SHORT FORM ORDER

INDEX No. 13741/2004

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XIII SUFFOLK COUNTY

PRESENT:
Hon. MELVYN TANENBAUM
Justice

MOTION #003 -Mot D
R/D: 052307
S/D 081007

ISABELLE JOHN,

PLTF'S/PET'S ATTY:
SUBIN ASSOCIATES, LLP
291 Broadway, 9th Floor
New York, New York 10007

Plaintiff,

- against -

SUFFOLK COUNTY WATER AUTHORITY, SMITHTOWN THEATRE HOLDING COMPANY, LLC, ROMANTICO DUE RESTAURANT d/b/a NICK & PEDRO'S, AFATI REALTY, INC., AND TOWN OF SMITHTOWN

DEFT'S/RESP'S ATTY:
(Suffolk County Water)
TIMOTHY J. HOPKINS, ESQ.
4060 Sunrise Highway, P.O. Box 38
Oakdale, New York 11769

Defendants.

(Smithtown Theatre Holding)
GARGUILO & ORZECHOWSKI, LLP
542 North Country Road
St. James, New York 11780

(Romantico Due Restaurant)
MICHAEL E. PRESSMAN, ESQ.
125 Maiden Lane, 17th Floor
New York, New York 10038

(Afati Realty, Inc.)
MORENUS CONWAY GOREN & BRANDMAN
58 So. Service Road, Suite 350
Melville, New York 11747

Upon the following papers numbered 1 to 20 read on this motion for an order pursuant to CPLR § Notice of Motion/Order to Show Cause and supporting papers 1-11; Notice of Cross Motion and supporting papers Answering Affidavits and supporting papers 12-16 Replying Affidavits and supporting papers 17-18 Other 19-20 ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by defendant FRIZZANTE LTD. d/b/a ROMANTICO DUE RESTAURANT ("FRIZZANTE") seeking an order pursuant to CPLR Section 3212 granting summary judgment dismissing plaintiff's complaint and all cross claims asserted against "FRIZZANTE" is denied.

On October 27, 2003 plaintiff ISABELLE JOHN ("JOHN") claims that she was walking on the sidewalk in front of defendant "FRIZZANTE's" restaurant when her foot struck a metal pipe which was protruding from the cement sidewalk. "JOHN" claims to have sustained significant injuries to her left leg as a result of her fall. Defendant "FRIZZANTE" leased the premises from defendant/owner AFATI REALTY ("AFATI"). Plaintiff claims that defendants failed to adequately maintain the sidewalk area where she sustained her injuries.

Defendant "FRIZZANTE's" motion seeks an order granting summary judgment dismissing plaintiff's complaint claiming the restaurant was not responsible to maintain or repair the public sidewalk area where plaintiff fell. In support of the motion defendant submits two affirmations of counsel and claims that pursuant to the terms of the lease entered into with "AFATI "the landlord is responsible for repairing structural defects to the premises. It is defendant's position that no evidence exists to establish that "FRIZZANTE" caused the claimed defective condition or had a duty to repair it. Defendant claims that under such circumstances no basis exists upon which movant can be found liable for plaintiff's injuries or any cross claims asserted by the co-defendants.

In opposition defendants TOWN OF SMITHTOWN ("TOWN") and "AFATI REALTY" each submit attorneys affirmations and claim that substantial issues of fact exist concerning movant's liability sufficient to defeat "FRIZZANTE's" summary judgment motion. Defendants contend that "FRIZZANTE's" representative conceded during an examination before trial that the "FRIZZANTE/AFATI" lease requires that the tenant maintain the sidewalk. Defendants also claim that the Town Code requires that occupants of lands abutting streets or highways in a business or industrial district must maintain and repair the sidewalks adjoining their lands. It is defendants position that significant questions of fact remain concerning "FRIZZANTE's" negligence sufficient to require a plenary trial. Defendant "TOWN" claims that movant has failed to provide responses to their discovery demands and therefore defendant's motion is premature. Defendant "AFATI" contends that its cross claim cannot be dismissed since the "FRIZZANTE/AFATI" lease provides that the landlord shall be indemnified for liability arising from the tenant's failure to adequately maintain the sidewalk.

CPLR §3212(b) states that the motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (OLAN v. FARRELL LINES, INC., 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); SPEARMAN v. TIMES SQUARE STORES CORP., 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, NEW YORK CIVIL PRACTICE Sec. 3212.09)). Moreover, it is well settled that a party opposing a motion for summary judgment must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (CASTRO v. LIBERTY BUS CO., 79 AD 2d 1014, 435 NYS 2d 340 (2nd Dept., 1981).

In order to establish tort liability the plaintiff must demonstrate the existence and breach of a duty owed to him by the defendant (PALKA v. EDELMAN, 40 NY2d 781, 390 (NYS2d 393 (1976); PALSGRAF v. LIRR CO., 248 NY 339 (1928); Prosser, "Torts" 4 Edition §30, 41-42 and 53)). He must further demonstrate that defendants' acts or omissions which constituted such breach were a proximate cause of plaintiff's injuries (SHEEHAN v. CITY OF NEW YORK, 40 NY2d 496, 387 NYS2d 92 (1976)).

A landowner owes a duty to another on his land to keep it in a reasonably safe condition (BARSO v. MILLER, 40 NY2d 233, 241, 386 NYS 2d 564 (1976)SMITH v. TAYLOR, 279 AD 2d 566, 719 NYS 2d 686 (2d Dept., 2001)). A party who possesses real property either as an owner or a tenant, is under a duty to exercise reasonable care to maintain that property in a safe condition, and this duty includes the

undertaking of minimal precautions to protect members of the public from the reasonably foreseeable acts of third persons (MARTINEZ v. SANTORO, 273 AD 2d 448, 710 NYS 374 (2d Dept., 2000); SADLER v. TOWN OF HURLEY, 280 AD 2d 805, 720 NYS 2d 613 (3rd Dept., 2001).

Liability for a dangerous condition on property is predicated upon occupancy, ownership, control or a special use of such premises. The existence of one or more of these elements is sufficient to give rise to a duty of care. Where none is present, a party cannot be held liable for injury caused by the defective or dangerous condition of the property (BALSAM v. DELMA ENGINEERING CORP, 139 AD 2d 292, 296-297 (1st Dept., 1988) leave to appeal denied, 73 NY2d 783 (1989); PAPPALARDO v. NY HEALTH & RACKET CLUB, 279 AD 2d 134, 718 NYS 2d 287 (1st Dept., 2000).

In a slip and fall case a plaintiff may only recover when she is able to show that the defendant either created the condition which caused the accident or had actual or constructive notice of the condition (ANDERSON v. KLEIN'S FOODS, 139 AD2d 904 (4th Dept., 1988), aff'd 73 NY2d 835 (1989); MOSS v. JNK CAPITAL, 211 AD2d 769, 621 NYS2d 679 (2d Dept., 1995)). Constructive notice may be inferred where the alleged defect was visible and apparent for a sufficient length of time prior to the accident so as to permit the defendant to discover and remedy it (GORDON v. AMERICAN MUSEUM OF NATURAL HISTORY, 67 NY2d 836 (1986); FASOLINO v. FASHION BUG, 77 NY2d 847, 567 NYS2d 640 (1991)).

Paragraph Second of the "Frizzante/Afati" lease provides:

> "SECOND - That throughout the said term the Tenant will take good care of the demised premises, fixtures and appurtenances, and all alterations, additions and improvements to either: make all repairs in about the same necessary to preserve them in good order and condition, which repairs shall be, in quality and class, equal to the original work; promptly pay the expense of such repairs; suffer no waste or injury; give prompt notice to the Landlord of any fire that may occur; execute and comply with all laws, rules, orders, ordinances and regulations at any time issued or enforced (except those requiring structural alterations), applicable to the demised premises or to the tenants occupation thereof, of the Federal, State, and Local Governments, and of each and every department, bureau and official thereof, and of the New York Board of Fire Underwriters; ..."

Smithtown Code Section 245-5 provides:

> "§245-5. Duty to repair and maintain
> Owners, occupants, lessors, or persons in control of all buildings or structures used for commercial purpose, and the owners or occupants of lands fronting or abutting on any street or highway, in a business or industrial district, shall maintain and repair the sidewalks adjoining their lands, and shall keep such sidewalks free and clear of and from snow, ice, and all other obstructions. Such owner, occupant, or lessor, and each of them, shall be liable for any injury or damage by reason of omission, failure, or negligence to maintain or repair such sidewalk or to remove snow, ice, or other obstructions therefrom."

Based upon the submission of evidence substantial questions of fact exist concerning defendant's negligence sufficient to require a plenary trial. Defendant's motion for an order pursuant to CPLR Section 3212 must therefore be denied.

Dated: September 12, 2007

MELVYN TANENBAUM

J.S.C.

NON-FINAL DISPOSITION