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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES Justice

PART 59

Index Number : 103880/2011
SARDELL, GRACE
vs
BRODSKY ORGANIZATION, LLC
Sequence Number : 002
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

decided in accordance with the attached Memorandum Decision and Order.

FILED
AUG -7 2015
COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
AUG 06 2015
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: AUG 04 2015

DEBRA A. JAMES, J.S.C.

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

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 59

GRACE SARDELL and JOSHUA KNAPP,

Plaintiffs,

-against-

THE BRODSKY ORGANIZATION, LLC, THE WALTON COMPANY, WALTON RETAIL LLC, GUMLEY-HAFT, LLC, LUCKY BRAND DUNGAREES, INC., LUCKY BRAND DUNGAREES STORES, INC., and URBAN ASSOCIATES, LLC,

Defendants.

Index No. 103880/2011

Motion Sequence 002

DECISION and ORDER

DEBRA JAMES, J.:

In this personal injury action, Lucky Brand Dungarees, Inc. and Luck Brand Dungaree Stores, Inc. (together Lucy Brand) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims as against it.

The Brodsky Organization, LLC, The Walton Company, Walton Retail, LLC, Gumley-Haft, LLC and Urban Associates (together Brodsky), owns and manages the building at 104 West 70th Street, New York, New York, (the building) where Lucky Brand operated a retail store in the commercial space on the ground floor.

Plaintiff Grace Sardell (Sardell) testified at her deposition that on July 7, 2009, a clear and dry weather day, she exited the building where she lived for fifteen years, to walk

her dog. She testified that she had taken five or six steps when her foot caught in the edge of the outer frame of one of the two cellar doors that covered the sidewalk, she fell to the ground and suffered injuries. She testified that she had seen and walked over the sidewalk and doors many times before the accident, but never complained to anyone about the condition of either. She identified photographs taken by her husband, the derivative plaintiff, of the accident location of the cellar door metal frame over which a ruler was placed by her husband.

It is not disputed that Lucky Brand periodically entered the basement of its leased premises through such cellar doors in the sidewalk adjoining the building.

The Administrative Code of the City of New York section 7-210 (a) provides that "[i]t shall be the duty of the owner of real property abutting any sidewalk . . . to maintain such sidewalk in a reasonably safe condition." See O'Brien v Prestige Bay Plaza Dev. Corp., 103 AD3d 428, 429 (1st Dept 2013) ("As a tenant of the shopping center, not an abutting landowner, [retail store defendant] has no statutory obligation to maintain the public sidewalk adjacent to its store").

However, a tenant's liability for a dangerous condition may also be predicated upon its special use of the property. Colon v

Corporate Bldg. Groups, Inc., 116 AD3d 414 (1st Dept 2014). "To recover from a tenant which occupies premises abutting a sidewalk under the theory that the tenant has a special use of the sidewalk, the tenant must be in exclusive possession and control of the alleged special-use area and the plaintiff must demonstrate that the alleged special use caused the defective condition which proximately caused his or her injuries" O'Toole v City of Yonkers, 107 AD3d 866, 867 (2d Dept 2013). O'Toole is instructive as it involves "[a] pair of metal doors set into the sidewalk [that] led to the basement of the premises." Id.

In O'Toole, the Appellate Division Second Department held that movant tenant established its prima facie entitlement to judgment as a matter of law by showing, inter alia, "that it neither created a dangerous condition nor caused such condition by their use of the metal doors leading to their basement." Id. at 867-868.

On such authority, Lucky Brand's motion shall be granted, as Lucky Brand has likewise prima facie established that it neither caused nor created any unsafe condition by its use of the metal doors leading to the basement. It establishes that the condition of the cellar doors remained the same from the time it began occupancy until the time of the accident, while it occasionally

opened and closed the doors to move merchandise into and out of the basement. Lucky Brand cites the testimony of Brodsky's building employee witnesses that the cellar doors were unchanged, and therefore not flush with the sidewalk prior to Lucky Brand's tenancy. Nor did Lucky Brand's possession and control of the basement, beneath padlocked doors, create an exclusive zone for Lucky Brand on the sidewalk above. Lucky Brand cites the testimony of Santiago, the building's superintendent, that he passed over the doors "thousands" of times, from which the Brodsky porters cleaned and shoveled snow.

The testimony of the Brodsky employee witnesses, including the doorman who testified that the height differential between the cellar door and the sidewalk was approximately one half to one inch, the superintendent, property manager and porter that the condition of the sidewalk and cellar doors were unchanged from 2008 through the time of Sardell's accident, along with Sardell's admission that she walked over the cellar doors innumerable times without incident establish the circumstances of a trivial defect. In Trincere v County of Suffolk, 90 NY2d 976, 977 (1997), stating that "there is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable," the Court of Appeals held that

the Appellate Division, "after examination of the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury'" properly concluded that "no issue of fact" was presented in connection with a cement slab elevated a little over a half-inch above surrounding slabs. "[A] property owner may not be held liable in damages for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip." Aguayo v New York City Hous. Auth., 71 AD3d 926, 927 (2d Dept 2010). Though it is true that "even a trivial defect may constitute a snare or trap" (Argenio v Metropolitan Transp. Auth., 277 AD2d 165, 166 [1st Dept 2000]), Lucky Brand establishes that the condition did not constitute a trap or snare in its moving papers.

