

Profanato v 263 Bowery Corp.
2007 NY Slip Op 33034(U)
September 17, 2007
Supreme Court, New York County
Docket Number: 0106792/2006
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____

PART 10

Justice

Index Number : 106792/2006

PROFANATO, JOANN

INDEX NO. _____

vs

263 BOWERY

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

The following papers, memoranda, and _____

this motion to/for 33212

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

SEP 27 2007

CLERK OF THE COURT
NEW YORK COUNTY

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: September 17 2007

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
Joann Profanato,

Plaintiff

-against-

263 Bowery Corp., and Restaurant
Auction Outlet, LLC,

Defendants.

DECISION/ORDER

Index No.: 106792/06
Seq. No.: 001

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

-----X

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

FILED
JUN 14 2007

Papers	Numbered
Def 263 Bowery n/m [3212] w/ CF affirm, VB affid, exhs	1
Pltff opp w/SMT affirm, exhs	2

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

GISCHE, J.

This is a personal injury action in which plaintiff Joanne Profanato contends that she was injured when she tripped over a hose stretched along a section of the sidewalk in front of the building owned by defendant 263 Bowery Corp. ("owner"). Defendant Restaurant Auction Outlet, LLC ("the restaurant business") has a street level commercial store in the building located at 263 Bowery, New York, New York. The owner has brought this motion for summary judgment. Since it is timely, and issue has been joined, it will be decided on the merits. CPLR 3212. Brill v. City of New York, 2

NY3d 648 (2004).

The motion is opposed by plaintiff. Co-defendant has taken no position on the motion.

Arguments presented

Plaintiff contends that while running to catch a bus with her son, she tripped over a green water hose on the sidewalk in front of 263 Bowery Street. Though she did not seek medical attention immediately, that night she was taken by ambulance to the hospital where she was diagnosed with a fracture. Plaintiff has been deposed and although the owner provides an appendix purporting to summarize her testimony, the actual transcript of the deposition is not before the court.

In support of its motion for summary judgment, the owner contends that it is completely distinct from the restaurant business. Vera Bensimhon, the owner's vice president states in her sworn affidavit that although the owner is a family business, the restaurant business is strictly Gabriel Bensimhon's "affair." The owner contends that it has no responsibility for or control over the actions of restaurant business and its staff. Ms. Bensimhon states that the hose plaintiff tripped over does not belong to the owner, nor is the person who was using it (Bruno Zorsa) an employee of the owner. Ms. Bensimhon states further that the owner is merely an out-of-possession landlord, uninvolved in the day to day activities of the business.

Mr. Bensimhon, who has been deposed, is the president of the owner. Both the Bensimhons acknowledge that 263 Bowery is the only business the corporation owns and that there is no written lease agreement between the defendants.

Applicable Law

On a motion for summary judgment the moving party must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. ” Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993).

The *prima facie* elements of a premises liability negligence case are that the defendants either created a dangerous condition, or had actual or constructive notice of the condition, and that such defects are visible and apparent. Segretti v. Shorestein Company East, LP, 256 AD2d 234 (1st dept. 1998). Where not defendant created, the condition must have existed for a sufficient length of time prior to the accident to permit the defendants to discover and remedy it. Berger v. ISK Manhattan Inc., 10 AD3d 510 (1st dept. 2004). Constructive notice may be found where an out-of-possession landlord reserves the right under its lease with the tenant to enter and inspect the premises and make repairs and a specific statutory violation exists. Guzman v. Haven Plaza HDFC, *supra*.

As a general matter, property owners have been held to a non-delegable duty to

insure that maintenance of their building poses no hazard to persons lawfully on their property. Kopinska v. Metal Bright Maintenance Company Inc., 309 A.D. 2d 633 (1st Dept 2003).

Discussion

The owner has failed to prove its defense, that it is an out of possession landlord, without any control over or responsibility for how the restaurant business operates. Mr. Bensimhon is the president of the owner and the manager of the restaurant business. He is also the owner of the limited liability corporation that owns the business. Mr. Bensimhon is also Mr. Zorsa's employer and Mr. Zorsa was the person who was using the hose that plaintiff tripped over.

There are substantial and material issues of fact that must be resolved at trial. While maintaining there is a separation between the two defendants, the owner has failed to offer proof of such distinction. Mr. Bensimhon's presence at the building also raises the issue of whether the owner had actual notice of the dangerous condition, but failed to correct it. Mr. Bensimhon was inside the store while Mr. Zorsa was using the hose that stretched from the store to the curb. Mr. Bensimhon testified that there was no cone or sign placed near the hose.

Having failed to prove that the owner was not in possession of the premises where the accident is alleged to have occurred at the time it took place, the motion for summary judgment by defendant 263 Bowery Corp. (owner) must be, and hereby is, denied.

Although the owner has raised other arguments about whether plaintiff

contributed to, or was the sole proximate cause of the happening of her accident, these are quintessential facts for the jury to decide. Moreover, although the owner contends it was not making a special use of the sidewalk, this is secondary to the larger argument raised by owner, that it was out of possession.

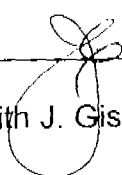
Since the note of issue was already filed, plaintiff shall serve a copy of this decision/order on the Office of Trial Support at 60 Centre Street so that the case may be scheduled for trial.

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

This shall constitute the decision and order of the court.

Dated: September 17, 2007
New York, New York

So Ordered:



Hon. Judith J. Gische, JSC

FILED
NEW YORK
JUDICIAL CLERK'S OFFICE