Lang v Holrod Assoc.
2018 NY Slip Op 30539(U)
March 28, 2018
Supreme Court, New York County
Docket Number: 162059/2014
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

KRISTIN LANG,
Plaintiff,
-against-

HOLROD ASSOCIATES n/k/a HOLROD ASSOCIATES LLC, THE CORONET CONDOMINIUM, MITSOSA AMORE INC., MITSOSA GROUP, INC., BAY MANAGEMENT CORP., INC., A.J. CLARKE REAL ESTATE CORP., A.J. CLARKE MANAGEMENT CORP., and JOHN DOES 1-5 fictitious names, representing an employee, employer, agent, servant, lessee/lessor, assignee/assignor, licensee, utility, municipality, occupant, agent, agency, department, contractor, subcontractor of the Defendant(s) or otherwise lawfully or unlawfully who was responsible for, and failed to properly: approve, issue, apply, open, close, repair, re-pave, contract, inspect, control, maintain, manage, supervise, design, construct, replace, safeguard, report about and/or was otherwise negligent, careless and/or reckless toward the Plaintiff in connection with the site of the incident and the conditions herein.
Defendants.

INDEX NO. 162059/2014
MOTION DATE 03/21/2018
MOTION SEQ. NO. 006
MOTION CAL. NO. ______

The following papers, numbered 1 to 7 were read on this motion for summary judgment:

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

Cross-Motion: ☐ Yes X No

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

Upon a reading of the foregoing cited papers, it is Ordered that Defendants Holrod Associates n/k/a Holrod Associates LLC ("Holrod"), Bay Management Corp. ("Bay Management"), A.J. Clarke Real Estate Corp. and A.J. Clarke Management Corp.'s ("A.J. Clarke," herein collectively the "Moving Defendants") motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiff's Complaint and all cross claims against them, is granted to the extent that Plaintiff's Complaint and all cross claims against Bay Management and AJ Clarke is dismissed. The remainder of the motion is denied.

On September 20, 2013 at around 4:20pm, Plaintiff's one-inch heel got stuck in a divot in a sidewalk, twisting her ankle and causing her to fall. The sidewalk was abutting to Defendant The Coronet Condominium's ("The Coronet") Premises located at 57 West 58th Street, New York, New York (the "Building"). Plaintiff commenced this action on June 5, 2014 to recover for personal injuries sustained as a result of her fall. The note of issue was filed on August 11, 2017.

The Building is comprised of commercial condominiums on the first floor-street level and residential condominiums above them. Defendant A.J. Clarke is the managing agent for Defendant Coronet. Defendant Holrod is a commercial condominium owner that owns roughly 30 of the 85 units in the Building, including the entire area of the commercial condos located on the first floor. Defendant Bay Management is the manager for Holrod. Defendant Mitsosa Amore Inc. and Mitsosa Group, Inc. ("Mitsosa") is a

commercial tenant on the first floor that operates a luggage store pursuant to a commercial lease with Holrod. Plaintiff fell on the sidewalk outside Mitsosa's store.

This Court granted Mitsosa's motion for summary judgment to dismiss the Plaintiff's Complaint and all cross claims against it on March 27, 2018. The Moving Defendants now move for summary judgment pursuant to CPLR §3212 to dismiss Plaintiff's Complaint and all cross claims against them. 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]).

"New York City Administrative Code §7-210 imposes a non-delegable duty on the owner of an abutting premises to maintain and repair the sidewalk" (Collado v Cruz, 81 AD3d 542, 917 NYS2d 178 [1st Dept. 2011]). An out-of-possession owner is not relieved of its "non-delegable duty to maintain the sidewalk in a reasonably safe condition" (Reyderman v Meyer Berfond Tr. #1, 90 AD3d 633, 935 NYS2d 28 [2nd Dept. 2011]). A tenant will only be liable in a third party tort action if the lease is "so comprehensive and exclusive" in entirely displacing the duty to maintain the sidewalk from the landowner to the tenant; or "if the tenant (a) affirmatively caused or created the defect that caused plaintiff to trip, or (b) put the subject sidewalk to a special use for its own benefit, thus assuming a responsibility to maintain the part used in reasonably safe condition" (Kellogg v All Saints Hous. Dev. Fund Co., Inc., 146 AD3d 615, 46 NYS3d 30 [1st Dept. 2017]; Abramson v Eden Farm, Inc., 70 AD3d 514, 894 NYS2d 429 [1st Dept. 2010]). Provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party (Collado, *supra*).

The relevant portion of the Management Agreement between Defendant Coronet and Defendant A.J. Clarke states:

> "Second: The agent shall perform the following services with due diligence and care [b]: cause the building to be made, including, but not limited to, electrical, plumbing, steam fitting, carpentry, masonry, elevator, decorating, and such other incidental alterations or changes therein as may be proper, subject only to the limitations contained in this agreement or in any proprietary lease or other agreement with any unit owner or tenant. Ordinary repairs or alterations involving an expenditure of over One Thousand Dollars ($1,000.00 for any one item shall be made only with the prior approval of the Owner, but emergency repairs, i.e., those immediately necessary for the preservation or safety of the building or for the safety of Unit Owners, or other persons, or required to avoid the suspension of any necessary service in the building, may be made by the Agent irrespective of the cost, thereof, without the prior approval of the Owner, after consultation with the president, vice-president or treasurer of the Owner, if available" (Moving Papers Ex. F).

