SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ *Justice* **PART** 13

MORGIN HAUG,
Plaintiff,

-against-

LENNY'S CATERING, LLC d/b/a LENNY'S GROUP,
66 WEST ASSOCIATES LLC and
S.W. MANAGEMENT, LLC,
Defendants.

INDEX NO. 155693/2014
MOTION DATE 05/10/2017
MOTION SEQ. NO. 004
MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits	4 - 6
Replying Affidavits	7 - 8

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants 66 West Associates LLC (herein "66 West") and S.W. Management, LLC's (herein "SW") motion for summary judgment pursuant to CPLR §3212 is granted, the Complaint is dismissed against them. Defendant Lenny's Catering, LLC d/b/a Lenny's Group (herein "Lenny's") motion for summary judgment pursuant to CPLR §3212 is denied.

Plaintiff Morgin Haug commenced this action on October 16, 2015 to recover for personal injuries sustained (Moving Papers Ex. A). On April 16, 2014 at around 6:50am Plaintiff allegedly slipped on ice on an exterior public staircase outside of Defendant Lenny's premises, located at 66 W. 9th Street a/k/a 418 6 Avenue, New York, New York (herein the "Staircase"). Defendant Lenny's is a tenant of Defendant 66 West who owns the building and Defendant SW is the managing agent. The Defendants answered, and the parties proceeded with discovery. The note of issue was filed on October 10, 2016.

The Defendants now move for summary judgment dismissing the Complaint against them. Defendants 66 West and SW contend that neither had any duty to remove snow or ice on the Staircase. All Defendants contend that they never had actual or constructive notice of the alleged icy condition that caused Plaintiff's fall. Plaintiff opposes the motion.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v City of New York, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (Amatulli v Delhi Constr. Corp., 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]; Martin v Briggs, 235 AD2d 192,

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

663 NYS2d 184 [1st Dept. 1997]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (Kornfeld v NRX Tech., Inc., 93 AD2d 772, 461 NYS2d 342 [1983], aff'd 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits (Epstein v Scally, 99 AD2d 713, 472 NYS2d 318 [1984]). Summary Judgment is "issue finding" not "issue determination"(Epstein, supra). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve (Brunetti v Musallam, 11 AD3d 280, 783 NYS2d 347 [1st Dept. 2004]).

Generally, an out-of-possession owner is not liable for injuries that occur on its premises unless it has retained control over the premises or is contractually obligated to repair unsafe conditions (Tulli v Shani Realty, LLC, 9 Misc.3d 126[a], 806 NYS2d 449 [1st Dept. 2005], Scott v Bergstol, 11 AD3d 525, 782 NYS2d 793 [2nd Dept. 2004]). Clear and unambiguous provisions of a lease are sufficient to establish that an out-of possession landlord relinquished any duty to remove ice or snow and are entitled to judgment as a matter of law (Scott, supra).

The Lease Agreement states in its relevant parts:

> "[Lenny's as tenant] shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements, fire or other casualty, excepted" (Moving Papers Ex. G, ¶ 4).
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> "If the premises are situated on the ground floor of the building, tenant, there shall further, at tenant's expense, keep the sidewalks and curb in front of said premises clean and free from ice, snow, etc." (Moving Papers Ex. G, Rules and Regulations).

No triable issue of fact exists as to the lack of liability of Defendant 66 West. Plaintiff slip and fell on the exterior Staircase leading to the commercial area leased to and occupied by Defendant Lenny's. Their subject Lease Agreement establishes that Defendant 66 West, an out-of-possession landlord, relinquished contractual responsibility to Defendant Lenny's for removing ice or snow on the Staircase (id). The Lease Agreement unambiguously obligated Defendant Lenny's to remove any ice or snow (id). Moreover, the deposition testimony by Defendants 66 West and Lenny's establish that Defendant Lenny's controlled, maintained and removed ice or snow from the Staircase (Moving Papers Exs. E, F).

A managing agent cannot be held liable if it was not in exclusive control of the building (Brasseur v Speranza, 21 AD3d 297, 800 NYS2d 669 [1st Dept. 2005] *citing* Rivera v Sebastian Enters., Inc., 243 AD2d 291, 664 NYS2d 516 [1997]). When a written agreement reveals that the agent did not have exclusive and comprehensive control of the property, there can be no liability on the part of the managing agent without affirmative acts of negligence (Lennon v Oakhurst Gardens Corp., 229 AD2d 897, 645 NYS2d 652 [3rd Dept. 1996]).

