Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES **PART 17**
Justice

----------X

JACQUELINE FORD,
Plaintiff, **Index No.: 8705/07**
Motion Date: 10/22/08
-against- **Motion Cal. No.: 26**

DOMINO'S PIZZA LLC, BROOKLYN LAND CO. LLC, BRUCE KAPNER, PETER KAPNER and LIEBERMAN-KOREN CORP., **Defendant.**

----------X

The following papers numbered 1 to 14 read on this motion by defendant Domino's Pizza LLC, (hereinafter, "Domino's") for an order pursuant to CPLR 3212 granting it summary judgment and dismissing the complaint and amended complaint and all cross-claims against it, and granting Domino's summary judgment on its cross-claim for breach of contract as against defendants Brooklyn Land Co. LLC, Bruce Kapner, and Peter Kapner, and setting this matter down for an evidentiary hearing to determine Domino's damages; and cross motion by defendants Brooklyn Land Co. LLC, Bruce Kapner, Peter Kapner, and Lieberman-Koren Corp. (hereinafter, "Brooklyn Land") for an order pursuant to CPLR 3212 granting them summary judgment and dismissing the complaint and amended complaint and all cross-claims against them, and granting summary judgment on its cross-claims in favor of Brooklyn Land on the issue of contractual and common law indemnification against Domino's. and setting this matter down for an evidentiary hearing to determine their damages.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply Affirmation.....	8-9
Notice of Cross-Motion-Affirmation-Exhibits.....	10-13
Affirmation in Partial Opposition.....	14-15
Reply Affirmation.....	16-17
Affirmation in Partial Opposition & Reply.....	18-19

Upon the foregoing papers, the motion by defendant Domino's for an order pursuant to CPLR 3212 granting it summary judgment and dismissing the complaint and amended complaint and all cross-claims against it, and granting Domino's summary judgment on its cross-claim for breach of contract as against defendants Brooklyn Land Co. LLC, Bruce Kapner, and Peter Kapner, and setting this matter down for an evidentiary hearing to determine Domino's damages; and cross motion by defendants Brooklyn Land for an order

pursuant to CPLR 3212 granting them summary judgment and dismissing the complaint and amended complaint and all cross-claims against them, and granting summary judgment on its cross-claims in favor of Brooklyn Land on the issue of contractual and common law indemnification against Domino's. and setting this matter down for an evidentiary hearing to determine their damages, are decided as follows:

The action herein stems from plaintiff Jacqueline Ford slipping and falling while on the raised sidewalk area directly adjacent to the Domino's Pizza store located at 131-31A Merrick Boulevard, Springfield Gardens, New York, on October 19, 2006. Plaintiff claims that it was raining and she stepped up onto the raised sidewalk, first with her left foot and then with the right. She felt the right foot slide out from beneath her and she lost her balance and reached out to grab a nearby pole to steady herself, but she could not and she fell. As a result of her fall, plaintiff claims to have suffered injuries and brought this action to recover damages.

As related to plaintiff's action, all defendants have brought the instant summary judgment motions. Defendants all claim that plaintiff's theory of liability-that by applying blue paint to the raised sidewalk area in question, the defendants made the area inherently slippery when wet - such as when it rains - does not constitute a valid cause of action. Defendants also claim that they did not have any constructive notice of the allegedly dangerous condition. Plaintiff opposes these motions claiming that defendants were on constructive notice of the dangerous condition, thereby subjecting them to liability for plaintiff's injuries.

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See*, Barr v County of Albany, 50 NY2d 247 (1980); Miceli v Purex, 84 AD2d 562 (2d Dept. 1981); Bronson v. March, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in Daliendo v Johnson, 147 AD2d 312,317 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

Defendants rely upon the deposition testimony of plaintiff which indicates she had visited the subject Domino's on several occasions in the past. At no point prior to the accident, had she made a complaint to anyone at Domino's regarding the condition of the raised sidewalk or the surrounding area, and that she did not know of anyone who had presented such a complaint. Defendants have also submitted the deposition testimony of Patricia Harris, a friend of plaintiff, who had driven to Domino's with plaintiff on the subject

day, but remained inside of the car while plaintiff went to get food. She observed plaintiff fall, but was only able to see the top portion of her body when she fell due to cars obstructing her full view. She noted that prior to the subject date, she had been to this Domino's two or three times when it was raining and had noticed that "where the blue paint was on the walkway, it was extra slippery. However, she did not notify any person at Domino's about her observation. Defendants have also submitted the deposition testimony of Ron Brezzelli, Domino's area supervisor who oversaw the subject Domino's operations. He stated that prior to October 19, 2006, there were no complaints of anybody falling in front of this store. Finally, defendants rely upon the deposition testimony of Peter Kapner who authenticated the leases between Domino's Pizza and the landlord's of the property (including defendants Brooklyn Land). He also stated that from Brooklyn Land's purchase of the property in 2001 until plaintiff's incident, there were no received complaints regarding the condition of the exterior of the Domino's building.

Initially, the court notes that defendants correctly argue that a claim that the application of paint to the sidewalk surface rendered the area inherently slippery is insufficient as a matter of law, without more, to establish liability against the defendants. Rodriguez v. Kimco Centereach 605, Inc., 298 A.D.2d 571 (2d Dept 2002.) Moreover, a claim that the condition of the sidewalk area was made "extremely slippery" by virtue of the accumulation of rain droplets on the painted and the inability of the surface to absorb the water would be insufficient as a matter of law, without more, to establish liability against the defendants. *Id*. On this branch of the motion they have established their burden of proof and plaintiff has not raised an issue of fact.

However, defendants claim that there was no notice of the condition has not been sufficiently established. It is well settled that "to prove a prima facie case of negligence in a slip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition" Meyer v. Pathmark Stores, Inc., 290 A.D.2d 4 (2d Dept 2002.) (Citations omitted.) On a motion for summary judgment to dismiss the complaint based on lack of notice, the defendant has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it. Valdez v. Aramark Servs., Inc., 23 AD3d 639 (2d Dept 2005.) Only after the moving defendant has satisfied this threshold burden will the court examine the sufficiency of the plaintiff's opposition. *See*, Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985) This burden cannot be satisfied by merely pointing out gaps in the plaintiff's case. Valdez v. Aramark Servs., Inc., *supra*.

Here, defendants have not met their respective burdens of making a prima facie showing that they did not have constructive notice of the slippery nature of the sidewalk's

existence for a sufficient length of time to discover and remedy it. The submitted testimony of Patricia Harris indicates that the alleged condition might have existed for about one year. Contrary to defendants' claim, Harris' testimony and plaintiff's testimony indicates that the area plaintiff slipped on was the same area in which Harris had noticed the slippery condition in the past. Accordingly, the defendants have failed to submit evidence sufficient to establish their lack of constructive notice of the alleged dangerous condition. *See*, Enamorado v. KHR Holding Co., LLC, 24 A.D.3d 411 (2d Dept 2005.) Accordingly, the branches of defendants' motion and cross-motion for summary judgment in their favor dismissing the complaint and amended complaint on this ground are denied.

The branch of Domino's motion seeking summary judgment on its cross-claim for breach of contract as against defendants Brooklyn Land Co. LLC, Bruce Kapner, and Peter Kapner, and setting this matter down for an evidentiary hearing to determine Domino's damages and the branch of the cross motion by defendants Brooklyn Land granting summary judgment on their cross-claims in favor of Brooklyn Land on the issue of contractual and common law indemnification against Domino's. and setting this matter down for an evidentiary hearing to determine their damages are denied.

Domino's has established that pursuant to the lease, Brooklyn Land was to procure public liability insurance specifically naming Domino's as an insured party, with a minimum of one million dollars in coverage for the type of occurrence involved in this action. They have also established that Brooklyn Land failed to procure such insurance. Similarly, Brooklyn Land has established that pursuant to the lease, Domino's was to procure and keep in effect public liability and property damage insurance and name landlord (Brooklyn Land) as an insured party, with a minimum of one million dollars in coverage for the type of occurrence involved in this action. They have also established that Domino's failed to procure such insurance. Contrary to Domino's assertions, its procuring insurance that included an endorsement designating unidentified additional insured's did not satisfy its lease obligations. It is also unavailing to suggest that Brooklyn Land had an obligation to contact Domino's insurance carrier to inform it that Brooklyn Land was an additional insured. As such, this Court finds Domino's and Brooklyn Land to have violated their lease obligations and it would be inappropriate to grant both or either summary judgment against the other for an act that both defendants did. Accordingly, the branches of the motions regarding insurance coverage are denied.

The branch of the cross-motion by Brooklyn Land for summary judgment and dismissal of the complaint and amended complaint as against Brooklyn Land on the basis of Brooklyn Land's status of an out of possession landlord is granted, without opposition. It is undisputed that the premises were in the exclusive possession and control of the tenant, Domino's at the time the accident allegedly occurred. It is well settled that an out-of-

possession landlord owes no duty to maintain and make repairs on demised premises unless the landlord retains control over the premises or is contractually obligated to perform such maintenance and repairs. (See, Putnam v Stout, 38 NY2d 607; see also, Ortiz v RVC Realty Co., 253 AD2d 802; D'Orlando v Port Authority of New York and New Jersey, 250 AD2d 805.) In this case, Brooklyn Land has presented competent evidence demonstrating their entitlement to summary judgment as a matter of law and there is nothing submitted in opposition to raises an issue of fact. Accordingly, the complaint and amended complaint are dismissed as against defendants Brooklyn Land (Brooklyn Land Co. LLC, Bruce Kapner, Peter Kapner, and Lieberman-Koren Corp.)

Dated: October 28, 2008

.....
ORIN R. KITZES, J.S.C.