[* 1]

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

PRESENT: CAROL EDMEAD J.S.C. PART 35
Justice

Index Number : 105489/2005
BEACH, LAVERNE
vs.
C.H. WING COMPANY
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 1/15/08
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

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

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

ORDERED that the motion of defendant C.H. Wing Company, Inc., for an order, pursuant to CPLR 3212, granting summary judgment and dismissing the complaint of plaintiffs Laverne Beach and Paul Beach, as against defendant Wing, **is denied**; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for defendant.

FILED
FEB 15 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/11/08

CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate ☐ DO NOT POST ☐ REFERENCE

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

LAVERNE BEACH and PAUL BEACH,

Plaintiffs,

-against-

C.H. WING COMPANY, INC., and
DYNASTY CLOTHING, INC.,

Defendants.

Index No. 105489/05

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant C.H. Wing Company, Inc. ("Wing") moves for an order, pursuant to CPLR 3212, granting summary judgment and dismissing the complaint of plaintiffs Laverne Beach ("plaintiff") and Paul Beach (collectively "plaintiffs"), as against defendant Wing.

The Complaint alleges that plaintiff was injured on October 5, 2004, at approximately 1:15 p.m., when she allegedly fell down a concealed exterior stairway leading to the street of a premises located at 81 Mott Street, New York, New York (the "subject premises"). Raber Enterprises LLC ("Raber"), managed the subject premises on behalf of Wing.

Plaintiff's Deposition

Plaintiff was visiting New York from South Carolina with a tour group. She wanted to get NYFD souvenir hats. Plaintiff saw the hats she was looking for on display. Plaintiff left the tour group and crossed the street to look for NYFD souvenir hats. She was on the pavement looking at the hats. She walked up to the hats, and as soon as she started to reach for the hats and touch them she fell (p. 21). Immediately before the accident happened, plaintiff was reaching for a hat (p.19). She reached over what turned out to be a hole. There was a blue tarp covering the

hole (p. 20). As soon as the accident happened, the salesperson tried to cover the area where plaintiff fell with flowers (p. 22).

Deposition Testimony of Lance Steinberg

Lance Steinberg ("Steinberg"), is a member of Raber, and runs its day-to-day operations (p. 6). Raber is a property management company (p. 7). At the time of plaintiff's accident, Raber was managing agent retained by Wing, the owner of the subject premises (p. 8). In addition to collecting rent, Raber would make visits to the building and do any necessary repair, hire people to do the repairs. These visits were not made on any regular schedule. The visits would be made if there was a complaint or for a regular checkup (p. 10). The custom and practice was that these visits would be made on a monthly basis (p. 11).

Looking at a photograph shown Steinberg at deposition (Pl.'s exh. 1), the merchandise displayed around the entrance to the basement door was probably placed there by Dynasty (pp. 30-31). There was no agreement or covenant entered into by Wing and Dynasty that restricted Dynasty from placing merchandise on the sidewalk of the store (p. 32).

Steinberg has entered the store Dynasty and seen merchandise similar to that depicted in the exhibits shown of Dynasty at his deposition (p. 40).

The stairs leading down to the basement, is an open stair that's visible from the street. That's been there since the building was built (p. 41). There was nothing preventing anyone who wanted to walk down those stairs from so doing (p. 43).

From 2000 until October 5, 2004, Steinberg visited the subject premises many times; more than ten times; he is not sure if he visited more than twenty times; but he visited the premises a lot (pp. 44-45). The purpose of his visits was to check on the building (p. 45).

Most of the time when he visited the premises, there was no merchandise blocking or out on the stairs. There were occasions, once or twice, where "we" had notice that the proprietor of Dynasty had merchandise on the stairs and "we" made her take down the merchandise. Steinberg personally told the tenant "You can't put it stuff there. Remove it immediatcly or I'm going to through you out" (pp. 47-48). Steinberg testified that "we" actually sent a letter to the proprietor telling her that she could not have the merchandise there.

He does not know if anyone else from Raber or Wing visited the subject premises from 2000 until the date of plaintiff's accident (p. 49).

Wing's Contentions

This case involves plaintiff's fall down an exterior stairway. The view of that stairway was obstructed by merchandise placed there by co-defendant Dynasty, a party that did not appear in this action and against whom plaintiffs chose not to take a default judgment. Plaintiff's testimony is clear that the merchandise and items placed by Dynasty and obstructing her view of the stairway were the sole proximate cause of her accident.

Wing is the out-of-possession landlord of the subject premises. The Complaint and Bill of Particulars do not allege any structural defect associated with the stairway itself. Instead, it alleges that the stairway was concealed by merchandise on display. That is, plaintiff alleges that co-defendant Dynasty Clothing, Inc.("Dynasty") was negligent in the layout and operation of its display.

Plaintiffs' Opposition

Based on Steinberg's deposition testimony, Wing had actual notice and was aware of this dangerous and defective condition. The basement was not leased to anyone and it was the

responsibility of the landlord to maintain the basement and the exterior area of the building. The witness for Wing, Steinberg, testified that he visited the subject premises more than ten times prior to October 5, 2004, and he was not sure whether he visited the subject premises more than twenty times. But, he did say that he visited the premises a lot. The purpose of his visits was to check on the subject premises, and on those occasions when he visited the subject premises, he would observe on occasion that there was merchandise around the stairwell. In fact, Steinberg testified that he spoke personally to co-defendant Dynasty requesting that Dynasty remove the merchandise. And Wing and/or its agent wrote a letter to the tenant insisting that Dynasty remove the merchandise and the display on shelves that were blocking the exterior stairwell to the basement of the subject premises.

As part of plaintiff's expert exchange Alvin Ubell stated under oath that within a reasonable degree of building inspection certainty, that the failure of Wing to provide secure barricades like a gate or a fence was a competent producing cause of this accident as well as the fact that the structural stairway leading down to the basement was creating a trap waiting for a patron to fall into.

Further, Wing cannot in good conscience argue that it is an out of possession landlord inasmuch as Steinberg appeared at the subject premises on a regular basis.

The Lease between co-defendants clearly provides that the owner shall maintain and repair the public portions of the subject premises, both exterior and interior. Plaintiff's accident occurred in a public portion of the subject premises leading towards 81 Mott Street.

Wing's Reply

Plaintiffs correctly state that Steinberg, who testified on behalf of Wing, would usually make monthly visits to the premises, from 2000 and into October of 2004, when the accident at issue occurred. However, Steinberg actually testified that in the five years of visiting the premises leading up to the date of the incident, most of the time there was no merchandise blocking or out on the stairs. There was, once or twice, where he had noticed that Dynasty had merchandise on the stairs and Wing made her take down the merchandise.

And, nowhere in his testimony does Steinberg state that the photograph fairly or accurately reflected the conditions created by Dynasty at the location at issue, on the date of the accident.

Plaintiffs are attempting to manufacture actual notice of knowledge on the part of Wing of a patently transitory condition, despite a complete lack of evidence to support such a contention.

Also, plaintiffs raise a tangential issue through their expert testimony concerning whether a gate or fence should have been placed in front of the stairway. There is no evidence that the stairway itself posed any kind of hazard; rather, any alleged hazard resulted solely from Dynasty's obstruction of plaintiff's view of the stairway.

And, plaintiffs' reference to the Lease is also a red herring. That provision of the Lease concerns the landlord's duty to make sure the premises are structurally sound.

Even if the court were to consider actual notice, the alleged actual notice is insufficient proof of notice on the part of Wing for it to be held liable for the existence of the condition created solely by Dynasty.

Neither Wing nor its managing agent had an office at the subject premises. Indeed, Wing itself is not known to have visited the premises at any time from 2000 up through the date of the alleged accident. Rather, Steinberg visited on a monthly basis on behalf of Wing.

Finally, Wing did not receive any complaints about this condition at any time prior to the alleged incident.

Analysis

Summary Judgment

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]).

In support of summary judgment, Wing relies on *Wrubel v Rose Boutique II, Inc.*, 13 AD3d 164, 787 NYS2d 263 (1st Dept 2004). In *Wrubel,* plaintiff alleged injury from a fall down an interior stairway leading from the ground floor to the basement in property owned by defendant Kostas & Michael Realty and leased to defendant Rose Boutique, which operated a flower shop on the premises. Plaintiff had selected some plants at the store and handed them to a clerk at the counter, where she inquired about birthday balloons. She was directed to some shelves on the opposite wall, which were adjacent to an open stairway. Attempting to retrieve some of these balloons, she slipped and tumbled down the stairs. The court found that even though Kostas & Michael Realty, the property owner, retained the right to re-enter the premises, it was nonetheless an out-of-possession landlord with no direction or control of the layout and operation of the flower shop. There is no indication it played any role in designing the store, including the placement of shelves. Whether the owner may have been responsible for the structural condition of the stairs is irrelevant. Plaintiff's fall was not attributable to any structural defect. Plaintiff has presented proof that would permit a jury to find that the accident was, in whole or in part, due to one or more of the following alleged factors: configuration of the store interior, with shelving hung immediately adjacent to the stairway leading down to the basement; placement of the merchandise on a shelf directly above the top step of the stairs; the unprotected nature of the entrance to the staircase; the employee's directing of plaintiff to the location in

question without any warning about the stairs; and plaintiff's inability and/or failure to notice the staircase when she reached for the balloons. The owner's right of re-entry principally to access the basement was thus unrelated to the accident, entitling it to summary dismissal.

Plaintiff argues that the instant case is distinguishable from *Wrubel* because in the instant case: (1) the owner/landlord and/or its agent was aware of the hazardous and defective condition in front of the exterior stairwell of the subject premises on numerous occasions based upon its agent's inspections prior to the plaintiff's accident; (2) the owner/landlord through its agent had direct knowledge of the display and pursuant to the lease had the responsibility and control of the exterior part of the building; and (3) the defendant cannot claim that it is an out-of-possession landlord since Sternberg appeared at the building on a regular basis and further Wing or its agent sent a letter to the tenant, directing the tenant to remove the defective and dangerous condition.

Further, plaintiff relies on *Gilmartin v Tempestoso,* 273 AD2d 875, 709 NYS2d 298 (4th Dept 2000), to argue that Wing was not truly and out-of-possession landlord, and that Wing had constructive notice of the dangerous and defective condition. In *Gilmartin,* plaintiff was injured when he allegedly slipped and fell on a layer of ice on an exterior staircase of a building owned by Ulderico Tempestoso and Antonio Ciccotelli. In support of the motion, defendants submitted deposition testimony in which they each testified that they had orally informed the tenants that the tenants were responsible for ice and snow removal but that no such provision is contained in the one-page lease. In addition, Tempestoso testified that he visited the premises five or six times a month to collect rent and to ascertain that their rules were being followed. The court found that contrary to the contention of defendants, they failed to meet their initial burden of establishing as a matter of law that they were out-of-possession landlords with no control over the premises and

thus were not liable for the allegedly dangerous condition of the premises (*see, Cherubini v Testa*, 130 AD2d 380, 382; cf., *Carvano v Morgan*, 270 AD2d 222; *see also*, *Young v Moran Props.*, 259 AD2d 1037, 1038). Also contrary to the contention of defendants, they failed to meet their initial burden of establishing as a matter of law that they had no constructive notice of the allegedly dangerous condition (*see*, *Mikolajczyk v Morgan Contrs.*, 273 AD2d 864 [decided herewith]; *Laster v Port Auth.*, 251 AD2d 204, 205, lv denied 92 NY2d 812) or that they had no duty to clear the ice because there was a snowstorm in progress when plaintiff fell (see, *Cerra v Perk Dev.*, 197 AD2d 851).

It is axiomatic that an out-of-possession landlord who has actual or constructive notice of a hazardous condition and retains the right to inspect and to make repairs in the leased premises may be held liable for failure to maintain the property in a safe condition. *Muhammed v Bucknor,* 228 A.D.2d 333, 644 N.Y.S.2d 244 (1st Dept.1996)(landlord may be responsible for hazardous conduct of tenant when landlord continues to exercise control over premises); *Chapman v Silber;* 97 N.Y.2d 9, 21, 734 N.Y.S.2d 541, 760 N.E.2d 329 (2001)(landlord with actual notice of existence of conditions that indicate hazard may be charged with constructive notice of hazard); *State v Monarch Chemicals, Inc.,* 90 A.D.2d 907, 456 N.Y.S.2d 867 (3d Dept.1982)(summary judgment denied where landlord had right of entry and may have had actual notice of seepage of chemicals from tenant's factory); *Galicia v Ramos,* 303 A.D.2d 631, 756 N.Y.S.2d 651 (2d Dept.2003)(landlord with actual notice of younger child's lead exposure must make effort to abate). A landlord cannot close his eyes to a dangerous condition on his property. *Vasquez v RVA Garage, Inc.,* 238 A.D.2d 407, 656 N.Y.S.2d 334 (2d Dept.1997)(land being used for fireworks every 4th of July). Whether or not a condition is sufficiently hazardous to create liability is

generally a question of fact. *Alexander v N.Y.C. Transit Auth.,* 34 A.D.3d 312, 824 N.Y.S.2d 262 (1st Dept.2006). Moreover, a landlord who leases premises with knowledge that the prospective tenant poses a danger to third persons, without taking measures to protect them can be found "affirmatively to have created the very risk which was reasonably foreseeable." *Strunk v Zoltanski,* 62 N.Y.2d 572, 479 N.Y.S.2d 175, 468 N.E.2d 13 (1984). *See also State v Scott,* 26 N.Y.2d 296 (1970) (landlord has duty to exercise sufficient care in selection of tenant).

Although the instant case is greatly on point with *Wrubel,* wherein the First Department found that even though the defendant therein, the property owner, retained the right to re-enter the premises, it was nonetheless an out-of-possession landlord with no direction or control of the layout and operation of the flower shop, in the instant case, there is some evidence that Wing and/or its agent directed the layout of merchandise in Dynasty, at least through the threat of eviction if Dynasty did not move the merchandise blocking the stairway.

On the issue of constructive notice, the instant case is more like *Gilmartin.* In *Gilmartin,* the defendant visited the premises five or six times a month to collect rent and to ascertain that their rules were being followed. In the instant case, the testimony establishes that on two occasions in the preceding five years, Wing, through its representative, saw conditions similar to those that existed on the date of the accident. What is more compelling, and more like *Gilmartin,* is the fact that Steinberg made regular visits to the subject premises. Although these visits were not made on any regular schedule, the visits would be made if there was a complaint or for a regular checkup. Steinberg, testified that he visited the subject premises many times; more than ten times prior to October 5, 2004, and he was not sure whether he visited the subject premises more than twenty times. But, he did say that he visited the premises a lot. The custom

and practice was that these visits would be made on a monthly basis.

And, although most of the time when Steinberg visited the premises, there was no merchandise blocking or out on the stairs, there were occasions, once or twice, where Wing and/or its agent noticed that the proprietor of Dynasty had merchandise on the stairs and defendant made her take down the merchandise. Steinberg testified that he spoke personally to co-defendant Dynasty requesting that Dynasty remove the merchandise.

Further evidence of constructive notice is that fact that Wing or its agent actually sent a letter to the proprietor telling her that she could not have the merchandise there.

Finally, based on Steinberg's monthly visits and defendant's letter to Dynasty to remove the merchandise from the stairs, an inference can be drawn that the complained-of condition was not suddenly created and raises a triable issue as to whether defendant could have obtained timely knowledge of it by the exercise of ordinary care (see *Denyssenko v Plaza Realty Servs., Inc.*, 8 AD3d 207 [2004]).

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendant C.H. Wing Company, Inc., for an order, pursuant to CPLR 3212, granting summary judgment and dismissing the complaint of plaintiffs Laverne Beach and Paul Beach, as against defendant Wing, **is denied**; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for defendant.

This constitutes the decision and order of this court.

Dated: February 11, 2008

Carol Robinson Edmead, J.S.C.