SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

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DELUCA, GWENDOLYN

Plaintiff,

- v -

CACHET MANAGEMENT LLC; 752 PARIS WEA LLC; VII 752 WEST END OWNER, LLC; 752 WEA INV LLC; 752 PARIS WEA-II LLC

Defendants.

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INDEX NO. 159400/2013

MOTION DATE 11/08/2018

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 135, 136, 137, 138, 139, 140, 141, 145, 146, 147, 148, 149, 150, 151, 152, 154, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

In this trip and fall matter, plaintiff Gwendolyn Deluca moves for summary judgment pursuant to CPLR 3212 on liability as against defendants Cachet Management LLC, 752 Paris WEA LLC, 752 WEA INV LLC, and 752 Paris WEA-II LLC (collectively, "Cachet Defendants")[1] or, alternatively, to strike to the answer of the Cachet Defendants (NYSCEF #135 – Notice of Motion). The Cachet Defendants oppose the motion. For its part, defendant VII 752 West End Owner, LLC (VII WEO) cross-moves for summary judgment to dismiss Plaintiff's complaint and all causes of action against it, together with interest, costs, and disbursements (NYSCEF #145 – VII WEO Notice of Cross-Motion). Plaintiff opposes the cross-motion. Former defendant 752 UWS, LLC was removed from this matter via So-Ordered Stipulation on June 25, 2015 (NYSCEF #32 – June 25, 2015 So-Ordered Stipulation). The Decision and Order is as follows:

FACTS

Plaintiff's Trip and Fall

Plaintiff claims that on January 7, 2011 at approximately 6:00 PM, she and her cousins Susan Nanni and Cheryl Gallo left Plaintiff's home on the Upper West Side to take a subway to a restaurant downtown (NYSCEF #140 – Exh. 1 – DeLuca Tr. at 21,

[1] The Cachet Defendants have also been referred to as the "WEA Defendants" at other stages of this litigation. These identifiers are interchangeable.

25-28)[2]. On their walk to the subway station at 97th Street and Broadway, Plaintiff and her cousins crossed West End Avenue along West 97th Street towards Broadway (*id.* at 27, 34-36). Plaintiff claims that this route took them by the Cachet Defendant's building, the Paris ("premises"), which was to their right, and the curb and street were to their left (*id.* at 42-43).

Plaintiff claims that it was very dark on the night of the incident (*id.* at 40, 43, 59, 62; Exh. 2 – Photos A-H). Plaintiff claims that as she walked on the sidewalk, she looked directly ahead of her in the direction of some emanating light (DeLuca Tr. at 44). Suddenly, Plaintiff felt an obstruction at her right ankle and immediately fell face-forward over a pile of discarded Christmas trees on the sidewalk (*id.* at 46, 55, 56-57; Exh 2 – Photos A, B, F). Plaintiff claims that she fell directly onto the sidewalk, sustaining a blunt-force impact to her face (DeLuca Tr. at 51-52; Photos I, J, K). Plaintiff's fall was witnessed by her two cousins (DeLuca Tr. at 28; NYSCEF #138 – Gallo Aff, ¶¶4-5; NYSCEF #139 – Nanni Aff, ¶¶1-2, 4). Both cousins aver that Plaintiff's pant leg got caught on a tree branch that jutted out from the pile of Christmas trees (Gallo Aff, ¶¶4-5; Nanni Aff, ¶¶2-3).

Plaintiff remained on the ground until her cousins assisted her up (DeLuca Tr. 52, 54). Plaintiff was bleeding from her nose, mouth and chin (*id.* 85). With her cousins help, Plaintiff walked into the lobby of the Premises to call an ambulance (*id.* at 54, 71). Plaintiff reported her injury to a non-uniformed man sitting behind the lobby desk (*id.* at 70). The building employee recorded the incident in the Cachet Defendants' Shift Note Log, stating that "a female... tripped over a xmas tree" (NYSCEF #140 – Exh. 4 – Shift Note Log).

Plaintiff was taken by ambulance from the Paris to St. Luke's Hospital (DeLuca Tr. at 86-88). Plaintiff claims that she sustained severe injuries including: a broken nose leading to respiratory infections and sleep apnea; damage to her teeth requiring dental implants, bone grafting, a root canal, and root amputation; and trauma to her knees, lower back, and a left hip injury requiring steroidal injections and physical therapy (*id.* at 89, 104-107, 111-112, 115-116, 118-121).

Building Ownership

The Paris building has changed hands multiple times; this is relevant for the resolution of the cross-motion. Prior to Plaintiff's accident on September 15, 2010, defendant VII 752 West End Owner, LLC conveyed ownership of the Paris building to 752 Paris WEA-II LLC and 752 Paris WEA LLC as tenants in common (NYSCEF #151 – 2010 Deed). Plaintiff's accident occurred on January 7, 2011. Defendant 752 Paris WEA-II LLC sold its share of the building on June 13, 2013 to former defendant 752 UWS, LLC (NYSCEF #164 – 2013 Deed). 752 Paris WEA LLC and 752 Paris WEA-II LLC admitted to ownership of the building at the time of Plaintiff's accident (NYSCEF #140 – Exh. 8 – Answer at ¶¶3-5, 7, 9). Cachet Management was the managing agent at

[2] Plaintiff's NYSCEF #140 compiles many of plaintiff's exhibits into one file. As such, this decision will refer to each individual exhibit within the larger file.

the time of the accident. It is unclear based on the papers what role 752 WEA INV LLC plays in this matter, however, the Cachet Defendants do not object to the inclusion of this party in this case. Plaintiff initiated the instant lawsuit on October 11, 2013.

The Cachet Defendants' Discovery Conduct and The July 25, 2017 So-Ordered Stipulation

This matter has had a tortuous discovery history, largely due to the noncompliance of the Cachet Defendants with court orders and discovery demands. At some point, the Cachet Defendants deleted video footage of Plaintiff's accident without explanation, ignored several Status Conference Orders requiring them to produce any video footage in their possession, and failed to produce any discovery besides an accident log and an insurance policy.

In addition, at an earlier stage of this litigation, the Cachet Defendants and Plaintiff resolved Plaintiff's motion to preclude the Cachet Defendants from presenting testimony at trial via a July 25, 2017 So-Ordered Stipulation. It reads as follows:

> "1. [Cachet] Defendants are precluded from introducing any evidence at trial regarding: (i) how Plaintiff's trip and fall on the sidewalk (the "Trip and Fall") outside 752 West End Avenue, New York, New York (a/k/a the "Paris" building) (the "Premises"), as alleged in the Verified Complaint in this action, occurred, and (ii) the maintenance of the Premises, including, but not limited to: (a) how the sidewalk was maintained; (b) how Christmas trees were placed on the sidewalk and who placed them there prior to the Trip and Fall; (c) whether the outside lighting was sufficient to alert pedestrians of any hazard posed by Christmas trees; (d) the placement of garbage on the sidewalk; and (e) the removal of snow and/or ice on the sidewalk" (NYSCEF #58/174 – July 25, 2017 So-Ordered Stipulation).
>
> The So-Ordered stipulation also added that "2. Nothing... shall preclude [Cachet Defendants] from submitting evidence of Plaintiff's comparative negligence, provided that any such evidence is not in the form of testimony from witnesses whom the [Cachet Defendants] were required to produce in response to the Court's orders and plaintiff's deposition note" and "3. Nothing... shall restrict Defendant VII 752 West End Owner, LLC from presenting evidence at trial" (*id.*).

Facts from Disputed Notice to Admit

As will be addressed in the discussion section of this decision, there is a dispute between Plaintiff and the Cachet Defendants regarding the admissibility of Plaintiff's May 29, 2018 Notice to Admit. Plaintiff claims that the Cachet Defendants failed to properly respond to its Notice to Admit; the Cachet Defendants claim that the Notice to Admit is a nullity because it improperly sought admissions that go to the heart of the controversy. Plaintiff's Notice to Admit sought the following admissions:

"(1) Between 2010 and 2013, it was Cachet Defendants' practice each year following the Christmas holiday to place discarded Christmas trees onto the Sidewalk for recycling and/or garbage collection;

(2) Between December 24, 2010 and approximately 6:00 p.m. on January 7, 2011, Cachet Defendants placed discarded Christmas trees onto the sidewalk for recycling and/or garbage collection;

(3) Cachet Defendants are not aware of any information or evidence that would indicate that any third parties placed Christmas trees onto the Sidewalk between December 24, 2010 and approximately 6:00 p.m. on January 7, 2011;

(4) Between 2010 and 2013, it was Cachet Defendants' practice each week to place garbage bags onto the Sidewalk for garbage collection;

(5) Prior to 6:00 p.m. on January 7, 2011, Cachet placed garbage bags onto the Sidewalk for garbage collection; and

(6) Cachet Defendants are not aware of any information or evidence that would indicate that any third parties placed garbage bags onto the Sidewalk prior to 6:00 p.m. on January 7, 2011" (NYSCEF #162 – May 29, 2018 Notice to Admit).

