SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

ROSARIO RODRIGUEZ-PENA

INDEX NO. 152992/2014

MOT. DATE

- v -

MOT. SEQ. NO. 009 and 010

175 WEST 107TH LLC

The following papers were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____

Replying Affidavits NYSCEF DOC No(s)._____

This is a personal injury action arising from a slip and fall on ice. There are two motions for summary judgment pending. In motion sequence 9, defendants/third party plaintiffs 175 West 107th LLC (the "owner"), Dominion Property Holdings, Dominion Management Company, LLC ("Dominion"), and Bradley Rinzier now move for summary judgment dismissing the complaint and on their crossclaim. In motion sequence 10, defendant Dynasty Cleaners Corp. ("Dynasty") moves for summary judgment in its favor. Plaintiff and the non-moving defendants oppose each motion. The motions are hereby consolidated for the court's consideration and disposition in this single decision/order. Issue has been joined and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

Plaintiff testified at her deposition that on February 11, 2014, she slipped and fell on the sidewalk near the corner of Amsterdam Avenue and 107th Street. The building abutting the sidewalk where plaintiff's accident occurred is located at 175 West 107th Street (the "building"). At the time of the accident, the building was owned by the owner, managed by Dominion, and Dynasty leased the corner unit of the building where it operated a laundromat.

Plaintiff claimed that it had snowed "a lot" two days before her accident and that it was sunny the day she fell. None of the parties have provided climatological records to the court. About her accident, plaintiff testified as follows:

> Q. Was there a path the entire time you were walking on 107th Street or for a portion of the time you were walking on 107th Street?
>
> A. For a time. But when I got to the corner, right away I became aware that it wasn't clean there.

Dated: 10/28/20

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐**GRANTED** ☒ **DENIED** ☒ **GRANTED IN PART** ☐ **OTHER**

Seq 10 Seq 9

3. Check if appropriate: ☐**SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐**FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

Q. You became aware after the accident or before the accident?

A. Afterwards.
…

Q. Now, you stated that you became aware that it wasn't cleaned after your accident. What wasn't cleaned?

A. The corner where I fell.

Q. What did you observe at the corner where you fell?

A. Snow.

Q. Did you observe any ice?

A. Yes. When I slipped.

Q. Was there anything in your hands while you were walking?

A. No.

Q. How much snow did you observe after the accident?

A. Well, two like high hills.

Q. Where were those hills?

A. They were there on the corner.

Plaintiff marked a photo of the accident location with an X to indicate where the ice she slipped on was located. That photo has been provided to the court. Plaintiff marked a portion of the sidewalk in front of Dynasty's laundromat.

Enyse Dean appeared for a deposition on behalf of the owner and Dominion. Dean is Dominion's property manager and testified that she had managed the building for 20 years. The building contains both residential and commercial units. Specifically, the building has four commercial tenants. Insofar as is relevant to these motions, those tenants include Dynasty and a non-profit called Dominican Sunday, which both occupy ground floor units. Dynasty is located at the corner of the building at the intersection of Amsterdam Avenue and 107th Street and Dominican Sunday is situated on 107th Street.

Dean authenticated a lease between the owner and Dynasty wherein Dynasty "agree[d] to expeditiously remove any snow accumulation in front of Premises at [Dynasty's] own cost and expense." Dean was asked to explain this provision:

Q. Can you describe to us what area is included in the portion where that says in front of premises for the purposes of this lease?

A. Define what you mean by area.

Q. Does this include the sidewalk abutting the premises?

A. Directly in front of the store, yes.

Q. When you say the area directly in front of the store, showing you what has been marked as Defendants' Exhibit A from March 22, 18 2017, there is an X with the initials RRP next to it. Do you see that X?

A. Yes.

Q. And you are familiar with the location shown in that photograph, correct?

A. Yes.

Q. Where that X is located, is that the area in front of Dominican Sunday Inc?

A. No.
…

Q. Going back to Exhibit A of March 22nd, 2017, where we have the X with the initials R-R-P next to it, the location where that X is on Exhibit A from March 22, 2017, is that part of the area that is covered by Paragraph 7 Subdivision II of the rider to the Dynasty Cleaners Corp lease that we have marked as Exhibit 2?

MR. KOPLOWITZ: Note my objection. You can answer.

Q. Another way of stating that is the location that's marked, is that an area that the tenant, that being Dynasty Cleaners Corp was suppose to expeditiously remove any snow accumulation from?

A. Yes

Dean further testified that the building had a super who performed snow removal as well. The superintendent specifically removed snow on the 107th Street side of the building.

Q. …So your testimony is that the super cleans in front of Dominican Sunday, but not in front of Dynasty if I understand your testimony, because you said earlier that it is a tall fellow who cleans snow in front; is that correct?

A. Yes.

Q. But that the super you said cleans 107th Street side including in front of the Dominican Sunday?

A. The super cleans as necessary, and he will clean the sidewalks as necessary.

Q. Does he sometimes clean in front of Dynasty if he gets there and sees that it needs to be done?

A. He may.

The lease between the owner and Dynasty further provides in relevant part:

"Tenant's Liability Insurance, Property Loss, Damage, Indemnity": Owner or its agents shall not be liable for any injury or damage to persons or property resulting from any cause of whatsoever nature, unless caused by or due to the negligence of Owner, its agents, servants or employees. Tenant agrees, at Tenant's sole cost and expense to maintain commercial general liability insurance in standard form in favor of Owner and Tenant against claims for bodily injury or

> death or property damage occurring in or upon the demised premises, effective from the date Tenant enters into possession of the demised premises and during the term of the lease. Tenant shall indemnify and save harmless Owner against any and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance, including reasonable attorneys' fees paid, suffered or incurred as a result of any breach by Tenant, Tenant's agents, contractors, employees, invitees, or licensees, of any covenant or condition of this lease or by the carelessness, negligence or improper conduct of the Tenant, Tenant's agents, contractors, employees,. invitees or licensees. In case any action or proceeding is a fraud against Owner by reason of any such claim, Tenant, upon written notice from Owner, will, at Tenant's expense resist or defend such action or proceeding by counsel approved by Owner in writing, such approval not to be unreasonably withheld.

Dynasty produced Yuri Jung for a deposition. She is a co-owner of Dynasty along with her husband, James Jung. She testified in relevant part that her husband removed snow from the sidewalk in front of the premises on Amsterdam Avenue, but not the area plaintiff marked in the photo which is along 107th Street.

> Q. Where your husband cleans up to, does that include where the person put the X on this picture, or does not include that?
>
> A. No.
>
> Q. It does not include that area, correct?
>
> A. That's correct.
>
> Q. Have you ever seen anybody shoveling snow on the 107th Street side of the building that included the area where the X is?
>
> A. Super.

Jung further testified that she was present at the laundromat on the date of plaintiff's accident. The laundromat opened at 8am that day. She claimed that her husband had put an orange cone on the sidewalk in the morning before plaintiff's accident because it was "[t]oo icy". Jung further admitted that the area where the orange cone was placed was an area that her husband would normally shovel snow from.

Plaintiff has asserted claims against the defendants for negligence. The owner, Dominion, Dominion Property Holdings and Rinzier have asserted third-party claims against Dynasty for contribution, common law and contractual indemnification and breach of contract for failure to procure insurance.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

At the outset, the court rejects plaintiff's argument motion sequence 9 is defective because movants did not submit copies of all the pleadings. That rule does not apply to e-filed cases.

The court now turns to the parties' substantive arguments as to plaintiff's claims. Defendants argue that plaintiff's claims against Dominion Management Company LLC and Rinzier should be dismissed because the former is neither an owner of the building or a tenant thereat and the latter is just an individual owner of the corporate defendants and there is no basis for liability against them. Plaintiff does not mount any opposition to these arguments. Therefore, plaintiff's claims against these defendants are deemed abandoned and her claims against them are severed and dismissed. While not specifically raised, the court searches the record as to Dominion Property Holdings, which is also neither an owner or tenant, and finds that it is also entitled to summary judgment dismissing plaintiff's claims against it.

