Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **LAWRENCE V. CULLEN** IA Part 6
Justice

X

PATRICIA VONWESTERNHAGEN, et al.,

Plaintiffs,

-against-

BREEZY POINT COOPERATIVE, INC., et al.,

Defendants.

X

Index Number 22716 2006

Motion Date December 1, 2009

Motion Cal. Numbers 16 and 17

Motion Seq. Nos. 6 and 7

The following papers numbered 1 to 30 read on this motion by defendants J. Eugene Neibel, Jr. s/h/a Eugene J. Neibel, Jr. and Joseph E. Neibel pursuant to CPLR 3212 for summary judgment dismissing the compliant and all cross claims and pursuant to CPLR 3211(a)(7) dismissing the complaint on the ground that the complaint fails to state a cause of action upon which relief may be granted; on the motion by the defendants Breezy Point Cooperative, Inc. and Arthur C. Lighthall pursuant to CPLR 3212 for summary judgment dismissing the complaint and the cross claims of the defendants David Feddern, Betty Feddern, J. Eugene Neibel, Jr., and Joseph E. Neibel; and on the cross motion by the defendants, David Feddern and Betty Feddern, pursuant to CPLR 3212 for summary judgment dismissing the complaint.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits.....	1-9
Notice of Cross Motion - Affidavits - Exhibits.....	10-13
Answering Affidavits - Exhibits.....	14-26
Reply Affidavits.....	27-30

Upon the foregoing papers it is ordered that the motions and cross motion are determined as follows:

This is a negligence action to recover money damages for injuries suffered as a result of a trip and fall that occurred in the early morning on September 6, 2004. The plaintiffs allege that the accident occurred in front of the premises located at 551 Creekside Avenue, Queens, New York. The premises where the accident occurred is located in the Breezy Point Cooperative. The plaintiffs allege that the accident was caused by a planter that was sticking out into the sidewalk/pathway.

The proprietary lease for the Cooperative states:

> The Lessor (Breezy Point Corporation) shall maintain, operate and keep in good repair the sidewalks, boardwalks, streets, parking lots, public buildings, beach areas, and other portions of the property to be used in common for the use and benefit of the proprietary and other leases, in accordance with the established character of the property and the customary method of operation of the property.

Additionally, pursuant to the Rules and Regulations of the Breezy Point Cooperative:

> Shareholders, members of the shareholder's family, guests, agents and employees shall not damage, obstruct or misuse or permit any damage, obstruction or misuse of any Cooperative property, including but not limited to fire hydrants, walks, lanes, streets, sidewalks, walkways, parking areas, sand service roads, sand areas, athletic fields, playgrounds, and all beach areas. Damage, misuse or obstruction of Cooperative property shall include but not be limited to: (e) Permitting shrubs, hedges, trees, etc., to encroach on walkways, service lanes, roadways or sidewalks so as to restrict full use of the same or to encroach onto another shareholders plot. All such shrubs, hedges, and similar natural growth shall conform to the fence regulations of the New Building and Alteration Regulations.

The cooperative also had a New Building and Alteration Regulations which stated:

> Any fence built by the Member must be placed in front of the site only, is to be no nearer than 18 inches from the nearest edge of the walk, no higher than 30 inches from the walk level, and no wider than the front of the house, provided, however, that any fence or similar structure now or hereafter erected which in the opinion of the Cooperative interferes with the orderly use of a

service lane by sanitation or other vehicles, must be removed by the Member on ten (10) days' written notice.

The plaintiff, Particia VonWesternhagen, testified at an examination before trial that on September 5, 2004 she went to Kennedy's Restaurant and Bar at approximately 8:00 P.M. or 9:00 P.M. and walked around the Roxbury section of Breezy Point to enjoy the Mardi Gras festivities that were going on. She testified that the accident occurred sometime after midnight when she was walking back to her car. She claimed that she tripped over a planter located at 551 Creekside Avenue. She stated that she was walking on the left side of a sidewalk close to a row of houses which were further to her left. She testified that she was walking straight ahead, but did not see the planter before she tripped over it. She testified that at the time of the accident, it was dark outside. She did not notice the planter until after she had tripped over it.

The plaintiff, Keith VonWesternhagen, testified at an examination before trial that he was walking with his wife when the accident occurred when she tripped over a planter located in front of 551 Creekside Avenue. He stated that he noted the address the day after the accident when he went back to the scene and took photographs of where the accident took place. He testified that there were planters that encroached upon the sidewalk where his wife fell.

The defendant, J. Eugene Neibel, Jr., testified at an examination before trial that he resides at 551 Creekside Avenue. He stated that he did not remember having planters either on his premises or in front of his property. He testified that his wife, who is now deceased, had a garden on their property and may have kept planters in front of their premises, but does not recall if planters were there at the time of the incident.

The defendant, David Feddern, testified at an examination before trial that he resides at 552 Creekside Avenue. He stated that his property has a fence in front and has a garden with plants in pots and in the soil. The houses that are on each side of his also have garden areas. He examined a picture of planters in front of 551 Creekside Avenue, but stated that he did not know who put them there or if they were present in September 2004.

The defendant, Betty Feddern, testified at an examination before trial that she resides at 552 Creekside Avenue. There is a fence and garden at her property. She stated that her neighbor, Mrs. Neibel, maintained a garden in front of 551 Creekside Avenue and that she had seen Mrs. Neibel raking and planting flowers in front of her premises.

Arthur Lighthall, the general manager of Breezy Point Cooperative, testified that he patrolled the property about twice daily. He would use a vehicle and also patrol by foot. He

testified the Cooperative was responsible for maintaining common property, including walkways, sidewalks, and parking lots and that daily inspections of these grounds were done. He stated that he had never seen any planters that encroached upon the sidewalk on Creekside Avenue.

On a motion for summary judgment, the moving party must establish its prima facie entitlement to judgment as a matter of law (*see, Grob v Kings Realty Associates, LLC*, 4 AD3d 394 [2004]). It is well settled that in order to establish a *prima facie* case of negligence, a plaintiff in a slip and fall case must demonstrate that the defendants either created the hazardous condition which caused the accident or had actual or constructive notice of the condition (*see*, *Panetta v Phoenix Beverages*, 29 AD3d 659 [2007]; *West v DeJesus*, 306 AD2d 402 [2003]; *Goldman v Waldbaum*, 248 AD2d 436 [1998]). To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient amount of time to allow the defendant or its employees to discover and remedy it (*see, Scoppettone v ADJ Holding Corp.*, 41 AD3d 693 [2007]; *Green v City of New York*, 34 AD3d 528 [2006]; *Librandi v Stop & Shop Food Stores*, 7 AD3d 679 [2004]). Here, due to the conflicting deposition testimonies regarding the planters in front of 551 Creekside Avenue, the summary judgment motion by the defendants Breezy Point Cooperative and Arthur C. Lighthall, and the summary judgment motion by the defendants J. Eugene Neibel, Jr. and Joseph E. Neibel must be denied as there are issues of fact as to whether these defendants either created or had constructive notice of a dangerous condition, which in the exercise of due care they could have discovered and remedied (*see, Miller v Michaels*, 56 AD3d 626 [2008]; *Smith v Bay Harbour Assoc., L.P.*, 53 AD3d 539 [2008]; *Indence v 225 Union Ave. Corp.*, 38 AD3d 494 [2007]). Inasmuch as under the Proprietary Lease, Breezy Point Cooperative was required to maintain the sidewalk in good repair and there is an issue of fact as to whether they maintained it properly, summary judgment must be denied. Similarly there is an issue of fact as to whether the Neibel defendants either created the hazard of the planter encroaching on the sidewalk or had actual or constructive notice of the condition such that summary judgment must be denied.

Finally, the cross motion by the defendants David Feddern and Betty Feddern is granted. The plaintiffs testified that the accident occurred in front of 551 Creekside Avenue. Inasmuch as the Feddern defendants did not own that property where the accident occurred and instead owned a neighboring premises, there is no basis to hold them liable for the accident.

Accordingly, it is hereby

ORDERED, that the motion by defendants J. Eugene Neibel, Jr. s/h/a Eugene J. Neibel, Jr. and Joseph E. Neibel is denied; and it is further

ORDERED, that the motion by Breezy Point Cooperative, Inc. and Arthur C. Lighthall is denied; and it is further

ORDERED, that the cross motion by the defendants David Feddern and Betty Feddern for summary judgment is granted; and it is further

ORDERED, that the complaint and all cross claims are dismissed as and against defendants, David Feddern and Betty Feddern, only; and it is further

ORDERED, that the clerk of the Court is authorized to enter judgment in accordance with the forgoing.

Dated: March 11, 2010

LAWRENCE V. CULLEN, J.S.C.