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

PRESENT: HON. JUDITH J. GISCHE PART 10
Justice

Index Number : 104396/2005
TESE-MILNER, ANGELA
VS
30 EAST 85TH STREET
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO.
notion to/for

PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits
Replying Affidavits

STENO RECORD
Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

compliance conference
May 8, 2008 @ 9:30
Part 10.

FILED
APR 10 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: April 7 2008

HON. JUDITH J. GISCHE 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 10

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Angela Tese-Milner, as trustee for
Howard C. Friedman, and
Howard C. Friedman,

Plaintiffs,

-against-

30 East 85th Street Company,
Banana Republic, LLC and
30 East 85th Street Condominium
Associates,

Defendants.

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DECISION/ORDER
Index No.: 104396/05
Seq. No.: 001

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

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

Papers	Numbered
Def BR n/m (§3212) w/NMF affirm, MR affid, exhs	1
Def 30 E 85th Company x/m (§3212) w/BC affirm, exhs	2
Def 30 E 85th Condo x/m (§3212) w/PDL affirm, exhs	3
Def 30 E 85th Company opp to BR n/m w/PDL affirm, exhs	4
Pltf opp to BR n/m w/GHS affirm	5
Pltf further opp to BR n/m w/GHS affirm, exh	6
Pltf opp to 30 E 85th Company x/m w/GHS affirm, RL affid, exhs	7
Def BR opp to 30 E 85th Company x/m w/NMF affirm	8
Def BR opp to 30 E 85th Condo x/m w/NMF affirm	9
Def BR reply to 30 E 85th Company x/m w/NMF affirm	10
Def BR reply to 30 E 85th Condo x/m w/NMF affirm	11
Def BR reply to pltf's opp w/NMF affirm	12
Def 30 E 85th Condo reply to pltf's opp w/BC affirm	13
Def 30 E 85th Company reply to pltf's opp w/PDL affirm	14

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action brought by the Trustee in Bankruptcy for Howard C. Friedman in that capacity and by Mr. Friedman, individually (hereinafter "plaintiff"). Plaintiff seeks to recover monetary damages for personal injuries he claims to have sustained

following a fall on a sidewalk in front of the building owned by defendant 30 East 85th Street Company ("landlord"), located at 1136 Madison Avenue, New York, New York ("premises"). Defendant Banana Republic, LLC ("tenant" or "BR"), is a commercial tenant of the landlord who leases a ground level store at the premises. Defendant 30 East 85th Street Condominium Associates ("condo") is the owner of the residential portion of the premises.

There are three motions before the court. They are: 1) the tenant's motion for summary judgment dismissing plaintiff's complaint and the landlord's cross claims against it; 2) the landlord's cross motion for summary judgment dismissing plaintiff's complaint and all the cross clams against it; and 3) the condo's cross motion, also for summary judgment dismissing plaintiff's complaint and all cross claims against it.

Plaintiff opposes all three motions as premature because discovery is not yet complete in this case, and also on the merits.

The landlord, condo and tenant adopt each other's arguments in support of their respective motions to dismiss the complaint, but each opposes the other's motion with respect to the cross claims between them. Thus, on the cross claims, the landlord adopts plaintiff's argument, that BR's motion for dismissal of the cross claims is premature.

The condo opposes the tenant's motion, even though BR has not sought summary judgment against the condo, an argument raised by BR in reply.

Issue has been joined. The note of issue has not yet been filed. The motions are timely under CPLR § 3212 [Brill v. City of New York, 2 NY3d 648 (2004)] and they will be decided on the merits. However, the court will also consider whether the

motions are premature because discovery is incomplete. CPLR § 3212 (f) The court's decision follows.

Arguments

Plaintiff alleges in his complaint and in the bill of particulars that he fell on the sidewalk outside the Banana Republic store at the premises. Plaintiff, who was deposed, testified at his examination before trial that his foot went into an elongated, elliptical hole on the right hand side of the sidewalk, close to the building line. He described the hole as being "six inches wide (*sic*), two, three inches width - - and I'd say two inches deep."

The defendants collectively argue that the "hole" is nothing more than a trivial defect, and not a trap. Each contends that the photographs taken of the hole show how shallow it is, and that it is not two inches deep, but no more than a half inch deep.

BR argues separately that even if there is a hole on the sidewalk it has no contractual obligation under its lease with the landlord to maintain the sidewalk. Thus, it is the tenant's argument that the plaintiff cannot prove BR owed him a duty, or that it failed to maintain the sidewalk in a safe condition. Alternatively, BR contends that if it did owe him a duty of care, it did not breach it because BR neither created the dangerous condition, nor did it have notice of it. The tenant provides the sworn affidavit of its General Store Manager, Ms. Ramirez who states that she is familiar with BR's store operations. She states that BR never uses the sidewalk for deliveries, nor has it ever performed any work to the sidewalk in question.

The landlord contends separately that only the plaintiff has been deposed as of the date of these motions and that there is outstanding discovery, including the

depositions of the defendants. The landlord contends that until it deposes its tenant, it cannot ascertain whether it made a special use of the sidewalk, thereby creating the dangerous condition alleged. Although not directly addressing the condo's motion for summary judgment, the landlord contends it should have an opportunity to depose "all the parties."

The condo separately argues it is entitled to summary judgment because it was not responsible for maintaining the sidewalk area where plaintiff fell and it did not have notice of a dangerous condition.

In opposition to all the motions before it, plaintiff relies upon his own testimony about the size of the hole and its location. He argues that section 19-152 (4) of the New York City Administrative Code ("Duties and Obligations of Property Owners with Respect to Sidewalks and Lots") defines what a trip hazard is and the hole he has described falls within that definition. Plaintiff also provides the sworn affidavit of his expert witness, Robert Schwartzberg, a professional engineer ("Schwartzberg"). Schwartzberg opines that the hole was due to lack of proper maintenance, and had existed for a considerable period of time, prior to the date of plaintiff's accident. He provides measurements of the hole and also opines it is a substantial defect, within the meaning of the Administrative Code.

Applicable Law

A movant seeking summary judgment in its favor 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).

Where a party opposed to summary judgment contends that discovery is incomplete, the court may consider whether the motion is premature because the information necessary to fully oppose the motion remains under the control of the proponent of the motion. CPLR § 3212 (f); Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324 (1st dept. 2004); Global Minerals and Metals Corp. v. Holme, 35 AD3d 93 (1st dept 2006) (internal citations omitted). Thus, should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny a motion for summary judgment and allow discovery to be completed.

Discussion

The motions for summary judgment, insofar as they seek dismissal of the complaint against them, must be denied partly because they are premature, and partly because defendants have failed to prove their defense, as a matter of law, which is that the hole in the sidewalk is a trivial, and therefore inactionable, defect.

The preliminary conference in this case was held April 19, 2007, at which time the end date for discovery was set for November 9, 2007. The tenant moved for summary judgment in August 2007, following plaintiff's deposition in June 2007. None of the defendants have been deposed and they present conflicting arguments about which one of them is responsible for maintenance of the sidewalk. Although the lease agreement provides that the landlord is responsible for structural repairs for the ground floor store, including sidewalks, this obligation is not without limitations. The lease provides that structural repairs are the obligation of the landlord, unless caused by the acts of the tenant, its agents, employees, etc. Furthermore, certain repairs are,

apparently, the obligation of the condo. Therefore, even if the tenant is not contractually obligated to repair the sidewalk, there are factual disputes about whether the tenant created a dangerous or unsafe condition, or had actual or constructive notice of the condition, and whether such defects were visible and apparent. Segretti v. Shorenstein Company East, LP, 256 A.D.2d 234 (1st Dep't 1998).

Defendants have failed to prove, as a matter of law, their defense that the sidewalk where plaintiff fell was not defective, or that any defect was too trivial to be actionable. Compare: Marcus v. Namdor, Inc., 46 A.D.3d 373 (1st Dept. 2007) (gentle slope, minor defect). There is no *per se* rule of what constitutes a minor defect, rather this is usually a factual issue for the jury to decide, based upon the peculiar facts and circumstances of the case. Trincere v. County of Suffolk, 90 N.Y.2d 976 (1997); Compare: Marcus v. Namdor, Inc., *supra.*

The court has, nonetheless, examined the photographs submitted by the parties to see whether, as defendants claim, the defect is so trivial that it is not actionable, and therefore should not even be submitted to the jury. Trincere v. County of Suffolk, *supra* at 977-78; Marcus v. Namdor, Inc., *supra*; Corrado v. City of New York, *supra*. After examining the photographs and reviewing the other evidence submitted on these motions, including plaintiff's own testimony, and the expert's opinion, the court finds that defendants have not met their burden, in the first instance, of proving the hole is so trivial, it is inactionable [*Compare*: Marcus v. Namdor, Inc., *supra* (defect so trivial as to be inactionable)] or even if the burden was met, that there are no factual disputes. A reasonable jury could find at trial that the defect is not trivial.

The tenant's motion and condo's cross motion for summary judgment on their

common law indemnification cross claims must be denied as well. The underlying premise of a common law indemnification claim is that one party, though innocent of any wrongdoing, is nonetheless held liable for the negligence committed by another due to the relationship between the two. *For example*: Pearson v. Parkside Ltd. Liability Co., 44 A.D.3d 833 (2nd Dept. 2007). None of the defendants have prove their defenses to the claims asserted by the plaintiff, or their co-defendants.

Conclusion

For the reasons stated, the defendants have failed to prove that the defect alleged by plaintiff is trivial, and therefore inactionable, as a matter of law. The motions for summary judgment are otherwise premature because discovery is incomplete.

The date by which to provide responses to any outstanding document demands is hereby extended to **May 2, 2008.** All sides to appear for the compliance conference scheduled for **May 8, 2008** with dates their principles are available to be deposed. Firm deposition dates as well as other date to finally complete discover will be set at that conference.

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

This constitutes the decision and order of the court.

Dated: New York, New York
April 7, 2008

So Ordered:

Hon. Judith J. Gische, JSC