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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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SALLY KEECH,

Plaintiff,

DECISION/ORDER
Index No. 155081/2013

-against-

30 EAST 85TH STREET COMPANY, LLC, LULULEMON USA, INC. and 30 EAST 85TH STREET CONDOMINIUM ASSOCIATES,

Defendants.

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HON. CYNTHIA KERN, J.:

Plaintiff commenced the instant action to recover damages for personal injuries she allegedly sustained when she tripped and fell on the sidewalk in front of a building located at 1146 Madison Avenue, New York, New York (the "premises"). Defendants Lululemon USA, Inc. ("Lululemon") and 30 East 85th Street Company, LLC ("Company") now separately move for Orders pursuant to CPLR § 2221 for leave to renew their prior motions for summary judgment and, upon renewal, for Orders pursuant to CPLR § 3212 granting them summary judgment dismissing plaintiff's complaint. Lululemon's motion and Company's cross-motion are consolidated for disposition and are resolved as set forth below.

The relevant facts are as follows. Company is the owner of commercial units located at the premises and Lululemon is a commercial tenant at the premises. On January 22, 2013 at approximately 9:00 p.m., plaintiff, the owner of a pet care company, was walking a client's dog when she tripped and fell on the sidewalk at the premises (the "accident"). Specifically, during her deposition, plaintiff testified that she accidentally stepped into a hole with her right foot and "couldn't get it out in time," causing her to fall and thereby sustain injuries. Photographs taken of the area after the accident show the existence of a crack in the sidewalk at the location plaintiff claims to have tripped. By a decision and order dated April 27, 2015,

the court denied Lululemon's motion and Company's cross-motion for summary judgment without prejudice to renew after the depositions of plaintiff, Lululemon and Company took place.

As an initial matter, the depositions of plaintiff, Lululemon and Company have now taken place and Lululemon's motion and Company's cross-motion for leave to renew pursuant to CPLR § 2221 are accordingly granted. Upon renewal, the court next considers Lululemon's motion for summary judgment dismissing plaintiff's complaint as against it on the ground that Lululemon, as a tenant, cannot be held liable to plaintiff for failing to maintain and repair the sidewalk. 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). 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." *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Id.*

The Administrative Code of the City of New York § 7-210 imposes upon the owner of premises abutting a sidewalk a "nondelegable duty...to maintain and repair the sidewalk." *See Collado v. Cruz*, 81 A.D.3d 542, 542 (1st Dept 2011). A tenant can only be held liable for failing to maintain or repair a sidewalk if the tenant created the dangerous or defective condition or made special use of the sidewalk. *Id.* "Provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party." *Id.*

In the present case, plaintiff's complaint must be dismissed as against Lululemon as it is undisputed that Lululemon is a tenant, not the owner, of the premises abutting the sidewalk. Further, Lululemon has submitted evidence that it did not create the crack or make special use of the sidewalk. Wynn Spencer, Lululemon's Vice President of Store Development, stated in an affidavit that Lululemon is unaware of any "changes, modifications, or repairs having been made to the sidewalk" at the premises and that Lululemon did not make special use of the sidewalk. Kate Castellucci ("Castellucci"), Lululemon's store manager, testified at her deposition that Lululemon did not place any promotional or other materials on the sidewalk.

Although Castelluci testified that Lululemon received deliveries of supplies, the First Department has specifically held that the receipt of ordinary deliveries of supplies does not constitute a special use of a sidewalk. *See Tyree v. Seneca Ctr.-Home Attendant Program*, 260 A.D.2d 297, 298 (1st Dept 1999). Thus, Lululemon had no duty to maintain and repair the sidewalk.

Although plaintiff has failed to oppose Lululemon's motion, 30 East 85th Street Condominium Associates ("Associates") has submitted opposition papers. Associates' argument that Lululemon may have created the crack by removing snow, ice and debris from the sidewalk or by receiving deliveries of supplies is without merit as it is based on mere speculation. Associates has failed to submit any evidence that these actions created the crack.

Upon renewal, Company's cross-motion for summary judgment dismissing plaintiff's complaint as against it is granted on the ground that Company, as the owner of commercial units, cannot be held liable to plaintiff for failing to maintain and repair the sidewalk. The First Department has held that individual condominium unit and commercial unit owners are not considered "owners" for the purposes of Section 7-210, which imposes a nondelegable duty on an owner of the abutting premises to maintain and repair the sidewalk. *Araujo v. Mercer Sq. Owners Corp.*, 95 A.D.3d 624, 624 (1st Dept 2012). *See also Jerdonek v. 41 West 72 LLC*, 36 N.Y.S.3d 17, 20 (1st Dept 2016) ("[T]he unit owners, though they collectively own the common elements, are divested of the powers and responsibilities of ownership with respect to those elements. Those powers and responsibilities are vested in the board of managers, which becomes the proper defendant on any claim, whether common-law or statutory, that lies against the owner of the common elements").

In response, plaintiff has failed to submit any opposition. Associates' argument that Company assumed a duty to maintain and repair the sidewalk by removing snow, ice and debris is unsupported by First Department case law, which expressly holds that unit owners do not have any duty, either common-law or statutory, to maintain and repair the sidewalk. *See Araujo*, 95 A.D.3d at 624; *Jerdonek*, 36 N.Y.S.3d at 20.

Accordingly, Lululemon's motion and Company's cross-motion for leave to renew their motions for summary judgment and, upon renewal, for summary judgment dismissing plaintiff's complaint are granted and it is hereby ORDERED that this action is dismissed as against Lululemon and Company. This constitutes the decision and order of the court.

DATE : 9/28/16

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KERN, CYNTHIA S., JSC

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