

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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BEVERLEE JONES,

Plaintiff,

- against -

1620 WESTCHESTER AVENUE LLC, BANK OF AMERICA CAPITAL ADVISORS LLC d/b/a BANK OF AMERICA, CHERA BLDG PROPERTIES LLC and H & R BLOCK EASTERN ENTERPRIESES, INC. d/b/a H & R BLOCK,

Defendants.

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DECISION AND ORDER

Index No. 301049/2012

PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated May 7, 2015 of defendant Chera Bldg Properties LLC and the affirmation and exhibits submitted in support thereof; the affirmation in opposition dated May 19, 2015 of defendants Bank of America, N.A. s/h/a Bank of America Capital Advisors LLC d/b/a Bank of America and 1620 Westchester Avenue LLC; plaintiff's affirmation in opposition dated February 12, 2015 [*sic*]; the affirmation in opposition dated May 20, 2015 of defendant H&R Block Eastern Enterprises, Inc.; movant's affidavit dated May 26, 2015; movant's affirmation in reply dated June 17, 2015; and due deliberation; the court finds:

In this action to recover for a trip and fall on a sidewalk defect, defendant Chera Bldg Properties LLC ("Chera") previously moved for summary judgment. The undersigned denied the motion, finding that Chera's proof regarding its lack of ownership of the property abutting the subject sidewalk was incompetent to meet its *prima facie* burden of tendering sufficient evidence in admissible form, that Chera failed to demonstrate that the sidewalk defect was too trivial to be actionable, and that Chera failed to submit evidence that it possessed neither actual nor

constructive notice of the defect. Chera now moves for leave to renew and reargue the prior decision.

In support of the motion for leave to renew, Chera submits an affidavit of an employee stating that Chera did not have notice of the condition. Renewal must be "based upon new facts not offered on the prior motion that would change the prior determination," CPLR 2221(e)(2), upon "reasonable justification for the failure to present such facts on the prior motion," CPLR 2221(e)(3). Even where the new evidence was available at the time of the original motion, the court has discretion to "relax this requirement . . . in the interest of justice." *Atiencia v. MBBCO II, LLC*, 75 A.D.3d 424, 904 N.Y.S.2d 59 (1st Dep't 2010). Courts may also relax the requirement of reasonable justification in the interest of justice. *See Matter of Pasanella v. Quinn*, 126 A.D.3d 504, 5 N.Y.S.3d 413 (1st Dep't 2015). However, "[w]hile the statutory prescription to present new evidence 'need not be applied to defeat substantive fairness,' such treatment is available only in a 'rare case,' such as where liberality is warranted as a matter of judicial policy, and then only where the movant presents a reasonable excuse for the failure to provide the evidence in the first instance." *Henry v. Peguero*, 72 A.D.3d 600, 602, 900 N.Y.S.2d 49, 51 (1st Dep't 2010) (citations omitted).

Here, Chera offered no explanation whatsoever why it did not submit such proof on its prior motion and offered no explanation for submitting an unsigned and therefore inadmissible affidavit.[1] It was incumbent upon defendant to submit such proof to demonstrate a *prima facie* showing on a motion for summary judgment, *see Yuk Ping Cheng Chan v. Young T. Lee & Son Realty Corp.*, 110 A.D.3d 637, 973 N.Y.S.2d 642 (1st Dep't 2013), and renewal "is not a second chance freely given to parties who have not exercised due diligence in making their first factual

[1] Chera subsequently filed a signed and notarized affidavit.

presentation." *Henry*, 72 A.D.3d at 602, 900 N.Y.S.2d at 51. The motion to renew is denied.

Chera next argues that the court erred in not rendering a decision "regarding the contractual indemnification issue." However, defendant made no such argument on the prior motion; therefore, the court could not have overlooked it. "[A] motion to reargue 'is not an appropriate vehicle for raising new questions . . . which were not previously advanced.'" *People v. D'Alessandro*, 13 N.Y.3d 216, 219, 918 N.E.2d 126, 127, 889 N.Y.S.2d 536, 537 (2009). "Renewal should not 'be available where a party has proceeded on one legal theory . . . and thereafter sought to move again on a different legal argument merely because he was unsuccessful upon the original application.'" *Nassau County v. Metropolitan Transp. Auth.*, 99 A.D.3d 617, 619, 953 N.Y.S.2d 183, 186 (1st Dep't 2012), *lv denied*, 21 N.Y.3d 921, 988 N.E.2d 1288, 966 N.Y.S.2d 775 (2013).

Chera next argues that it was entitled to summary judgment because plaintiff could not establish that Chera created or had notice of the condition, given plaintiff's testimony that she did not see the defect prior to the accident. As found previously, a movant cannot succeed on a motion for summary judgment merely by pointing to gaps in the opponent's proof; Chera was obligated to affirmatively demonstrate the absence of triable issues of fact and affirmatively demonstrate its lack of notice of the defect. *See e.g. Alvarez v. 21st Century Renovations Ltd.*, 66 A.D.3d 524, 887 N.Y.S.2d 64 (1st Dep't 2009); *see also Artalyan, Inc. v. Kitridge Realty Co., Inc.*, 79 A.D.3d 546, 547, 912 N.Y.S.2d 400, 400 (1st Dep't 2010) ("[Defendants'] contention that they should have been granted summary judgment because plaintiffs could not establish as a matter of law that they were negligent misapprehends their burden on their own motion").

To the extent Chera relied on its status as an out-of-possession landowner, "[a] landlord is generally not liable for negligence with respect to the condition of property after the transfer of

possession and control to a tenant unless the landlord is either contractually obligated to make repairs and/or maintain the premises or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision." *Johnson v. Urena Serv. Ctr.*, 227 A.D.2d 325, 326, 642 N.Y.S.2d 897, 898 (1st Dep't 1996), *lv denied*, 88 N.Y.2d 814, 673 N.E.2d 1243, 651 N.Y.S.2d 16 (1996).

While paragraph 13 of the lease did not obligate Chera to make repairs, Chera reserved the right to enter the premises for repairs and other purposes. Contrary to Chera's reading of the lease, Chera did not reserve the right to enter merely in case of emergency, but rather

> at other reasonable times, to examine the same and to make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to any portion of the building or which Owner may elect to perform, in the demised premises, following Tenant's failure to make repairs or perform any work which Tenant is obligated to perform under this lease, or for the purpose of complying with laws, regulations and other directions of governmental authorities.

Because sidewalk defects are considered structural, *see Cucinotta v. City of New York*, 68 A.D.3d 682, 892 N.Y.S.2d 352 (1st Dep't 2009); *Langston v. Gonzalez*, 39 Misc.3d 371, 958 N.Y.S.2d 888 (Sup Ct Kings County 2013); *Wolfe v. Gallery Partners, LLC*, 2012 NY Slip Op 32301(U) (Sup Ct N.Y. County Sept. 4, 2012), and because of the scope of the re-entry provision, Chera's proof was insufficient to demonstrate its right to summary judgment, regardless of the lease's provision requiring Chera's tenant, defendant H&R Block Eastern Enterprises, Inc., to "make all repairs and replacements to the sidewalks and curbs adjacent thereto."

Finally, abutting landowner's duty to maintain the sidewalk, imposed by Administrative Code of the City of New York § 7-210, is non-delegable, *see Collado v. Cruz*, 81 A.D.3d 542, 917 N.Y.S.2d 178 (1st Dep't 2011), and, as explained above, Chera's proof regarding notice was

lacking. *See Amador v. City of New York*, 96 A.D.3d 475, 946 N.Y.S.2d 151 (1st Dep't 2012).

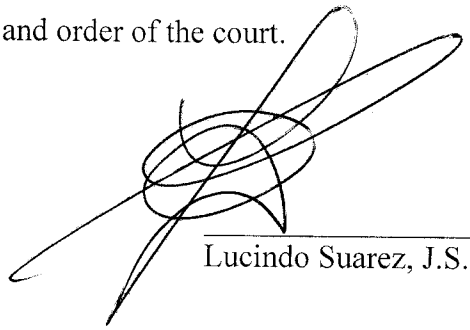
Accordingly, it is

ORDERED, that the motion of defendant Chera Bldg Properties LLC for leave to renew the decision and order of the undersigned dated March 26, 2015 is denied; and it is further

ORDERED, that the motion of defendant Chera Bldg Properties LLC for leave to reargue the decision and order of the undersigned dated March 26, 2015 is denied.

This constitutes the decision and order of the court.

Dated: June 29, 2015



Lucindo Suarez, J.S.C.