SHORT FORM ORDER

INDEX No. 05-7804
CAL. No. 06-02468-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 12-13-06
ADJ. DATE 2-13-07
Mot. Seq. # 003- MotD
004- MG

CATHERINE WISHER,	:	SIBEN & SIBEN, LLP
	:	Attorneys for Plaintiff
Plaintiff,	:	90 East Main Street
	:	Bay Shore, New York 11706
- against -	:	
NP/I&G LAKE GROVE, LLC, NEW PLAN EXCEL REALTY TRUST, INC., LAKE GROVE RESTAURANT, L.L.C. d/b/a HOULIHAN'S and A.C.E. RESTAURANT GROUP OF NEW YORK, L.L.C.,	:	HARRINGTON, OCKO & MONK, LLP
	:	Attys for Defts NP/I&G & New Plan Excel
	:	81 Main Street, Suite 215
	:	White Plains, New York 10601
	:	
	:	GIBSON & BEHMAN, P.C.
	:	Attys for Defts Houlihans & ACE Rest.
Defendants.	:	80 Broad Street, 13th Floor
		New York, New York 10004

Upon the following papers numbered 1 to 27 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-9; 10-19 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 20-25 ; Replying Affidavits and supporting papers 26-27 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#003) by defendants NP/I&G Lake Grove, LLC and New Plan Excel Realty Trust, Inc. ("the New Plan defendants") for summary judgment on their cross claims for contractual and common-law indemnification over defendants Lake Grove Restaurant d/b/a Houlihan's and A.C.E. Restaurant Group of New York, LLC is granted. The request for attorney's fees is denied.

ORDERED that the motion (#004) by the New Plan defendants for summary judgment against plaintiff and dismissing all claims and cross claims asserted against them is granted.

This is an action for summary judgment by the New Plan defendants in response to a contractual indemnification claim brought against them by Lake Grove Restaurant, LLC d/b/a Houlihan's and A.C.E. Restaurant Group of New York, LLC arising out of an accident that took place on the premises on September 13, 2005.

Plaintiff, Catherine Wisher, testified that on September 13, 2005, as she was walking on a sidewalk leading to the main entrance of Houlihan's Restaurant in Lake Grove, she felt her right foot being "grabbed" and fell. Sometime after her accident, plaintiff observed the walkway was cracked. Plaintiff testified she never observed the cracks in the walkway before the accident. John Byrne, a property manager employed by the New Plan defendants, testified that they owned the property at 4000 Middle Country Road in Lake Grove but leased a freestanding pad site on the property to Houlihan's. According to Byrne, Houlihan's was responsible for maintaining the leased premises and its sidewalks. Orlando Marin, the restaurant's general manager, testified that he was responsible for inspecting the sidewalks and it was "... Houlihan's responsibility, A.C.E.'s responsibility to maintain that sidewalk..." He testified he was aware of the cracks prior to plaintiff's accident and advised the area director of Houlihan's of the condition.

It is well settled that an out-of-possession owner is not liable in negligence for conditions upon the land after transfer of possession and control. Generally, a landlord's liability for injuries caused by defective or dangerous conditions upon the leased premises depends upon whether the landlord has retained sufficient control over the premises to be held to have had constructive notice of the condition (*see, **Putnam v Stout***, 38 NY2d 607, 381 NYS2d 848 [1976]; ***Ritto v Goldberg***, 27 NY2d 887, 317 NYS2d 361 [1970]). A landlord's reservation of the right to enter and repair may be deemed to constitute sufficient retention of control and to provide the landlord with constructive notice of a defective condition, thereby subjecting the landlord to liability (*see, **Pellegrino v Walker Theatre, Inc.***, 127 AD2d 574, 511 NYS2d 372 [1987]; ***O'Neil v Port Authority of New York and New Jersey***, 111 AD2d 375, 489 NYS2d 585 [1985]). However, it is well settled that a landlord's limited right of re-entry does not give rise to liability, unless there exists a significant structural or design defect which violates a specific statuatory provision (***Quinones v 27 Third City King Rest.***, 198 AD2d 23, 603 NYS2d 130 [1993]; ***Levy v Daitz***, 196 AD2d 454, 601 NYS2d 294 [1993]).

Defendants have submitted a copy of the lease executed by the parties, which under Article XXII, Section 22.01 provides the owner with a limited right of re-entry to show the premises to prospective purchasers during the last six months of the term of the lease, "...and to the extent necessary or appropriate to enable owner to exercise all of its rights under this lease..."

The lease also states, in relevant part under section 12.01, Maintenance by Tenant: " ... Tenant shall keep the Leased Premises (including all Common Facilities *thereon* [emphasis added]) in first-class order and condition, sightly and clean (including maintaining landscaping in a neat and attractive fashion), and shall make all necessary or appropriate repairs, replacements, renewals and betterments thereof, interior and exterior, structural and non-structural, and foreseen and unforeseen, ..."

Finally, Article XII, Section 13.03 of the lease entitled "Indemnification" states, in relevant part, that "...[t]enant will, subject to the provisions of Section 13.04, indemnify and save harmless Owner ...from and against any and all claims, actions, liability and expense in connection with loss of life, bodily injury and/or damage to property arising from or out of any occurrence (I) in, upon or at the Leased Premises,..."

On a motion for summary judgment the moving party bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (***Winegrad v NYU Medical Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). Defendants have met their burden. While defendants retained a limited right of re-entry, it does not give rise to liability since no significant structural or design defect has been pleaded or proven. The lease specifically designated the responsibility to repair and keep the leased premises in good condition to Houlihan's. The testimony of Orlando Marin, the general manager, confirms defendants position that the responsibility to repair and maintain the sidewalks belonged to Houlihan's. The indemnification clause is clear and unambiguous.

The burden then shifts to the nonmoving party to demonstrate that there are material issues of fact; however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see*, ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church*** , 6 AD3d 596, 774 NYS2d 785 [2004]).

Plaintiff argues there are genuine issues of material fact pertaining to New Plan's obligations pursuant to the lease agreement, which would preclude New Plan's motion for summary judgment. First, plaintiff argues there is an issue of fact as to whether plaintiff's fall occurred in the area deemed to be a common facility subject to the control of New Plan. In support, plaintiff offers Article IX , section 9.01 of the lease, entitled "Common Facilities of the Lease Agreement:Controlled by Owner; Required Parking Spaces", which states, in part ... "Notwithstanding anything set out in this Lease to the contrary, it is agree that (I) all common Facilities shall be subject to the exclusive control and management of the Owner, and the Owner shall have the right at any time (either before, during or after the initial construction thereof), once or more often, to change the size, area, level, location and arrangement of the access roads, parking areas, and other Common Facilities, to construct buildings and other improvements thereon and therein (including, without limitation, deck parking facilities on the parking areas, and curb cuts in the access roads..."

Further, pursuant to section 10.02(B) of the lease, "[t]he term 'Common Facilities' shall mean all areas, space, equipment and special services in or serving the Shopping Center and their employees, agents, servants, customers and other invitees, including, without limitation: any open pedestrian malls; customer and employee parking areas and parking lot improvements; access roads, driveways; ... and those serving more than open premises within a building, and any of the foregoing which serve the common facilities; plantings; landscape areas; truck serviceways; loading dock area and facilities; courts; ramps; sidewalks..."

Neither of these sections of the contract, taken either alone or in combination, raise an issue of fact. Clearly, Section 9.01 deals with the owner's responsibility to maintain the parking lots. Section 10.02(B) defines common facilities. While sidewalks may be included in that definition, it is clear that the owner relinquished control and maintenance of the sidewalks on the leased premises to Houlihan's.

Plaintiff next argues that defendant knew or should have known about the cracked sidewalk given its proximity to the parking lot. Plaintiff further argues that Article XXI, Section 21.05 of the lease

which gives the owner the right to cure defects not corrected by the tenant within 15 days, or immediately in the case of an emergency, imposed a duty upon defendants to repair the cracked sidewalk.

To constitute actual or constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit its discovery and repair (***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Bykofsky v Waldbaum's Supermarkets, Inc.,*** 210 AD2d 280, 619 NYS2d 760 [1994]). Liability can be predicated only upon failure of the defendants to remedy the danger after actual or constructive notice of the condition (***Piacquadio v Recine Realty Corp.*** 84 NY2d 967, 622 NYS2d 493 [1994]), and a plaintiff must prove that the defendant's negligent conduct was a proximate cause of her injury (*see,* ***Smith v New York City Housing Auth.,*** 261 AD2d 390, 689 NYS2d 237 [1999]; ***Miller v State of New York,*** 62 NY2d 506, 478 NYS2d 829 [1984]).

Accepting all of the evidence offered by plaintiff as true for the purposes of this motion and according her the benefit of the most favorable inferences that can be drawn therefrom, any finding that defendants had notice, either actual or constructive, of the condition of the sidewalk and that the defect existed for a sufficient period of time before plaintiff's fall to enable defendant to remedy it would call for speculation (*see,* ***Campanella v 1955 Corp.,*** 300 AD2d 427, 751 NYS2d 588 [2002]).

Based on the evidence presented herein, defendants have clearly established their prima facie entitlement to summary judgment as a matter of law (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Accordingly, defendants' motion for summary judgment on their cross claims for indemnification is granted. Defendants' motion for summary judgment against plaintiff and dismissing all claims and cross claims against them is also granted. The request for attorney's fees is denied.

Dated: APR 19 2007

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION