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

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Jeffrey Smith

INDEX NO. 115025/05

MOTION DATE

- v -

MOTION SEQ. NO. 003

Chelsea Wholesale

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 ...

Answering Affidavits — Exhibits

Replying Affidavits

FILED
OCT 25 2007
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Chelsea Wholesale Flower Market LLC pursuant to CPLR 3212 for summary judgment dismissing the complaint of the plaintiffs Jeffrey L. Smith and Annie Holford-Smith and all cross claims, and for costs associated with making the instant motion is granted solely to the extent that the complaint and all cross claims asserted against Chelsea Wholesale Flower Market LLC. And it is further

ORDERED that Chelsea Wholesale Flower Market LLC shall serve a copy of this order and memorandum decision upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

CAROL EDMEAD
J.S.C.

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

Dated: 10/23/07

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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JEFFREY SMITH AND ANNIE HOLFORD-SMITH,

Index No. 115025-2005

Plaintiffs,

-against-

DECISION/ORDER

CHELSEA WHOLESALE FLOWER MARKET, LLC, JAMESTOWN COMMERCIAL MANAGEMENT COMPANY, and JAMESTOWN CHELSEA MARKET, L.P.,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action, Jeffrey L. Smith (the "plaintiff") and Annie Holford-Smith (collectively, the "plaintiffs") allege that on October 14, 2005, plaintiff slipped and fell on water in a common area hallway of the Chelsea Market, a premises owned and operated by defendants Jamestown Commercial Management Company ("Jamestown Management") and Jamestown Chelsea Market, L.P. ("Jamestown Market"). The Chelsea Market is a large indoor food mall with several different stores, and defendant Chelsea Wholesale Flower Market LLC (the "Flower Market") is the first store on the left-hand side, six feet from the inner door inside the mall.[1]

The Flower Market now moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross claims, and for costs associated with making the instant motion.

In support, the Flower Market contends that according to plaintiff's deposition, plaintiff's accident occurred at least 15-20 feet from the entrance doors to the Flower Market. Plaintiff

[1] See EBT, page 8 of Chelsea Flower Market's Manager, Phillip J. Vellucci.

testified that he fell in a hallway of the mall about 30-40 feet from the front doors of the mall, in a location which was not inside any store. He stated that it was raining outside at the time and plaintiff observed tracked-in water on the floor. Plaintiff testified that he was caused to fall by water on the floor of the hallway.

The Flower Market also submits the deposition testimony of co-defendant Jamestown Management's Director of Security, Raymond John Duesbury ("Mr. Duesbury"). Mr. Duesbury testified that Jamestown Management employs a maintenance crew and security personnel to ensure that the floors in the common area are in a safe condition. Jamestown Management was solely responsible for the cleaning and maintenance of the common areas, including the specific area where plaintiff fell. According to Mr. Duesbury, the Flower Market had no responsibility to clean or maintain "the area where [Mr. Duesbury] saw him, where the plaintiff fell." The Flower Market's own Manager, Robert Vellucci, also testified that the plaintiff's accident occurred in a common area of the mall that the Flower Market had no responsibility to clean or maintain.[2]

The Flower Market also contends that pursuant to paragraphs 4, 31, and 50.01 of the applicable lease, the "Owner" of the subject building was responsible for cleaning the common areas. Under said lease, the Flower Market had no responsibility to clean the common areas of the mall unless the cleaning was required due to its own acts.

The Flower Market argues that the mere fact that it was located in the general vicinity of the plaintiff's accident is not a basis for liability. Further, plaintiffs failed to present any proof

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[2] The Flower Market asserts that plaintiffs failed to forward Mr. Velluci's deposition transcript for execution, and thus, initially seeks an extension of time to submit his testimony in the event the Court seeks review of his transcript. In opposition, plaintiffs provided the transcript of Mr. Velluci. In response, the Flower Market requests that the Court consider and accept Mr. Velluci's deposition testimony.

that the Flower Market created, or had actual or constructive notice of a defective condition. The Flower Market contends that since it had no duty or responsibility to maintain or clean the floor in the area where plaintiff fell, summary judgment dismissing the plaintiffs' complaint and all cross claims must be granted.

In opposition, plaintiffs argue that defendant failed to argue that it did not occupy, possess, control, or have a special use of the areas in front of its market, and clearly, the Flower Market occupies the premises, controls the market and common area in front of it, and as the tenant, enjoys possession of the hallway in front of its store.

Also, the Flower Market's use of the hallway in front of its store creates an issue of fact as to whether such use constitutes a "special use" of the area sufficient to impose a duty of care. Although the subject lease places responsibility for maintenance of the hallway on Jamestown Management and Jamestown Market, such lease addresses issues of indemnification between such two defendants which is not at issue herein. In light of the Flower Market's Manager's deposition testimony that Flower Market only had one entrance to the store, the Flower Market enjoys a special use of the common hallway in front of its store as a means of bringing in flowers which drip water onto the floor. The Flower Market, uses its entrance to take out flowers from the store in order to deliver them to customers. Like many other flower shops, the Flower Market leaves flowers outside of the store in the common area in order to attract customers. Further, the Flower Market does nothing inside their own store in response to rain. The Flower Market's Manager testified that "the raining doesn't affect the inside of my store unless someone comes in with an umbrella. So rain outside on the retain entrance doesn't affect me." He further stated that Flower Market takes no measures either inside or in the common areas when it rains.

