

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

CAMILA CASTILLO,

Plaintiff,

-against-

BANGLADESH SOCIETY, INC.,
CHUNG LUNG JEAN, and LIEN YU TONG

Defendants.

Index No: 15818/04

Motion Date: 5/17/06

Motion Cal. No.: 8,9

Motions bearing Calendar numbers 8 & 9 are combined for disposition.

The following papers numbered 1 to 19 read on this motions and cross-motion by defendants for summary judgment dismissing the complaint.

	<u>PAPERS</u> <u>NUMBERED</u>
Cal.# 8 Notice of Motion-Affidavits-Exhibits	1 - 4
Cal.# 9 Order to Show Cause-Affidavits-Exhibits	5 - 9
Notice of Cross-Motion-Affidavits-Exhibits ...	10 - 13
Answering Affidavits-Exhibits.....	14 - 16
Replying Affidavits.....	17 - 19

Upon the foregoing papers it is ordered that the motions and cross-motion are determined as follows.

The defendant's, BANGLADESH SOCIETY, INC.'s, motion for summary judgment dismissing the complaint and all cross-claims insofar as they are asserted against it is granted and the remainder of the action is severed.

The motion of defendant, Jean and the cross-motion of defendant, Tong, are denied.

This is an action to recover for personal injuries plaintiff sustained on January 24, 2004 at 7:30 p.m. when she slipped and fell on ice on the public sidewalk in front of the premises known as 86-22 Whitney Ave., Elmhurst. The premises are owned by the defendant, JEAN and occupied by the tenant, defendant TONG who operates a cafe/bar at the location. The plaintiff commenced this

action against the owner and occupant of the premises abutting the sidewalk where she fell and the BANGLADESH SOCIETY, INC., the owner of the adjoining premises known as 86-24 Whitney Ave. All of the defendants separately move for summary judgment in their favor dismissing the complaint.

In the City of New York, prior to 2003, the owner or lessee of property abutting a public sidewalk was under no duty to pedestrians, simply by virtue of being an abutting owner or lessee, to maintain the public sidewalk or to remove snow and ice that naturally accumulated on the sidewalk in front of the premises and could not be held liable in tort for failing to do so. (See Hausser v. Giunta, 88 NY2d 449,452-453 [1996]; D'Ambrosio v. City of New York, 55 NY2d 454 [1982].) As of September 14, 2003, this common law rule was changed with the passage of Administrative Code of the City of New York § 7-210. Section 7-210 imposes upon the owners of property abutting the public sidewalk the affirmative duty to maintain the sidewalk, including removal of snow and ice, and makes the owner liable in tort for injuries arising out of its breach of this duty.

The defendant, BANGLADESH SOCIETY, INC. made a prima facie showing of entitlement to summary judgment by submitting, inter alia, the deposition testimony of the plaintiff, the affidavit and deposition testimony of Muhammad A. Hussain, an officer of the defendant, which established that the plaintiff did not fall on the sidewalk abutting its property and, thus, it had no duty to the plaintiff pursuant to the Administrative code §7-210. Therefore, the BANGLADESH SOCIETY, INC. can be held liable only if it created the condition by attempts at snow removal which rendered the sidewalk on the neighboring property more hazardous. (see Rios v. Acosta, 8 AD3d 183 [2004], supra; Palmer v. City of New York, 287 AD2d 553 [2001], supra; Steo v. New York Univ., 285 AD2d 420 [2001].) In this regard Hussain asserts in his affidavit that the defendant did not create the condition on the neighboring property because neither he nor anyone else from the BANGLADESH SOCIETY, INC. performed any snow removal on the sidewalk abutting its own property or the neighbor's property.

Where, as here, the movant has established its entitlement to summary judgment, the party opposing the motion must come forward with evidentiary proof in admissible form sufficient to demonstrate the existence of a factual issue requiring a trial of the action. (Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zukerman v. City of New York, 49 NY2d 557, 562 [1980].) The co-defendants do not oppose the motion. Plaintiff's attorney's conclusory claim that because the "path" on which plaintiff fell ran the entire block raises a question of fact as

to whether the movants attempted to remove the snow is unsupported by any competent evidence and, thus, insufficient to raise a question of fact. (Zukerman v. City of New York, supra.) Accordingly, the motion is granted and the complaint, so far as it is asserted against the defendant, BANGLADESH SOCIETY, INC., is dismissed.

The defendant, JEAN's motion is denied for failure to establish his entitlement to summary judgment as a matter of law. In support of his motion for summary judgment, the defendant argues that he cannot be held liable for plaintiff's injury because he is an out of possession landlord without notice. Specifically, defendant contends that he did not have notice, actual or constructive, of the icy condition, and that pursuant to the lease, it was the tenant who was obligated to maintain the sidewalk including removing the snow and ice. The defendant's claim, however, is insufficient to establish, as a matter of law, that he did not breach the affirmative duty imposed upon him by the Administrative Code.

Ordinarily an out of possession landlord is not liable for injuries sustained at its premises after possession has been transferred to a tenant unless it retains control over the premises or is contractually obligated to repair unsafe conditions or the condition giving rise to the injury arises out of the violation of a statute or administrative code provision. (See, Guzman v. Haven Plaza Hour. Dev. Fund Co., 69 NY2d 559 [1987]; Kaiping v. V & J, Inc., 8 AD3d 628 [2004].) The above rule however, is not relevant here since the sidewalk is not part of the demised premises. The sidewalk is owned by the City of New York and maintenance and liability is now imposed on the "owner" of the abutting property.

Administrative Code § 7-210 is designed for the safety and protection of the public and imposes upon the landowner a positive non-depletable duty. The violation of which is evidence of negligence. (Elliott v. City of New York, 95 NY2d 730,724 NY (2001); see, e.g. Smulczeski v. City Center of Music & Drama, 3 NY2d 498 (1957); Reider v. Whitebrook Realty Corp. 23 AD2d 691 [1965].) Nothing in the Administrative Code permits an out of possession landowner the right to assign and/or delegate its obligations under the Code to the tenant in possession (compare, DiNatale v. State Farm Mutual Automobile Insurance Company, 5 AD3d 1123[2004] applying Amherst Town Code § 83-9-5[5-1].) Ensuring the financial responsibility of the party now obligated to maintain an abutting sidewalk is an integral part of the newly enacted Code provision.

As for the defendant's claim that he did not have notice of the condition, this too is unavailing. Even an out of possession landlord can be held liable for violations of a statute or Administrative Code provision provided he had notice of the condition. (See generally, Putnam v. Stout, 38 NY2d 607 [1976];, Murphy v. 136 Northern Blvd. Associates, 304 AD2d 540 [2004].) Inasmuch as the defendant, BANGLADESH SOCIETY, INC., submitted evidence which indicates that 1.4 inches of snow fell on January 18, 2004, and that the temperature between January 18, 2004 and January 24, 2004 was generally below freezing, questions of fact exist as to whether JEAN may be charged with constructive notice of the icy condition which allegedly caused the plaintiff's fall.

The cross-motion of the defendant, TONG, is denied as untimely, without considering the merits of the motion. (CPLR 3212[a]; Miceli v. State Farm Mut. Auto. Ins. Co., 3 NY3d 725 [2004]; Brill v. City of New York, 2 NY3d 648 [2004]; Milano v. George, 17 AD3d 644 [2005].)

Pursuant to a Stipulation, dated December 6, 2005, and So Ordered by Justice Ritholtz, summary judgment motions had to be made returnable no later than April 15, 2006. The defendant, Tong's, cross-motion returnable on April 26, 2006 is thus, untimely. (See, Milano v. George, supra.) Although Tong's motion was late, he neither moved for leave to make a late summary judgment motion nor submit any explanation, much less one which constitutes "good cause", for his failure to timely move. (Brill v. City of New York, supra.) Nor has defendant provided any reason to delay and move by cross-motion. (See, Gaines v. Shell-Mar Foods, Inc., 21 AD3d 986 [2005]; Thompson v. Leben Home for Adults, 17 AD3d 347 [2005]; Gonzalez v. Zam Apartment Corp., 11 AD3d 657[2004]). In the absence of a "good cause" showing, the court has no discretion to entertain even a meritorious non-prejudicial motion for summary judgment. (Brill v. City of New York, supra; Thompson v. New York City Bd. of Educ., 10 AD3d 650[2004].)

Dated: June 5, 2006
D# 26

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J.S.C.