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

PRESENT: Hon. CAROL EDMEAD J.S.C. PART 35
Justice

Metz, Mary

-v-

Roth, Steven et al.

INDEX NO. 103414/09
MOTION DATE 3/26/10
MOTION SEQ. NO. 002
MOTION CAL. NO. ____

The following papers, numbered 1 to ____ were read 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

FILED
MAY 14 2010
COUNTY CLERK'S OFFICE
NEW YORK

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that defendants' motion to dismiss plaintiff's Complaint as against Steven Roth, Vornado Realty Trust, Vornado Management Corp., and Rose Associates Inc., pursuant to CPLR §§3211(a)(1) and (7), is denied; and it is further

ORDERED that defendants shall serve an Answer within 30 days of service of this order with notice of entry; and it is further

ORDERED that counsel for plaintiff and counsel for defendants appear for a Preliminary Conference before Justice Carol Edmead, 60 Center Street, Part 35, Rm. 438 on Tuesday, July 20, 2010 at 2:15 p.m.; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated 5/10/10

ENTER: _____ J.S.C.
CAROL EDMEAD
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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MARY METZ,

Plaintiff,

Index # 103414/09

-against-

STEVEN ROTH, VORNADO REALTY TRUST, VORNADO MANAGEMENT CORP., BEACON COURT CONDOMINIUM, BOARD OF MANAGERS OF BEACON COURT CONDOMINIUM, and ROSE ASSOCIATES INC.,

Defendants,

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STEVEN ROTH, VORNADO REALTY TRUST, VORNADO MANAGEMENT CORP., BEACON COURT CONDOMINIUM, BOARD OF MANAGERS OF BEACON COURT CONDOMINIUM, and ROSE ASSOCIATES INC.,

Third-Party Plaintiffs,

-against-

Third-Party
Index # 590683/09

PELLI CLARKE PELLI ARCHITECTS, LLP, SLCE ARCHITECTS, LLP, BERARDI STONE SETTING, INC., BOVIS LEND LEASE LMB, INC., and PHILIP HABIB & ASSOCIATES,

Third-Party Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury action, defendants/third-party plaintiffs Steven Roth ("Mr. Roth"), Vornado Realty Trust ("Vornado Trust"), Vornado Management Corp. ("Vornado Management"), Beacon Court Condominium ("Beacon Court"), Board of Managers of Beacon Court Condominium (the "Board"), and Rose Associates Inc. ("Rose") (collectively "defendants") seek to dismiss the Complaint of Mary Metz ("plaintiff") as against Mr. Roth,

Vornado Trust, Vornado Management, and Rose, pursuant to CPLR §§3211(a)(1) and (7).[1]

Background

On March 13, 2006, plaintiff allegedly tripped and fell on a curb ramp on the sidewalk in the courtyard of 1 Beacon Court, 151 East 58th Street, New York, NY 10022 (the "premises"). In her Complaint, plaintiff alleges, *inter alia,* that the slope of the curb ramp was excessively steep relative to the length, width, and depth of the sidewalk. The sidewalk, which is built with cobblestone-like bricks, also unreasonably camouflaged the presence of the curb ramp. Plaintiff alleges that defendants negligently owned, managed, and controlled the premises.[2]

In their motion, defendants contend that plaintiff failed to state a claim against each defendant. Defendants argue that, contrary to plaintiff's allegations, Vornado Trust and Vornado Management (the "Vornado entities") are not managing agents of the premises. Citing the affidavit of James Curtin ("Mr. Curtin"), Vice President of Risk Management for Vornado Trust, defendants contend that Vornado Trust is a parent company to Vornado Management, and that there is no relationship between the two entities, except that Vornado Management, a payroll company, issues payroll checks to employees of Vornado Trust's subsidiaries (*see* the "Curtin Affd."). Mr. Curtin further attests that, contrary to plaintiff's allegations, Vornado Trust is not the "successor in interest" to Vornado Management, nor "the same for legal purposes" as Vornado Management, nor a "pseudonym" for Vornado Management. Likewise, Vornado

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[1] Defendants' counsel informed the Court that his reference to CPLR §3211(a)(8) was in error and asked that the court disregard any reference to it, to which plaintiff's counsel and the Court agreed. By separate conference call with all counsel, defendants' attorney advised that his reference in his reply to a cross-motion by plaintiff was included in error and asked that the Court disregard it. Thus, the Court does not address CPLR 3211(a)(8) or references to a cross-motion by plaintiff.

[2] The Complaint comprises two causes of action: (1) premises liability based on a defective and dangerous condition, and (2) premises liability based on a trap or snare.

Management is not the "successor in interest" to Vornado Trust, nor "the same for legal purposes" as Vornado Trust, nor a "pseudonym" for Vornado Trust. As neither Vornado Trust nor Vornado Management owns or controls the premises, neither owes a duty to plaintiff. Therefore, liability cannot be imposed against either.

Second, defendants argue that documentary evidence warrants dismissal of the Complaint as against Rose. Plaintiff's claims against Rose rest upon the allegation that Rose "provides services to Defendant Beacon Court Condominium, including maintenance of its general common elements" (Complaint, ¶ 14). Citing the management agreement between Beacon Court and Rose ("the Management Agreement"), defendants argue that Rose is only responsible to "properly maintain and operate the Residential Common Elements of the Condominium," *i.e.* "the building." Thus, Rose is not responsible for the areas outside the building, where the alleged incident occurred. Plaintiff does not allege that the incident occurred within the residential section of the building. Further, the area where the alleged incident occurred abuts commercial retail stores and restaurants, and therefore, is not attributable to the Management Agreement. In addition, the Management Agreement indicates that the building's owner, not Rose, is responsible for approving costs over $5,000, and is responsible for directing the work to be performed and has the final say on any measures that must be taken.

Third, defendants argue that, as neither of the Vornado entities are properly sued herein, the claims against Mr. Roth, as an officer of the Vornado entities, should fail for that reason alone. In addition, plaintiff failed to plead the facts necessary to state a claim for piercing the corporate veil so as to attach personal liability to Mr. Roth. Plaintiff failed to plead that Mr. Roth exerted complete domination over the Vornado entities, or that Mr. Roth used his alleged

position to conduct personal business. Instead, plaintiff alleges that Mr. Roth "knew of the dangerous condition, through warnings and statements from those who were involved in the construction of the courtyard," which is insufficient to indicate dominion and control.

Defendants further argue that the Complaint should be dismissed as against Mr. Roth, as a member of the Board. In the absence of individually tortious conduct, the business judgment rule shields directors of a cooperative corporation from personal liability. Defendants further contend that individual members of a co-op board not charged with acting tortiously other than in their capacity as board members may not be held personally liable, since the control of the board's policies lies in the hands of the board collectively, and not in the hands of any individual member. Mr. Roth's alleged negligence hinges solely on his responsibilities as a Board member, which is insufficient to hold him personally liable.

In opposition, plaintiff first argues that the Vornado entities are proper defendants. Plaintiff contends that in related federal litigation, *Lucille Francesco v Beacon Court Condominium, et al.* (the "Francesco litigation"), Vornado Trust admitted *via* its attorney, Larry Lum ("Mr. Lum"), that it has control of the courtyard sidewalk area including the subject curb ramp (*see* the "September 23, 2008 Letter"). Defendants further admitted that Vornado Trust is "not disputing that there was a defect and/or that the above named entities [Beacon Court Condominium, Condominium Board, Rose Associates, Inc. and Vornado Realty Trust s/h/a "Vornado Realty"] had notice of said defect" (*id.*). Plaintiff contends that admissions by an attorney, such as Mr. Lum, the lead counsel for defendants, are admissible against the principal. Plaintiff further contends that defendants conceded control over the sidewalk to avoid producing Mr. Roth for a deposition. It is insignificant that the attorneys herein may have a different

strategy; Mr. Lum was admitting facts, not discussing an amorphous strategy, plaintiff argues. Further, Vornado Trust's filing with the Securities and Exchange Commission ("SEC") for the relevant period also constitutes an admission that Vornado Trust controls the premises (*see* "Vornado Trust's 10-K"). An excerpt of Vornado Trust's 10-K document, which is certified by Mr. Roth, states: "We [Vornado Trust] receive an annual fee . . . for managing the common area of" the premises. If defendants have a problem with the excerpt, defendants should provide their own copy, plaintiff argues. Based on the letter and Vornado Trust's 10-K, Vornado Trust is a proper defendant in this action.

As to Vornado Management, plaintiff argues that Exhibit 10 to Vornado Trust's 10-K, which is incorporated by reference, states that Vornado Management is responsible for "repairing, making replacements and maintaining [the premises] and all common areas at the [premises] (*see* "Exhibit 10," p.4, ¶ 6). Therefore, Vornado Management also is a proper defendant in this action, plaintiff argues.

Regarding Rose, plaintiff argues that the September 23, 2008 Letter constitutes an admission that Rose controls the premises where plaintiff fell, and that Rose does not dispute that there was a defect and/or it had notice of the defect. Plaintiff further argues that her claim against Rose is premised on the fact that Rose independently assumed responsibility for the maintenance of the premises, and not that Rose owns the premises, as defendants assert. Plaintiff contends that evidence of a subsequent repair or remedial measures raises an issue of fact as to whether a party assumed responsibility for maintaining a sidewalk. According to the deposition of Rose's concierge, Christopher A. Grasso ("Mr. Grasso"), Rose is responsible for the

maintenance of sidewalk (*see* the "Grasso EBT").[3] Mr. Grasso testified that Rose maintained a log book about the sidewalk, received complaints about it, took care of it, changed the lights around it, and, most importantly, placed warning signs around dangerous conditions, such as the curb-cut where plaintiff fell. Plaintiff further contends that Rose's residential manager, Sean O'Sullivan ("Mr. O'Sullivan"), testified similarly (*see* the "O'Sullivan EBT"). Such evidence from the Francesco litigation demonstrates that Rose assumed a duty, separate from its duty under contract, as a managing agent of Beacon Court. As Rose clearly controlled and maintained the premises, defendants' motion regarding Rose must be denied.

