[* 1]

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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Index Number : 106449/2006

AHERN, SUSANNE

VS.

WB/STELLAR IP OWNER, L.L.C.

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

INDEX NO.

MOTION DATE 9/8/09

MOTION SEQ. NO.

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-2
Answering Affidavits — Exhibits	3-6
Replying Affidavits	7-8

Cross-Motion: X Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

FILED
JAN 13 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/7/2010

JUSTICE SHIRLEY WERNER KORNREICH J.S.C.

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

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

[* 2]

SUPREME COURT OF THE STATE OF YORK
COUNTY OF NEW YORK

----------X

SUSANNE AHERN,

Plaintiff,

-against-

WB/STELLAR IP OWNER, L.L.C., I & O INTERIORS, LLC, BIERZO CONSTRUCTION CORP., and "ABC CORPORATION," a fictional name,

Defendants.

----------X

DECISION and ORDER

Index No.: 106449/2006

KORNREICH, SHIRLEY WERNER, J.

In this action for personal injuries, defendants I & O Interiors, LLC (I&O) and WB/Stellar IP Owner, L.L.C. (WB) move for summary judgment dismissing the complaint and all cross-claims against them. Plaintiff opposes. Defendant Bierzo Construction Corp. (Bierzo) defaulted in answering and on the motions.

Background

Plaintiff claims that she was injured in two accidents that occurred on September 6, 2005. The first accident (Hallway Accident) occurred in the hallway outside her rental apartment, Apartment 24L, which is in a building, located at 310 Greenwich Street, New York, NY. The premises allegedly are owned by defendant WB, although there is some confusion in the record on that point.[1] Plaintiff testified that, as she returned from throwing out her garbage in the incinerator room on her floor, she stumbled in the hall in front of Apartment 24H. Plaintiff did not fall; she stumbled. She was wearing rubber flip-flops at the time. She described the object

[1] The building's manager, Mr. Stahl, testified at his deposition that Independence Plaza Associates is the name of the owner. Tr. 125.

over which she allegedly stumbled as "a skid that construction workers use," approximately a quarter inch thick, four feet long and three feet wide. Tr. 12. She did not know what it was made of and never touched it, but imagined it was wooden. *Id.* When asked whether she knew why the skid was in the hallway, she said, "I know they were doing construction across the hall in 24H." Plaintiff said that prior to the accident, workers were renovating Apartment 24H, which was empty. She saw workers going in and out of 24H, but she could not recall the last time prior to the accident that she saw them. Nor did she know when the work on 24H stopped. The workers were there approximately two and a half weeks prior to the Hallway Accident, during which time there was debris on the hallway carpeting. Plaintiff did not recall seeing the skid prior to her accident. Tr. 12.

After the Hallway accident, plaintiff had no trouble walking. Tr. 22. Nonetheless, she thought she had sprained or twisted her right ankle and felt a little bit of pain. Tr. 20, 22 & 136. As she put it, "I tripped in the hallway, but I got hurt in [sic] my terrace." Tr. 14.

After the Hallway Accident, plaintiff went into her own apartment, 24L, to call her son. Due to lack of an adequate cell signal inside the apartment during the call, plaintiff went outside on her apartment's terrace. While she was on the terrace speaking to her son, she fell breaking her right arm and left leg (Terrace Accident). She testified that she stepped on two different rocks, one with her right foot and the other with her left, which caused her to fall. Later she identified a photograph, taken the day after her fall as depicting in the center of the terrace "broken rocks that was debris" and "[l]oose rocks from construction that was happening above my apartment." The photographs of the terraces, "rocks" and "debris" were not part of this record. At oral argument, plaintiff's attorney stated that the rocks had not been preserved. Tr.

13, September 8, 2009. Plaintiff testified that weeks before the Terrace Accident, the building was doing refacing work from different terraces. She said that days before the Terrace Accident, she saw refacing work being done, but she never actually saw the work being done that caused the condition depicted in the photograph of her terrace. Tr. 35. Nor did she actually see the rocks fall on her terrace. Tr. 158. She did not complain about the rocks/debris and did not know how long they had been there prior to the Terrace Accident. Tr. 31.

WB produced Tobias Sahl for a deposition. He had been the manager of plaintiff's apartment building since November 2004, including the day of plaintiff's alleged accidents. He was employed by Stellar Management. In September 2005, I&O was renovating Apartment 24H and Mr. Sahl inspected their work. Tr. 109-111. During the renovation, Mr. Sahl saw masonite in front of the door that was placed there by I&O during its working hours, which ended at four or five pm. *Id.* The masonite was used to protect the floor. Tr. 111. He described masonite as brown, flat material, four feet by four feet and three-sixteenth to one eighth inch thick. Tr. 114-155. He denied that his employer instructed contractors to put down mansonite. Tr. 116.

Mr. Sahl identified I&O's contract for the renovation of several apartments, including 24H. It demonstrates that I&O was not hired to do any work on the terraces of plaintiff's building, which was confirmed by Mr. Sahl. Tr. 124-125. The contract provides that I&O is responsible for furnishing materials and protection.

Mr. Sahl described the balcony work performed by Bierzo as removing old concrete from the floors and edges and replacing it with new, waterproofed, concrete. Tr. 126. He received no complaints from tenants about debris from the work falling on their terraces, and he said that the contractor used protection to keep this from occurring. Tr. 126-127. Mr. Sahl said that tenants

were responsible for cleaning their own terraces. Tr. 145.

I&O's deposition witness was Noam Izahkiy, who was the project manager in charge of supervising the renovation of the apartments in plaintiff's building in September 2005. He said that during the work, I&O protected the hallway rugs with masonite and sticky nylon. Tr. 17. He said that the masonite would cover the hallway almost completely from side to side and sticky nylon that adheres to carpeting would be placed on top, from the apartment to the elevator. Tr. 22-24. When I&O used more than one piece of masonite, the pieces would be taped together with duct tape. *Id.* He thought I&O probably did work on the 24th floor. Tr. 12. He never received any complaints about masonite on the 24th floor. Tr. 24.

Discussion

Movants' grounds for dismissal are that there was no notice or evidence that they caused or created the conditions that led to the Hallway and Terrace Accidents. Further, they argue that the alleged defect presented by the skid plaintiff allegedly tripped on was a non-actionable trivial defect. I &O adds that there is no evidence that plaintiff fell on masonite. Plaintiff counters that the owner of the building had a non-delegable duty to keep the premises in safe condition, pursuant to Multiple Dwelling Law §78; that the skid was a non-trivial defect left in the hallway by I&O's workers, that the facade contractor caused the rocks to fall on the terrace; that the owner is responsible for the acts of its independent contractors; and that the Terrace Accident was caused in part by the Hallway Accident, which weakened plaintiff's ankle. No medical evidence was presented to confirm this. The owner disagrees that it can be held liable for the acts of I&O and Bierzo.

I. Landlord's Obligation under the Multiple Dwelling Law

"Breach of a landlord's general statutory duty to maintain leased premises in a safe condition ... does not impose liability without fault, but requires a showing of those elements comprising common-law negligence." *Juarez by Juarez v Wavecrest Mgmt. Team*, 88 N.Y.2d 628, 644 (1996)(construing Multiple Dwelling Law). This requires evidence that "the landlord created, or had actual or constructive notice of, the hazardous condition which precipitated the injury." *Perez v Bronx Park S. Assocs.*, 285 A.D.2d 402, 403 (1st Dept 2001). In order to constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to allow the owner to discover and remedy it. *Id.* The "landlord's duty is nondelegable and a party injured by the owner's failure to fulfill it may recover from the owner even though the responsibility for maintenance has been transferred to another." *Mas v Two Bridges Assoc.*, 75 NY2d 680, 687-688 (1990).

II. Hallway Accident

Movants have demonstrated that there was no actual or constructive notice of the skid in the hallway. There is no evidence of actual notice and no evidence of how long the skid had been there prior to the Hallway Accident from which constructive notice could be inferred. Although there is evidence that I&O placed masonite on the floor, there is no evidence that masonite and a skid are the same thing. Even were the court to find that there is a question of fact a to whether a skid and masonite are the same thing, the condition would be too trivial to be actionable.

The presence of a trivial defect standing alone is not actionable; the plaintiff must present evidence that the defect was a "trap or snare" or that it was a significant hazard by reason of location, adverse weather or lighting conditions. *Trincere v County of Suffolk*, 90 NY2d 976,

977 (1997)(one-half inch elevation of cement slab); *Gaud v Markham*, 307 AD2d 845, 845-846 [2](1st Dept 2003)(height differential less than an inch); *Guerrieri v Summa*, 193 AD2d 647 (2d Dept 1993)(elevated metal strip less than three-quarters inch); *Liebl v Metropolitan Jockey Club*, 10 AD2d 1006 (2d Dept 1960)(one inch high saddle). Here, plaintiff presented no evidence that the, at most, quarter inch high skid was a trap or snare, or that there were other conditions that rendered it hazardous.[2]

III. The Terrace Accident

There is no evidence in the record that there was actual notice of the debris or rocks on which plaintiff allegedly fell, how long they had been there, or how they got there. Plaintiff never saw anything fall on her terrace. Hence, it would be pure speculation to infer that they came from the landlord's contractor. In searching the record, the court grants summary judgment dismissing the action and third-party action against Bierzo. CPLR 3212. Accordingly, it is

ORDERED that the motions for summary judgment are granted and the complaint, all cross-claims and all third-party claims are dismissed with prejudice, and the Clerk is directed to enter judgment accordingly.

Dated: January 7, 2010

J.S.C.

[2] Moreover, no medical evidence was submitted that plaintiff suffered a sprained right ankle or that her "stumbling" in the hallway proximately caused an injury. *Brown v County of Albany*, 271 A.D.2d 819, 821 (3d Dept 2000), *app. den.* 95 NY2d 767 (2000) (competent expert medical testimony required to causally connect accident to soft tissue damage beyond observation of lay jury).