No triable issue of fact exists as to the lack of liability of Defendant SW, the managing agent of the building. As previously stated herein, the subject Lease Agreement establishes that Defendant Lenny's and not SW had exclusive and comprehensive control of the building (Moving Papers Ex. G). Defendant SW had no duty to maintain the Staircase.

The drastic remedy of summary judgment is rarely granted in negligence cases since the very question of whether the defendant's conduct was indeed negligent is a jury question except in the most glaring cases (Johannsdottir v Kohn, 90 AD2d 842, 456 NYS2d 86 [2nd Dept. 1982]). "The very question of whether the defendant's conduct amounts to negligence is inherently a question for the fact-trier in all but the most egregious instances" (Siegel, Practice Commentary to CPLR §3212; see, also, Hajder v G.&G. Moderns, 13 AD2d 651, 213 NYS2d 880 [1st Dept. 1961]).

A defendant will only be held liable in a slip-and-fall accident caused by ice when he created this dangerous condition or had actual or constructive notice of this condition (Gonzalez v Am. Oil Co., 42 AD3d 253, 836 NYS2d 611 [1st Dept. 2007] *citing* Piacquadio v Recine Realty Corp., 84 NY2d 967, 646 NE2d 795, 622 NYS2d 493 [1994]; Gordon v American Museum of Natural History, 67 NY2d 836, 837, 492 NE2d 774, 501 NYS2d 646 [1986]). To find constructive notice, the condition must have been visible and apparent, and that it existed for a sufficient length of time for the defendant to have discovered it and taken curative action (Harrison v N.Y.C. Tr. Auth.,113 AD3d 472, 978 NYS2d 194 [1st Dept. 2014]). A showing of general cleaning procedures is insufficient to satisfy a party's burden of establishing it lacked notice of the alleged condition prior to the accident (Mike v 91 Payson Owners Corp., 114 AD3d 420, 979 NYS2d 332 [1st Dept. 2014]

Defendant Lenny's fails to make a prima facie showing of entitlement to summary judgment as a matter of law. At the time of Plaintiff's fall, it is undisputed that there was no storm in progress. The climatological evidence presented establishes that all snowfall and precipitation ended approximately five (5) hours prior to the subject incident. Defendant Lenny's fails to provide evidence of the last time inspections were done by its employees on the date of Plaintiff's fall. The safety "checks" of the Staircase were not "specific" but rather periodical (Opposition Papers Ex. B). Given the fact that Defendant Lenny's had employees on site by 5:40am and that those employees' duties included ensuring that the Staircase was safe, it can be presumed that there was sufficient time for those employees to notice and address the dangerous condition before the accident (Opposition Papers Ex. F, Lebron v Napa Realty Corp., 65 AD3d 436, 884 NYS2d 37 [1st Dept. 2009]). Defendant Lenny's fail to show that the daily inspections were in fact performed, or how thorough the inspections were.

Issues of fact remain as to whether Defendant Lenny's had constructive notice of the ice on the Staircase. Issues of fact also remain as to whether or not ice could have scientifically been there since the climatological records presented by both parties remain inconclusive.

Accordingly, it is ORDERED, that Defendants 66 West Associates LLC and S.W. Management, LLC's motion for summary judgment pursuant to CPLR §3212 is granted, and it is further,

ORDERED, that the causes of action in the Complaint asserted against Defendants 66 West Associates LLC and S.W. Management, LLC, are hereby severed and dismissed, and it is further,

ORDERED, that Defendant Lenny's Catering, LLC d/b/a Lenny's Group's motion for summary judgment pursuant to CPLR §3212 is denied, and it is further,

ORDERED, that the causes of action in the Complaint asserted against Defendant Lenny's Catering, LLC d/b/a Lenny's Group, remain in effect, and it is further,

ORDERED, that the caption in this action is amended and shall read as follows:

MORGIN HAUG,

Plaintiff,

-against-

LENNY'S CATERING, LLC d/b/a LENNY'S GROUP,

Defendant.

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and it is further,

ORDERED, that within twenty (20) days from the date of entry of this Order Defendants shall serve a copy of this Order with Notice of Entry on Plaintiff, upon the Trial Support Clerk located in the General Clerk's Office (Room 119) and the County Clerk (Room 141B) who are directed to amend the caption and the court's records accordingly, and it is further,

ORDERED, that the Clerk enter judgment accordingly.

Enter:

Dated: June 15, 2017

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE