[* 1]

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 : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

on this motion to/for _____

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

MAR 03 2010

COUNTY CLERK'S OFFICE NEW YORK

Dated: Feb 26, 2010

HON. JUDITH J. GISCHE J.S.C.

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

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

----------x

Angela Tese-Milner as Trustee of
Howard C. Friedman, and Howard C. Friedman,

Plaintiff (s),

-against-

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

Defendant (s).

----------x

DECISION/ ORDER
Index No.: 104396-2005
Seq. No.: 003

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 Company n/m (3212) w/PDL affirm, exhs (sep back)	1, 2
Def Condo opp w/ MJB affirm	3
Pltff opp w/GHS affirm	4
Def Company reply w/PDL affirm	5
Declaration (Doc No. 5) (sep submission on consent w/cover letter)	6

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

GISCHE J.:

This is an action brought by the Trustee in Bankruptcy for Howard C. Friedman in that capacity and by Mr. Friedman, individually (hereinafter collectively "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 located at 30 East 85th Street ("premises" or "building"). Defendant 30 East 85th Street Company ("company" sometimes "commercial unit owner") owns the commercial units on the first floor of the

building and leases a ground level store to defendant Banana Republic, LLC. Defendant 30 East 85th Street Condominium Associates ("condominium") is the association of the owners of the individual residential units of the condominium.

Presently before the court is the commercial unit owner's motion for summary judgment dismissing plaintiff's complaint against it and all cross claims. Alternatively, if that motion is denied, the commercial unit owner seeks summary judgment on its cross claims against the condominium for contractual indemnification.

The motion is separately opposed by the plaintiff and the condominium. The parties have executed a stipulation discontinuing, with prejudice, all claims Banana Republic.

Issue has been joined and the note of issue was filed April 22, 2009. This motion was timely brought (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]). There were prior motions for summary judgment by each defendant on the issue of whether the alleged defect is "trivial," and therefore inactionable as a matter of law. In its decision dated April 7, 2008, the court denied each defendant's prior motion finding that there is a triable issue of fact whether the defect is trivial and further because discovery was incomplete and the motions were premature.

The court's decision and order on this motion for summary judgment by the commercial unit owner is as follows:

Arguments

Plaintiff contends he fell tripped and fell on the sidewalk outside the Banana Republic store at the premises. According to plaintiff, this occurred when his left foot went into an elongated, elliptical hole on the right hand side of the sidewalk, close to the

building line.

The commercial unit owner argues that the condominium is responsible for the maintenance and repair of the sidewalk abutting the premises because the sidewalk is a "common element" within the meaning of the condominium offering plan and by-laws. The condominium, however, argues that none of the condominium documents specifically define "common element" to include the sidewalk. They further argue that because the company's lease with Banana Republic makes the commercial unit owner responsible for "structural repairs," the responsibility to fix the sidewalk lies with the commercial unit owner, not the condominium.

In support of this motion by the commercial unit owner for summary judgment, the commercial unit owner relies upon various condominium documents which include the declaration and the bylaws. In particular, the condominium relies upon the definition of "common element" in Article 7 of the condominium's declaration ("declaration") and another section in the offering plan pertaining to repairs of the general common elements ("repair section").

Article 7[a] defines "The Common Elements." The common elements consist of the "General Common Elements, the Residential Limited Common Elements, the Commercial limited Common Elements, and the Limited Common Elements. "The General Common Elements" are defined to include "the Land." "The Land" is defined a "that certain tract, plot, piece and parcel of land . . . described in Exhibit A to the declaration."

The offering plan contains a section pertaining to repairs. That section provides, in

relevant part, as follows:

> "all painting, decorating, maintenance, repairs and replacements to the General Common Elements, whether located inside or outside of Units, shall be made by the Condominium Board, which need not obtain the approval of Unit Owners or mortgagees of Units (regardless of the cost thereof), and the cost of the same shall be a Common Expense to all Unit Owners unless necessitated by the negligence, misuse, or neglect of a Unit Owner . . .in which case such Unit Owner will bear the entire cost thereof."

Article 5 of the by-laws pertains to the operation of the property and section 5.1 sets forth requirements for maintenance and repairs. In relevant part, it provides as follows:

> "(A) Except as otherwise provided in the Declaration or in these By-Laws, all painting, decorating, maintenance, repairs and replacements, whether structural or non-structural, ordinary or extraordinary:
>
> [***]
>
> (ii) -in or to the Common Elements (other than terraces or balconies . . .) shall be performed by the Condominium Board as a Common Expense; . . ."

The commercial unit owner argues that the condominium has on prior occasions taken actions that are consistent with its being responsible for the maintenance and repairs of the sidewalk abutting the building. Edwin Rivera, the building's superintendent ("superintendent") was deposed. He is employed by Wallack Management, the condominium's managing agent. According to the superintendent, there was a major traffic incident in front of the Banana Republic store prior to the date of plaintiff's accident. At that time a car jumped the curb and went onto the sidewalk, causing it to cave in.

The superintendent testified at his EBT that he set up some barricades to protect

pedestrians and then immediately notified Wallack Management. Wallack Management arranged to get the sidewalk repaired. The superintendent also testified that he reports any cracks or broken areas on the sidewalk to Wallack Management and Wallack Management, in turn, takes care of having an engineer examine the problem so a decision can be made about what to do.

Maria Ramirez, Banana Republic's general manager, testified that people employed by the condominium shoveled the sidewalk whenever it snowed.

Although Banana Republic's lease with the company sets forth the parties' obligations vís-a-vís repairs and maintenance of the "demised premises," and it provides that the commercial unit owner is responsible for structural repairs, including those needed to the sidewalk, the commercial unit owner emphasizes that this is only to the extent that such repairs are not the responsibility of the condominium and, furthermore, that the lease agreement between itself (as landlord) and Banana Republic (as tenant) does not relieve the condominium of its obligations under the condominium documents. The commercial lease, dated April 30, 1993 ("the commercial lease") defines the demised premises as "the commercial retail space," and distinguishes those premises from "the building" and "the land." Article 20 of the lease provides in relevant part as follows:

> "Landlord [the company] shall make or cause to be made all "Structural" (as hereinafter defined) repairs and replacement to the Demised Premises as well as repairs in the nature of those identified in Section 20.03, which are not required to be made by the Condominium Board under the Condominium Documents . . . "Structural" repairs and replacements for purposes of this Article shall mean any and all necessary repairs and replacements to the following, if and to the extent the same affect the Demises Premises: . . .(j) sidewalks (except Tenant [Banana Republic] shall keep the same reasonably clean and free

of snow and ice);

The commercial unit owner argues that not only is it not obligated to maintain or repair the sidewalk in front of the Banana Republic store for the benefit of the condominium, the commercial unit owner had no prior notice of a dangerous condition, nor did it create the condition that is alleged by plaintiff to have existed when he was injured.

Ryan Sabet, an agent with Manhattan Skyline Management, was also deposed. Manhattan Skyline manages the commercial stores (*i.e.*, is the commercial unit owner's managing agent). He testified at his EBT that the condominium is responsible for the sidewalks, no one ever complained to him about a dangerous condition on the sidewalk, and had he observed or known about a deteriorating condition on the sidewalk he would notified Wallack Management, the managing agent for the condominium, to take care of it. Sabet also testified that any snow is cleared by the condominium managing agent's staff.

The commercial unit owner argues that there is legal precedent directly on point, that the owners of individual condominium unit owners are not liable for injuries sustained as a result of defects in the common elements and since the sidewalk is a common element, the commercial unit owner is not liable to plaintiff. The commercial unit owner argues further that the condominium is obligated under the by-laws (section 5.4[B]) to procure insurance for accidents occurring on the common elements and to name the commercial unit owner as additional insured.

The condominium argues that the issue of whether the commercial unit owner or the condominium is responsible for the sidewalk's upkeep, maintenance and repair is a

question of fact for the jury to decided because the only document that directly addresses that issue is the lease between the company and Banana Republic. That lease requires that the company maintain the sidewalk.

Plaintiff adopts the arguments made by the condominium and argues further that there is no evidence the cost of materials and labor incurred in connection with the maintenance of the sidewalk was payable out of the common charges and therefore, commercial unit owner's reliance on cases where common elements are clearly defined is misplaced.

The Law Applicable to a Motion for Summary Judgment

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]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

When issues of law are the only issues raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 AD2d 459 (2d Dept 2003).

Discussion

A landowner is under a duty to maintain its property in a reasonably safe condition under existing circumstances, which includes the likelihood of injury to a third party (

Perez v. Bronx Park South, 285 AD2d 402 [1st Dept 2001]). This duty includes the sidewalk abutting its property (New York City Admin Code § 7-210; Vucetovic v. Epsom Downs, Inc, 2006 WL 4804734, 2006 N.Y. Slip Op. 30210(U) [N.Y.Sup. Sep 18, 2006] *aff'd* Vucetovic v. Epsom Downs, Inc., 45 A.D.3d 28 *aff'd* Vucetovic v. Epsom Downs, Inc., 10 N.Y.3d 517 [2008]).

Despite this statutory requirement, the condominium argues that it is not responsible for maintenance of the sidewalk where plaintiff tripped and fell because the commercial unit owner assumed that responsibility under its lease with the commercial tenant and the obligation to maintain, etc., the sidewalk is not set forth in the condominium documents. Plaintiff adopts those arguments and urges further that it is for the jury to decide whether it is the condominium or the commercial unit owner that bears the responsibility for maintaining the sidewalk in a reasonably safe condition because the condominium documents are silent on this point and, therefore, there is a disputed issue of fact.

For reasons that follow, the court finds that there is no material, triable issue of fact on the issue of duty. It is an issue of law. The court decides that the condominium, not the commercial unit owner, is responsible for the maintenance and repair of the sidewalk abutting the building.

Although none condominium documents specifically address whether the "sidewalk" abutting the building is classified as "common element," there is abundant language in these documents supporting a conclusion that the sidewalk is a "common element" or "general common element," and therefore the responsibility of the

condominium to maintain.

The offering plan provides an introduction section and "description of [the] property and improvements." The land and property are collectively defined in that section as the "Property" and the "common elements" are defined as follows:

> "(a) all foundations, columns, beams, supports, girders, joints, exterior walls, interior walls, partitions, floors, staff offices, toilets and ceilings, to the extent that the same are not expressly provided in the Declaration to be included as a part of the Unit, a limited common element, or the Residential or Commercial Limited Common Elements;
>
> (b) all hallways, corridors, lobbies, vestibules, cellars, stairs, stairways, mechanical and electrical equipment spaces, and entrances and exits to and from the Building, to the extent same are not expressly provided in the Declaration to be included as part of a Unit, a limited Common Elements, or the Residential or Commercial Limited Common Elements;
>
> (c) all central and appurtenant installations for services such as power, light telephone, gas, sewer plumbing, drainage, hot and cold water distribution, heat, ventilation, cable television, and other mechanical and electrical systems . . .
>
> (d) all other parts of the Property, including the boiler room, fuel oil storage room, electric service room, gas and water meter room, building storage rooms . . "

Page 7 of the offering plan provides that the "Condominium Board shall, in general, be responsible for all maintenance and repairs in or to the General Common Elements, the Residential Limited Common Elements and if involving structural or certain capital expenditures, the Limited Common Elements. The Commercial Unit Owners shall, in general, be responsible for all maintenance and repairs in or to the Commercial Limited Common Elements."

In the "location and area information" section of the offering plan (page 20), it further provides that "East 85th Street is a public street and will be maintained, and the snow will be removed therefrom, by the City of New York. Snow Removal from adjacent sidewalks will be responsibility of the Condominium Board. The cost of such snow removal will be included in the Common Charges."

Under the condominium's by-laws (section 5.4[B]), the board is required to maintain liability insurance for personal injury "arising out of any occurrence on the Property and listing as co-insureds . . . each Unit Owner . . ."

Property is further defined in the by-laws as "(i) the Land . . . (ii) the Building, which includes, without limitation, the Units, the Common Elements and all easements, right and appurtenances belonging thereto; and (iii) all other property, real, personal or mixed, intended for use in connection therewith . . ." It is clear from the declaration that the "General Common Elements" include "the Land" and the "Common Elements" include the "General Common Elements . . ." and other common interests.

The sidewalk, though publicly owned, is a common element or part of the "property" as defined by the by-laws because it is necessary and essential to the beneficial use of the condominium units in the building (see, Jasinski v. The City of New York, 290 AD2d 237 [1st Dept 2002]). A unit owner's proportionate ownership interest in the common elements of the condominium does not subject it to liability for injuries that take place in the common elements, unless the unit owner was negligent, or undertook some duty to inspect and maintain those common elements (Pekelnaya v. Allyn, 25 AD3d 111 [1st Dept 2005]). Thus, absent some direct control by the unit owner of those

common elements, the unit owner is not liable for injuries sustained by someone due to a dangerous or defective condition in the common elements (Pekelnaya v. Allyn, *supra*).

Summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue or when the issue is even arguable, and plaintiff is entitled to all reasonable inferences in its favor (Rodriguez v. Parkchester South Condominium, Inc., 178 AD2d 231, 232 [1st Dept 1991]). Here, the company has met its burden by coming forth with evidence in an admissible form establishing a prima facie right to judgment as a matter of law. The company has proved that no material and triable issues of fact exist (Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). Plaintiff's accident took place on a public sidewalk which, by statute, the owner is obligated to maintain is a safe condition. Pursuant to the condominium documents, the condominium board has duty to maintain liability insurance for accidents occurring on the common elements and to name the commercial unit owner as additional insured (Jasinski v. City of New York, *supra*). The company has established that it did not have nor did it assume the duty to maintain or repair the sidewalk where the accident took place nor did it have or exercise exclusive control over it.

The terms of the lease between the company and Banana Republic dictate the contractual relationship of those parties. The condominium is not bound by the terms of that lease, nor is the lease is for the benefit of the condominium. The condominium cannot shift its obligation for sidewalk maintenance to the commercial unit owner relying on that lease agreement. Furthermore, under the lease the commercial unit owner only assumed those responsibilities that were not otherwise the obligation of the

condominium. There is no evidence advanced by either the plaintiff or the condominium that the commercial unit owner created the dangerous condition alleged. Absent a duty of care to the injured person, a party can not be held liable for negligence (Balsam v. Delma Engr. Corp., 139 AD2d 292 [1st Dept 1998]). Therefore, the motion by 30 East 85th Street Company for summary judgment is hereby granted in all respects. The complaint and all cross claims against the company are hereby severed and dismissed.

Conclusion

For the reasons stated, the motion by defendant 30 East 85th Street Company for summary judgment is hereby granted in all respects. The complaint and all cross claims against the company are hereby severed and dismissed.

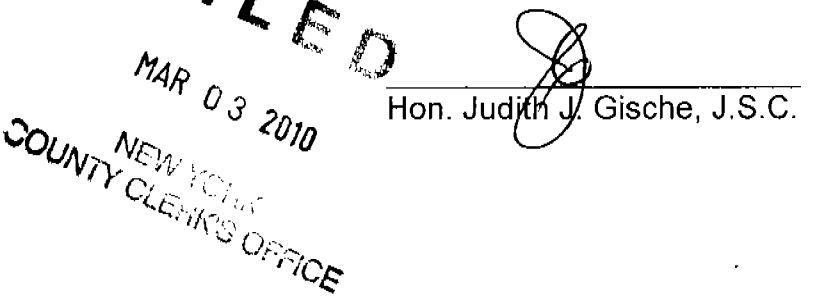
The court's records (SCROLL) show that this case is presently in the mediation part. Once that process is complete, this case is ready to be tried. Therefore, plaintiff shall serve a copy of this decision and order on the mediator and the office of trial support so that the case can be scheduled for trial.

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
February 26, 2010

So Ordered:



Hon. Judith J. Gische, J.S.C.