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

PRESENT: HON. JUDITH J. GISCHE Justice

PART 10

Index Number : 115882/2008

MORTMAN, BARBARA

VS.

TISHMAN SPEYER PROPERTIES

SEQUENCE NUMBER : 001

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

Is 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
AUG 13 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/4/10

AUG 04 2010

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

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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BARBARA MORTMAN and SHELDON MORTMAN,

Plaintiffs,

-against-

TISHMAN SPEYER PROPERTIES, INC.,
TISHMAN SPEYER PROPERTIES, L.P.,

Defendants.

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Decision/Order
Index No.: 115882/2008
Seq. No.: 001

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's n/m, NC affirm, exhs	1
Pltf's affirm in opp (MN), exhs	2
Def's reply affirm (NC), exhs	3

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

This is an action to recover money damages for personal injuries allegedly sustained by plaintiff Barbara Mortman (sometimes "Mortman"), after falling while walking on a set of stairs at the north esplanade of Rockefeller Center (sometimes "property"). Her husband, Sheldon Mortman, has asserted a derivative claim for loss of services. Issue was joined and the Note of Issue was filed with the court on November 23, 2009. This motion for summary judgment, made by defendants Tishman Speyer Properties Inc., and Tishman Speyer Properties, L.P. is timely brought within 120 days

of filing the Note of Issue. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2004). The court's decision and order is as follows.

Arguments Presented

Mortman claims she was injured when she fell while walking on steps located on the north side of the ice skating rink in Rockefeller Plaza on May 27. 2007. The primary theory of liability asserted is that Mortman's injury was the result of a defect in the construction of the staircase, built over seventy years ago, and a subsequent failure to properly maintain the structure. Plaintiff claims that defendants are the owners of the property and, therefore, responsible for any defect in design or maintenance of this structure.

Defendants move for summary judgment claiming they have no duty to Mortman because they do not own the property. Defendants have produced a deed from 2001 showing that RCPI Landmark Properties, Inc. is the current owner of the property. Defendants claim that they are only the property managers, who have no direct duty to plaintiff. Alternatively, defendants argue that there was no prior notice of the claimed defect and plaintiff's fall was sole the result of her own actions.

Mortman testified at her deposition that she tripped while walking up the outdoor stairs, near the ice-skating rink, at Rockefeller Center. She claims the sneaker on her left foot got caught on a step, admitting that she may not have taken a "big enough step up."

Defendants' protection supervisor, Michael Mandzik, testified at his deposition about the duties of his job, the duties of those he supervises and his account of

plaintiff's accident. Although the primary duty of Mandzik and the employees under his watch is to keep the premises secure and respond to incidents on site, Mandzik testified that Tishman employees were instructed to report any deficiencies or hazardous conditions on the property to the "appropriate personnel". Mandzik testified that neither he, nor his patrolmen, are required to physically inspect the property. Mandzik could not recall prior reports of any similar incidents.

Plaintiff heavily relies upon the sworn affidavit of its expert witness, Dr. William Marletta ("Marletta"), a Certified Safety Professional. At the outset, the court rejects any argument that the expert affidavit should be disregarded as untimely, since there is no prejudice to defendants and no evidence of willfulness on the part of plaintiffs. Marichione v. Greenky, 5 A.D.3d 1044 (4th Dept. 2004); Lissak v. Cerabona, 10 A.D.3d 308 (1st Dept. 2004). Marletta opines that the riser heights between the steps and the stair treads are not uniform, thereby creating a dangerous condition. He also opines that from years of use the granite material comprising the stairs has worn down, reducing the "the original slip resistant qualities intended." Marletta also opines that the handrails, which were part of the original construction, are placed too far apart.

Discussion

Summary judgment is designed to permit a party to show by affidavit or other evidence that there is no material issue of fact to be tried, and that judgment may be directed as a matter of law. Brill v. City of New York, 2 N.Y.3d 648 (2004). Once the movant meets this requirement, 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 (1986). When determining whether an issue of fact exists, a court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences from its favor. Negri v. Stop & Shop, Inc., 65 N.Y.2d 625 (1985).

In order to prevail on a claim of negligence, Mortman must show that the defendants owed a duty to the plaintiff and breached this duty, which ultimately caused her injuries. Darby v Compagnie Natl. Air France, 96 N.Y.2d 343, 347 (2001). In general, an owner of property has a non-delegable duty to keep the premises in a reasonably safe condition to avoid injury to third parties. Basso v. Miller, 40 N.Y.2d 233 (1976). This duty is tempered by the requirement that the owner either created the condition or had actual or constructive knowledge of it. Lezama v. 34-15 Parsons Blvd, L.L.C., 16 A.D.3d 560 (2d Dept. 2005). A managing agent, however, is not the owner of property. Its relationship with the owner is contractual. Contractual obligations, by themselves generally do not give rise to tort liability in favor of a third party. Espinal v. Melville Snow Contractors, Inc., 98 N.Y.2d 136 (2002). In Espinal, *supra*, the Court of Appeals recognized three exceptions to the general rule as follows: [1] when the contracting party launches a force or instrument of harm; [2] when the plaintiff detrimentally relies on the continued performance of the defendant and [3] when the contracting party has displaced the other party's duty to maintain the premises safely. Consistent with the third Espinal, exception, the Courts have held that a managing agent may only be held liable for nonfeasance if it is in complete and exclusive control of the management and operation of a building. Ramirez v. City of New York, 13 A.D.3d 248 (1st Dept. 2004); German v. Bronx United in Leveraging Dollars, Inc., 258 A.D2d 251 (1st Dept. 1999).

Defendants have conclusively proved they are not the owners of the property. The have produced a deed proving that RCPI Landmark Properties, Inc. owns the property. Defendants admit, however, they are the managing agents. Thus, they only have a duty to plaintiff if they are in exclusive and complete control of the management and operation of the property.

Defendant's supervisor, Madzik testified that the defendants were responsible for upkeep of the property, collecting rent, and hiring the individuals needed to complete these jobs. Although Madzik stated that the defendants are responsible for maintaining the stairs, he was unsure if there was any contract that required defendants to do so. Plaintiffs have failed to place any evidence before the Court on this motion that defendants' duties are greater than those as described by Madzik. No written contract disclosing defendants duties has been produced by either party on this motion.

Under the undisputed facts of this case, defendants have no duty of care to plaintiff. There is no evidence from which a trier of fact could conclude that defendants are in exclusive and complete control of the property. There is no evidence that they had any control over the creation and/or maintenance of the alleged defects that caused Mortman's accident. In this regard, the alleged defects primarily occurred when the stairs were built approximately 70 years ago. Plaintiff claims that the stairs failed to comply with the building code and industry wide standards for building the stairs at that time. See: Buchholz v. Trump 767 Fifth Avenue, LLC; 5 N.Y.3d 1 (2005). There is no proof whatsoever that defendants had any role in the construction of the building. While plaintiff does claim that slip resistance on the treads has worn down over time,

this is a structural repair and, absent proof to the contrary, would not fall within a general obligation of a managing agent to perform maintenance.

Alternatively, defendants claim that even they owed plaintiff a duty there was no prior notice of any dangerous condition. They also claim that plaintiff caused her own accident. While there are issues of fact concerning how the accident occurred, there is no evidence that defendants had either actual or constructive notice that the stairs were in a dangerous condition. Madzik testified that he did not know of any prior complaints or incidents of a similar nature. Plaintiffs have not come forward with any proof to the contrary. There is also no proof of constructive notice. To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover it. Batton v. Elghanayan, 43 N.Y.2d 898 (1978); Birthwright v. Mid-City Sec. Inc., 268 A.D.2d 401 (2d Dept. 2008). At bar, to the extent any liability is predicated on slip resistance changing over time, there is no indication at what point in time plaintiff claims that normal wear and tear changed into a dangerous condition. Chavis v. New York City Housing Authority, 160 A.D.2d 277 (1st Dept. 1990).

Conclusion

In accordance herewith, it is hereby:

ORDERED that the motion for summary judgment made the by defendants Tishman Speyer Properties, Inc., and Tishman Speyer Properties, L.P against plaintiffs Barbara Mortman and Sheldon Mortman is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter a judgment in favor of Tishman Speyer Properties, Inc., and Tishman Speyer Properties, L.P and against Barbara Mortman and Sheldon Mortman dismissing the complaint, together with statutory costs and disbursements.

Any requested relief not expressly addressed herein has nonetheless been considered and hereby denied. This shall constitute the decision and order of the Court.

Dated: New York, New York
August 4, 2010

So Ordered:

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