff was unable to identify the location of her accident or the cause of her fall. Additionally, they argue that defendants did not cause or create the alleged defect as they did not make any prior repairs to the sidewalk or anywhere in front of the store, and therefore cannot be held liable.

Plaintiff contends that the within motions must be denied because: (1) defendants were on constructive notice of the alleged dangerous condition of the sidewalk defect; and (2) there are triable issues of fact to be considered.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by

affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in 3212(c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The rule governing summary judgment is well established: "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 University Medical Center*, 64 NY2d 851 [1985]; *Torterello v Carlin*, 260 Ad2d 201 [1st Dept 1999]).

In order to establish a prima facie case of negligence in a trip and fall action, a plaintiff must demonstrate that a defendant either created a dangerous condition, or had actual and/or constructive notice of the defective condition alleged (see *Judith D. Arnold v New York City Housing Authority*, 296 AD2d 355 [1st Dept 2002]). A genuine issue of material fact exists when defendant fails to establish that it did not have actual or constructive notice of a watery or hazardous condition. (*Aviles v. 2333 1st Corp.*, 66 A.D.3d 432, 887 N.Y.S.2d 18 [1st Dept. 2009]; *Baez-Sharp v. New York City Tr. Auth.*, 38 A.D.3d 229, 830 N.Y.S.2d 555 [1st Dept. 2007]). In *Baez*, the Court stated that defendant "failed in its initial burden, as movant, to establish, as a

matter of law, that it did not create and did not have actual or constructive notice of the watery and hazardous condition."

The NYC Administrative Code, Section 7-210, titled Liability of Real Property Owner For Failure to Maintain Sidewalk in a Reasonably Safe Condition, states as follows:

> a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.
>
> b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk... (New York City, N.Y., Code sec. 7-210)

"A managing agent not in complete and exclusive control is not liable for mere nonfeasance." This is a burden the plaintiff must prove. (see, *Dempsey v. Mt. Ebo Associates, Inc.*, 262 A.D.2d 229, 692 N.Y.S.2d 344 [1st Dept. 1999]).

Here, Starbucks is merely a lessee, not the owner of the building, thus not liable per the NYC Administrative Code. Further, Starbucks' lease agreement does not place any burden on them to maintain the sidewalk. Therefore, Starbucks cannot be held liable for personal injuries sustained on the sidewalk adjacent to their store. Additionally, plaintiff gives no proof that Kaufman Management had "complete and exclusive control" over the Starbucks premises, and as such, Kaufman cannot be held liable. (See also, *Gardner v. 1111 Corp.*, 286 A.D. 110, 141 N.Y.S.2d 552 [1st Dept. 1955]; and *Hakim v. 65 8th Ave., LLC*, 42 A.D.3d 374, 840 N.Y.S.2d 323 [1st Dept. 2007]).

Defendant 450 7th Ave. asserts that they should also be relieved of liability in this action because plaintiff cannot identify the location of her accident. Plaintiff, however, stated at her deposition that "the sidewalk was damaged where [she] fell." (Martoral transcript at 32). This disagreement leads to a factual dispute, not allowing for summary judgment in the defendant's favor. As such, defendant 450 7th Ave. will remain in the action. By their very nature, negligence cases do not lend themselves to summary judgment because the issue of whether the defendant (or plaintiff) acted reasonably under the circumstances is rarely an issue that can be decided as a matter of law (*Ugarriza v. Schmieder*, 46 N.Y.2d 471 [1979]). Accordingly, it is hereby

ORDERED that defendant Starbucks Corporation's motion for summary judgment dismissing the complaint, is granted; and it is further

ORDERED that defendant Kaufman Management Co.'s motion for summary judgment dismissing the complaint, is granted; and it is further

ORDERED that defendant 450 7th Ave. Associates' motion for summary judgment dismissing the complaint, is denied, in its entirety; and it is further

ORDERED that the remaining parties proceed to mediation, forthwith

Dated: March 28, 2012

ENTER:

Joan M. Kenney, J.S.C.