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

HON. JUDITH J. GISCHE

PART 10

Index Number : 114506/2004

REESE, NANCY E.

VS

363 EAST 76TH STREET

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

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

FILED
MAR 20 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: March 7 2007

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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Nancy E. Reese,

Plaintiff

-against-

363 East 76th Street Corporation, Duane Reade Inc., JKI Corp., Duane Reade Realty Inc., and Ran First Associates,

Defendants.

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DECISION/ORDER
Index No.: 114506/04
Seq. No.: 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers	**Numbered**
Def 363 E76 n/m s/j w/ DF affirm, exhs	1
Def Duane Reade opp w/JGB affirm, exhs	2
Reply w/DF affirm	3

Upon the foregoing papers the court's decision is as follows:

GISCHE, J.

This is an action by plaintiff to recover damages for her personal injuries. Now before the court is defendant, 363 East 76th Street Corporation's ("363 East 76th") motion for summary judgment dismissing plaintiff's complaint against it, and all cross claims by Duane Realty Inc., *s/h/a* Duane Reade Inc. and Duane Reade Realty Inc. ("Duane Reade"). The other named defendants, JKI Corp. and Ran First Associates have not appeared in this action (hereinafter "JKI" and "Ran First," respectively).

Issue is joined, discovery is complete and plaintiff filed her note of issue on July 17, 2006. Defendant 363 East 76th brought its motion timely thereafter. CPLR §3212;

Brill v. City of New York, 2 NY3d 648 (2004). Therefore, it will be considered on the merits.

Plaintiff has not taken any position on this motion, though there is proof of service.

Duane Reade opposes the motion on the basis that there are triable issues of fact. It also opposes the motion because 363 East 76th seeks summary judgment on its cross claim against Duane Reade for common law indemnification. Although 363 East 76th seeks this relief in the body of its motion, it is not included within the notice provisions. Duane Reade urges the court to deny 363 East 76th's motion for that reason alone. Since Duane Reade has 1) addressed this branch of the 363 East 76th's motion on the merits, 2) Duane Reade has raised no claim of prejudice, and 3) the court, for reasons set forth below, decides that 363 East 76th is not entitled to summary judgment, this branch of the motion will be considered on the merits, notwithstanding the defective notice. *See*: Baciagalupo v. Baciagalupo, 53 Misc2d 13 (Sup Ct, NY Co 1967).

Background

Plaintiff Nancy Reese claims, and testified at her examination before trial, that on April 20, 2004, as she was leaving the Duane Reade store located at 363 East 76th Street (the "store") she fell. She describes her fall as follows: "I did not slip. I went to take a step. My right heel went into the hole." She has described the area where she fell as being a platform where there was a pole extending upwards. Although she was shown color photographs of the entrance to the store at her EBT, she testified that they

did not show the pole that had been present when she fell. In her bill of particulars, plaintiff claims violations of unspecified sections of the New York City Building Code and "other statutes." In response to a demand for the specific statutory, code, regulatory, etc., provisions that were violated, she stated that "no further particularization need[s] to be given" because the trial court could take "judicial notice" of the violated sections.

363 East 76th contends that it is the "out of possession landlord" of the store and that its tenant, Duane Reade, was solely responsible for maintaining the premises, including the platform in question. Although in its answer 363 East 76th admitted that it is the "owner" of the premises, there is some confusion as to what this means. This is discussed further below in the court's analysis. 363 East 76th contends that because plaintiff has not alleged that the defective condition was due to any particular code or statutory violation, it is not liable for her injuries because it was out of possession, without the right to enter the premises, and therefore without any control over the premises. Alternatively, 363 East 76th argues that if plaintiff's complaint is not dismissed, it is entitled to common law indemnification by Duane Reade because it was negligent.