The Cachet Defendants responded with a Reply to Notice to Admit signed only by their attorney with the same response for all six admission requests: "The answering defendants object to this demand on the grounds that it is not a proper question for a Notice to Admit. Notwithstanding the objection and without waiving same, the defendant cannot truthfully either admit or deny those matters, as the matters of which an admission is requested cannot be fairly admitted without some material qualification or explanation" (NYSCEF #163 – June 14, 2018 Reply to Notice to Admit).

DISCUSSION

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp*, 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiff's Partial Summary Judgment Motion

A plaintiff in a negligence action must show that: (1) defendant owed plaintiff a duty of reasonable care; (2) defendant breached that duty; and (3) plaintiff sustained damages as a proximate result of defendant's breach (*see Friedman v Anderson*, 23 AD3d 163, 164 [1st Dept 2005]). "Owners have a general duty to maintain their property in a reasonably safe condition" (*Golden v Manhasset Condominium*, 2 AD3d 345, 346 [1st Dept 2003]; *see also Kush v City of Buffalo*, 59 NY2d 26, 29 [1983]). This duty includes the obligation to maintain the sidewalk abutting one's real property in a "reasonably safe condition" (New York City Admin. Code §7-210[a]; *see Doyley v Steiner*, 107 AD3d 517, 520 [1st Dept 2013]). To establish a prima facie case of negligence in a trip and fall case, "a plaintiff must demonstrate that defendant created the condition which caused the accident, or that defendant had actual or constructive notice of the condition" (*Uhlich v Canada Dry Bottling Co. of New York*, 305 AD2d 107, 107 [1st Dept 2003]).

Here, Plaintiff makes out a prima face case of negligence. First, it is undisputed that on the date of the incident, the Cachet Defendants owned, managed, and maintained the Paris building. As such, the Cachet Defendants owed a duty to Plaintiff to maintain the sidewalk from hazardous conditions.

Next, Plaintiff shows that the Cachet Defendants breached their duty to Plaintiff. Plaintiff's Notice to Admit establishes that the Cachet Defendants placed the Christmas trees and garbage bags outside of the Paris at some time before plaintiff's accident. Additionally, Plaintiff's testimony and photographs from the time of the accident shows that the Cachet Defendants piled Christmas trees and garbage bags as to obstruct pedestrian traffic on the sidewalk and create an unsafe condition. As such, the Cachet Defendants created the hazard upon which Plaintiff tripped (*see Derix v Port Authority of New York and New Jersey*, 162 AD3d 522 [1st Dept 2018] [granting plaintiff summary judgment where plaintiff showed defendant created and controlled the hazardous condition]). Critically, the Cachet Defendants improperly responded to Plaintiff's Notice to Admit and thus the Cachet Defendants are deemed to have admitted to all six of Plaintiff's requests.

There is a dispute between the parties regarding the admissibility of the Notice to Admit. CPLR 3123(a) states that "[e]ach of the matters of which an admission is requested shall be deemed admitted unless... the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters".

The Cachet Defendants' Reply to the Notice to Admit is deficient under CPLR 3123 as it not sworn to by the Cachet Defendants and was merely submitted by their attorney on "information and belief" (NYSCEF #163 – Reply to Notice to Admit). The Cachet Defendants' failure to respond with a sworn statement is fatal as defendants'

Reply to Notice to Admit is rejected and Plaintiff's Notice to Admit is deemed admitted (*see Watson v City of New York*, 178 AD2d 126, 128 [1st Dept 1991] [defendant's failure to respond with a sworn statement resulted in admittance of Plaintiff's notice to admit]).

The Cachet Defendants' argument that Plaintiff's Notice to Admit is a nullity is rejected. The Cachet Defendants claim that the Notice to Admit improperly sought admissions concerning matters that go the heart of the controversy and therefore cannot be used as a basis for Plaintiff establishing a prima facie case for summary judgment.