In opposition to Lucky Brand's motion, Sardell maintains that her foot getting caught between the sidewalk and the frame of the cellar "makes any height differential irrelevant as the cellar door frame constituted a trap and not a simple tripping hazard." Such argument begs the question because as stated in Burko v Friedland, 62 AD3d 462, 462 (1st Dept 2009), "the defect, which did not appear to be a trap or snare by reason of its location, adverse weather or lighting conditions or other

circumstances, was trivial". Plaintiff does not even refer to the photographs taken by her husband, which she identified at her examination before trial, to raise an issue of fact that the condition of the alleged offending cellar door constituted a trap or snare.

Lucky Brand also requests dismissal of all cross claims against it. Brodsky, in its answer to the amended complaint, asserted cross claims for common-law and contractual indemnification against Lucky Brand. Lucky Brand's lease with Brodsky, dated September 29, 2000 (the Lease) article 21.02 provides that

> Tenant shall indemnify and save harmless Landlord and its agents against and from (a) any and all claims (I) arising from (x) the use, conduct or management of the Demised Premises or any business therein, or (y) any work or thing whatsoever done, or any condition created (other than by Landlord for Landlord's or Tenant's account) in or about the demised premises during the term of this lease . . . , or (ii) arising from any negligent or otherwise wrongful act or omission of Tenant . . . , and (b) all costs, expenses and liabilities incurred in or in connection with each such claim or action or proceeding brought thereon except to the extent any of the foregoing is the result of Landlord's gross negligence of [sic] willful misconduct.

Lucky Brand argues that New York City's Administrative Code imposes a non-delegable duty on the owner of abutting premises to maintain and repair the sidewalk. Collado v Cruz, 81 AD3d 542

(1st Dept 2011). The responsibility for repair may be shifted from a landlord to a tenant under the terms of a lease. Cucinotta v City of New York, 68 AD3d 682 (1st Dept 2009). In that regard the Lease article 15.01 requires that

> Tenant shall take good care of the Demised Premises. Tenant, at its expense, shall promptly make all repairs, ordinary or extraordinary, interior or exterior, structural or otherwise, in and about the Demised Premises and the Building . . . as shall be required by reason of (I) the performance or existence of Tenant's Work or Tenant's Changes, (ii) the installation, use or operation of Tenant's Property in the Demised Premises, (iii) the moving of Tenant's Property in or out of the Building, or (iv) the misuse or neglect of Tenant".

With respect to sidewalks, the Lease states: "Tenant shall, at its sole cost and expense, keep the sidewalks in front of the Demised Premises and the curbs adjacent thereto free from snow, ice, dirt and rubbish and make all necessary repairs and replacements thereto." Id., article 18.09.

In opposition to Lucky Brand's motion, Brodsky asserts that "the condition [of the metal cellar doors] that existed can only have arisen from the use, conduct or management of co-defendants Lucky and not defendants Brodsky." Such statement is purely conclusory as Brodsky offers no evidence that "the condition" required a repair, let alone one that arose from Lucky Brand's actions, negligent or otherwise, under article 18.09 of the

Lease.

Nor does article 15.01 of the Lease oblige Lucky Brand to make repairs unrelated to its presence on, operations in or neglect of the leased premises. The evidence shows that the condition of the cellar doors was constant throughout the term of Lucky Brand's tenancy. No one testifies, or even alleges, that the cellar doors were ever flush with the sidewalk before Lucky Brand's tenancy or Sardell's accident. Therefore, the cross claims for common-law and contractual indemnification as against Lucky Brand shall be dismissed, as it is free from liability for Sardell's accident.

Brodsky cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims as against it, and for summary judgment in its favor on its cross claims. It indisputably incorporates the property owner.

As discussed above, the defect complained of, a one half to one inch difference in height between the edge of the cellar doors and the sidewalk, was trivial. Sokolovskaya v Zemnovitsch, 89 AD3d 918, 919 (2d Dept 2011) ("considering the appearance of the alleged defect in the photographs, the testimony of the defendants' superintendent, and all relevant circumstances of the accident, the defendants established, prima facie, that the

alleged defect did not possess the characteristics of a trap or nuisance and was too trivial to be actionable"). It was not a trap; nothing about the location, adverse weather or lighting conditions or other circumstances connote a trap. *See* Burko v Friedland, 62 AD3d at 462. The fact that "a pedestrian might merely stumble, stub his or her toes, or trip" does not make the defect actionable. See Maciaszek v Sloninski, 105 AD3d 1012, 1013 (2d Dept 2013). Therefore, Brodsky's motion shall be granted and the complaint dismissed as against it.

Brodsky motion summary judgment on its cross claims for common-law and contractual indemnification is denied for the reasons stated by the court in granting Lucky Brand's motion to dismiss such claims.

Accordingly, it is

ORDERED that the motion of defendants Lucky Brand Dungarees, Inc. and Lucky Brand Dungarees Stores, Inc. for summary judgment, dismissing the complaint and all cross claims as against them, is granted, and the complaint and all cross claims as against them are dismissed, with costs and disbursements to such defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that that prong of the cross-motion of defendants

The Brodsky Organization, LLC, the Walton Company, Walton Retail, LLC, Gumley-Haft, LLC, and Urban Associates, LLC for summary judgment dismissing the complaint and all cross-claims as against them is granted, and the complaint and all cross claims as against them are dismissed, with costs and disbursements to such defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that that prong of the cross-motion of defendants The Brodsky Organization, LLC, the Walton Company, Walton Retail, LLC, Gumley-Haft, LLC, and Urban Associates, LLC for summary judgment in their favor on their cross-claims is denied; and it is further

ORDERED that the complaint is dismissed and the Clerk shall enter judgment accordingly.

Dated: August 4, 2015 **ENTER:**

J.S.C.
DEBRA A. JAMES