Regarding Mr. Roth, plaintiff contends that a corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether he acted on behalf of the corporation in the course of official duties, and regardless of whether the corporate veil is pierced; this includes when the officer engages in negligent malfeasance. Plaintiff argues that the evidence in the Francesco litigation shows that Mr. Roth was warned of the defective nature of the ramp at least twice, but, nevertheless, actively selected the construction design that caused the ramp to be defective. Prior to the final construction, third-party defendant Philip Habib & Associates ("Philip Habib"), an engineering firm, informed Vornado Trust on at least two occasions that using the same color granite stones created a tripping hazard because the stones would blend together and camouflage the changes in elevation (*see* the "Philip Habib faxes").[4] Further, Robyn Sandberg ("Ms. Sandberg"), an architect with third-party defendant Pelli Clarke Pelli Architects, LLP ("Pelli"), testified that Mr. Roth made the decision regarding the color of

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[3]The EBTs to which the parties refer were held as part of the Francesco litigation, not the action herein.

[4]There are two faxes, one dated September 24, 2003, and the other dated October 21, 2003.

the stones (*see* the "Sandberg EBT"). Ms. Sandberg's testimony comports with that of Mr. O'Sullivan, who stated that Mr. Roth "took a personal interest" in the appearance of the courtyard. Citing a 2003 newspaper article,[5] plaintiff contends that Beacon Court was Mr. Roth's vision, As Mr. Roth had the final say in the construction of the defective ramp where plaintiff fell, he is a proper defendant.

In reply, defendants argue that plaintiff failed to submit any admissible proof that she has a valid claim against the Vornado entities. Plaintiff's reliance on the September 23, 2008 Letter is misplaced. Since Vornado Management was not a party to the Francesco litigation, the alleged admission fails to encompass Vornado Management as an entity. Further, said Letter is not an admission. Mr. Lum is not a member or employee of either of the Vornado entities. Additionally, said Letter does not come from the instant litigation, and neither Mr. Lum or Mr. Lum's law firm represents the Vornado entities herein. Defendants also point out that Mr. Lum merely stated that defendants are "not contesting control" of the premises, not that defendants "were in control" of the premises. For whatever reason, Mr. Lum opted not to contest control of the courtyard sidewalk at issue in the Francesco litigation. This, at most, was his strategy for that particular litigation. Defendants disagree with this strategy and intend to litigate these issues herein. Defendants also distinguish the caselaw on which plaintiff relies. Further, there is no indication that the purported Vornado Trust's 10-K is valid. Such document is unsworn, and there is no information attached that reveals where it comes from. A review of the document reflects that it is a "Form 10-K," and the top of the next page identified as page 158 reflects that this is a continuation of "notes to consolidated financial statements." Plaintiff's cobbled-together

[5]Cuozzo, *Vornado's Roth Gets Last Laugh*, New York Post, Nov. 23, 2003 at 34.

documentation is inadmissible and, as a result, she fails to adequately oppose defendants' motion.

As to Vornado Management, Exhibit 10, titled "59th Street Management and Development Agreement," which was signed on July 3, 2002, is hardly an admission that Vornado Management is a proper defendant. Again, defendants note that plaintiff failed to attach the entire document. Under "Article II," the document states that the "Agreement shall commence on the date hereof and shall continue until the date of Substantial Completion of the Property." Plaintiff had already moved into the property when the alleged incident occurred. Thus, the property was clearly substantially completed, defendants argue. Accordingly, Exhibit 10 has little to do with the allegations as set forth in plaintiff's Complaint. Thus, as plaintiff provided no evidence to refute defendants' evidence, dismissal should be granted as to the Vornado entities.

As to Rose, defendants argue that Rose had no duty as to the area in which plaintiff fell. It is undisputed that the Management Agreement shows that Rose's management responsibilities do not cover the accident location. Further, the September 23, 2008 Letter is not an admission to the contrary, and the caselaw on which plaintiff relies is distinguishable. And, Mr. Grasso's testimony demonstrates that the logbook is merely a record keeping tool, and that he was unsure whether Rose repaired the broken lights around the sidewalk"[6] Such testimony fails to constitute an assertion of control, defendants argue. The Management Agreement clearly spells out that Rose was not responsible for the area where the curb-cut exists, and that signs were placed at the

[6]The Court notes that Mr. Grasso specifically responded to the question: "Does [the person who repairs the lighting] work for Rose Associates?" (Grasso EBT, 42:15).

incident's location more than a month after she fell cannot undo the letter of the Management Agreement, defendants argue. Also, the EBTs on which plaintiff relies pertain to the claims of the another plaintiff of an incident that occurred after the plaintiff's incident herein. Therefore, the events that allegedly demonstrate that Rose assumed control over the premises did not occur until well after the events in the instant case.