To support these arguments, 363 East 76th relies upon the EBT testimony of Mr. Powell, the Assistant Manager for the Duane Reade store on 76th Street. Mr. Powell testified that he worked there at the time of the accident and for a some time before then. He testified that there was never any pole or railing in the concrete platform while he worked there, but that he knew about and had seen holes in the concrete. The

holes were present on the date of the accident. Mr. Powell testified that the area was not marked or barricaded in any way. According to Mr. Powell, he and other Duane Reade personnel were responsible for keeping the platform area clear of debris.

363 East 76th also relies upon the EBT testimony of Mr. Gutierrez, the building superintendent. Mr. Gutierrez testified that after Duane Reade moved in to the retail space they installed the platform where plaintiff's accident is alleged to have occurred. He described it as a one step platform with railing down the middle, separating the entrance on one side from the exit. He testified that he was not responsible for maintaining the store, or the concrete platform. He also testified that he noticed the railing had been removed, but could not recall when that occurred, or whether it was in place on the date of the accident. He testified that he had no obligation to inspect the area in front of the store and that although he had noticed "overnight they removed the railing [. . .] and they left the hole there" he did not report what he had observed to anyone in management, or his superiors.

Based upon the foregoing, 363 East 76th contends that if any defendant bears liability it is Duane Reade, therefore, if it is denied summary judgment, it seeks common law indemnification.

Duane Reade opposes 363 East 76th's motion on a number of bases.

First, Duane Reade argues that 363 East 76th is the owner of the building, not just a landlord, and that it has a non-delegable duty to maintain the premises in a safe condition. Duane Reade contends that plaintiff's fall was due to a violation of section 7-210 of the Administrative Code of the City of New York [enacted July 16, 2003],

imposing upon abutting real property owners liability for injuries arising from a sidewalk defect ("the sidewalk law"). This law provides as follows:

> "7-210. Liability of real property owner for failure to maintain sidewalk in a reasonably safe condition.
>
> a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.
>
> b. Notwithstanding any other provision of law, the owner of real property, abutting any sidewalk, including but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk."

Duane Reade next argues that 363 East 76th has failed to prove, through evidence in admissible form, that under its lease with Duane Reade, 363 East 76th maintained no responsibility or control over the premises. Duane Reade contends that Mr. Gutierrez who testified about Duane Reade's responsibilities under the lease is not familiar with the lease and not a signatory. Duane Reade points out that 363 East 76th has not provided its lease with Duane Reade or copies of other relevant leases. Duane Reade does provide one lease it has in its possession. That lease, however, is its lease agreement with JKI, Corporation, another defendant in this action who has not appeared.

According to this sublease or "First Amendment of Lease" dated July 13, 2000, Duane Reade and JKI apparently swapped retail spaces. Although Mr. Gutierrez

testified this had happened, he did not know any details, and had never seen the lease. This amendment incorporates by reference the September 1996 lease between Ran First Associates ("1996 lease"), another defendant who has not appeared in this action. Ran First is identified in the 1996 lease as the "owner." Paragraph 74 of the 1996 lease, however, provides that notwithstanding the identification of Ran First as "Owner" it is not the fee owner but a tenant or "Over-Tenant" pursuant to a 1990 "Over-Lease."

Paragraph 4 of the printed 1996 lease provides that the "owner" shall maintain and repair the public portions of the building, both exterior and interior" and paragraph 39, entitled "Successors and Assigns," provides that "[t]he covenants, conditions and agreements contained in this lease shall bind and insure to the benefit of Owner and Tenant and their respective [. . .] assigns."

Duane Reade also contend 363 East 76th had actual notice of the condition in front of the store, based upon Mr. Gutierrez's testimony that he saw the open holes in the cement, but did not repair them or notify anyone in charge of their presence.

Finally, Duane Reade contends that 363 East 76th's motion for summary judgment granting it common law indemnification is premature and cannot be decided until the issue of liability is resolved.

Based upon the foregoing, Duane Reade contends that 363 East 76th has not met its burden of providing it is entitled to summary judgment, and its motion must be denied in its entirety.

Discussion

On a motion for summary judgment, the moving party has the initial burden of producing evidence as would be required at a trial and has a greater burden to produce

evidentiary facts than the adversary. Friends of Animals v. Associated Fur Mfrs., 46 NY2d 1065 (1979). Where the moving party does not sustain this burden of proof it must be denied, even if the opposing papers are insufficient. Winegrad v. New York University Medical Center, 64 NY2d 851 (1985).

At the outset, the court rejects 363 East 76th's argument, that it is entitled to summary judgment dismissing the complaint simply because plaintiff has not opposed it. The moving party seeking summary judgment always has the burden of proving its case and inadequacies or gaps in its opponent's proof will not sustain the moving party's burden. Fromme v. Lamour, 292 A.D.2d 417 (2nd Dept 2002) (*citing* George Larkin Trucking Co. v. Lisbon Tire Mart, Inc., 185 A.D.2d 614 (4th Dept. 1992). This is true even when based upon a party's failure to oppose the motion, because summary judgment is a resolution on the merits. Vinci v. Northside Partnership, 250 AD2d 965 (3rd Dept 1998). Therefore, if 363 East 76th does not prove its defenses, as a matter of law, or if Duane Reade raises triable factual disputes, then 363 East 76th's motion must be denied.

Generally, an out-of-possession landlord may not be held liable the personal injuries sustained by someone injured in the subject premises unless the landlord has notice of the defect and has consented to be responsible for maintenance or repair. Lopez v. 1372 Shakespeare Ave. Housing Development Fund Corp., 299 A.D.2d 230, 231 (1st Dept 2002). Where, however, 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, constructive notice may be found. Guzman v. Haven Plaza Hous. Dev. Fund Co., 69 N.Y.2d 559 (1987).

Defendant 363 East 76th has not proved that it is an out of possession landlord with no right to enter the premises, maintain it or make repairs. It has not proved that it delegated any of its maintenance obligations to Duane Reade, nor has it proved that even if it did so, such obligations are, as a matter of law, delegable.

363 East 76th relies upon the EBT testimony of people who have no personal familiarity with the lease provisions that it claims absolve it of any liability. Duane Reade has, on the other hand, set forth triable disputes about whether 363 East 76th could delegate the responsibilities it claims it did.

Moreover, although 363 East 76th contends that the area where plaintiff fell is not part of the sidewalk, within the meaning of the sidewalk law, this argument is offered without any legal authority, and it is directly contradicted by other evidence presented in this record. Plaintiff testified that she took several steps from the store and that she fell as she "began to walk from the platform onto the sidewalk." Under section 7-210, the owner of real property abutting a sidewalk is responsible for maintaining the sidewalk in a reasonably safe condition. Therefore, 363 East 76th has not proved, as a matter of law, that it did not violate any applicable codes, statutes, ordinances, etc., such that it would not be liable to plaintiff. Duane Reade has asserted the violation of the sidewalk law as a defense. Plaintiff's testimony and her bill of particulars state, albeit generally, that there were code violations that resulted in the defective condition she complains of.

363 East 76th Street has also failed to prove that it did not have notice (either constructive or actual) of the defective conditions in front of the store, and that it was not responsible for correcting them. Mr. Gutierrez testimony is that he noticed the holes but did not notify anyone of them, or repair them. While he claims he was not under

any obligation to do so, this is not dispositive of plaintiff's claims.

There is even a factual dispute about whether there was a pole or other structure arising from the concrete platform. Plaintiff has testified there was. Mr. Gutierrez testified there was a railing and it was removed, but he could not remember when. Mr. Powell testified he never saw anything in the platform - railing or pole - but just the holes.

Since 363 East 76th has not met its burden on this motion for summary judgment, and there are triable issues of fact, its motion must be denied in its entirety. The issue of whether this defendant is entitled to common law indemnification by Duane Reade cannot be decided summarily either, but must await the decision at trial.

This case is ready to be tried. Plaintiff shall serve a copy of this decision on the Office of Trial Support at 60 Centre Street so that it may be placed on the trial calendar and assigned.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
March 7, 2007

So Ordered:

Hon. Judith J. Gische, J.S.C.