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

PRESENT : DONNA M. MILLS **PART 21**

Justice

MUKTY, MAHMUDA

Plaintiff,

-v-

NEW YORK CITY TRANSIT AUTHORITY, et al.,

Defendants.

INDEX NO. 104270/05

MOTION DATE _____

MOTION SEQ. NO. 008

MOTION CAL NO. _____

The following papers, numbered 1 to 3 were read on this motion for _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1
Answering Affidavits– Exhibits	2
Replying Affidavits	3

CROSS-MOTION: ____ YES ✓ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 6/13/08

J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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MAHMUDA MUKTY,

Plaintiff,

Index No.

-against-

104270/05

NEW YORK CITY TRANSIT AUTHORITY, THE CITY OF NEW YORK, THE TOWER 53 CONDOMINIUM ASSOCIATION a/k/a 825 SEVENTH AVENUE CONDOMINIUM, VORNADO NEW YORK RR ONE L.L.C., THE BEER GARDEN, INC., LINDY'S RESTAURANT CORP. and MINSKOFF GRANT REALTY & MANAGEMENT CORP.,

Defendants.

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DONNA MILLS, J. :

Motion Sequence Nos. 008 and 009 are consolidated for disposition.

In Motion Sequence No. 008, defendant Lindy's Restaurant Corp. (Lindy's) moves for summary judgment dismissing all claims and cross claims brought against it. In Motion Sequence No. 009, defendant Vornado New York RR One L.L.C. (Vornado) moves for the same relief. During the course of this action, two defendants, Minskoff Grant Realty & Management Corp. and The Beer Garden, Inc. have been dismissed from this case.

In this personal injury action, plaintiff alleges the following: on February 2, 2004, at approximately 5:15 p.m., plaintiff approached the entrance of the "D" train subway station located on 53rd Street near 7th Avenue in Manhattan. Plaintiff walked straight towards the first subway station step, then slipped and fell, striking the right side of her head on the right side pillar and landing on her left knee on the step. She describes the step on which she slipped as having accumulated snow and ice. She brings a negligence suit against defendants.

Both moving defendants assert that they did not attempt to clean up the sidewalk area and that they did not have a duty to clean up the area prior to the accident. Lindy's relies on the deposition testimony of Bujar Karce, a superintendent employed by defendant The Tower 53 Condominium Association a/k/a 825 Seventh Avenue Condominium (Tower); Antoine Monroe, a cleaner for defendant New York City Transit Authority (NYCTA); Abel Pineda, a general manager of Lindy's; Sean Fallon, a property manager of Vornado; and Kevin Woods, a supervisor for NYCTA.

Bujar Karce testified that the building on the subject premises contains commercial and residential units. The entrance to the residential portion of the building is located on 53rd Street. Karce stated that the commercial units are only responsible for the maintenance of the abutting sidewalk on 7th Avenue. He identified Lindy's as a tenant in the commercial unit owned by Vornado. He testified that his people remove snow from the public sidewalk abutting the entrance of the residential portion of the building on 53rd Street, and this would include the area in front of the entrance to the subway station. Karce testified that he did not see any employees of Lindy's clearing the snow from that specific area.

Antoine Monroe testified that he was familiar with the subway station located at 53rd Street and 7th Avenue. He further testified as to his responsibilities for maintaining the stairs leading to the subway. He stated that when sweeping the stairs leading to the subway from the sidewalk, his co-workers clean and sweep 3 feet around the beginning of the stairway on the sidewalk. They would have a continuing obligation to keep the area clear of snow and ice and to use salt and sand in the area 3 feet from the entrance to the station. He did not have a specific recollection of working on the date of the accident.

Abel Pineda testified that Lindy's leases space from Vornado, the owner of one the commercial units. He specifically stated that Lindy's employees do not remove snow and ice in the general area of the entrance to the subway on 53rd Street and that his employees usually clean snow and ice in front of the 7th Avenue entrance to the restaurant.

Sean Fallon testified that Vornado owned the condo unit that is leased to Lindy's. He identified the lease agreement between Vornado and Lindy's which is submitted by Lindy's.

Kevin Woods testified that as a supervisor for NYCTA, he supervises the subway station at bar. His duties include supervising the station agents and cleaners as well as conducting administrative work and inspections. He further testified that NYCTA would be responsible for cleaning and removing snow and ice 3 feet around the subway entrance.

Lindy's contends that responsibility for cleaning the ice and snow at the subway entrance was Tower's and/or NYCTA's, and that Lindy's has no duty in this matter.

Vornado also argues that the responsibility for cleaning the premises was Tower's and NYCTA's. Moreover, Vornado claims that it is entitled to conditional summary judgment over and against Tower and NYCTA on the basis of its claims for common law indemnification.

Plaintiff opposes the motions for summary judgment and argues that there is an issue of fact as to the responsibility of these defendants. Plaintiff points out Section 30 of the subject lease which provides:

> Tenant (Lindy's) shall at Tenant's expense keep the Demised Premises clean and in order to the satisfaction of Owner (Vornado) and if the Demised Premises are situated on the street floor, Tenant shall at Tenant's own expense make all repairs and replacements to the sidewalks and curbs adjacent to thereto and keep said sidewalks and curbs free from snow, ice dirt and rubbish ... .

Plaintiff states that under the terms of the lease, Lindy's was responsible for keeping the sidewalks "adjacent thereto," namely the sidewalk on 53rd Street and 7th Avenue, free from snow and ice. Plaintiff also refers to Section 16-123 (a) of the New York City Administrative Code, which provides the following:

> Every owner, lessee, tenant, occupant or other person, having charge of any building or lot of ground in the city, abutting upon any street where the sidewalk is paved, shall, within four hours after the snow ceases to fall... remove the snow or ice ... from the sidewalk and gutter...

Plaintiff asserts that this law holds both Lindy's and Vornado, in their capacities as lessee and owner, responsible for the cleaning of the sidewalk

On this motion, defendants rely on an attorney's affirmation, together with deposition testimony. Plaintiff states that although an affirmation of defense counsel, who is without personal knowledge of the facts, may serve as a vehicle for the submission of documentary exhibits providing evidentiary proof in admissible form, where deposition transcripts of a party filing a summary judgment motion are submitted in support of the motion, and have been neither signed nor verified by the moving party, then the affirmation of the attorney for that party is held insufficient to sustain that party's burden for obtaining summary judgment.

In reply, Lindy's cites CPLR Rule 3116 (a) which states that "if the witness fails to sign and return the deposition within 60 days, it may be used as though fully signed." Lindy's states that since the depositions relied upon were conducted in 2007, the depositions can be used as if they were executed and are sufficient to support its motion.

Lindy's cites Section 10 of Tower's by-laws relating to Maintenance and Repairs which provides in part:

> All painting, decorating, maintenance, repairs and replacements, whether structural or non structural, ordinary or extra ordinary in or to the common elements, whether such elements are located outside the unit or within the unit, shall be made by the condominium board and the costs and expense there shall be charged to the unit owners as a common expense.

Lindy's asserts that from the by-law, Tower would be responsible for common elements outside the unit which would include the abutting sidewalk to the commercial unit leased by Lindy's. Lindy's claims that Tower established from the deposition testimony of its manager that it has been its custom and practice to clean the sidewalk area in question. Thus, Lindy's contends that it does not have a duty to remove snow or ice near the subway entrance.

Vornado also contends in reply that Tower had the responsibility to clean up the sidewalk area. Vornado states that it did not cause the condition at the subway entrance and did not have notice of the condition.

The duty of reasonable care owed by a tort-feasor to an injured party is elemental to any recovery in negligence. Palka v Servicemaster Management Services Corp., 83 NY2d 579 (1994). Unless a duty to plaintiff is established, a prima facie case of negligence is not made out. Warech v Trustees of Columbia University, 203 AD2d 53 (1st Dept 1994).

First, relating to a procedural issue, defendants are in the right in relying on their attorney's affirmations and deposition testimony. Said testimony can be used as if it was executed.

Lindy's has no duty to a third party based on the lease agreement. A contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party. Stiver v Good & Fair Carting & Moving, Inc., 9 NY3d 253 (2007).

As plaintiff points out, Section 16-123 (a) of the Administrative Code requires owners and lessees to remove snow and ice from abutting sidewalks. However, the law does not explicitly impose liability for personal injuries sustained when the owner or lessee fails to clear accumulated snow and ice. See Norcott v Central Iron Metal Scrapes, 214 AD2d 660 (2d Dept 1995). Thus, the owner or lessee who does nothing at all with respect to snow removal is not liable to a person who slips and falls at the site. Of course, if there is misfeasance, and the owner or lessee does something that makes the snow and ice condition more hazardous, he or she could be held liable. See Booth v City of New York, 272 AD2d 357 (2d Dept 2000); also Bruzzo v County of Nassau, 50 AD3d 720 (2d Dept 2008).

Here, Lindy's and Vornado deny doing any snow removal at the scene of the accident. Plaintiff has not shown that these defendants made the area more hazardous by their actions. Therefore, these defendants are not liable to plaintiff.

Accordingly, it is

ORDERED that defendants Lindy's and Vornado's motions for summary judgment are granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED:

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.