The court now turns to the balance of motion sequence 9 as to the owner. Admin Code § 7–210 imposes upon owners of certain real property a duty to maintain the sidewalk adjacent to the property and shifts tort liability to such owners for the failure to maintain the sidewalk in a reasonably safe condition. This duty includes an obligation to remove snow and ice from the sidewalk pursuant to Admin Code § 16-123. There is no dispute here that § 7-210 applies to the building. However, 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 the subject defective condition (*Bing v. 296 Third Ave. Group, L.P.*, 94 AD3d 413 [1st Dept 2012]; see also *Scott v. Bergstol*, 11 AD3d 525 [2d Dept 2004] [owner established entitlement to summary judgment by demonstrating that it was an out-of-possession landlord with no duty to remove snow and ice from the premises]). This is because once a duty has been established, ordinary negligence principles apply, and an out-of-possession owner that does not take any steps to remove snow and ice cannot be held liable because it neither caused nor created the harmful condition nor had notice of it.

Here, there is an issue of fact as to whether the owner had delegated its responsibility to maintain the portion of sidewalk where plaintiff claims she fell based upon the deposition testimony. Indeed, Dean testified that the superintendent may have cleaned the area where plaintiff fell and while Dynasty's lease indicates that it was responsible for maintaining the sidewalk in front of its premises, the parties to that lease may have altered their obligations through custom and practice. Further, the owner has not established that it did not cause or create the ice condition from which plaintiff's accident arose. There is no testimony as to what snow removal efforts the owner made in the days leading up to and including plaintiff's accident. Absent such a showing, the owner is not entitled to summary judgment.

The court now turns to Dynasty's motion as to plaintiff's claims. Ordinarily, a commercial tenant does not owe a duty to pedestrians injured because of snow or ice on a sidewalk pursuant to Admin Code § 7-210 because it only applies to property owners (see *Tucciarone v. Windsor Owners Corp.*, 306 AD2d 162 [1st Dept 2003]; see also *Locario v. State*, 90 AD3d 547 [1st Dept 2012]; *Bleich v. Metropolitan Management, LLC*, 132 AD3d 933 [2d Dept 2015]; see generally *O'Brien v. Prestige Bay Plaza Dev. Corp.*, 103 AD3d 428 [1st Dept 2013]). However, Dynasty displaced the owner's obligations to maintain the sidewalk in front of its premises safely by agreeing to do so in a comprehensive provision contained in the underlying lease.

Therefore, Dynasty can be held liable for failing to take reasonable care to remove snow and ice from the sidewalk (see NY PJI 2:111A). On this record, there is a dispute as to whether plaintiff fell in an area that Dynasty was obligated to maintain for the reasons already stated herein. The court rejects Dynasty's counsel's argument that "[t]he [t]estimony is [a]mpy [c]lear on [w]hat [a]rea of the [s]ubject [p]roperty [e]ach [d]efendant [w]as [r]esponsible [f]or" Whether Dean knew if Jung routinely shoveled snow in the area where plaintiff's accident occurred is not dispositive. Dean clearly testified that the ar-

ea marked by plaintiff was Dynasty's responsibility to maintain and assuming *arguendo* that Dean's responses to other deposition questions contradicts that position, such contradiction merely highlights triable issues of fact.

The court further rejects Dynasty's argument that it lacked notice of the icy condition which caused plaintiff's accident. As the court previously noted, the parties have not submitted any climatological data which would prove that a freeze/refreeze situation had not occurred and even if they had, Jung's testimony that her husband place an orange cone on ice mere hours before plaintiff's accident is sufficient to raise a triable issue of fact on this point.

Dynasty has otherwise failed to come forward with any proof which would demonstrate that it is entitled to judgment as a matter of law dismissing plaintiff's claims. Accordingly, Dynasty's motion as to plaintiff's claims is denied.

As for the third-party claims, the balance of the motions is also denied based upon the issues of fact previously identified by the court.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that motion sequence 9 is granted to the extent that plaintiff's claims against Dominion Management Company, LLC, Dominion Property Holdings and Rinzier are severed and dismissed; and it is further

ORDERED that the balance of motion sequence 9 is denied; and it is further

ORDERED that motion sequence 10 is denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 10/28/20
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.