Regarding Mr. Roth, defendants argue that plaintiff has provided no evidence that Mr. Roth had any knowledge about the alleged cause of this incident. Plaintiff alleges that she fell at a "curb-cut." The Philip Habib faxes only raise an issue as to whether the differential in height as to the street and sidewalk, particularly the curb, constituted a tripping hazard based on the color of the stones. There is no evidence that the nature of the curb-cut was in anyway defective based on the color of the stones. More importantly, plaintiff ignores the fact that steps were taken to remedy the concerns of Philip Habib. In order to demarcate the change in elevation from the street and the curb, black granite was inserted into the curb for the protection of pedestrians. Thus, plaintiff's evidence does not relate to the actual cause of the incident. As there is no evidence of any malfeasance by Mr. Roth, the Complaint should be dismissed as to him.

Discussion

Dismissal pursuant to CPLR §3211(a)(1) and (7)

Under CPLR 3211(a)(1), dismissal of a complaint is warranted where "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" based on documentary evidence (*150 Broadway NY Associates, L.P. v Bodner*, 14 AD3d 1 [1st Dept 2004]). The term "documentary evidence" referred to in CPLR 3211(a)(1) "typically means

. . . out-of-court documents such as contracts, deeds, wills, and/or mortgages and includes '[a] paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground on which the motion is based'" (*Webster Estate of Webster v State of New York*, 2003 WL 728780 [Ct Cl 2003], *citing* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 20; 7 Weinstein-Korn-Miller, NY Civil Practice, P 3211.06). Further, in "order to prevail on a CPLR 3211(a)(1) motion, the documents relied on must definitively dispose of plaintiff's claim" (*Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]).

The standard on a motion to dismiss a pleading for failure to state a cause of action, pursuant to CPLR §3211(a)(7), is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 AD2d 205 [1st Dept 1997]). The court must "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002], *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "In deciding such a preanswer motion, the court is not authorized to assess the relative merits of the complaint's allegations against the defendant's contrary assertions or to determine whether or not plaintiff has produced evidence to support his claims" (*Salles v Chase Manhattan Bank* at 228). Further, it is well settled that evidence submitted in opposition to a motion does not have to be the form admissible for trial. Therefore, on a motion to dismiss, the Court may

consider evidence constituting hearsay *(Josephson v Crane Club, Inc.*, 264 AD2d 359, 360 [1st Dept 1999] [holding that the testimony of the plaintiff's brother, although inadmissible at trial, may be considered in determining "whether a triable issue exists to defeat the motion"]). However, where the bare legal conclusions and factual allegations are "flatly contradicted by documentary evidence," they are not presumed to be true or accorded every favorable inference (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]; *Kliebert v McKoan*, 228 AD2d 232 [1st Dept], *lv denied* 89 NY2d 802 [1996]), and the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Leon v Martinez*, *supra* at 88 [1994]; *Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001]).

Premises Liability

It is well settled that negligence for a dangerous or defective condition on property is predicated upon the ownership, occupancy, or control of the property, and where none of these elements is present, a party may not be held liable for injuries caused by the dangerous or defective condition (*Balsam v Delma Engineering Corp.*, 139 AD2d 292, 296-297 [1st Dept 1988]; *Flaherty v American Turners New York, Inc.*, 291 AD2d 256, 257 [1st Dept 2002]).

Vornado Trust

Here, contrary to defendants' arguments, plaintiff sufficiently states a cause of action against Vornado Trust. Plaintiff alleges that defendants, including Vornado Trust, were negligent in their ownership, management, and control of the premises. The Curtin Affd. contains no more than a conclusory denial that Vornado Trust controlled the premises (Curtin

Affd., ¶ 6); it is not accompanied by any documentary evidence that flatly contradicts plaintiff's claim. However, the September 23, 2008 Letter supports plaintiff's allegations.

The September 23, 2008 Letter, also supports plaintiff's claim against Vornado Trust. Such letter, which is written from Mr. Lum to Bran Noonan, Esq. concerning the Francesco litigation, states in full:

> Please be advised that Beacon Court Condominium, Condominium Board, *Rose Associates, Inc. and Vornado Realty Trust s/h/a "Vornado Realty" are not contesting control of the courtyard sidewalk area including the subject curb ramp. Further, the above named parties are not disputing that there was a defect and/or that the above named entities had notice of said defect.* As such, we do not see the necessity of further depositions of our clients. Therefore, we respectfully request that you withdraw the Notices of Deposition with regards to Tom Dunlap and Steven Roth.
> (Emphasis added)

Defendants concede that Vornado Trust was a defendant in the Francesco litigation, and that Mr. Lum was the attorney representing Vornado Trust in the Francesco litigation. Importantly, defendants do not dispute that the "sidewalk area including the subject curb ramp" mentioned in the September 23, 2008 Letter is the same area where plaintiff herein claimed she fell. Instead, defendants argue that the September 23, 2008 Letter is neither admissible evidence, nor an admission by Vornado Trust. The caselaw contradicts both arguments.

It is well settled that "prior statements or averments of parties or their agents in the course of litigation that refute an essential element of a [party's] present claim may constitute documentary evidence within the meaning of CPLR 3211(a)(1)" (*Morgenthow & Latham v Bank of New York Company, Inc.*, 305 AD2d 74, 80 [1st Dept 2003], *lv denied*, 100 NY2d 512 [2003]) [emphasis added]). In *Morgenthow*, the defendant, Bank of New York (BNY), was appealing the Supreme Court's denial of its motion to dismiss the plaintiffs' fraud claim on the grounds that the allegations made by the plaintiffs' attorney-in-fact in a separate pending federal action against

a different defendant constituted a judicial admission that flatly contradicted the plaintiff's claim. In reversing the Supreme Court, the First Department held that the allegations made by the plaintiffs in the federal action "are binding on plaintiffs and negate any claim of justifiable reliance on BNY's alleged misrepresentations " (*id.* at 77). In *Biondi v Beekman Hill House Apt. Corp.* (*supra* at 80-81), the First Department held that extrinsic evidence submitted by the defendant including "a *post-submission letter* to the court from plaintiff's counsel" submitted in a previous federal action showed that the plaintiff does not have a cause of action. In *WFB Telecom., Inc. v NYNEX Corp.* (188 AD2d 257, 259 [1st Dept 1992], *lv denied* 81 NY2d 709 [1993]), the First Department granted the defendant's motion to dismiss where the defendant submitted a letter from the plaintiff's counsel that flatly contradicted the plaintiff's current allegations of *prima facie* tort.

Therefore, the September 23, 2008 Letter constitutes admissible documentary evidence, even though it was submitted as part of separate, prior federal litigation involving defendants. In the letter, Vornado Trust, via its attorney in the Francesco litigation, not only admitted to controlling the premises, it also conceded that "there was a defect and/or that the [Vornado Trust] had notice of said defect." Thus, the September 23, 2008 Letter supports the allegations in plaintiff's Complaint that Vornado Trust owed a duty to plaintiff.

Vornado Trust's 10-K also constitutes as evidence that Vornado Trust controlled the premises. Although it is not clear from the document whether the property cited as being managed by Vornado Trust is the subject premises herein, defendants do not contest the document on this basis. Instead, while conceding that SEC reports and filings may be used as documentary evidence, defendants challenge the validity of the proffered document on the

ground that it is "unsworn and there is no information attached which even reveals where the statement comes from" (reply, ¶ 10).

However, defendants' arguments lacks merit. Plaintiff explains that she provided the Court with only an excerpt of Vornado Trust's 10-K because the document is "several hundred pages long" (opp., ¶ 4). Further, contrary to defendants' argument that "there is no indication as to [the document's] actual validity," the Court notes that the excerpt contains sufficient identification. The first page clearly states: "United States Securities and Exchange Commission . . . Form 10-K . . . For the Fiscal Year Ended: December 31, 2006," and it lists "Vornado Realty Trust" as the "exact name of registrant as specified in its charter." In addition, the third page, titled "Certification," contains a lengthy statement written and signed by Mr. Roth, as Chief Executive Officer of Vornado Trust, on February 27, 2007.

The second page of the document, titled "Vornado Realty Trust Notes to Consolidated Financial Statements (Continued)," contains the following sentence under Section 6, "Investments in Partially Owned Entities – continued": "We [Vornado Trust] receive an annual fee for managing Alexander's and all of its properties equal to the sum of . . . (iv) $22,000, escalating at 3% annum, *for managing the common area of 731 Lexington Avenue*" (emphasis added). The address, 731 Lexington Avenue, is later defined as "property comprised of 105 condominium units" (*id.*). The Court notes that it is not clear from Vornado Trust's 10-K whether the property cited is the subject premises herein (151 East 58th Street, New York, NY 10022). However, defendant fails to provide any documentary evidence that flatly contradicts plaintiff's allegations, such as a complete, sworn copy of Vornado Trust's 10-K that

demonstrates that Vornado Trust does not control the subject premises.[7] Because the Curtin Affd. is not dispositive, defendants' motion to dismiss the Complaint as to Vornado Trust is denied.

Vornado Management

Plaintiff's allegation that defendants, including Vornado Management, were negligent in their ownership, management, and control of the premises is sufficient to state a claim against Vornado Management. Again, the Curtin Affd. contains no more than a conclusory denial that Vornado Management controlled the premises (Curtin Affd., ¶ 8); it is not accompanied by any documentary evidence that flatly contradicts plaintiff's claim. Exhibit 10 clearly supports plaintiff's allegation that Vornado Management is a "Manager" of the premises. The fact that plaintiff provided only excerpts of the document is of no moment.

Titled "59th Street Management and Development Agreement," Exhibit 10 states that it is an agreement between 731 Residential LLC and 731 Commercial LLC (collectively "Owner") and Vornado Management ("Manager"). The document further states:

> Owner hereby appoints Manager . . . to act for it in the operation, maintenance, management and development of *the 59th Street Parcel identified on Exhibit A* attached hereto and made a part hereof (the "Property"), which management and development duties are more particularly described in Articles IV and V.
> (*Id.* at 1) (Emphasis added)

"Exhibit A" gives the exact coordinates for the "Residential Parcel" of land, which includes sections of Lexington Avenue and East 58th Street. Defendants do not dispute that such coordinates include the premises where plaintiff fell herein. In addition, "Article IV" states that

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[7]Contrary to defendants' argument in reply, defendants, as the movant herein, bear the burden of providing documentary evidence that flatly contradict the allegations in plaintiff's Complaint (reply, ¶ 10; *Biondi, supra* at 81).

the Manager's duties included the "[r]epairing, making replacements and maintaining the Property and all common areas at the Property" (*id.* at 4). Finally, the document is signed on behalf of the "Manager" by Joseph Macnow, as Executive Vice President of Vornado Management.

In their reply, defendants note that the document was signed on July 3, 2002, and that Article II states that the "Agreement shall commence on the date hereof and shall continue until the date of Substantial Completion of the Property." Defendants contend that as plaintiff had already moved into the premises when the alleged incident occurred, "the property itself was clearly substantially completed. Therefore, the agreement proffered has very little to do with the issue presently at hand" (reply, ¶ 13). However, neither defendants nor the document identifies "the date of Substantial Completion of the Property," and neither defendants nor the document indicates when – or if – the agreement actually ended on such date. Further, Article II, titled "Term," states in relevant part:

> The term of this Agreement shall commence on the date hereof and shall continue until the date of Substantial Completion of the Property (the "Initial Expiration Date") *unless this Agreement shall be terminated and the obligations of the parties hereunder shall sooner cease and terminate, as hereinafter provided; provided, however, that the term of this Management Agreement shall automatically extend for consecutive one-year periods following the Initial Expiration Date unless Manager or Owner provides the other with written notice, at least six months prior to the beginning of any such additional one-year period, of its election to terminate this Management Agreement.*
> (Emphasis added)

Not only does the document fail to identify an "the Initial Expiration Date," it is also inconclusive as to whether the agreement was automatically extended, or whether the "Manager" or "Owner" elected to terminate it. Therefore, contrary to defendants' argument, it is not clear that the document is irrelevant to plaintiff's claims herein. As defendants fails to provide

evidence that flatly contradicts plaintiff's allegation that Vornado Management controlled the premises, defendants' motion to dismiss the Complaint is denied as to Vornado Management.[8]

Rose

The Management Agreement on which defendants rely in support of their contention that Rose does not control the Premises does not flatly contradict plaintiff's allegations. While the Management Agreement clearly states that Rose is the managing agent of the "Residential Section of the Beacon Court Condominium," it is not clear whether the Residential Section excludes the area where plaintiff fell. The section titled "Fourth," to which defendants refer, states in relevant part:

> The Agent shall perform the following services with diligence and care:
> (a) Cause to be hired . . . all persons necessary to be employed in order to properly maintain and operate the *Residential Common Elements* of the Condominium (and such other portions of the Building, which are the obligation of the Owner to maintain). (Emphasis added)

Plaintiff specifically alleges that she fell "while walking on a private sidewalk [owned, controlled and managed] by defendants near the front entrance of 1 Beacon Court," *i.e.* "the courtyard sidewalk" (Complaint, ¶¶ 15-17, 22). The Management Agreement fails to address whether this "private sidewalk" is included among the Residential Common Elements. Therefore, the Management Agreement does not conclusively refute plaintiff's claims.

Further, the September 23, 2008 Letter indicates that Rose controlled the premises. Rose is named among the defendants "not contesting control of the *courtyard sidewalk area including the subject curb ramp*" (emphasis added). The September 23, 2008 Letter contradicts

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[8]The Court notes that plaintiff does not contest defendants' arguments that plaintiff incorrectly describes the Vornado entities in her Complaint.

defendants' allegations regarding the terms of the Management Agreement.

While it is well settled that evidence of remedial measures may be admitted where there is a disputed issue of maintenance or control,[9] the Court notes that testimony of Messrs. Grasso and O'Sullivan, both employees of Rose, does not support plaintiff's allegation that Rose "assumed responsibility" for maintaining the premises, as plaintiff argues. The Grasso and O'Sullivan EBTs were conducted as part of the Francesco litigation, in which Mrs. Francesco alleged that she fell at the premises in April 2006, about a month after plaintiff's incident (Grasso EBT, p. 95).[10] Mr. Grasso's testimony demonstrates that he was equivocal about whether Rose managed the premises, specifically the courtyard outside of the building, where plaintiff fell. And, the testimony of Mr. Sullivan fails to demonstrate any remedial measures taken by Rose after plaintiff's fall. Nevertheless, given Rose's admission in the September 23, 2008 Letter, and the ambiguity of the Management Agreement, plaintiff's allegations that Rose maintained the premises so as to attach liability for plaintiff's injuries survive defendants' motion to dismiss.

Mr. Roth

Plaintiff also sufficiently states a claim against Mr. Roth in his capacity as a corporate officer of the Vornado entities. The First Department has held that "a corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced" (*Peguero v 601 Realty Corp.*, 58 AD3d 556, 558-559 [1st

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[9] *O'Callaghan v Walsh*, 211 AD2d 531, 532 [1st Dept 1995]; *Diaz ex rel. Martinez v Eminent Associates, LLC*, 31 AD3d 296, 2 [1st Dept 2006] [holding that "the evidence of subsequent repair by [the defendant] raises a factual issue as to whether [the defendant] assumed responsibility for maintaining the sidewalk"].

[10] The Court notes that plaintiff provides only select pages of the Grasso and O'Sullivan EBTs, not the entire transcripts.

Dept 2009], quoting *Espinosa v Rand*, 24 AD3d 102, 102 [1st Dept 2005]). Importantly, the First Department notes that the "'commission of a tort' doctrine permits personal liability to be imposed on a corporate officer for misfeasance or malfeasance, *i.e.*, an affirmative tortious act; personal liability cannot be imposed on a corporate officer for nonfeasance, *i.e.*, a failure to act" (*id.* at 559, citing *Michaels v Lispenard Holding Corp.*, 11 AD2d 12, 14 [1960]; *MLM LLC v Karamouzis*, 2 AD3d 161 [2003]; *Mendez v City of New York*, 259 AD2d 441, 442 [1st Dept 1999] ["Where there is no evidence of independently tortious conduct on the part of individual defendants, and nothing in the record raises a triable dispute that they acted at all times within the scope of their employment, those individuals are entitled to summary dismissal of the action"]).

Here, according the Complaint every favorable inference, and reading it in conjunction with the plaintiff's submissions, plaintiff has sufficiently stated a claim against Mr. Roth. The Court notes that as in *Peguero*, defendants herein bore the burden of proof on their affirmative defense that Mr. Roth was not personally liable as an officer of the Vornado Entities. However, defendants failed to assert Mr. Roth's "alleged negligence consisted merely of nonfeasance and instead argued only inaccurately and more generally that personal liability could not be imposed upon him because he acted in his capacity as an officer of the Corporation" (*Peguero* at 2-3) (citation omitted). Further, while the Complaint appears to allege only *nonfeasance* on the part of Mr. Roth,[11] plaintiff's submissions allege misfeasance (*see Michaels v Lispenard Holding*

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[11] Plaintiff alleges the following in her Complaint:
Defendants *failed to maintain the property* in a safe manner and condition, and remedy and warn of the dangerous condition of the curb ramp.

. . . . Defendants knew during construction and as a result of prior trips and falls on the subject ramp that the ramp was dangerous, but *they consciously, willfully, and recklessly chose to disregard* the dangerous condition in favor of the aesthetic appeal.

Corp., 11 AD2d 12, 14 [1st Dept 1960] ["It has been held that corporate officers 'are not liable for nonfeasance; they are liable for misfeasance, or malfeasance; and that negligence in actually performing duties is actually misfeasance rather than nonfeasance'"]). The Sandberg and O'Sullivan EBTs indicate that Mr. Roth arguably *created* a tripping hazard at the premises, by personally choosing the color of the stones used for the sidewalk.

During her EBT, conducted on September 9, 2008, Ms. Sandberg testified that Vornado Trust retained Pelli as its architect on the Beacon Court Condominium project (Sandberg EBT, p. 23). She further testified that she was aware that someone from Philip Habib had raised a concern regarding the "tripping hazard at the step up between the curb and the driving portion" of the courtyard (*id.* at 52). When asked who decided on the type of stone for the sidewalk ramps, Ms. Sandberg stated that "[u]ltimately that was the owner's decision" (*id.* at 76). She later defined the owner as Vornado Trust (*id.* at 93).[12]

Ms. Sandberg testified that while Mr. Roth and Mr. Dunlap were representatives of Vornado Trust, Mr. Dunlap was her principal contact at Vornado Trust. However, she also testified that Mr. Roth attended several meetings regarding the "aesthetic issues" of the project. When asked about Mr. Roth's role in designing the courtyard at Beacon Court, Ms. Sandberg testified as follows:

Footnote 11, contd.

> *Defendant Steven Roth in particular knew of the dangerous condition, through warnings and statements from those who were involved in the construction of the courtyard, but ignored it.*
> (Complaint, ¶¶ 21-24, 35-38) (emphasis added)

[12]At first, Ms. Sandberg distinguished between curb of the sidewalk and the sidewalk ramp (*id.* at 81). She also testified that Philip Habib's comments "have nothing to do with the sidewalk ramp. They only have to do with the curb edge" (*id.* at 84). However, later she states: "I would presume that Mr. Habib is including the ramp from the definition of sidewalk" (*id.* at 86). She also testified that the sidewalk ramp was distinguished from the sidewalk only by a change in grade (*id.* at 87).

Q. So the decision concerning the color of the stones whose was it; was it yours or Mr. Dunlap's?
A. *It was ultimately Mr. Steve Roth.*
Q. Why do you say that?
A. *Because . . . it was his decision.*
Q. What does that mean? He said I'm going to make this decision?
A. Mr. Roth, why he is the chairman of the company.
Q. Which company by the way?
A. *He is the CEO of Vornado Realty Trust. He was very involved in the aesthetic issues.*
Q. What do you mean by that?
A. He enjoyed reviewing aesthetic issues relative to the project.
Q. What is the basis of your belief that he enjoyed reviewing the aesthetic qualities of the project?
A. We make preparations to Mr. Roth in which he would review such things as – reviewed various design issues along the way.
(Sandberg EBT, pp. 97-98) (emphasis added)

Ms. Sandberg later testified:

A. Mr. Roth was interested in the design of the paving at Lexington Place, Beacon Court.
Q. How do you know this, because you were present at a meeting where he spoke or he told you directly?
A. Because he asked us to prepare multiple options for him for paving patterns.
(*Id.* at 100)

However, upon further questioning, Ms. Sandberg became more equivocal, stating that Mr. Roth was interested only in the stone used for the driving area of the courtyard, *not the sidewalk* (*id.*).

Q. Is it your belief that [Mr. Roth] he had no interest *in the sidewalk*?
A. *I wouldn't know.*
Q. So your answer is narrowly tailored, correct? You are saying that Mr. Roth . . . was interested in the aesthetic design of just the street; is that your testimony?
A. I can say – I would say that *he was interest in the design and pattern of the street*, yes.
Q. And not generally the courtyard?
A. *I can't answer that. I don't have an answer to that question. No, I don't know. I don't know.*
(*Id.* at 101) (emphasis added)

Mr. Sullivan, in an EBT conducted on August 12, 2008, also was equivocal in his testimony regarding whether Mr. Roth made the decision to replace the stones on the courtyard

sidewalk.[13]

> Q. Do you know whether there have been any changes or alterations to *the courtyard sidewalk*?
> [Objections from defendants' counsels]
> A. *Not that I -- no.*
> Q. After the construction, do you know whether any stones were replaced?
> A. Yes.
> Q. When were the stones replaced?
> A. Most of the work occurred in late '04 and early '05.
> Q. *Do you know why the stones were replaced?*
> A. *Because Mr. Roth took a personal interest in having that courtyard as smooth as possible.*
> (Sullivan EBT, p. 156) (emphasis added)[14]

Defendants' argument that steps were taken to remedy the concerns of Philip Habib and there is no evidence of any misfeasance on the part of Mr. Roth is insufficient. The Sandberg EBT demonstrates that, in response to Philip Habib's concerns, black stones were added to demarcate the curb of the sidewalk (Sandberg EBT, pp. 49-56). Mr. O'Sullivan testified that stones were replaced in late 2004 and early 2005 (O'Sullivan EBT, p. 156). However, the allegations in the Complaint indicate that at the time of her accident "The sidewalk, which is built with cobblestone-like bricks, also unreasonably camouflaged the presence of the curb ramp" (Complaint, ¶¶ 18, 32) (emphasis added). As the Sandberg and O'Sullivan EBTs indicate that the alleged camouflage of the curb ramp was the result of Mr. Roth's selections, and defendants failed to establish their affirmative defense that Mr. Roth was not personally liable for misfeasance as an officer of the Vornado Entities, the allegations against Mr. Roth also survive

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[13]The Court notes that plaintiff provides only six pages of the Sullivan EBT, and defendants do not address Mr. Sullivan's statements regarding Mr. Roth in their reply.

[14] The Court notes that plaintiff provides only a few pages of the Sullivan EBT, and those pages are not dispositive. Further, in their reply, defendants do not respond to Mr. Sullivan's statements regarding Mr. Roth's role, nor do they provide a copy of the full transcript, as they did with the Sandberg EBT.

defendants' motion to dismiss.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendants' motion to dismiss plaintiff's Complaint as against Steven Roth, Vornado Realty Trust, Vornado Management Corp., and Rose Associates Inc., pursuant to CPLR §§3211(a)(1) and (7), is denied; and it is further

ORDERED that defendants shall serve an Answer within 30 days of service of this order with notice of entry; and it is further

ORDERED that counsel for plaintiff and counsel for defendants appear for a Preliminary Conference before Justice Carol Edmead, 60 Center Street, Part 35, Rm. 438 on Tuesday, July 20, 2010 at 2:15 p.m.; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: May 10, 2010

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD