

<b>Rivas v Reade House Condominium Assn.</b>
2010 NY Slip Op 31633(U)
June 29, 2010
Supreme Court, New York County
Docket Number: 101260/2006
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: Saliann Scarpulla

PART 19

Index Number : 101260/2006  
 RIVAS, CHERYL  
 vs.  
 READE HOUSE CONDOMINIUM  
 SEQUENCE NUMBER : 004  
 SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

is 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

*is determined in accordance with the accompanying decision paper.*

**FILED**  
**JUL 06 2008**  
 COUNTY CLERK'S OFFICE  
 NEW YORK

Dated: 6/29/10

Saliann Scarpulla  
**SALIANN SCARPULLA** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
 Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X  
CHERYL RIVAS,

Plaintiff,

- against-

Index No.: 101260/2006  
Submission Date: 4/28/2010

READE HOUSE CONDOMINIUM  
ASSOCIATION, TOWN SPORTS  
INTERNATIONAL, INC., GREENWICH  
READE ASSOCIATES, DG ASSOCIATES AND  
TSI GREENWICH STREET, INC.,

**DECISION AND ORDER**

Defendants.

----- X

For Plaintiffs:  
Greenberg & Stein, P.C.  
275 Madison Avenue, Suite 1100  
New York, NY 10016

For Defendants Greenwich Reade Associates and DG Associates:  
Margaret G. Klein & Associates  
200 Madison Avenue, 6<sup>th</sup> Floor  
New York, NY 10016

For Defendant Reade House  
Condominium Association:  
Flynn Gibbons & Dowd  
80 Maiden Lane  
New York, NY 10038

For Defendants Town Sports International, Inc. and TSI Greenwich  
Street, Inc.:  
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP  
3 Gannett Drive  
White Plains, NY 10604

Papers considered in review of this motion for summary judgment:

- Notice of Motion . . . . . 1
- Affs in Opp . . . . . 2, 3
- Replies . . . . . 4, 5
- Supplemental Letters . . . . . 6, 7, 8

**FILED**  
**JUL 06 2010**  
**COUNTY CLERK'S OFFICE**  
**NEW YORK**

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendants Greenwich Reade Associates ("Greenwich") and DG Associates ("DG") move for summary judgment dismissing the complaint and cross claims insofar as asserted against them, or, in the alternative, for summary judgment on their cross claims for contractual and common law

indemnification asserted against defendants Town Sports International, Inc. ("Town") and TSI Greenwich Street, Inc. ("TSI").

On December 9, 2005 at approximately 10:00 p.m., plaintiff Cheryl Rivas ("Rivas") allegedly slipped and fell on snow and ice while walking on the sidewalk in front of the New York Sports Club. The sports club operated out of a condominium unit owned as tenants in common by defendants Greenwich and DG, located at 151 Reade Street/311 Greenwich Street in Manhattan. That condominium unit was part of a mixed-use building owned by defendant Reade House Condominium Association ("RHCA"). Defendant Town is the parent company of New York Sports Club and defendant TSI is the corporate name of the New York Sports Club doing business at the subject premises.

Rivas commenced this action in or about January 2006 against RHCA and Town seeking to recover damages for the injuries she sustained as the result of her fall. She then served an amended complaint, adding Greenwich, DG and TSI as defendants in the action. Defendants answered the amended complaint, denied all material allegations, and interposed cross claims.

Greenwich and DG now move for summary judgment dismissing the complaint and cross claims insofar as asserted against them or, in the alternative, for summary judgment on their cross claims for contractual and common law indemnification asserted against Town and TSI. They first argue that they owed no duty to remove the snow and ice from the sidewalk because they are not adjoining landowners, rather, RHCA is the actual adjoining

landowner. They further argue that pursuant to the Declaration and By-Laws of the Reade House Condominium, RHCA was required to remove snow and ice from the common areas of the premises exposed to the elements, which included the sidewalk. They maintain that the snow and ice removal expense is part of the maintenance charged to Greenwich and DG.

Section 2.4(A)(i) of the By-Laws provides that the condominium shall operate, maintain, repair, restore, add to, improve, alter and replace the General Common Elements and the Residential Limited Common Elements as described in the declaration. Section 5.1(c) of the By-Laws provides that “each unit and all portions of the common elements shall be kept in first-class condition, order and repair (and free of snow, ice and accumulation of water with respect to any french balcony, terrace, roof, or other part of the Property exposed to the elements) by the Unit Owner or the Condominium Board, whichever is responsible for the ordinary maintenance thereof as set forth herein.”

Pursuant to Article 7 of the Declaration, the Common Elements are “comprised of the Land and those rooms, areas, corridors and other portions of the Building (other than the Units), as well as those Facilities therein, either currently or hereafter existing for the common use of the Units or of the Unit Owners or necessary for, or convenient to, the existence, maintenance, management, operation, or safety of the Property. “Property” is defined as “the Land, the Building, and any structures attached thereto, all of the improvements erected or to be erected on the Land, all easements, rights and appurtenances pertaining thereto and all other property, real, personal, or mixed, used or intended to be used

in connection therewith.” “Land” is defined as “that certain tract, plot, piece and parcel of land situate, lying and being in the City, County and State of New York, as more particularly described in Exhibit A to the Declaration.”

In further support of their motion, Greenwich and DG submit the examination before trial testimony of Reade House Condominium superintendent Jennifer Davis (“Davis”). Davis testified that from 1999 through 2005, New York Sports Club would often not clear snow and ice from the sidewalk abutting the sports club. She spoke with the manager and other employees at the sports club to try and correct the problem on many occasions prior to Rivas’ accident, informing them that it was their responsibility to clear snow and ice from the sidewalk abutting the sports club. Many times, if New York Sports Club employees did not clear snow and ice from the sidewalk, she or porters employed by Reade House Condominium would clear the snow and ice.

Greenwich and DG further argue that they are entitled to indemnification from TSI and Town because pursuant to the lease agreement between Greenwich and DG and TSI, TSI (the tenant) was responsible for snow and ice removal from the sidewalks adjacent to the premises. Further, according to the lease agreement, TSI was responsible for indemnifying and holding landlord harmless against all claims due to any act or omission or negligence of tenant.

RHCA, Rivas, Town and TSI all oppose the motion. They argue that Greenwich and DG must be held liable because as owners of the condominium unit abutting the sidewalk,

they owed a non-delegable duty pursuant to N.Y. Administrative Code §7-210 to remove snow and ice from the sidewalk. They further maintain that the condominium declarations do not specifically allocate responsibility to RHCA for the maintenance, repair or snow and ice removal from the subject sidewalk. Finally, they contend that RHCA could not be responsible for maintenance, repair or cleaning of the sidewalk because it is only responsible for the maintenance, repair or cleaning of “common elements” and the subject sidewalk is not a “common element.”

Town and TSI additionally argue that an issue of fact exists as to whether they owe a duty to indemnify Greenwich and DG because the lease merely requires tenant to indemnify owner for any act or omission or negligence of tenant in and on the “demised premises, commercial unit or building,” and the “demised premises, commercial unit or building” does not include the subject sidewalk.

### **Discussion**

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the 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). A motion for

summary judgment must be denied if there is any doubt as to the existence of a triable issue of fact. *See Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

Generally, a landowner owes a duty to maintain its property in a reasonably safe condition under existing circumstances, which includes the likelihood of injury to a third party. *See Perez v. Bronx Park South Associates*, 285 A.D.2d 402 (1<sup>st</sup> Dept. 2001). Pursuant to N.Y.C. Administrative Code §7-210, that duty includes the sidewalk abutting the landowner's property. *See generally Vucetovic v. Epsom Downs, Inc.*, 10 N.Y.3d 517 (2008).

The administration of a condominium's affairs is governed principally by its by-laws, which are, in essence, an agreement among all of the individual unit owners as to the manner in which the condominium will operate, and which set forth the respective rights and obligations of unit owners, both with respect to their own units and the condominium's common elements. *Murphy v. State*, 14 A.D.3d 127 (2<sup>nd</sup> Dept. 2004); *Schoninger v. Yardarm Beach Homeowners' Association*, 134 A.D.2d 1, 6 (2<sup>nd</sup> Dept. 1987). Owners of individual units are generally not liable for injuries sustained as a result of defects in the common elements. *See Rothstein v. 400 E. 54th St. Co.*, 51 A.D.3d 431 (1<sup>st</sup> Dept. 2008); *Ortiz v W&M Props., Inc.*, 2010 NY Slip Op 31101U (Sup. Ct. N.Y. Co., May 7, 2010).

Here, the declaration and by-laws for the Reade House Condominium clearly provide that the condominium board is responsible for the maintenance and repair of the general common elements of the premises and for ensuring that any french balcony, terrace, roof, or other part of the Property exposed to the elements be kept free of snow, ice and accumulation

of water. According to these provisions, RHCA was responsible for maintenance of the common elements, and for snow and ice removal from any portion of the Property “exposed to the elements.” The issue presented here is whether “Common Elements” includes the sidewalk upon which Rivas slipped and fell.

The RHCA by-laws and declaration do not specifically address whether the sidewalk abutting the subject premises is classified as a “Common Element” or part of the “Property.” However, there is substantial language in the documents submitted that support a conclusion that the sidewalk is a general common element. “Common Element” is defined as “the entire Property, including the Land, and all parts of the Building and improvements thereon other than the Units.” In the declaration, “Property” is defined as “the Land, the Building, and any structures attached thereto, all of the improvements erected or to be erected on the Land, all easements, rights and appurtenances pertaining thereto and all other property, real, personal, or mixed, used or intended to be used in connection therewith.” The term “appurtenant” includes everything “which is necessary and essential to the beneficial use and enjoyment of the thing leased or granted.” *Jasinski v. City of New York*, 290 A.D.2d 237, 238-239 (1<sup>st</sup> Dept. 2002). In *Tese-Milner v. 30 East 85<sup>th</sup> Street Company*, (2010 N.Y. Slip. Op. 30405[U] [Sup. Ct. N.Y. Co., February 26, 2010]), the Court found that the sidewalk was a common element or part of the “property” as defined by the condominium board’s by-laws because it was necessary and essential to the beneficial use of the condominium units in the building. This court concurs with the findings in *Tese-Milner v. 30 East 85<sup>th</sup> Street Company* and, even

more recently, in *Ortiz v W&M Props., Inc.*, 2010 NY Slip Op 31101U (Sup. Ct. N.Y. Co., May 7, 2010), that “common elements” as set forth in a condominium’s by-laws/offering plan/declaration can include an abutting sidewalk, thereby placing responsibility and liability for the maintenance of said sidewalk upon the owner of the building who has retained responsibility for maintenance of the “common elements.”

In addition, here, there has been no direct evidence presented that Greenwich and DG were responsible for the maintenance of the abutting sidewalks. In fact, evidence has been presented that the condominium took acts consistent with its own responsibility to maintain the sidewalk. Davis testified that the condominium in fact performed snow and ice removal from the sidewalk on many occasions when the sports club failed to do so. There is no indication in the record that RHCA attempted to contact Greenwich and DG to have them clear snow and ice from the sidewalk whenever the sports club failed to do so.

Therefore, in light of the evidence presented, and in accordance with its by-laws and declaration, because RHCA is the owner of the land and is responsible for maintenance of the common elements, RHCA was responsible for snow and ice removal from the subject sidewalk. *See Ortiz v W&M Props., Inc.*, 2010 NY Slip Op 31101U (Sup. Ct. N.Y. Co., May 7, 2010); *Tese-Milner v. 30 East 85<sup>th</sup> Street Company*, 2010 N.Y. Slip. Op. 30405(U) (Sup. Ct. N.Y. Co., February 26, 2010).

The opponents to the motion properly note that the factual scenario, the defect complained of, and the relevant by-laws and provisions are different here than in the *Tese-*

*Milner* case (and, the Court notes, the *Ortiz* case). Although in the instant case the defect complained of is a snowy/icy condition on the sidewalk, whereas in the *Tese-Milner* and *Ortiz* cases the defects complained of structural defects in the sidewalks, those courts' analysis of the respective building owner's duties and responsibilities is instructive. Further, while the opponents to the motion properly note that the court in *Tese-Milner* does not refer to Administrative Code §7-210 in its analysis, the court in *Ortiz* does take Administrative Code §7-210 into account in its analysis and still reaches a similar result, i.e. that in accordance with certain language and provisions in the condominium's by-laws and offering plan, the owner of the land can retain responsibility for the maintenance of the abutting sidewalks. As such, Greenwich Reade Associates and DG Associates' motion for summary judgment dismissing the complaint and cross claims asserted against them is granted because there has been no evidence presented that they, as owners of the condominium unit, were responsible for snow and ice removal from the abutting sidewalk where Rivas' accident took place.

Greenwich Reade Associates and DG Associates' remaining arguments are rendered academic by the above determination.

In accordance with the foregoing, it is

ORDERED that defendants Greenwich Reade Associates and DG Associates' motion for summary judgment dismissing the complaint and cross claims insofar as asserted against them, or, in the alternative, for summary judgment on their cross claims for contractual and

common law indemnification asserted against defendants Town Sports International, Inc. and TSI Greenwich Street, Inc. is granted to the extent that the complaint and cross claims insofar as asserted against defendants Greenwich Reade Associates and DG Associates are dismissed; and it is further

ORDERED that the remainder of the action with respect to the remaining defendants is severed and shall continue under this index number.

This constitutes the decision and order of the court.

Dated: New York, New York  
June 29, 2010

**FILED**  
JUL 06 2010  
COUNTY CLERK'S OFFICE  
NEW YORK

ENTER:

*Saliann Scarpulla*  
\_\_\_\_\_  
J.S.C.  
**SALIANN SCARPULLA**  
J.S.C.