[* 1]

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

PRESENT: JAFFE BARBARA JAFFE J.S.C. PART 5

Index Number : 120577/2003

TORRES, DIANA

vs

CITY OF NEW YORK

Sequence Number : 001

DISMISS ACTION

CAL #107

INDEX NO. 120577/03

MOTION DATE 6/22/10

MOTION SEQ. NO. 001

MOTION CAL. NO. 107

The following papers, numbered 1 to _____ were read on this motion to/for summary judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER

FILED

AUG 19 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 8/12/10

AUG 12 2010

BARBARA JAFFE J.S.C.

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 : PART 5

----------x

DIANA TORRES and WILFRED TORRES,

Plaintiffs,

-against-

CITY OF NEW YORK, 3280 BROADWAY COMPANY, INC., 3280 BROADWAY REALTY COMPANY, LLC, 3280 BROADWAY REALTY COMPANY, and JARLEX MANAGEMENT, INC.,

Defendants.

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Index No. 120577/03

Argued: 6/22/10
Mot. Seq. No.: 001

DECISION AND ORDER

BARBARA JAFFE, J.:

For plaintiffs:
James W. Shuttleworth, III
Finkelstein & Partners, LLP
436 Robinson Ave.
Newburgh, NY 12550
845-562-0203

For defendants 3280 and Jarlex:
Gregory D.V. Holmes, Esq.
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By notice of motion dated March 29, 2010, defendants 3280 Broadway Company, Inc., 3280 Broadway Realty Company, LLC, and 3280 Broadway Realty Company (collectively, 3280 Realty) and Jarlex (collectively, defendants) move pursuant to CPLR 3212 for an order summarily dismissing the complaint and any cross-claims against them. Plaintiffs oppose the motion.

I. BACKGROUND

By lease dated February 7, 1994, 3280 Realty leased to defendant City the sixth floor of the building located at 3280 Broadway in Manhattan for use by the New York Police Department (NYPD). (Affirmation of Gregory D. V. Holmes, Esq., dated Mar. 29, 2010 [Holmes Aff.], Exh.

D). Pursuant to Article 13 of the lease, 3280 Realty is required to repair and maintain "in good, clean and orderly condition, free of dirt, rubbish, snow, ice and unlawful obstruction" any sidewalks adjoining or appurtenant to the building. Although required to remove snow and ice on business days only, when requested by City, defendants are also required to remove snow and ice on weekends and holidays. (*Id.*).

On Sunday, February 23, 2003, plaintiff Diana Torres (plaintiff), then a City employee, was allegedly injured when she fell on the sidewalk located in front of the premises. (Holmes Aff., Exh. A). On April 21, 2004, she testified at an examination before trial (EBT) that at 6:50 a.m on the day of her accident, she was on her way to work at 3280 Broadway. As the sidewalk in front of the building was obstructed by snow and snow-bound vehicles parked on it, she walked 15 to 20 feet south of the building's entrance to find a clear path onto the sidewalk. Upon stepping onto the sidewalk curb, plaintiff slipped and fell on a patch of dirty ice. At the time, NYPD employees regularly parked on the sidewalk in front of the building, and plaintiff had previously seen building personnel remove snow from the sidewalk. (Holmes Aff., Exh. F; Affirmation of James W. Shuttleworth, III, Esq., dated May 28, 2010 [Shuttleworth Aff.], Exh. A).

On or about December 7, 2005, plaintiffs commenced the instant action against defendants, and on or about July 24, 2007, defendants served their answer. (Holmes Aff., Exhs. A, B). At a deposition held on October 23, 2008, Jarvis Doctorow testified that on February 23, 2003, he owned and managed the building at 3280 Broadway and was employed by Jarlex and that 3280 Realty managed the building and maintained the sidewalk in front of it. According to Doctorow, snow or ice would not be cleared from the sidewalk on a Sunday absent written

request from the NYPD, that upon receipt of such a request, he would instruct his employees to clear the sidewalk, and that the employees did so only if instructed. He was unable to recall if he had instructed them to clear the sidewalk on the date of plaintiff's accident. (Holmes Aff., Exh. E).

II. CONTENTIONS

Defendants deny any duty to clean and remove the ice on which plaintiff fell absent any written request to do so on the day of plaintiff's accident. Moreover, as the accident occurred before the enactment of the new Sidewalk Law (Admin. Code § 7-210), they contend that they may not be held liable absent evidence that they undertook to remove the snow or ice on the sidewalk or used the sidewalk for a special purpose, and given plaintiff's testimony as to the absence of a shoveled path on the sidewalk, defendants deny having undertaken to do so. They also assert that the NYPD is liable for plaintiff's accident, having made special use of the sidewalk as a parking area, and that the ongoing snowstorm is immaterial, given City's duty in the first instance.

Plaintiffs assert that the snow and ice on the sidewalk on February 23, 2003 had actually been there since a snowstorm on February 18, 2003, relying on the affidavit of a meteorologist who states, based on his review of the weather conditions and in his expert opinion, that the ice on which plaintiff fell had been there since at least February 18, and that no new ice had formed or accumulated between February 18 and February 23, 2003. (Shuttleworth Aff., Affidavit of Howard Alstchule, dated May 25, 2010). Plaintiffs thus argue that as the ice on which plaintiff fell had accumulated over the work week, when defendants were undisputably required to remove ice and snow, it is irrelevant whether City had requested its removal on February 23.

They also contend that the snow surrounding the vehicles on the sidewalk evidences defendants' attempt to clear the snow from the sidewalk, thereby creating a dangerous condition, and that defendants had constructive notice of the condition as the ice had formed at least five days before the accident.

In reply, defendants deny plowing the sidewalk on February 23, 2003 or taking any action that rendered it more dangerous. (Reply Affirmation, dated June 21, 2010).

III. ANALYSIS

The proponent of a motion for summary judgment must establish, *prima facie*, its entitlement to judgment as a matter of law, and must provide sufficient evidence demonstrating the absence of triable and material factual issues. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Walden Woods Homeowners Assn. v Friedman*, 36 AD3d 691 [2d Dept 2007]). Failure to do so requires that the motion be denied regardless of the sufficiency of the opposing papers. (*Id.*). The opposing party then has the burden of producing admissible evidence demonstrating the existence of triable and material issues of fact on which its claim rests. (*Zuckerman v New York*, 49 NY2d 557 [1980]).

Moreover, "as a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense." (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004], *quoting George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 185 AD2d 614, 615 [4th Dept 1992]). And a defendant moving for summary judgment must negate, *prima facie*, an essential element of the plaintiff's cause of action. (*Rosabella v Metro. Transp. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]).

To establish a *prima facie* claim of negligence, a plaintiff must demonstrate: (1) a duty owed by the defendant to the plaintiff; (2) a breach thereof; and (3) injury proximately resulting therefrom. (*Solomon v City of New York*, 66 NY2d 1026 [1985]).

Generally and at common law, only a municipality is responsible for maintaining public sidewalks. (*D'Ambrosio v City of New York*, 55 NY2d 454 [1982]; *Montalvo v Western Estates, Ltd.*, 240 AD2d 45 [1st Dept 1998]). Although the New York City Administrative Code was amended by shifting tort liability for a failure to maintain a sidewalk from City to abutting landowners, it became effective after the accident in issue here and is thus inapplicable. (NYC Admin. Code § 7-210 [the Sidewalk Law], eff. Sept. 14, 2003]). Thus, a landowner may be held liable for a pre-Sidewalk Law accident only if it created the defect causing the accident, or made special use of the sidewalk. (*Weiskopf v City of New York*, 5 AD3d 202 [1st Dept 2004]).

It is also well-settled that an out-of-possession landlord is responsible for a dangerous or defective condition on the premises if it: (1) exercises control over the premises by virtue of its contractual responsibility to repair and maintain or assumes responsibility for repairs through a course of conduct; (2) creates the condition; or (3) has actual or constructive notice of it. (*Rossal-Daub v Walter*, 58 AD3d 992 [3d Dept 2009]; *Ever Win, Inc. v 1-10 Industry Assocs., LLC*, 33 AD3d 845 [2d Dept 2006]). Here, it is undisputed that defendants were contractually required to remove ice and snow from the sidewalk in front of 3280 Broadway during the week and, upon request, on the weekend.

Doctorow's testimony that no written request was received from the NYPD is immaterial as the lease does not require that the request be in writing, and is otherwise not probative given his inability to recall. Defendants' reliance on a memorandum dated August 22, 2006, in which

NYPD Sergeant Eric Roman states that he "never made a written request with building representatives for snow removal or clean up services in regards to the sidewalk in front of 3280 Broadway" (Holmes Aff., Exh. G), is also misplaced, as it establishes only that Roman personally made no written request to clear the sidewalk. Absent any evidence that he had sole authority to do so, and again, given the immateriality of the receipt of a request in writing, defendants fail to establish that they received no request to clear the sidewalk on February 23, 2003. Thus, defendants have not demonstrated, *prima facie*, that they had no duty to clear the sidewalk on the day of plaintiff's accident. (*Compare Hakim v 65 Eighth Ave., LLC*, 42 AD3d 374 [1st Dept 2007] [as condition was allegedly caused by leaking roof and landlord was responsible, under the lease, for repairs to roof, it could not disclaim responsibility for accident as matter of law], *with Bennett v Berger*, 283 AD2d 374 [1st Dept 2001] [landowner had no duty to remove snow and ice from sidewalk where lease expressly provided that lessee was responsible for snow and ice removal]).

In any event, plaintiff submits evidence demonstrating that the ice had accumulated on the sidewalk during the work week preceding February 23, and as it is undisputed that defendants were responsible for clearing snow and ice from the sidewalk on those days, plaintiff has raised a triable issue of fact as to whether defendants should have removed the ice from the sidewalk before her accident, notwithstanding the alleged absence of a written request. In reply, defendants fail to submit any evidence showing that the ice had not formed during the week before the accident, or that they had removed or attempted to remove it. In light of this result, I need not address the parties' other arguments.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants 3280 Broadway Company, Inc., Broadway Realty Company, LLC, 3280 Broadway Realty Company, and Jarlex Management, Inc.'s motion for summary judgment is denied.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: August 12, 2010
New York, New York

AUG 19 2010

FILED
AUG 19 2010
NEW YORK
COUNTY CLERK'S OFFICE