[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A. Madden PART 11

Index Number : 112325/2008

AUERBACH, BRETT

VS

TRINITY BOXING

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 9/17/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision and order.

FILED
FEB 02 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: January 19, 2010

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

----------x

BRETT AUERBACH,

Plaintiff,

-against-

Index No. 112325/08

TRINITY BOXING AND ATHLETIC CLUB, INC., 110 GREENWICH STREET ASSOCIATES, LLC., WAVERLY PROPERTIES, LLC. and JAKOBSON PROPERTIES, LLC.,

Defendants.

----------x

Joan A. Madden, J.

Defendants 110 Greenwich Street Associates, LLC., Waverly Properties, LLC., and Jakobson Properties LLC. (together "110 Greenwich") move for summary judgment dismissing the complaint and any cross claims filed against them (motion seq. no. 002). Defendant Trinity Boxing and Athletic Club, Inc. ("Trinity") separately moves for summary judgment dismissing the complaint against it or, in the alternative, for summary judgment with respect to its cross claim against 110 Greenwich for contribution or indemnification (motion seq. no. 003).[1] Plaintiff Brett Auerbach ("Auerbach") opposes both motions for summary judgment. For the reasons stated below, 110 Greenwich's motion is granted and Trinity's motion is denied.

Background

This is an action to recover damages for personal injuries allegedly sustained by Auerbach on July 2, 2008, at approximately 7:00 p.m., when he tripped and fell after landing on a depression in the floor containing a steel mounting bolt at the Trinity Boxing Club (the "gym") located at 110 Greenwich Street, New York, New York ("the premises"). Auerbach had been a

[1] Motion seq. nos. 002 and 003 are consolidated for disposition.

member of the gym since January, 2007. Auerbach contends that the defendants created the depression in the floor of the gym and "negligently, carelessly and recklessly" allowed it to remain there. Based on the record, including deposition testimony and Exhibit 1 of Plaintiff's Affirmation in Opposition to 110 Greenwich's motion for summary judgment, the depression appears from photographs to be approximately 4 inches long, 3 inches wide, and ½ an inch deep. Trinity and 110 Greenwich concede that there were depressions in the floor at the time of the accident, but dispute whether they were created prior to the signing of the lease or sometime thereafter.

The gym is owned and operated by Trinity. The premises, on which the gym is located, is owned by 110 Greenwich Street Associates, LLC. Waverly Properties, LLC. is the property manager of the premises and is employed by Jakobson Properties LLC.

At the time of the accident, Trinity occupied the premises pursuant to a lease dated February 7, 2004, between Trinity, as tenant, and 110 Greenwich, as landlord (the "Lease"). Article 20 of the Lease states that Trinity had inspected the premises prior to entering into the Lease and "was acquainted with...[its] condition" and agreed to "take...[the premises] as is." Under Article 4 of the Lease, Trinity agreed to maintain and repair the premises and to make all non-structural repairs to preserve the premises in "good working order and condition." Under the Lease, 110 Greenwich remained responsible for making structural repairs to the premises.

At his deposition, Auerbach testified that he was doing a calisthenics training exercise under the direction of Marci, a trainer employed by Trinity, at the time he fell on the floor of the gym (Auerbach dep. at 39). According to Auerbach, the exercise Marci instructed him to do involved repeatedly jumping "from the concrete floor to the canvas of the lower [boxing] ring, and then backwards back down to the concrete floor" (Auerbach dep. at 47). Auerbach testified

that he fell during a repetition of this exercise when he jumped backwards and fell when his heel landed in the depression on the concrete floor (Auerbach dep. at 54-5).

Thomas Jakobson ("Jakobson"), a managing member of 110 Greenwich Street Associates and employee of Jakobson Properties LLC., testified during his deposition that he had not seen the depressions prior to the time Trinity leased the premises, but could not confirm that they had been created after Trinity occupied the premises (Jakobson dep. at 26). Jakobson further testified that the premises was vacant for a time prior to Trinity taking possession (Id. at 14), that 110 Greenwich employed a superintendent for the building at that time (Id. at 15), and that he met with John Snow ("Snow"), the manager of the Trinity Boxing Club, at the premises prior to the signing of the Lease (Id. at 16).

At his deposition, Snow testified that the depressions were present at the time Trinity came to occupy the premises (Snow dep. at 26). He subsequently testified, however, that he did not recall how long he had been working at the Trinity Boxing Club before he noticed the holes (Id. at 35). Snow also testified that he did not speak to Jakobson about the holes (Id.).

110 Greenwich moves for summary judgment dismissing the complaint, arguing that (1) as an out-of-possession landlord, 110 Greenwich did not owe a duty of care to Auerbach because, under the terms of the Lease, the alleged defect in question was not structural in nature and did not constitute a statutory violation, (2) Trinity, rather than 110 Greenwich, was responsible for repairing the alleged defect as it was a non-structural repair, and (3) the depression in this case is too trivial to be actionable. 110 Greenwich also seeks summary judgment dismissing Trinity's cross claim against it on the grounds that the condition was non-structural and, as such, 110 Greenwich was not responsible for repairing it.

Trinity moves for summary judgment dismissing the complaint on the grounds that the defect at issue is too trivial to be actionable and Trinity owed no duty to Auerbach to repair it since the defect at issue was structural and 110 Greenwich was responsible for structural repairs under the terms of the Lease. Additionally, Trinity asserts that, in the event that summary judgment is not granted to it with respect to plaintiff's direct action, it should be granted summary judgment on its cross claim for indemnification against 110 Greenwich since the condition at issue is structural and, therefore, should have been repaired by 110 Greenwich.

Auerbach opposes both Trinity's and 110 Greenwich's motions for summary judgment on the grounds that the depression was not a trivial defect or, at the very least, there is an issue of fact as to whether the defect in question is trivial. Auerbach further asserts that the defendants negligently created and failed to repair the depression in violation of the City of New York's Administrative Code. With respect to 110 Greenwich's arguments concerning whether 110 Greenwich had notice of the condition or acted negligently, Auerbach contends that there are triable issues of fact in this regard. With respect to Trinity's claim that it is not liable if the condition is structural, Auerbach contends that Trinity is not absolved from liability as Auerbach was performing exercises in the proximity of the hole on which he fell at the direction of a trainer employed by Trinity.

Plaintiff concedes, however, that Trinity and 110 Greenwich are correct that the doctrine of res ipsa loquitor alleged in the complaint is inapplicable.

In support of his position, Auerbach submits the affidavit of Scott M. Silberman, P.E. ("Silberman") who is a licensed professional engineer. Silberman states in his affidavit that his opinions are based on an account(s) of the circumstances surrounding the fall, photographs furnished during discovery, and his observation of the site of the fall. Silberman opines that the

"subject floor upon the defendant's premises, was, on the date of plaintiff's injury, in defective and/or dangerous condition...[and was permeated] with multiple defects which created tripping hazards..." (Silberman affidavit, 2). Silberman further opines that the defects constitute violations of the City of New York's Administrative Code Sections 28-103 (relating to the duties and powers of the Commissioner of Buildings) and 28-301.1 (relating to the obligation of owners to maintain their buildings in a safe, code compliant manner).

Following the submission of this affidavit, Trinity submitted an affirmation in further opposition to 110 Greenwich's motion for summary judgment on the grounds that the code sections may provide a basis for liability against 110 Greenwich as a building owner.

In reply, 110 Greenwich contends that Silberman's expert affidavit should not be considered by the court as Auerbach did not exchange the affidavit prior to the filing of the Note of Issue and the affidavit was served only in response to its summary judgment motion, and that in any event, Silberman's opinion, is insufficient to defeat its summary judgment motion.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

With respect to 110 Greenwich's motion for summary judgment, 110 Greenwich has made a prima facie case that, as an out-of-possession landlord, it did not owe a duty to repair the

defect at issue and the opposing parties have not contradicted this showing. In general, "an out-of-possession landlord may not be held liable for a third party's injury on his or her premises unless the landlord has [actual or constructive] notice of the defect and has consented to be responsible for maintenance and repair." Lopez v. 1372 Shakespeare Ave. Housing Development Fund Corp., 299 A.D.2d 230, 231 (1st Dep't 2002) (emphasis supplied). "Constructive notice may be found...where...the landlord expressly reserves a right under the terms of the lease to enter the premises for the purpose of inspection, maintenance and repair, and there is a specific statutory violation." Id. Here, even assuming *arguendo* that there are triable issues of fact as to whether 110 Greenwich knew about the defect prior to leasing the premises, the record demonstrates that 110 Greenwich did not agree to repair the defect, which was non-structural in nature.

Specifically, under the Lease, Trinity agreed to "take...[the premises] as is" (Lease, Article 20) and make all non-structural repairs to preserve the premises in "good working order and condition (Lease, Article 4)." While 110 Greenwich retained responsibility to make repairs to structural conditions, the condition in this case is not structural. "A structural change or alteration is such a change as affects a vital and substantial portion of the premises, as changes its characteristic appearance, the fundamental purpose of its erection, or the uses contemplated, or, a change of such a nature as affects the very realty itself-- extraordinary in scope and effect, or unusual in expenditure." See 1 Rasch, New York Landlord and Tenant § 15:7 cited in Garrow v. Smith, 198 A.D.2d 622, 623-4 (1993). Based on this definition, it cannot be said that the defect at issue, consisting of a ½ inch deep depression in the floor approximately 4 inches long and 3 inches wide with a steel bolt at the bottom, is structural.

Furthermore, since the defect is not structural, the limited right of reentry that 110 Greenwich retained under the Lease does not give rise to an obligation by 110 Greenwich to repair it. See Velazquez v. Tyler Graphics Ltd., 214 A.D.2d 489 (1st Dept 1995). In addition, the Administrative Code provisions relied on by Auerbach's expert, § 27-103[2] and §28-301.1, are insufficient to raise an issue of fact as to 110 Greenwich's liability. Section 27-103 simply refers to the scope of the coverage of the Administrative Code provisions relating to the Building Code. Section 28-301.1 provides, in relevant part, that an "owner shall be responsible to maintain...[his] building...and all other structures...in a safe and code-compliant manner." Putting aside the fact that Auerbach failed to give notice of the expert prior to filing the Note of Issue, these Administrative Code provisions cited by the expert are too general to impose a basis for tort liability. Dixon v. Nur-Hom Realty Corp., 254 A.D.2d 66 (1st Dept 1998).

Next, contrary to Auerbach's contention, 110 Greenwich did not have responsibility for the defect based on the provision of the Lease prohibiting Trinity from laying linoleum and certain other floor coverings.[3] This provision only restricts Trinity's ability to make major changes in the type of floor covering and therefore has no bearing on Trinity's obligation to maintain the floor or to repair defects like the one at issue.

Accordingly, 110 Greenwich's motion for summary judgment is granted.

---

[2]While Silberman cites section 28-103 it appears from his affidavit that he is referring to section 27-103.

[3] According to Article 6 of the Rules and Regulations incorporated into the Lease Agreement, Trinity was prohibited from:

> "laying linoleum, or similar floor covering, so that the same shall come in direct contact with the floor of the demised premises, and, if linoleum or other similar floor covering is desired to be used, an interlining of builder's deadening felt shall be first affixed to the floor, by a paste or other material, soluble in water, the use of cement or other adhesive material being expressly forbidden."

Trinity's motion for summary judgment against the plaintiff is denied. Under the terms of the Lease, Trinity agreed to take the property "as is" and to maintain the property in good condition, making appropriate non-structural repairs. As it has been determined that the depression is non-structural, Trinity is responsible under the Lease for repairing it. Moreover, as the occupier of the premises, Trinity arguably knew or should have known about the defect.

Next, Trinity's argument that the defect in question is too trivial to be actionable is unavailing. In determining whether a defect is trivial, a court must examine all of the facts presented, including the "width, depth, elevation, irregularity, and appearance of the defect, along with the time, place, and circumstances of the injury and whether it constitutes a trap or snare." See Trincere v. County of Suffolk, 90 NY2d 976, 977 (1997). Here, the record, including, the photographs submitted showing the size and nature of the defect, and the testimony of the plaintiff, are sufficient to raise a triable issue of fact as to whether the defect constituted a dangerous or defective condition.

That being said, however, any claim against Trinity seeking to recover under the doctrine of res ipsa loquitor, must be dismissed as Auerbach has conceded that the doctrine does not apply here.

Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment by defendants 110 Greenwich Street Associates, LLC., Waverly Properties, LLC., and Jakobson Properties LLC. (motion seq. no. 002) is granted and the complaint and cross claims asserted against these defendants are dismissed; and it is

ORDERED that, except to the extent plaintiff seeks to recover based on a theory of res ipsa loquitor, the motion for summary judgment by defendant Trinity Boxing and Athletic Club, Inc. (motion seq. no. 003) is denied; and it is further

ORDERED that the remaining parties shall appear for a pre-trial conference on February 4, 2010, at 3:15 p.m. in Part 11, room 351, 60 Centre Street, New York, New York..

Dated: January 21, 2010

J.S.C.