The failure to put down mats or other non-clip surfaces helped cause the wet condition in question. In addition, the Flower Market did not have a schedule for cleaning or inspecting the area in front of its store. And, there is no showing that the Flower Market's employees were unaware of the water condition shortly before the accident, such that it could not have discovered and/or remedied the condition using reasonable care.

Plaintiffs also contend that the water existed for a significant period of time prior to his accident to establish notice. Plaintiff testified that he noticed water on the ground in front of Flower Market when he first walked in, and fell due to such water about 30-45 minutes later. The water was therefore visible and apparent since it was out in the open common area for all. Also, there is evidence that the water condition was smudged, muddy and dirty.

In reply, the Flower Market states that plaintiffs failed to submit any evidence that the Flower Market either owned or controlled the hallway where plaintiff fell, or that it created the wet condition on the common hallway floor. Flower Market also points out that the accident did not occur inside the store. Nor did the accident location involve a special use of the common area. The Flower Market's use of the hallway, if any, was not exclusive, but used by all customers of the mall, all other tenants of the mall, and the owner/manager of the mall. There is no testimony linking the Flower Market to the wet condition on which plaintiff fell. Further, the lease and the deposition testimony are clear that the Flower Market was in no way responsible for the cleaning or maintenance of the hallway area. Plaintiffs also submit no evidence that Flower Market occupies or controls the common area in front of its store. The Flower Market also adds that there is no testimony indicating that it left flowers in the common area of the mall. The wet condition could just have likely have been caused by a delivery to or by any one of the other

tenants of the mall, and was more likely caused by customers coming in from the rain outside and tracking in moisture or from dripping umbrellas, as testified to by the plaintiff. Additionally, there was a newsstand tenant directly next to where the plaintiff fell.

There is no evidence of a special use of this common hallway by the Flower Market. A review of Mr. Vellucci's deposition transcript shows that not one question concerning deliveries or use of the lobby hallway was asked of him. In fact, the only time a question was asked concerning use of the lobby hallway was of the plaintiff himself who stated that Flower Market did not have any goods or products for sale in the hallway. Further, while this motion was pending, a deposition of Charles Curmi, Jamestown Market's Superintendent, was held, wherein he confirmed that Jamestown Market and Jamestown Management were solely responsible for the cleaning and maintenance of the lobby hallway.

Plaintiffs also fail to mention that the "owner/manager" in fact placed a mat in the location of the accident, and a photograph of the location shows that it occurred in the mall hallway, some distance away from the entrance to the Flower Market. Lastly, the common area hallway where plaintiff's accident occurred was not a part of the Flower Market's demised premises which is shaded in on the plan. There is also no testimony concerning an "oil" puddle or that the water was smudged and dirty.

In light of the lack of merit of plaintiffs' claims, sanctions and costs against the plaintiffs is warranted.

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]). 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]).

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 (CPLR §3212[b]; *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). The 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]).

"Liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property. The existence of one or more of these elements is sufficient to give rise to a duty to exercise reasonable care. Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property (*Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296-297 [1st Dept], lv denied, lv 958 dismissed 73 NY2d 783).

In the present case, it is uncontested that plaintiff fell on water in the common hallway of the Chelsea Market, 15-20 feet from the entrance of the Flower Market.

Yet, the record establishes that the common area of the subject building was neither owned nor occupied by the Flower Market. According to the deposition testimony of Jamestown Management's Director of Security, Raymond John Duesbury, and Jamestown Market's Superintendent Charles Curmi, Jamestown Management owned the Chelsea Market and was solely responsible for cleaning common area in which plaintiff fell. Mr. Duesbury testified that both the Security and Maintenance fell under Chelsea Management, and if it were raining, he would call "maintenance" as it was "our job to get the rugs down. . . .It is the super's job to put the mats down." And, according to Mr. Duesbury, the Flower Market had no responsibility for cleaning or maintaining the floor in the area where the plaintiff fell.

Nor is there any indication that the Flower Market exercised any control over the common hallway. The deposition testimony of Mr. Duesbury, Mr. Curmi, and Flower Market's Manager, Robert Vellucci establishes that the Flower Market was one of several stores located

inside the Chelsea Market, and simply had a right to use the common area along with all other tenants, customers, and the public in general.

Moreover, the applicable lease required the "Owner" to keep the common area where plaintiff fell clean. Pursuant to paragraph 31 of the applicable lease, the Owner shall "clean the public halls and public portions of the building which are used in common by all tenants." Paragraph 4 of such lease states that the "Owner shall maintain and repair the exterior of and the public portions of the building." Furthermore, under said lease, the "Tenant shall not be required to . . . clean the common areas of the same [Building], except to the extent such cleaning is required due to the acts or negligence of Tenant or its agents, employees, contractors or invitees." As there is no evidence that the presence of the water was due to any act or negligence of the Flower Market so as to trigger Flower Market's duty to clean the common area, it cannot be said that the Flower Market breached any duty to the plaintiff (*see Fraher v JNPJC Brusco Assoc.*, 286 AD2d 289 [1st Dept 2001]). Thus, the Flower Market established as a matter of law that it did not possess or control the common hallway area (*see Turrisi v Ponderosa*, 179 AD2d 956 [3d Dept 1992]).

The record further establishes that the Flower Market did not have any goods or products for sale in such hallway so as to find that it made a special use of the common hallway (Plaintiff EBT, p. 42). The principle of special use imposes an obligation on the abutting landowner or occupier, where he or she puts part of a public way to a special use for his own benefit and the part used is subject to his control, to maintain the part so used in a reasonably safe condition to avoid injury to others (*Balsam v Delma Engineering Corp.*, 139 AD2d 292, 298,532 NYS2d 105, 109 [1st Dept 1988]; *Nickelsburg v City of New York*, 263 AD 625, 626 [1st Dept 1942]; *see,*

Santorelli v City of New York, 77 AD2d 825 [1st Dept 1980]; *Wylie v City of New York*, 286 AD 720 [1st Dept 1955]). Special use cases usually involve the installation of some object in the sidewalk or street or some variance in the construction thereof, such as an appurtenance installed for the benefit of the owner or lessee at its request (*Yee v Chang Xin Food Market, Inc.*, 302 AD2d 518, 755 NYS2d 262 [2d Dept 2003] [holding that supplying defendant's customers with shopping carts to transport their packages from its store along the sidewalk to the parking lot at the rear of the store does not constitute a special use of the property]; *see also, Spangel v City of New York*, 285 A.D.2d 425, 728 N.Y.S.2d 157 [1st Dept 2001]; *Kaminer v Dan's Supreme Supermarket/Key Food*, 253 AD2d 657, 677 NYS2d 553 [1st Dept 1998]).

There is no evidence that the common area was constructed in a special manner for Flower Market's use (*see Pierre v City of New York*, 273 AD2d 368, 709 NYS2d 206 [2d Dept 2000]). Even assuming there was evidence in the record indicating that the common hallway leading to the Flower Market was used in the course of the delivery of flowers, an occasional use of the such area for deliveries does not constitute a special use (*Tyree v Seneca Center-Home Attendant Program, Inc.*, 260 AD2d 297, 689 NYS2d 61 [1st Dept 1999] [holding that defendants' mere receipt of ordinary deliveries of office supplies does not suffice to show special use of the sidewalk by the appellant tenants sufficient to withstand the summary judgment motions]).

Furthermore, the plaintiff testified that the Flower Market did not have any goods or products, and thus, any flowers, situated in the common area. Notably, speculation that the Flower Market may have created the dangerous condition by transporting flowers to and from its store is insufficient to create a genuine question of fact. Mere conclusions or unsubstantiated

allegations or assertions are insufficient to raise an issue of fact (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]). Thus, plaintiffs' contentions regarding Flower Market's creation of the water condition are unavailing.

As no issue of fact exists as to whether the Flower Market had a duty to clean or maintain the common area in which plaintiff fell (*see Perez v City of New York*, 18 AD3d 358 [2005] [holding that since the record shows that plaintiff fell outside the premises in a common area, no triable issue as to whether defendant had the duty to keep the area clean and well-maintained]), summary judgment dismissing the complaint and all cross claims is warranted.

The cases on which plaintiffs rely are wholly distinguishable on the facts and the law. Such cases involved situations where the plaintiff fell inside of the defendant's premises, where defendant's duty was uncontested, where constructive notice could be established, or whether defendant's use of a sidewalk for private use and convenience constituted a special use of the sidewalk. Here, the record fails to support a finding that the Flower Market had a duty to maintain the common area in which plaintiff fell, that Flower Market created the water condition, or that the Flower Market made a "special use" of the subject common area.

And, while a duty will be found to exist where an abutting landowner created the defect (*Spangel v City of New York*, 285 AD2d 425, 728 NYS2d 157 [1st Dept 2001]), here there is no indication that the Flower Market created the water condition. Indeed, plaintiff "presumed" that

the water came from "people tracking it in" from the rain, as it had been raining outside at the time of plaintiff's accident.

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Chelsea Wholesale Flower Market LLC pursuant to CPLR 3212 for summary judgment dismissing the complaint of the plaintiffs Jeffrey L. Smith and Annie Holford-Smith and all cross claims, and for costs associated with making the instant motion is granted solely to the extent that the complaint and all cross claims asserted against Chelsea Wholesale Flower Market LLC. And it is further

ORDERED that Chelsea Wholesale Flower Market LLC shall serve a copy of this order and memorandum decision upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

CAROL EDMEAD
J.S.C.

Dated: October 23, 2007

Hon. Carol Robinson Edmead, J.S.C.