The First Department has recently clarified that "[a] notice to admit is designed to elicit admissions on matters which the requesting party 'reasonably believes there can be no substantial dispute' (CPLR 3123[a]). '[A] notice to admit may not be utilized to request admission of material issues or ultimate or conclusory facts,' or 'facts within the unique knowledge of other parties'. Rather, it is 'only properly used to eliminate from trial matters which are easily provable and about which there can be no controversy'. Further, because a notice to admit 'is not intended as simply another means for achieving discovery,' it may not be used to obtain information in lieu of other disclosure devices'" (*Fetahu v New Jersey Tr. Corp.*, 167 AD3d 514, 515 [1st Dept 2018] [internal citations omitted]).

However, the nullity argument is of no moment because the Cachet Defendants failed to preserve it due to their improper Reply to Notice to Admit. In any event, Plaintiff's Notice to Admit does not go to the heart of the matter and requests admissions on questions of the Cachet Defendants disposal practices. As such, the Cachet Defendants are deemed to have admitted to all of Plaintiff's requests.

Finally, Plaintiff demonstrates that her trip and fall was proximately caused by the Cachet Defendants' negligence. As Plaintiff's deposition testimony, the testimony of the two non-party witnesses, and the documentary evidence demonstrates, Plaintiff tripped and fell when her pant leg was caught by a Christmas tree branch, causing Plaintiff to fall face-first onto the concrete and suffer injuries.

As such, Plaintiff has made out a prima facie case against the Cachet Defendants on liability. The Cachet Defendants owed Plaintiff a duty to maintain its sidewalk in a safe manner, the Cachet Defendants breached that duty by creating the hazardous condition, and Plaintiff tripped and fell over said condition.

The Cachet Defendants are unable to rebut Plaintiff's prima face case. Due to the preclusion stipulation, the Cachet Defendants are precluded from offering any evidence regarding: (i) how the incident occurred; and (ii) the maintenance of the Paris, including its sidewalk, how Christmas trees were placed on the sidewalk and who placed them there, whether the lighting was sufficient, and the placement of garbage on the sidewalk. As such, the Cachet Defendants are unable to show with admissible evidence an issue of fact in this matter.

The Cachet Defendants attempt to make oblique attacks on Plaintiff's motion for summary judgment. First, they contend that the non-party affidavits of Gallo and Nanni are deficient as they were not sworn under penalty of perjury. However, there is no requirement that an affidavit include the words "under the penalties of perjury" and it is sufficient that an affidavit is sworn to and notarized (*see* CPLR 2106; *Rodriguez v New York City Transit Authority*, 118 AD3d 618, 618-619 [1st Dept 2014]). The Gallo and Nanni affidavits were properly sworn to and notarized and thus defendants' argument fails.

Second, the Cachet Defendants claim that the non-party affidavits are self-serving and conclusory. The Cachet Defendants also claim that the non-party affidavits make expert claims. The Cachet Defendants' arguments are baseless. Even though the non-parties are Plaintiff's cousins, the affidavits are fact-based statements that provide eyewitness accounts of the incident. There is nothing conclusory in the non-party affidavits and there are no statements therein that indicate any expert conclusions. The non-parties affidavits use of words such as "illegal" and "hazardous" are not used in a technical manner. As such, there are no deficiencies in the non-party affidavits.

Third, the Cachet Defendants claim that summary judgment on liability must be denied because there is an issue of comparative fault. However, the Court of Appeals has held that "a plaintiff does not bear the double burden of establishing a *prima facie* case of defendant's liability and the absence of his or her own comparative fault" on a motion for partial summary judgment (*Rodriguez v City of New York*, 31 NY3d 312, 324-325 [2018]). The issue of comparative fault can be addressed in the damages phase. The Preclusion Stipulation stated that "[n]othing... shall preclude [Cachet Defendants] from submitting evidence of Plaintiff's comparative negligence, provided that any such evidence is not in the form of testimony from witnesses whom the [Cachet Defendants] were required to produce in response to the Court's orders and Plaintiff's deposition note" (NYSCEF #174). The Cachet Defendants will be able to contest Plaintiff's comparative fault within the strictures of the Stipulation in the damages phase of this litigation.

As such, all of the Cachet Defendants' attempt to defeat Plaintiff's motion for partial summary judgment fail. The court notes that as summary judgment on the merits is appropriate, there is no need to address Plaintiff's argument for sanctions regarding spoliation or to strike the Cachet Defendants' answer.

VII Paris West End Owner LLC's Cross-Motion

Defendant VII 752 West End Owner cross-moves for summary judgment on all claims against it. VII WEO argues that it was not the owner or property manager for the Paris on the date of the loss and had no duty or responsibility for anything at the premises. VII WEO points to a Bargain and Sale Deed dated September 15, 2010 that conveyed the Paris from it to 752 Paris WEA-II LLC and 752 Paris WEA LLC as tenants in common (NYSCEF #151 – September 15, 2010 Deed). VII 752 offers the

affidavit of Diego Rico, the Vice President of the company, who claims, with personal knowledge, that 752 WEO did not own the property on the date of the incident, again pointing to the September 15, 2010 Deed (NYSCEF #150 – Diego Rico Aff). VII 752 also points to 752 Paris WEA-II LLC and 752 Paris WEA LLC admission in their answer that they owned the premises on the date of the incident. Additionally, VII WEO offered Matthew Cohen, a former employee of a VII WEO affiliate, for deposition on the issue of Paris ownership.

Plaintiff opposes the motion and claims that there are still issues of fact regarding whether VII WEO had control over, or a legal relationship with, the premises on the date of the incident. Plaintiff claims that VII WEO has failed to put forth any evidence demonstrating that it is not responsible for Plaintiff's injuries. Plaintiff claims that VII WEO relies on the exact same evidence it submitted on an earlier denied motion to dismiss, save for the addition of Matthew Cohen's deposition (NYSCEF #21 – February 19, 2015 Order). As for Matthew Cohen's deposition, Plaintiff argues that he was never a VII WEO employee and did not have personal knowledge of the facts necessary to dispose of the questions regarding ownership, control, or liability.

Plaintiff in particular focuses on VII WEO's cross-claim against the Cachet Defendants which claimed that the Cachet Defendants agreed to purchase and maintain insurance providing coverage for VII WEO and that the Cachet co-defendants were liable to indemnify VII WEO in this matter. Apparently, the insurance policy ended on January 1, 2011, approximately 6 days prior to Plaintiff's accident. However, VII WEO withdrew its cross-claims against the Cachet Defendants by stipulation (NYSCEF #173 – July 25, 2017 Stipulation of Discontinuance)

VII WEO's cross-motion for summary judgment is granted. First, it is clear that VII WEO was not the owner, operator, or manager of the Paris property the day of Plaintiff's accident. The 2010 Deed indicates that the property was conveyed to the Cachet Defendants well before the incident. Furthermore, the Cachet Defendants admitted to owning and managing the property the day of the incident. Second, there is no evidence that VII WEO contributed in any way to Plaintiff's incident. Third, VII WEO withdrew its cross-claim regarding indemnification and there is no proof in the record to indicate that there was an active insurance policy governing the relationship between VII WEO and the Cachet Defendants at the time of Plaintiff's injury. As such, VII WEO has made a prima facie showing of entitlement to summary judgment – it was not the owner or manager of the Paris the day of the incident and thus no liability can attach to it.

Plaintiff fails to demonstrate an issue of fact precluding summary judgment. Plaintiff has proffered no evidence, even after discovery, indicating that VII WEO had a relationship with the premises of the Cachet Defendants at the time of the incident. While it was appropriate to deny VII WEO's motion to dismiss prior to discovery, nothing has turned up in the intervening period to indicate that VII WEO is liable in this matter. VII WEO's decision to withdraw its cross-claims and Plaintiff's failure to point to an insurance relationship between the co-defendants indicates that there is no

relationship between the parties. Even discounting Rico's affidavit and Cohen's deposition, the September 15, 2010 Deed, and the Cachet Defendant's admissions clearly demonstrate that the premises was not owned or managed by VII WEO. As such, the motion for summary judgment must be granted and all remaining claims against VII WEO dismissed.

Accordingly, it is ORDERED that Plaintiff's motion for partial summary judgment as to liability against Cachet Management LLC, 752 Paris WEA LLC, 752 WEA INV LLC, and 752 Paris WEA-II LLC is granted; it is further

ORDERED that defendant VII 752 West End Owner LLC's motion for summary judgment is granted and all claims are dismissed as against it; and it is further

ORDERED that the Clerk of the Court enter judgment as written.

This constitutes the Decision and Order of the court.

8/26/2019
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE