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SCANNED ON 3/26/2007

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

PRESENT: PART 8

Index Number : 119012/2003

ABRAHAM, BENJAMIN

VS

CITY OF NEW YORK

Sequence Number : 005

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided pursuant to attached Rem

FILED
FEB 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 2/20/07

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

HON. MARILYN SHAFER, JSC

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62

----------X

BENJAMIN ABRAHAM,

Plaintiff,

-against- Index No. 119012/03

CITY OF NEW YORK, 104 SECOND REALTY LLC, MING KAM CHEONG individually and doing business as BAMBOO HOUSE RESTAURANT, and BAMBOO HOUSE RESTAURANT,

Defendants.

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MARILYN SHAFER, J.:

The defendant 104 Second Realty LLC (landlord) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and the cross claims, or, in the alternative, for an order granting summary judgment to the landlord on its cross claim for contractual indemnification against the co-defendants Ming Kam Chong (Chong) and Bamboo House Restaurant (collectively, tenant).

The tenant cross-moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint.

This is an action by the plaintiff Benjamin Abraham (Abraham) to recover damages for personal injuries suffered in a sidewalk slip and fall on snow in front of 104 Second Avenue in Manhattan. The accident occurred on December 7, 2002, at 2:30 AM, after a night of bar hopping. At the time of the accident, the restaurant operated by the tenant in possession was closed for

business.

In support of its motion to dismiss the complaint, the landlord argues that it had no duty to remove the snow and ice from the sidewalk. In the alternative, the landlord argues that the lease required: that the tenant remove the snow and ice from in front of the restaurant; that the tenant indemnify the landlord; and that the tenant procure insurance naming the landlord as an additional insured.

In support of its cross motion to dismiss the complaint, the tenant argues that there is no evidence that it had notice of the dangerous condition, or that it created the condition. In opposition to the landlord's motion for summary judgment on its indemnification claim, the tenant alleges that the landlord's superintendent, Honorio Salas (Salas), regularly assisted the restaurant's employees in snow removal in front of the restaurant, and that it is possible that Salas created the dangerous condition. It is argued that the landlord should not be indemnified for its own negligence.

In reply, the defendant landlord alleges that Salas only performed snow removal in front of the building's main entrance to the residential apartments above.

In opposition to the motions, the plaintiff Abraham alleges that according to the local climatological data compiled by the National Climatic Data Center for Central Park, six inches of snow fell on December 5, 2002, two days prior to the slip and fall on December 7, 2002. Abraham asserts that the snow upon which he slipped was created by the defendants' snow removal activities. Abraham alleges that he had observed that a path had been cleared in the area of the sidewalk where he fell. It is argued (citing Juiz v City of New York, 244 AD2d 298 [1st Dept 1997]) that: the lease provision required the tenant to remove snow and ice from the

abutting sidewalk; the tenant's worker's assertion that it was regular practice of both the tenant's employees and the building superintendent Salas to clear snow when there was a storm; and the tenant's admission that he did not know whether anyone had shoveled snow after this storm, are sufficient to raise a triable issue as to whether the tenant's employees, and the landlord's agent Salas, had attempted snow removal and thereby created or increased the hazard that caused Abraham's injuries.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373 [2005]; Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which requires a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (Zuckerman v City of New York, 49 NY2d 557 [1980]).

An abutting owner, or a tenant in possession, owes no duty to pedestrians to remove natural accumulations of snow and ice from the sidewalk (Roark v Hunting, 24 NY2d 470 [1969]). A commercial tenant's undertaking in a lease to clear the sidewalk abutting its premises of snow and ice does not give rise to a duty to third-parties (Tucciarone v Windsor Owners Corp., 306 AD2d 162 [1st Dept 2003]). In order to recover against the defendants, Abraham must

show that: (1) the defendants attempted to clear the sidewalk; (2) the effort of the defendants to remove the snow made the sidewalk more dangerous; and (3) the increased danger was a substantial factor in causing Abraham's injury (Glick v City of New York, 139 AD2d 402 [1st Dept 1988]).

Removal of snow and ice by the abutting owner will not impose liability simply because it is incomplete (Bonfrisco v Marlib Corp., 24 NY2d 817 [1969]). In addition, mere evidence of the property owner's general habits regarding snow removal are insufficient to raise an issue of fact as to whether the defendants may have engaged in snow removal that led to the slip and fall (Oles v City of Albany, 267 AD2d 571 [3rd Dept 1999]). Therefore, conclusory allegations that a defendant's snow removal operations created or increased a dangerous snow-related hazard are insufficient to impose liability (Espinal v Melville Snow Contrs., 98 NY2d 136 [2002]).

Here, no evidence, except sheer speculation, indicates that the defendants undertook careless snow removal in the hours prior to Abraham's accident. The slip and fall occurred in the middle of the night, when the restaurant was closed (Tucciarone v Windsor Owners Corp., 306 AD2d 162, supra). There is no evidence that the defendants had sufficient time to discover and correct any allegedly dangerous condition (Simmons v Metropolitan Life Ins. Co., 84 NY2d 972 [1994]). The assertion that the snow existed from the time of a snow storm two days before the date of the slip and fall accident, and that the defendants' negligent shoveling created the snow upon which Abraham slipped, is nothing more than speculation and conjecture (Pala v D. Braf, Ltd., 284 AD2d 382 [2d Dept 2001]). Speculation is an insufficient basis to connect the defendants' activities with Abraham's slip and fall (Bernstein v City of New York, 69 NY2d 1020 [1987]; Nadel v Cucinella, 299 AD2d 250 [1st Dept 2002]; Gibbs v Rochdale Vil., 282

AD2d 706 [2d Dept 2001]).

Therefore, the motion and the cross motion for summary judgment dismissing the complaint must be granted.

Accordingly, it is

ORDERED that the defendants' motion and cross motion for summary judgment are granted and the complaint is hereby severed and dismissed as against the defendants 104 Second Realty LLC, Ming Kam Cheong individually and doing business as Bamboo House Restaurant, and Bamboo House Restaurant, and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 2/21/07

ENTER:

J.S.C.

HON. MARILYN SHAFER, JSC

FILED
FEB 26 2007
NEW YORK
COUNTY CLERK'S OFFICE