Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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PENELOPE GEORGE,

Plaintiff,

Index No.: 729/07
Motion Date: 12/17/08
Motion Cal. No: 17
Motion Seq. No.: 1

-against-

ANDREAS CHIOS, EKATERINA CHIOS and
YS II CLEANER CORP.,

Defendants.

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The following papers numbered 1 to 12 read on this motion by defendant YS II Cleaner Corp. for an order, pursuant to CPLR 3212, granting summary judgment in its favor dismissing all claims in the complaint and all cross claims asserted against it.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Plaintiff's Affirmation in Opposition.....	5 - 6
Co-defendant's Affirmation in Support.....	7 - 8
Plaintiff's Affirmation in Opposition to co-defendants' Affirmation	9 - 10
Reply Affirmation	11 - 12

Upon the foregoing papers, it is ordered that the motion and cross motion are disposed of as follows:

This is a negligence action to recover money damages for personal injuries allegedly sustained by plaintiff Penelope George ("plaintiff"), as a result of her May 2, 2006 slip and fall on the sidewalk adjacent to the premises located at 200-19 32nd Avenue, Bayside, New York, that defendant YS II Cleaner Corp. ("YS") leases from co-defendants Andreas Chios and Ekaterina Chios (the "Chios defendants"), owners of the premises. Defendant YS moves for an order, pursuant to CPLR 3212, granting summary judgment in its favor dismissing all claims in the complaint and all cross claims asserted against it on the ground, inter alia, that as plaintiff fell on a defective curb that is the sole responsibility of the City of New York, it owed no duty to maintain the curb. The Chios defendants, by way of the Affirmation In Support of Co-defendant's Motion for Summary Judgment,

join in the application by YS for summary judgment and dismissal.

It is well-established that summary judgment should be granted only when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231(1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

The initial question in a negligence action is whether the alleged tortfeasor owed a duty of care to the injured party [(see, Church ex rel. Smith v. Callanan Industries, Inc., 99 N.Y.2d 104 (2002); Espinal v. Melville Snow Contrs., Inc., 98 N.Y.2d 136 (2002) ; Eaves Brooks Costume Co., Inc. v. Y.B.H. Realty Corp., 76 N.Y.2d 220 (1990); Sheila C. v. Povich, 11 A.D.3d 120 (1st Dept. 2004)], and the existence and scope of that duty are legal questions for the courts to determine. See, 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 96 N.Y.2d 280 (2002); Solan v. Great Neck Union Free School Dist.,43 A.D.3d 1035 (2nd Dept. 2007); Daubert v. Flyte Time Regency Limousine, 1 A.D.3d 395 (2nd Dept. 2003). In premises liability cases, it is well recognized that to "'establish a prima facie case of negligence, a plaintiff must establish the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and that such breach was a proximate cause of injury to the plaintiff (citations omitted).' '[L]iability for a dangerous condition on property is generally predicated upon ownership, occupancy, control or special use of the property (citations omitted).' 'The existence of one or more of these elements is sufficient to give rise to a duty to exercise reasonable care (citations omitted)." Nappi v. Incorporated Village of Lynbrook, 19 A.D.3d 565 (2nd Dept. 2005); see, Comack v. VBK Realty Associates, Ltd., 48 A.D.3d 611 (2nd Dept. 2008); Vetrone v. Ha Di Corp., 22 A.D.3d 835 (2nd Dept. 2005); see, also, Casale v. Brookdale Medical Associates, 43 A.D.3d 418 (2nd Dept. 2007)["[T]he imposition of liability for a dangerous condition on property must be predicated upon occupancy, ownership, control, or special use of the premises"].

Here, YS argues that it is entitled to dismissal on the ground that the City of New York remained responsible for the maintenance and repair of the subject curb, under New York City Administrative Code § 7-210 ("section 7-210"), entitled "Liability of real property owner for failure to maintain sidewalk in a reasonably safe condition."[1] In support of this contention, YS proffered

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[1]Section 7-210 provides:

a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such

(continued...)

the deposition testimony of, inter alia, plaintiff and defendant Andreas Chios, who testified with regard to the happening of the accident. Plaintiff answered in the affirmative numerous questions whereby the location of the accident was denoted as the "curb." Further, defendant Chios also indicated that plaintiff stated that she tripped on the "curb," in the following exchange:

Q. You said you spoke with [plaintiff] about the accident?
A. You mean the lady?
Q. Yes
A. Yes
Q. And she was outside when you spoke to her?
A. No, no, inside the store, sitting at the chair and crying. And I asked her, "What happened?" and she say "I walk from the street to come to the store, and I hit this– how do you explain?
Q. Referring to the curb?
A. Yes– and fell down. I said, "You feel alright, you alright, you

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[1](...continued)
sidewalk in a reasonably safe condition.

b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk. This subdivision shall not apply to one-, two- or three-family residential real property that is (I) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes.

c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks (other than sidewalks abutting one-, two- or three-family residential real property that is (I) in whole or in part, owner occupied, and (ii) used exclusively for residential purposes) in a reasonably safe condition. This subdivision shall not be construed to apply to the liability of the city as a property owner pursuant to subdivision b of this section.

d. Nothing in this section shall in any way affect the provisions of this chapter or of any other law or rule governing the manner in which an action or proceeding against the city is commenced, including any provisions requiring prior notice to the city of defective conditions.

broke anything?" She said–
Q. She told you that her accident happened on the curb?
A. Yes

YS asserts that as the accident occurred at the curb, neither it nor the Chios defendants had any duty or obligation to make repairs to the subject curb, as section 19-101(d) of the Administrative Code, which defines a sidewalk, expressly excludes the curb from the term sidewalk, providing:

> Sidewalk shall mean that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property, but not including the curb, intended for use of pedestrians.

Thus, YS asserts that section 7-210, which imposes liability upon the property owner for defective sidewalks, does not apply. It further contends that even if the accident occurred on the sidewalk, thereby making the aforementioned section applicable, it is still entitled to dismissal as the section only applies to owners and does not create a duty on it as a tenant.

Additionally, YS, as the lessee, argues that it was not required to make structural repairs pursuant to the underlying lease, and proffers paragraph "43" of the rider to the underlying lease, which states the following:

> Tenant is hereby responsible, at its own cost and expense throughout the term of this lease for all ordinary and extraordinary maintenance and non-structural repairs to the demised premises. Landlord shall be responsible for structural repairs only unless the need for structural repairs has been caused by the negligence or other act or omission of tenant or tenant's agents.

YS asserts that the responsibility to make structural repairs was the obligation of the Chios defendants, as the owners, and it "had no responsibility under the lease to repair the curb where plaintiff's accident occurred and also, for that matter, had no responsibility to repair the sidewalk abutting the premises." Lastly, it contends that even if it was under an obligation to repair the defect, it was only in the leased premises three weeks prior to plaintiff's accident and did not have sufficient time to make such repairs.

In opposition to the motion, plaintiff states that the defect lay on the sidewalk, stating in her deposition testimony that "as I went to cross, to go over the sidewalk, I stepped apparently at a broken sidewalk." When asked, "[is] that raised portion of that you are talking about, is that on the curb, the street, the sidewalk, or something else," plaintiff stated "[it] is on the sidewalk." When further prompted for clarification as to the location of the defect, and asked, "[is] it on the curb or no, or plushly [sic] on the sidewalk, or half and half, or something else," plaintiff answered, "[w]ell, I do not know if the curb starts from there, I do not think so." Plaintiff further contends that the Chios defendants testified that the lease obligated YS to maintain the sidewalk abutting the demised premises, and proffers paragraph "51" of the rider to the underlying lease, which states the following:

> Tenant agrees to maintain and repair, at its own cost and expense, the demised [premises] and keep same free of debris, snow and ice, and shall maintain the sidewalk at its own cost and expense, including repairs that are necessary to maintain that sidewalk. Tenant shall comply with all sidewalk notices and/or violations issued against the demised premises as a result of tenant's use, negligence or other act. Tenant shall comply with any such violation within thirty (30) days after issuance and shall provide proof of compliance and payment of any repair work, permit fees, fines and/or penalties assessed as a result of said violation.

Thus, plaintiff contends that YS displaced the obligation of the Chios defendants to maintain the sidewalk adjacent to the premises. She further contends that "while it is true that the [Chios defendants] owe a non-delegable duty to [plaintiff] to maintain the sidewalk in a reasonably safe manner, pursuant to [section 7-210], YS is not absolved of its own duty that it assumed by contract." Thus, plaintiff asserts that YS is not entitled to summary judgment. This Court agrees.

From the outset, the applicability of section 7-210 turns upon the factual issue of where the accident occurred in the first instance. If the accident occurred at the curb, which YS suggests, the relevant statutory section would not apply, and there would be no duty upon either YS or the Chios defendants to repair the curb, which is excluded from the term sidewalk by section 19-101(d) of the Administrative Code. However, section 7-210 becomes applicable if the accident occurred upon the sidewalk, whereby a duty to maintain the subject sidewalk would exist. As there is a triable issue as to what portion of the subject walkway the accident occurred, as the words "sidewalk" and "curb" have been used interchangeably, summary judgment is precluded. Further, there are issues of fact with regard to whose duty it would be to maintain the sidewalk in the event that it were found that the accident occurred in an area governed by section 7-210. Although YS relies upon paragraph "43" of the lease rider to contend that the sidewalk represents a structural defect which the Chios defendants were responsible for maintaining, paragraph "51" of the rider to the underlying lease obligated YS, as the tenant, to maintain the sidewalk at its own cost and expense, and make repairs that are necessary to maintain the sidewalk. Additionally, paragraph "4" of the lease, entitled "Repairs," requires YS to take good care of the premises and fix "the sidewalk adjacent thereto, and at its sole cost and expense, make all non-structural repairs []." Thus, pursuant to the lease agreement, if section 7-210 is found to be applicable, YS may have assumed the duty to repair the subject sidewalk. Likewise, there is a triable issue of fact regarding whether YS had sufficient time to make the requisite repairs, if the duty to do so existed in the first instance.

Thus, notwithstanding the numerous contentions of YS to the contrary, there are triable issues of fact presented which preclude summary disposition of this matter. Accordingly, the motion by defendant YS II Cleaner Corp. for an order, pursuant to CPLR 3212, granting summary judgment in its favor dismissing all claims in the complaint and all cross claims asserted against it hereby is denied in its entirety.

Dated: March 2, 2009

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J.S.C.