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

PRESENT: MARTIN SHULMAN J.S.C. PART 1

Index Number : 105564/2004

JUAREZ, JUSTINO

VS

JAEGER, LUELIEN

Sequence Number : 003

DISMISS

INDEX NO. 105564/04

MOTION DATE

MOTION SEQ. NO. 003

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 ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
MAY 04 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: April 23, 2007

MARTIN SHULMAN J.S.C. 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 1

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JUSTINO JUAREZ,

Index No. 105564/04

Plaintiff,

DECISION/ORDER

-against-

LUELLEN JAEGER, LUELLEN JAEGER d/b/a ALT JAY REALTY CO. and STARBUCKS CORPORATION d/b/a STARBUCKS COFFEE COMPANY,

Defendants.

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HON . MARTIN SHULMAN, J.S.C.:

In this personal injury action plaintiff Justino Juarez ("plaintiff" or "Juarez") seeks to recover for injuries sustained as a result of his December 8, 2003 slip and fall on a patch of ice on the sidewalk in front of the premises located at 1559 Second Avenue, New York, New York (the "building"). Defendants Luellen Jaeger and Luellen Jaeger d/b/a Alt Jay Realty Co. (collectively "defendant" or "owner") own the building and lease the ground floor store to co-defendant Starbucks Corporation d/b/a Starbucks Coffee Company ("Starbucks" or "tenant"). Defendant moves for summary judgment dismissing the complaint and all cross-claims, or alternatively for indemnification from Starbucks. Plaintiff opposes the motion. Starbucks does not oppose the motion.

Defendant argues that it is not liable to Juarez since it is an out-of-possession owner and Starbucks is responsible for snow and ice removal from the sidewalk pursuant to Article 48 of the lease between said parties. Exh. E to motion. The owner relies upon Starbucks' response to its notice to admit, wherein Starbucks admitted that the copy of the lease included in the notice to admit was a true and correct copy and

that the lease, and specifically Article 48, was in full force and effect on December 8, 2003.[1] Exh. F to motion.

Analysis

Plaintiff does not dispute defendant's account of the facts surrounding plaintiff's slip and fall. Nunez Opp. Aff. at ¶3. Rather, Juarez contends that New York City Administrative Code ("Admin. Code") §7-210 was in effect on the date of his injury and as such, defendant's claim that it cannot be liable as an out-of-possession owner whose tenant is contractually responsible for maintaining the sidewalk abutting the building is unavailing.

Admin. Code §7-210 (the "Sidewalk Law"), which became effective September 14, 2003, provides in relevant part:

> a. It shall be the duty of the owner of real property abutting any sidewalk... to maintain such sidewalk in a reasonably safe condition.
>
> b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk . . . 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 remove snow, ice, dirt or other material from the sidewalk. . .

Prior to September 14, 2003, the City of New York was generally liable for accidents caused by sidewalk defects. *Rodriguez v. City of New York*, 12 A.D.3d 282,

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[1] In support of the requested alternative relief against tenant, owner further argues that the lease requires tenant to indemnify owner from any default in performance of the lease. Exh. E to motion at Article 52. Attached to plaintiff's opposition to this motion is a letter dated September 8, 2006 from Starbucks' counsel to owner's counsel acknowledging receipt of the motion and agreeing that owner was entitled to indemnification from Starbucks under the lease. Nunez Opp. Aff. at Exh. B.

784 N.Y.S.2d 855 (1st Dept., 2004). Where a sidewalk accident allegedly caused by snow and/or ice occurred prior to that date, the abutting property owner was not liable unless it created a defective condition in the sidewalk, used the sidewalk for a special purpose or removed snow and/or ice in a manner that made the sidewalk more hazardous than it would have been. *Romero v. ELJ Realty Corp.*, 831 N.Y.S.2d 72, 73 (1st Dept., 2007); *Klotz v. City of New York*, 9 A.D.3d 392, 393, 781 N.Y.S.2d 357, 358 (2nd Dept., 2004); *Gerber v. City of New York*, 280 A.D.2d 289, 290, 719 N.Y.S.2d 650 (1st Dept., 2001). An out-of-possession owner or landlord could also be liable for injuries that occur on the premises if it retained control of the premises or was contractually obligated to repair the unsafe condition. *Lupo v. Montauk Properties, LLC*, 20 A.D.3d 398, 798 N.Y.S.2d 510 (2nd Dept., 2005).

The defendant's undisputed status as the building's out-of-possession owner and Starbucks' contractual responsibility to remove snow and ice from the sidewalk abutting the building is no longer sufficient to entitle defendant to summary judgment dismissing the complaint. The Sidewalk Law on its face imposes an affirmative duty of reasonable care upon landowners, with the exception of owners of "one-, two- or three-family residential real property that is (i) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes." Admin. Code §7-210(b). None of these exceptions is alleged to apply in this action. Accordingly, defendant's motion must be denied. *See Padob v. 127 E. 23rd St. LLC*, N.Y.L.J. 9/30/05, p. 18, col. 1 (Sup. Ct., NY Cty.); *Castillo v. Bangladesh Society, Inc.*, 12 Misc.3d 1170(A), 820 N.Y.S.2d 841 (Sup. Ct., Queens Cty., 2006).

The Sidewalk Law does not impose absolute tort liability upon landowners for injuries sustained on an abutting sidewalk. *Padob v. 127 E. 23rd St. LLC*, *supra*; *Gangemi v. City of New York*, 13 Misc.3d 1112, 827 N.Y.S.2d 498, 512 (Sup. Ct., Kings Cty., 2006). Thus, to establish defendant's liability, plaintiff must demonstrate a breach of the statutorily imposed duty of care and injury as a result of such breach. *Gangemi v. City of New York*, *supra*. To prove a breach of duty in most slip and fall cases, a plaintiff must show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition.

Here, although defendant's motion is addressed solely to the issue of whether or not defendant owed a duty to plaintiff, Juarez also argues that defendant breached that duty by virtue of its constructive notice[2] of the sidewalk's condition.[3] The owner's reply disputes plaintiff's constructive notice allegation.[4] Here, whether the owner may be

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[2] "Constructive notice requires that the defect be visible and apparent, and it must exist for a sufficient length of time prior to the incident so as to permit a [defendant] to discover and remedy it". *Meyers v. Haskins*, 140 A.D.2d 923, 924, 528 N.Y.S.2d 738 (3rd Dept., 1988).

[3] Plaintiff argues questions of fact exist regarding the owner's constructive notice of pre-existing ice, citing: 1) Juarez's deposition testimony that it snowed two days before his fall; 2) Starbucks' employee's deposition testimony that there were patches of ice on the sidewalk on the morning of plaintiff's fall; and 3) Local Climatological Data for the month of December 2003 indicating significant snowfall on December 6, 2003 (two days prior to plaintiff's December 8, 2003 accident) together with below freezing temperatures for the period December 6, 2003 through December 8, 2003. Nunez Opp. Aff. at Exh. A.

[4] Defendant's reply counters that no question of fact exists since Starbucks' snow removal procedures were reasonable, plaintiff merely speculates as to how and when the ice formed and it is unreasonable to expect an out of possession owner to go to the premises to inspect snow removal within the two days between the snowfall and plaintiff's fall. Takakjian Reply Aff. at ¶8.

charged with constructive notice of the icy condition alleged to have caused plaintiff's injury presents a factual issue which cannot be resolved on the basis of the papers before the court. Both parties' submissions, consisting of attorney affirmations with attached pleadings verified by counsel and deposition transcripts, are insufficient to establish constructive notice. *Sanchez v. Barnes & Noble, Inc.*, N.Y.L.J. 4/13/07, p.24, col.1 (Sup. Ct., Suffolk Cty.).

Finally, the portion of defendant's motion seeking summary judgment dismissing Starbucks' cross-claims is granted without opposition and defendant is entitled to judgment on its claim for indemnification from Starbucks. Nothing in the Sidewalk Law precludes such a result. Accordingly, it is hereby

ORDERED that the portion of defendant's motion seeking summary judgment dismissing the complaint is denied; and it is further

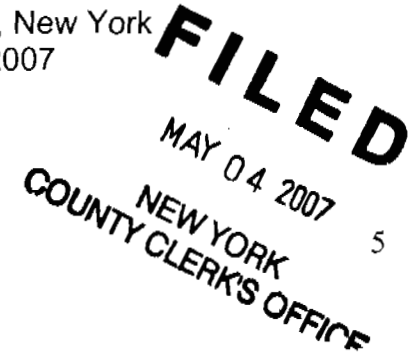
ORDERED that the portion of defendant's motion seeking summary judgment dismissing defendant Starbucks' cross-claims is granted; and it is further

ORDERED that defendants Luellen Jaeger and Luellen Jaeger d/b/a Alt Jay Realty Co. are entitled to indemnification from Starbucks in connection with this action.

The action is restored to the I.A.S. Part 1 trial calendar for May 23, 2007 at 9:30 a.m., at 111 Centre Street, Room 1127B, New York, New York.

The foregoing constitutes the Decision and Order of this Court. Courtesy copies of this Decision and Order have been mailed to counsel for all parties.

Dated: New York, New York
April 23, 2007



Hon. Martin Shulman, J.S.C.