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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Index Number : 104613/2005
DE LA CRUZ, DARLISHA
VS
201 WEST 109TH STREET
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 6/19/07
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

s motion to/for _____

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

FILED
JUN 29 2007
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion of defendant BMB Corporation for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and dismissing all cross claims is denied. It is further

ORDERED that counsel for defendant BMB Corporation shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

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

Dated: 6/27/07

HON. CAROL EDMEAD J.S.C.

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: PART 35

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DARLISHA DE LA CRUZ, an infant by her Mother and Natural Guardian, MILVA MARGARITA GONZALEZ and MILVA MARGARITA GONZALES, individually,

Plaintiffs,

-against-

201 WEST 109TH STREET ASSOCIATES, LLC, and BMB CORPORATION,

Defendants.

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Index No. 104613/05

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant BMB Corporation ("BMB") moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and dismissing all cross claims.

The pleadings allege that on December 23, 2004, while on a public sidewalk in front of 992 Amsterdam Avenue, New York, New York (the "subject premises") plaintiff Darlisha DeLaCruz ("plaintiff") was struck by a "piece of wood from the defendants' premises." It is alleged that an exterior panel became dislodged from the second floor exterior paneling from the surface of the building, which separates the ground floor bar from the residential apartments above, and injured plaintiff. It is also alleged, and it is undisputed that at the time of the accident, defendant 201 West 109th Street Associates, LLC ("201") owned the subject premises, and that BMB leased a portion of the subject premises.

Plaintiff's Deposition

Just prior to the accident plaintiff did not notice anything on the sidewalk. There was no construction that was going on at the building where the accident occurred. There was no debris

of any kind on the ground. There was no one doing any work on the outside or inside of the building. (Pl.s' dep. pp. 18-19) Plaintiff took this route, pass the subject premises, almost every day. (Pl.'s dep. p. 19) Plaintiff never saw any pieces of wood outside of the building prior to the date of the accident. (Pl.'s dep. p. 21) As plaintiff approached the subject premises, a strong wind came and it took this piece of plywood off and it hit her. (Pl.'s dep. p. 46). Plaintiff saw the piece of plywood actually come off of the building and in a few seconds, it hit her. (Pl.'s dep. p. 49) As plaintiff approached the subject premises, the piece of plywood was still attached to the building. (Pl.'s dep. p. 79) Plaintiff saw the piece of plywood come off of the building, fly through the air and hit her. (Pl.'s dep. p. 84)

Deposition Testimony of Chander Malik

He is a principal of BMB. (Malik dep. p. 6) BMB obtained physical possession of the subject premises in September 2004. He was not required to do any repairs in the lease. (Malik dep. p. 16) Prior to opening as a bar, BMB performed painting work on the outside of the building (Malik dep. p. 27) The first time any work of any time was done on the exterior of the building was the end of January 2005. (Malik dep. p. 27) The first time work was done on the interior of the subject premises was sometime around January, 2005 (Malik dep. p. 28) Malik is uncertain as to when work was done (Malik dep. p. 29) No work was done by BMB to the exterior of the building that required the landlord's consent. (Malik dep. p. 32) He does not recall if the landlord ever gave consent for any work done by BMB in connection with the subject premises (Malik dep. pp. 32-33) BMB did have workers on the subject premises in December, 2004 (Malik dep. pp. 48-49) And, it is possible that these workers were doing work the week of plaintiff's accident. (Malik dep. p. 50) There were boards covering the windows prior to the

bar's opening in 2005, but Malik does not recall when they were removed, or whether he was responsible for putting the wooden boards up. (Malik dep. pp. 50-53) Malik does not recall if his worker, Mr. Pereria, ever had a local worker, Mr. Pedro, do work on the exterior of the building. (Malik dep. pp. 72-73)

Defendant BMB's Contentions

To establish a *prima facie* case of negligence in a premises action, the plaintiff mush demonstrate that the defendant "created the condition which caused the accident, or that defendant had actual or constructive notice of the condition." Plaintiff must show that defendant BMB created the condition or performed a task that caused plaintiff's accident. Here, there is no evidence that defendant BMB created the allegedly defective condition on the subject premises. Further, plaintiff has not produced any evidence that defendant BMB was aware of the alleged condition before the incident. Defendant BMB did not receive any complaints regarding the alleged condition and there is no evidence of any prior accidents at this location.

Moreover, there is no issue of fact as to whether defendant BMB had constructive notice of the allegedly defective condition and therefore, plaintiffs' complaint against defendant BMB must be dismissed.

And, in this case, any defect in the manner that the plywood may have been affixed to the structure of the premises would not have been visible or apparent. It would have been a latent defect. If a defect could have been discovered by a layman, even by inspection, it is considered a latent defect. To constitute constructive notice, the defect must be visible and apparent, in addition to existing for a sufficient length of time. Constructive notice will not be imputed where a defect is latent and would not be discoverable upon reasonable inspection. It is inconceivable

that BMB, who was leasing a bar on the first floor, could have known, or is legally responsible for any alleged defect in the manner that the plywood paneling was affixed above the exterior of the bar.

The lease governing the subject premises specifically exempts the tenant BMB from having to make any structural alterations. In fact, the lease forbade BMB from making any changes to the building without the landlord's consent. Between the time that BMB came into possession of the bar until the accident allegedly occurred, neither BMB nor anybody on BMB's behalf did anything to modify, after or repair the paneling allegedly responsible for the occurrence on any of the exterior paneling. No maintenance of any kind was performed on this panel. Nor did BMB have any knowledge or any reason to know that the paneling was loose or improperly affixed to the building. BMB did not inspect the paneling and in fact had nothing to do with this exterior paneling. If there was anything defective about this paneling, BMB had no notice or knowledge of same.

Plaintiffs' Contentions

Contrary to the claims of BMB that it had no responsibility for the exterior of the premises, Article Thirty-Two of the lease imposes a partial duty to maintain premises. Further Article Second of the lease provides in part that "the Tenant will take good care of the demised premises....make all repairs in and about the same necessary to preserve them in good order and condition...." Further, Chander Malik admits that BMB painted the exterior of the premises.

An issue of fact is raised by the deposition testimony of Aryeh Adler, a principal of 201 who did not recall who put the panels up and whether they were in place prior to the accident.

And, BMB premises its claim for summary judgment solely on the basis of neither having

actual or constructive notice of the condition that caused the accident, and completely fails to address the claim of *res ipsa loquitur*.

Defendant BMB's Reply[1]

With respect to notice, plaintiff selectively refers to the subject lease in a misleading manner. Article 2 in fact mandates that "the Tenant (BMB Corporation) will take good care of the demised premises, fixtures and appurtenances, and all alterations, additions, and improvements to either; make all repairs in all about the same necessary to preserve them in good order and condition...." Article 2 specifically exempts structural alterations. There is simply no evidence that BMB performed any work to the exterior of the premises prior to the alleged accident.

[1] The movant BMB may not raise a new basis for summary judgment in reply. As such, BMB's arguments as to *res ipsa loquitor* shall not be considered by the court.

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the

proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Notice: Actual and Constructive

"It is well settled that in order for a landlord to be held liable for injuries resulting from a defective condition upon the premises, the plaintiff must establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected" (*Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646, 649 NYS2d 115 [citations omitted]; *see Lupi v Home Creators*, 265 AD2d 653, 696 NYS2d 291, *lv. denied* 94 NY2d 758, 705 NYS2d 5).

Once a defendant has actual or constructive notice of a dangerous condition, the defendant has a reasonable time to undertake remedial actions that are reasonable and appropriate under all of the circumstances (*see Stasiak v Sears, Roebuck & Co.*, 281 AD2d 533, 722 NYS2d

251; *LoSquadro v Roman Catholic Archdiocese of Brooklyn*, 253 AD2d 856, 678 NYS2d 347).

To constitute constructive notice, a dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy the condition (*see Gordon v. American Museum of Natural History*, 67 NY2d 836, *supra*; *see also Segretti*, 256 AD2d 234, *supra*; *Lemonda v. Sutton*, 268 AD2d 383, 702 NYS2d 275 [1st Dept. 2000]; *Guttierez v. Lenox Hill Neighborhood House, Inc.*, 4 AD3d 138, 771 NYS2d 513 [1st Dept. 2004]; *Budd v. Gotham House Owners Corp.*, 17 AD3d 122, 793 NYS2d 340 [1st Dept. 2005]). A defendant/property owner may also have constructive notice of a dangerous condition if the plaintiff presents evidence that the condition was ongoing and recurring in the area of the accident, and such condition was left unaddressed (*see Gordon v. American Museum of Natural History*, 67 NY2d 836, *supra*; *see also O'Connor-Miele v. Barhite & Holzinger, Inc.*, 234 AD2d 106, 650 NYS2d 717 [1st Dept. 1996]; *Colt*, 209 AD2d 294, *supra*). By contrast, a mere general awareness of the presence of some dangerous condition is legally insufficient to establish constructive notice (*see Piacquadio v. Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]; *see also Gordon v. American Museum of Natural History*, 67 NY2d 836, *supra*; *Segretti*, 256 AD2d 234, *supra*).

The responses of BMB's principal, Mr. Malik are equivocal as to when work was done by BMB, what work was done by BMB, whether work was done on the exterior or the building, and if so, was prior consent of the owner obtained. Defendant has failed to meet its burden to establish its entitlement to summary judgment as to the plaintiff's complaint.

Defendant BMB has failed to establish, as a matter of law, that it did not create the alleged defective condition or that its actions were not a proximate cause of the plaintiff's injuries

(*see Hatfield v Bridgedale, LLC,* 28 AD3d 608, 610; *Pickering v Lehrer, McGovern, Bovis, Inc.,* 25 AD3d 677, 679; *Mennerich v. Esposito,* 4 AD3d 399, 400-401). The failure to make such a showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642).

And, defendant BMB has failed to establish as a matter of law that it lacked actual or constructive notice of the condition in question (*see also Riordan v BOCES of Rochester*, 4 A.D.3d 869, 870-871, 772 N.Y.S.2d 428).

The court does not reach the issue of *Res Ipsa Loquitor.*

Conclusion

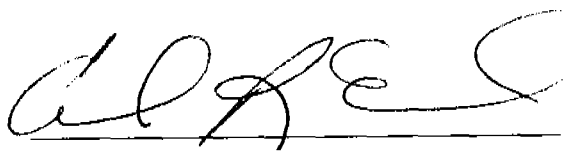
Based on the foregoing, it is hereby

ORDERED that the motion of defendant BMB Corporation for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and dismissing all cross claims is denied. It is further

ORDERED that counsel for defendant BMB Corporation shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

This constitutes the decision and order of this court.

Dated: June 27, 2007



Carol Robinson Edmead, J.S.C.