Lang v Holrod Assoc.
2018 NY Slip Op 31724(U)
March 27, 2018
Supreme Court, New York County
Docket Number: 162059/2014
Judge: Manuel J. Mendez

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. 005
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

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Mitsosa Amore, Inc. and Mitsosa Group, Inc.'s ("Mitsosa") motion for summary judgment pursuant to CPLR §3212 to dismiss Plaintiff's Complaint and all cross claims against it, is granted.

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 Management Corp. is the managing agent for Defendant Coronet. Defendant Holrod Associates n/k/a Holrod Associates LLC ("Holrod") 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 Corp., Inc. is the manager for Holrod. Defendant Mitsosa is a commercial tenant on the first floor that operates a luggage store pursuant to a commercial lease with Defendant Holrod (Opposition Papers Ex. A). Plaintiff fell on the sidewalk outside Mitsosa's store.

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

Mitsosa now moves for summary judgment pursuant to CPLR §3212 to dismiss Plaintiff's Complaint and all cross claims against it. 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*). Repairs to a defective sidewalk are considered structural repairs, not non-structural (*see generally* Cucinotta v City of N.Y., 68 AD3d 682, 892 NYS2d 352 [1st Dept. 2009]).

The relevant portion of Article 4 of the Lease states:

"*Owner shall maintain and repair the public portions of the building*, both exterior and interior, except that if Owner allows Tenant to erect on the outside of the building a sign or signs, or a hoist, [ineligible] or sidewalk elevator for the exclusive use of Tenant. Tenant shall maintain such exterior installations in good appearance, shall cause the same to be operated in a good and workmanlike manner, shall make all repairs thereto necessary to keep same in good order and condition at Tenant's own cost and expense, and shall cause the same to be covered by the insurance provided for hereafter in Article 8. *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...* " (Opposition Papers Ex. A, Lease Article 4, *emphasis added*).

The Relevant portion of Article 46 [A] of the Rider to the Lease states:

"Supplementing printed Article 4 hereof, Tenant covenants and agrees to maintain in good order and condition and repair the exterior of the Demised Premises,

including the store front, windows, doors, fittings, any signs, awnings and/or any other equipment, as well as the interior of the Demised Premises, in a manner satisfactory to the Landlord..." (*Id, emphasis added*).

Mitsosa makes a prima facie showing of entitlement to judgment as a matter of law to dismiss Plaintiff's Complaint and all cross claims against it. Mitsosa is not the landowner of the Building and thus has no statutory obligation to maintain the sidewalk in a reasonably safe condition. The Lease between Mitsosa and Defendant Halrod is not "so comprehensive and exclusive" in entirely displacing Halrod's obligation to maintain the sidewalk onto Mitsosa. Mitsosa was responsible to make non-structural repairs to the sidewalk, not structural repairs. Finally, Mitsosa demonstrated that it did not create the divot in the sidewalk that caused the Plaintiff to fall or put the sidewalk to special use for its own benefit. Plaintiff's Complaint and all cross claims against Mitsosa must be dismissed as Plaintiff fails to raise any triable issues of fact.

Accordingly, it is ORDERED, that Defendant Mitsosa Amore, Inc. and Mitsosa Group, Inc.'s motion to for summary judgment pursuant to CPLR §3212 to dismiss Plaintiff's Complaint and all cross claims against it is granted, and it is further,

ORDERED, that the causes of action in the Complaint and all cross claims asserted against Defendant Mitsosa Amore, Inc. and Mitsosa Group, Inc. 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, BAY MANAGEMENT CORP., INC., A.J. CLARKE REAL ESTATE CORP., A.J. CLARKE MANAGEMENT CORP., 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, 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.

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and it is further,

ORDERED, that within thirty (30) days from the date of entry of this Order Defendant Mitsosa Amore, Inc. and Mitsosa Group, Inc. 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 accordingly.

Enter: **MANUEL J. MENDEZ**
J.S.C.

Dated: **March 27, 2018**

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ **FINAL DISPOSITION** **X NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**