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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ Justice

PART _____

Index Number : 106792/2010
REQUA, SANDRA J.
vs.
APPLE
SEQUENCE NUMBER : 001
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

is decided in accordance with the annexed decision.

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

Dated: 4/1/13

_____, 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

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SANDRA J. REQUA,

Plaintiff,

Index No. 106792/2010

-against-

DECISION/ORDER

APPLE INC., BOSTON PROPERTIES INC., BOSTON PROPERTIES LLC, BOSTON PROPERTIES LIMITED PARTNERSHIP, BOSTON PROPERTIES INC d/b/a BOSTON PROPERTIES LIMITED PARTNERSHIP, 767 FIFTH PARTNERS LLC and MOED DE ARMAS & SHANNON ARCHITECTS P.C.,

Defendants.

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BOSTON PROPERTIES INC., BOSTON PROPERTIES LLC, BOSTON PROPERTIES LIMITED PARTNERSHIP, BOSTON PROPERTIES INC d/b/a BOSTON PROPERTIES LIMITED PARTNERSHIP and 767 FIFTH PARTNERS LLC ,

Third-Party Plaintiffs,

Index No. 590316/2012

-against-

GENSLER,

Third-Party Defendant.

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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

Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Sandra Requa commenced the instant action to recover damages for personal injuries she allegedly sustained when she fell outside the Apple store on Fifth Avenue. Defendant Apple Inc. ("Apple") now moves for an order pursuant to CPLR § 3212 granting it summary judgment. Defendants and third-party plaintiffs Boston Properties, Inc., Boston Properties, LLC, Boston Properties Limited Partnership, Boston Properties, Inc. s/h/a Boston Properties Inc. d/b/a Boston Properties Limited Partnership and 767 Fifth Partners LLC (collectively referred to herein as "Boston Properties") have cross-moved for an order pursuant to CPLR § 3126 striking Apple's answer and cross claims, pursuant to CPLR § 3124 compelling Apple to produce Jason Barlia for a deposition and pursuant to CPLR § 3214(b) lifting the say on discovery in place pending Apple's summary judgment motion. For the reasons set forth below, Apple's motion is granted and Boston Properties cross-motion is denied as moot.

The relevant facts are as follows. On or about December 8, 2009, plaintiff exited and fell outside the Apple store located at 767 Fifth Avenue in New York City. Apple's retail space at this location has a distinct clear glass cube (the "Cube") sitting atop the outdoor plaza (the "Plaza"). The Cube serves as the entrance to Apple's store, which is underneath the Plaza. In 2009, when the accident occurred, the pavers immediately surrounding the Cube were six inches lower than the level of the surrounding Plaza (the "Recessed Area"), as if the Cube were surrounded by a moat. The Cube and the Plaza were connected by a metal grate placed across the Recessed Area that provided a walkaway between the Plaza and the doors of the Cube (the "Bridge"). On the day the accident at issue herein occurred, plaintiff exited the Apple store,

crossed the Bridge and claims to have lost her footing at the edge of the Recessed Area, where she fell and injured herself.

Apple entered into a lease for the property in 2005 (the "2005 Lease"). Apple's leased premises are described in the 2005 Lease as "the space on the . . . plaza level, of the Building including the Cube to be erected thereon . . .." Apple did not lease or own either the Plaza or the Recessed Area. Pursuant to the 2005 Lease, the landlord, now Boston Properties, had the duty to "maintain the plaza in good condition and repair." Any improvements to the Plaza were to be made by the landlord but the 2005 Lease provided that the improvements "be presented to Apple for review" and "[a]ny outstanding design differences between the two parties [to] be discussed by [landlord] and Apple CEO, Steve Jobs."

The court first turns to Apple's motion for summary judgment. 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, Apple has established its *prima facie* right to summary judgment as it has shown that it owed no duty to plaintiff. In order for a defendant to be held liable for negligence, the plaintiff must establish that the defendant owes some duty of care to the plaintiff. *See Pulka v. Edelman,* 40 N.Y.2d 781 (1976); *see also Palsgraf v. Long Is. R. R. Co.,* 248 N.Y.

339, 342 (1928). "[A]bsent such duty, as we have said before, there can be no breach of duty, and without breach of duty there can be no liability." *Kimbar v. Estis,* 1 N.Y.2d 399, 405 (1956). As a general matter, an owner owes no duty to warn or to protect others from a defective or dangerous condition on neighboring premises. *Galindo v. Town of Clarkstown*, 2 N.Y.3d 633, 636 (2004). However, courts recognize two exceptions to the general rule: (1) when an owner affirmatively created or contributed to the defective area; or (2) when an owner made special use of the defective area. *See id.*; *Kaufman v. Silver*, 90 N.Y.2d 204 (1997); *Vrabel v. City of New York*, 308 A.D.2d 443 (2nd Dept 2003).

Here, the evidence presented by Apple demonstrates that it neither created nor controlled the Recessed Area where plaintiff was injured. The original design for the area surrounding the Cube called for a flat profile with no drop down in elevation. However, at the end of 2004 the New York City Planning Commission ("CPC") wanted the Plaza to "respond" in some way to the Cube, so defendant architect Moed De Armas & Shannon Architects, P.C. ("Moed") redesigned the Plaza to include the Recessed Area around the Cube. Thus, it was Moed that designed the Recessed Area, not Apple. Furthermore, the 2005 Lease clearly states that the Recessed Area is the "Landlord's Work" and it was built by contractors hired by the landlord. Defendants' argument that Apple's undisputed coordination in the design process demonstrates that it helped create the Recessed Area is without merit. It is immaterial that Apple may have had input in the design process or coordinated with defendants regarding the installation of the Recessed Area as input or coordination is insufficient to create liability.

Additionally, the evidence presented by Apple demonstrates that did not make special use of the area to impute liability. An adjacent landowner can be liable for defective conditions on a

neighbor's property under the special use doctrine if: (1) the conditions were created for the adjacent property owner's benefit and (2) the adjacent property owner controlled the property and was free to fix any defects in that property. *Id.* In the instant matter, the evidence demonstrates that Apple neither benefitted from nor had control over the Recessed Area. As discussed above, the Recessed Area was designed to appease CPC, not Apple. Furthermore, pursuant to the 2005 Lease, Apple did not have the ability to repair or change the Recessed Area. The 2005 Lease provided that any changes to Plaza had to be "presented to Apple to review" but it did not give Apple the right to affirmatively make any changes itself. Thus, Apple did not have the requisite control over the area to create liability through the special use doctrine.

Defendants' argument that control is established by evidence of Apple periodically employing security guards to control crowds on the Plaza or evidence of Apple's maintenance of the Bridge is without merit. The alleged cause of plaintiff's injury was a design defect in the recessed area. Even if Apple employed security guards or performed some maintenance, that would not establish Apple's control over the design process.

Defendant has failed to present evidence raising a triable issue of fact as to Apple's control of the property. The deposition testimony of Mr. Shannon, a principal of Moed, that "[t]he design that we prepared with regard to the plaza, to my knowledge, required Apple's consent" is insufficient to raise a triable issue of fact as to whether Apple controlled the Recessed Area as it is directly refuted by the 2005 Lease terms. The Lease provides that all additional Plaza improvements be "presented to Apple for review." It does not require Apple to consent to the design of the Plaza before it is implemented. Simply put, nothing in the record reveals that the Plaza, including the Recessed Area, could not be built or altered but for Apple's consent. If

any of the defendants chose not to move forward with a plan to redesign the Recessed Area because Apple, upon review, rejected the idea, or modified their plans based on Apple's suggestions, that was their choice. Apple's input in the overall process is simply insufficient to impose liability.

Boston Properties contention that summary judgment should be denied pursuant to CPLR § 3212(f) because the deposition of Apple store Manager Jason Barlia remains outstanding is unavailing. "A determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence." *Rutture & Sons Constr. Co. v. Petrocelli Constr.*, 257 A.D.2d 614 (2d Dept 1999). Here, none of the facts within Mr. Barlia's knowledge are relevant to wether Apple had a duty to plaintiff as a lessee of adjacent property to the Recessed Area. While Boston Properties argues that Mr. Barlia has probative and exclusive testimony regarding Apple's external security, lighting, the Bridge and notice of prior accidents, this information would not change the essential fact of the case, namely that Apple did not create nor control the Recessed Area.

Similarly, Moed's contention that summary judgment should be denied because the deposition of third-party defendant Gensler, the architect who prepared the designs from which the Recessed Area was constructed, remains outstanding is also unavailing. Any information regarding Apple's involvement in the design process is irrelevant as Apple did not create the design for the Recessed Area, nor did it have final authority over the design.

Finally, Boston Properties' contention that summary judgment should be denied because Apple still owes contractual defense/indemnity to Boston Properties is without merit as this court already determined that Apple did not create or control the Recessed Area, which is the area

where plaintiff's alleged injuries were sustained. Thus, any indemnification claim based on Apple's "conduct/management of the [Recessed Area]" is without merit.

Accordingly, Apple's motion for an Order pursuant to CPLR § 3212 granting it summary judgment is granted and plaintiff's complaint is hereby dismissed as to Apple. The Clerk is directed to enter judgment accordingly. Based on this holding, Boston Properties' cross-motion seeking to lift the stay in this action pending resolution of this motion, striking Apple's answer and cross claims, and compelling Apple to produce Jason Barilia for a deposition is rendered moot. If Boston Properties still seeks to depose Jason Barilia, they will have to do so as a non-party witness. This constitutes the decision and order of the court.

Dated: 4/1/13

Enter: _____
J.S.C.