SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ **PART** _____
Justice

Index Number : 115725/2009
RUSSIAN CHILDREN'S WELFARE
vs.
200 PARK SOUTH ASSOCIATES LLC
SEQUENCE NUMBER : 004
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

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Is decided in accordance with the annexed decision.

FILED
SEP 12 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/10/12

_____, 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: Part 55

----------x

RUSSIAN CHILDREN'S WELFARE SOCIETY, INC.,

Plaintiff,

Index No. 115725/09

-against-

DECISION/ORDER

200 PARK SOUTH ASSOCIATES LLC, ABS PARTNERS REAL ESTATE, LLC and MIDWAY INVESTORS, LLC,

Defendants.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2,3
Cross-Motion and Affidavits Annexed.....	
Answering Affidavits to Cross-Motion.....	
Replying Affidavits.....	4
Exhibits.....	5

Plaintiff Russian Children's Welfare Society, Inc. ("Russian Children's") commenced the instant action to recover for damage to its office stemming from two separate flood incidents on November 18, 2008 and during the weekend of December 25-27, 2009. Defendant Midway Investors, LLC ("Midway") now moves for an order pursuant to Civil Practice Law and Rules ("CPLR") § 3212 dismissing plaintiff's complaint and all cross-claims asserted against it. For the reasons set forth below, Midway's motion is denied.

The relevant facts are as follows. Plaintiff commenced the instant action to recover for damage to its office located at 200 Park Avenue South, New York, New York (the "building"),

Suite 1617 (the "premises") as a result of two floods, one which occurred on November 18, 2008, and the other which occurred during the weekend of December 25-27, 2009. At the time of the occurrence, defendant 200 Park South Associates, LLC ("200 Park") was the owner of the building and defendant ABS Partners Real Estate, LLC ("ABS") was the management company for the building.

On or about May 1, 2006, Midway entered into a contract with 200 Park in which Midway leased Suite 1705 in the building beginning on May 3, 2006 for a period extending until July 31, 2011 (the "Lease"). Suite 1705 was located above plaintiff's office space. The Lease provided that Midway would maintain the leased premises, which included Suite 1705 plus a portion of the outside terrace area, known as a Setback. The Setback was defined as "the area designated by cross hatching on the plan annexed hereto as Exhibit C." Following discovery in the case, it appears that the floods were caused by a clogged drain located on the terrace area leased by Midway. However, whether the drain is on the Setback, and thus, Midway's property, is disputed by the parties.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the instant action, Midway is not entitled to summary judgment as there exists issues of fact as to whether the clogged drain, which caused the flooding, was located on Midway's leased property. Midway asserts that Exhibit C to the Lease shows that it is not responsible for the portion of the terrace closest to the wall facing the street, which it asserts is where the drain is located. Rather, it asserts that maintenance of said drain is the responsibility of 200 Park and ABS. However, it is not clear from the Lease where the drain is located and thus, whether it is on Midway's leased property. The deposition testimony provided by both Gary Forster, ABS's Projects Manager and Superintendent of the building as well as Denise Shirley, a limited partner of Midway, raises an issue of fact as to whether the drain is part of Midway's leased premises. Further, even if the drain was not part of Midway's lease premises, there exists an issue of fact as to whether the drain's protective screen was on Midway's leased property.

Moreover, there exists an issue of fact as to whether Midway caused or created the condition. Pursuant to the Lease, "(e) Tenant agrees to maintain the Setback in good condition and repair at all times, and to repair promptly conditions of disrepair from and after the date of this Lease." Midway asserts that there is no definitive evidence that the leaves clogging the drain were from the plants it maintained on the terrace. However, testimony from both plaintiff as well as Mr. Forster raises an issue of fact as to whether it was Midway's poor maintenance of the plants on the terrace which caused the flood. Both plaintiff and Mr. Forster asserted that the flood was partially caused by Midway's planting of bamboo on the leased portion of the terrace. Further, there is testimony that almost all of the material clogging the drain was leaves identical to Midway's plantings. There is also testimony that Midway's decked terrace was about four feet away from the drain and that there were planters with bamboo in them which were in the

"general vicinity of the drain." Mr. Forster testified that foliage from certain bamboo plants placed by Midway on its terrace clogged the drain which overflowed resulting in the alleged damage and that at the time of the first alleged flood, "there was a substantial amount of dried bamboo leaves in the drain." Mr. Forster further testified that Midway left its bamboo plants on its terrace during the winter, and thus, the plants died and dropped their leaves, which in turn, clogged the drain. Moreover, Midway testified that it did indeed keep two bamboo plants on the terrace and that after the first alleged flood, Ms. Shirley was shown the drain and that at that time, she saw leaves in the drain. Thus, as there exists triable issues of fact as to whether Midway caused or created the alleged damage, Midway's motion for summary judgment must be denied.

Accordingly, Midway's motion for summary judgment is denied. This constitutes the decision and order of the court.

Dated: 9/10/12

ENTER

J.S.C.

FILED

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