The relevant portion of the Managing Agreement between Bay Management and Holrod (listed as "Owner") states:

> "3.2 Manager shall operate the Property in a manner commensurate with the size, quality and character of the Property...In particular, Manager agrees to provide the following services: [c] To purchase necessary supplies and replacement materials and fixtures; to make contracts for electricity, gas, telephone, maintenance, security, refuse disposal, vermin extermination, and for other utilities or services which Manager shall reasonably consider advisable; and to make ordinary repairs and alterations, provided that expenditures for any unbudgeted item of repair or alteration shall not exceed the sum of $10,000.00 without the approval of the Owner, unless made under circumstances which Manager shall reasonably consider to constitute an emergency" (*Id* at Ex. H).

Defendants A.J. Clarke and Bay Management make a prima facie showing of entitlement to judgment as a matter of law to dismiss Plaintiff's Complaint and all cross claims against them. A.J. Clarke and Bay Management are not the landowner of the Building and thus have no statutory obligation to maintain the sidewalk in a reasonably safe condition. A.J. Clarke's Management Agreement with Defendant Coronet, and Bay Management's Managing Agreement with Defendant Holrod, are not "so comprehensive and exclusive" in entirely displacing the Coronet and potentially Holrod's obligation to maintain the sidewalk onto A.J. Clarke and Bay Management. Finally, A.J. Clarke and Bay Management demonstrated that they did not create the divot in the sidewalk that caused the Plaintiff to fall or put the sidewalk to special use for their own benefit. Plaintiff's Complaint and all cross claims against A.J. Clarke and Bay Management must be dismissed as Plaintiff fails to raise any triable issues of fact.

Defendant Holrod fails to make a prima facie showing of entitlement to judgment. It is undisputed that Defendant Coronet is the owner of the Premises. Holrod is the owner of multiple commercial condominium units within the Premises. Generally, the owner of commercial condominium units "is not an owner for the purposes of Administrative Code of the City of New York §7-210" meaning it has "no obligation to maintain the sidewalk" (Keech v 30 E. 85th St. Co., LLC, 154 AD3d 504, 61 NYS3d 499 [1st Dept. 2017]). However, Holrod fails to submit any documentation to confirm that Coronet never "comprehensively and exclusively" displaced their duty to maintain the sidewalk onto Holrod. Furthermore, the Commercial Lease between Holrod and Defendant Mitsosa lends an inference that Holrod had the exclusive duty to repair structural repairs to the sidewalk abutting commercial condominium units it owned (Opposition Papers Ex. B). Therefore, summary judgment in favor of Holrod is denied.

Accordingly, it is ORDERED, that Defendants Holrod Associates n/k/a Holrod Associates LLC, Bay Management Corp., A.J. Clarke Real Estate Corp. and A.J. Clarke Management Corp.'s motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiff's Complaint and all cross claims against them, is granted to the extent that Plaintiff's Complaint and all cross claims against Bay Management Corp., A.J. Clarke Real Estate Corp. and A.J. Clarke Management Corp. is dismissed, and it is further,

ORDERED, that the causes of action in the Complaint and all cross claims asserted against Defendants Bay Management Corp., A.J. Clarke Real Estate Corp. and A.J. Clarke Management Corp. are hereby severed and dismissed, and it is

further,

ORDERED, that the causes of action in the Complaint asserted against HOLROD ASSOCIATES n/k/a HOLROD ASSOCIATES LLC, THE CORONET CONDOMINIUM, and JOHN DOES 1-5 fictitious names remain in effect, and it is further,

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

KRISTIN LANG,

Plaintiff,

-against-

HOLROD ASSOCIATES n/k/a HOLROD ASSOCIATES LLC, THE CORONET CONDOMINIUM, and JOHN DOES 1-5 fictitious names, representing an employee, employer, agent, servant, lessee/lessor, assignee/assignor, licensee, utility, municipality, occupant, agent, agency, department, contractor, subcontractor of the Defendant(s) or otherwise lawfully or unlawfully who was responsible for, and failed to properly: approve, issue, apply, open, close, repair, re-pave, contract, inspect, control, maintain, manage, supervise, design, construct, replace, safeguard, report about and/or was otherwise negligent, careless and/or reckless toward the Plaintiff in connection with the site of the incident and the conditions herein.

Defendants.

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and it is further,

ORDERED, that within thirty (30) days from the date of entry of this Order Defendants Bay Management Corp., A.J. Clarke Real Estate Corp. and A.J. Clarke Management Corp. shall serve a copy of this Order with Notice of Entry on all parties, 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, and enter Judgment accordingly.

Enter:

MANUEL J. MENDEZ
J.S.C.

Dated: March 28, 2018

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE