Tesher v Sol Goldman Invs., LLC
2011 NY Slip Op 31457(U)
May 31, 2011
Supreme Court, New York County
Docket Number: 115878/06
Judge: Saliann Scarpulla
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SCANNED ON 6/3/2011

[* 1]

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

PRESENT: ______________________________ PART 19

Index Number : 115878/2006
TESHER, LYNN E.
VS.
SOL GOLDMAN INVESTMENTS
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. ____________

MOTION DATE ____________

MOTION SEQ. NO. ____________

MOTION CAL. NO. ____________

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

FILED
JUN 03 2011
NEW YORK COUNTY CLERK'S OFFICE

motion ~~and cross-motion are~~ is decided in accordance with accompanying memorandum decision.

This constitutes the decision and order of the Court

Dated: 5/31/11 ____________________ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

[* 2]

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

--x

LYNN TESHER and MARTIN TESHER,

Plaintiffs,

-against-

SOL GOLDMAN INVESTMENTS, LLC, SOL GOLDMAN REAL ESTATE, SOLIL MANAGEMENT CORPORATION, 219 EAST 69TH STREET, LLC, ALLAN GOLDMAN, JANE GOLDMAN, HANDS ON PHYSICAL THERAPY and RONA TALENTO,

Defendants.

--x

Index No.: 115878/06
Submission Date: 3/9/11

DECISION AND ORDER

Appearances:

For Plaintiff:
Henry Schwartz, Esq.
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Brooklyn, New York 11241
718-222-3118

For Goldman Defendants:
Margaret G. Klein & Associates
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New York, New York 10016
212-683-9700

For Defendants Hands On and Talento:
Law Offices of Edward Garfinkel
12 Metrotech Center, 28th Floor
Brooklyn, New York 11201
7180250-1100

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JUN 03 2011
NEW YORK
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Scarpulla, J.:

Motion sequence numbers 003 and 004 are hereby consolidated for disposition.

In these consolidated actions, plaintiffs, Lynn Tesher ("plaintiff") and Martin Tesher ("Tesher"), seek to recover damages for personal injuries sustained by plaintiff on July 13, 2005, when she tripped on a defect in a public sidewalk abutting the property located at 219 East 69th Street, Manhattan, New York (the building). The consolidated

actions involve-two separate torts; the first sounding in general negligence of a property owner, and the second involving the professional malpractice of a physical therapist.

In motion sequence number 003, defendants Hands On Physical Therapy (Hands On) and Rona Talento ("Talento") (collectively "defendants") move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross claims as against them.

In motion sequence number 004, defendants Sol Goldman Investments, LLC (SGI), Estate of Sol Goldman s/h/a Sol Goldman Real Estate (Estate), Solil Management Corporation (Solil), Allan Goldman, Jane Goldman (together, Allan and Jane Goldman) and 219 East 69th Street, LLC (219 East) (collectively "the Goldman defendants"), move, pursuant to CPLR 3212, (1) for an Order granting summary judgment dismissing plaintiffs' complaint and all cross claims as against all of the Goldman defendants, with the exception of 219 East, on the basis that they do not own the building abutting the public sidewalk where plaintiff allegedly fell; (2) for an Order granting summary judgment dismissing the complaint as against the Goldman defendants based on the trivial nature of the defect; (3) for an Order granting summary judgment dismissing the complaint as against the Goldman defendants based on the open and obvious and not inherently dangerous nature of the alleged defect; (4) for an Order declaring the Supplemental Summons and Amended Complaint filed on August 26, 2008 under Index Number 107475/2008 a nullity and not in compliance with CPLR 1003; (5) for an Order

granting summary judgment dismissing all claims as against defendants 219 East and Allan and Jane Goldman as time-barred by the statute of limitations.

Plaintiffs cross-move, pursuant to CPLR 203 ©, permitting the continued joinder of 219 East as set forth in the plaintiffs' supplemental summons and amended complaint.

Background

Plaintiff's Fall on the Sidewalk

Plaintiff testified that she has resided at the building since 1969. In the early afternoon on the date of the accident, plaintiff exited the building and began walking westerly along 69th Street with the intention of catching a cab on Third Avenue. As she walked, she did not look at the sidewalk. Instead, she looked straight ahead so as not to run into any other pedestrians. Plaintiff had proceeded approximately 15 to 20 feet along the sidewalk on 69th Street when one of her feet hit "an impediment, a raised piece of cement in the sidewalk" (hereinafter "the defect"), causing her to fall to the ground. (Goldman Defendants' Notice of Motion, Exhibit G, Plaintiff's Deposition, at 13).

Plaintiff explained that the subject sidewalk defect spanned the entire width of the sidewalk from the building to the street. As also reflected in color photographs of the sidewalk, plaintiff testified that the height differential between the two sidewalk flags to be "about an inch." (*Id.* at 21). Plaintiff also stated that, even though she walked in the area of the accident five or six times a day, she had never before noticed the subject defect. She explained that she typically looked forward, as opposed to downward when

walking, as the block where the building was located was typically heavy in pedestrian traffic. She also maintained that the defect was difficult to observe from the vantage point of a pedestrian walking down the street.

John Morgan ("Morgan"), the building's doorman, testified that the height differential between the two subject sidewalk flags existed for at least a year prior to plaintiff's accident. Morgan also noted that the defect was the cause of two other tripping accidents involving non-tenant pedestrians in the year prior to plaintiff's accident. Morgan notified the property manager of the building, Diego Vincenty ("Vincenty") of the defect in November of 2004, physically pointing out the condition.

Plaintiff's Physical Therapy Treatment

Plaintiff, who suffers from rheumatoid arthritis, sustained a right shoulder rotator cuff injury (hereinafter "the shoulder injury") on July 13, 2005, when she tripped over the alleged defect in the sidewalk. Plaintiff was then treated by non-party Dr. Robert Zeits ("Dr. Zeits"), an orthopaedic physician, who performed surgery to repair her shoulder injury. Thereafter, Dr. Zeits ordered post-surgical physical therapy with defendant Hands On.

During October and November of 2005, plaintiff's treatment with Hands On was without incident. At plaintiff's appointment with Dr. Zeits on November 10, 2005, Dr. Zeits prescribed therapist-assisted physical therapy with the restriction, "No external rotation [greater than] 30 [degrees]." (Defendants' Notice of Motion, Exhibit E, Dr. Zeits'

November 10, 2005 Physiotherapy Prescription). In addition, said prescription called for plaintiff to wear a sling "full-time except when bathing [and] [physical therapy]." (*Id.*).

On December 2, 2005, while at her physical therapy session at Hands On, plaintiff was assigned defendant Talento as her physical therapist. Talento, who treated plaintiff only on this one occasion, obtained plaintiff's informed consent before beginning treatment.

Regarding the sequence of events that took place at this December 2, 2005 physical therapy session, plaintiff testified, in pertinent part:

> The first thing [Talento] did was to move my arm, fairly forcibly, in the one direction I was told not to move it. I said, "Wait. You have not looked at the prescription." Because it hurt and I knew I was not supposed to rotate it quickly. She said, "No. I know what I am doing." I said, "Maybe, but I am finished." That was the extent of the session

Plaintiff also testified that, as Talento moved her arm "about 90 degrees," she said, "Ouch. Stop. That's the one direction you are not supposed to go in. You have to read the prescription." Plaintiff also maintained that she experienced "[j]ust a terrible pain in my shoulder. It was more like a tear, a ripping." (*Id.* at 17). Plaintiff noted that she and Talento were alone in the room at the time of the subject session, which took about 10 minutes from beginning to end. Thereafter, plaintiff, who was now in pain, went home, put ice on her shoulder and called her husband, Tesher. When Tesher arrived home, plaintiff told him what had happened at that day's physical therapy session. Tesher, a

doctor, then examined plaintiff's shoulder, which was allegedly swollen, and told her to keep putting ice on it.

When later asked if she complained to anyone about Talento's treatment, plaintiff stated, "I think I mentioned it to the therapist I normally saw. That Krista Fay (Fay). I believe I told her she moved my arm in the wrong way and it really hurt." Plaintiff also noted that she believed that her husband may have spoken to one of the owners of Hands On about the incident.

Plaintiff now alleges that the negligent manner in which Talento administered her physical therapy resulted in the re-tear of her recent rotator cuff repair, eventually requiring two additional surgeries and causing permanent damage to her right shoulder.

The Defendants' Summary Judgment Motions

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.'" *Santiago v Filstein*, 35 A.D.3d 184, 185-186 (1st Dep't 2006), quoting *Winegrad v New York University Medical Center*, 64 N.Y.2d 851, 853 (1985). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 A.D.3d 227, 228 (1st Dep't 2006); *see also Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980); *DeRosa v City of New York*, 30 A.D.3d 323, 325 (1st Dep't 2006). If there is any doubt as to the existence of a triable issue of

fact, the motion for summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 N.Y.2d 223, 231 (1978); *Grossman v Amalgamated Housing Corp.*, 298 A.D.2d 224, 226 (1st Dep't 2002). With these principles in mind the Court resolves defendants' motions for summary judgment.

Hands on's and Talento's Summary Judgment
Motion (Motion Sequence Number 003)

Although plaintiff's amended complaint sounds in negligence, in fact, the causes of action against Hands On and Talento sound in medical malpractice. "Conduct may be deemed malpractice, rather than negligence, when it 'constitutes medical treatment or bears a substantial relationship to the rendition of medical treatment by a licensed physician.'" *See Scott v Uljanov*, 74 N.Y.2d 673, 674-675 (1989), quoting *Bleiler v Bodnar*, 65 N.Y.2d 65, 72 (1985)); *see also Ryan v Korn*, 57 A.D.3d 507, 508 (2nd Dep't 2008); *Morales v Carcione*, 48 A.D.3d 648, 649 (2nd Dep't 2008). "'The critical factor is the nature of the duty owed to the plaintiff that the defendant is alleged to have breached.'" *Ryan v Korn*, 57 AD3d at 508, quoting *Caso v St. Francis Hospital*, 34 A.D.3d 714, 714 (2nd Dep't 2006). "'When the duty arises from the physician-patient relationship or is substantially related to medical treatment, the breach gives rise to an action sounding in medical malpractice, not simple negligence.'" *Morales*, 48 A.D.3d at 649, quoting *Mendelson v Clarkstown Medical Associates*, 271 A.D.2d 584, 584 (2nd Dep't 2000).

Here, the gravamen of plaintiff's complaint challenges the physical therapy treatment plaintiff received by Talento while she was a patient at Hands On. In addition, the alleged incident, which arose out of a physical therapist-patient relationship, was substantially related to the rendering of physical therapy treatment to plaintiff's shoulder. As such, this action sounds in medical malpractice, and not simple negligence.

Defendants also argue that they are entitled to summary judgment dismissing the complaint, because plaintiff never filed a certificate of merit, as required by CPLR 3012-a, nor did plaintiff serve a CPLR 3101 (d) disclosure, in lieu of a certificate of merit. In addition, as conceded by plaintiff, plaintiff never filed a notice of medical malpractice, as required under CPLR 3406, nor has plaintiff ever moved to extend the time to file such a notice.

However, as conceded by defendants in their reply papers, plaintiff did file a certificate of merit. In fact, plaintiff attached it to the last page of the verified complaint, and defendants attached it to their own affirmation. In any event, there is no authority for imposing a sanction of dismissal for a plaintiff's failure to serve a certificate of merit as required by CPLR 3012-a (*see Dye v Leve*, 181 A.D.2d 89, 90 (4th Dep't 1992) (holding that defendant's motion to dismiss based on plaintiff's failure to serve a certificate of merit, as required by CPLR 3012-a, was properly denied, and it afforded plaintiff 30 days to comply with the statute), or for failure to serve a notice of medical malpractice, as required by CPLR 3406. *See Tewari v Tsoutsouras*, 75 N.Y.2d 1, 10 (1989) (finding that

an affidavit of merit is not an absolute prerequisite, as the requirement to serve a notice of medical malpractice action is a rule regulating calendar practice and a failure to file the notice is not a pleading default); *see also Campbell v Starre Realty Company*, 283 A.D.2d 161, 164 (1st Dep't 2001). As such, this court will address the merits of defendants' motion.

"In order to establish a prima facie case of medical malpractice, a plaintiff must show not only that the doctor deviated from accepted medical practice but also that the alleged deviation proximately caused the patient's injury." *Koeppel v Park*, 228 A.D.2d 288, 289 (1st Dep't 1996); *Bacani v Rosenberg*, 74 A.D.3d 500, 501 (1st Dep't 2010). "A medical malpractice defendant moving for summary judgment meets his initial burden by establishing that he did not deviate from accepted medical practice or proximately cause injury." *Bacani*, 74 AD3d at 501.

Here, defendants successfully established that there are no genuine issues of fact regarding whether Talento departed from good and accepted physical therapy practice that led to any injury being sustained by plaintiff. As such, they are entitled to summary judgment dismissing plaintiff's complaint and all cross claims as against them.

Defendants submit the affidavit of Mark Amir, P.T., who stated that, not only did Talento properly evaluate and treat plaintiff, Talento's treatment of plaintiff did not lead to any injury sustained by plaintiff. Amir based his opinion upon a full review of the deposition transcripts of plaintiff, Tesher, Talento and non-party physical therapist, Fay,

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as well as plaintiff's bill of particulars and other relevant medical records. Amir found no evidence that Talento overextended or improperly manipulated plaintiff's shoulder, although he acknowledged that Talento should have documented her records of plaintiff's treatment more carefully.

Specifically, Amir stated, in pertinent part:

> My review of the aforesaid records reveals that Rona Talento properly evaluated and treated the plaintiff when she administered physical therapy treatment on December 2, 2005. Furthermore, Hands On Physical Therapy did not in any way depart from good and accepted physical therapy practice ... I can find no evidence that Rona Talento injured plaintiff during the brief physical therapy session with Lynn Tesher on December 2, 2005. The limited movement performed by Rona Talento did not, in my opinion within a reasonable degree of physical therapy and medical certainty cause any injury to Lynn Tesher. I can find no evidence that Ms. Talento overextended or improperly manipulated Ms. Tesher's shoulder.

Dr. Amir also opined that

> within a reasonable degree of physical therapy certainty that [Rona] Talento acted in accordance with good and accepted physical therapy practices, including informed consent, in her care and treatment of plaintiff with the possible exception that her notes could have been a little more detailed in terms of indicating the movements that she performed on plaintiff. However, I find no deviation from the standard of care that led to any injury under the circumstances.

Defendants also submit Talento's affidavit, wherein she stated, "[w]hen I treated plaintiff, I reviewed her chart before treating her, I followed the instructions and orders in the chart and did not exceed any range of motion as ordered by plaintiff's physician." Talento further noted that she "in no way departed from good and accepted physical

therapy practice in my care and treatment of the plaintiff on December 2, 2005, including informed consent." *Id.*

Finally, defendants submit the affidavit of Dimitrios Kostopoulos (Kostopoulos), a Principal of Hands On and a licensed physical therapist. He stated that, after reviewing the records maintained by Hands On, as well as the deposition transcripts of Talento, plaintiff and Tesher, he opined, within a reasonable degree of medical certainty, that Talento's treatment of plaintiff "in no way departed from good and accepted physical therapy practice that led to any injury being sustained by the plaintiff." Moreover, Kostopoulos "saw no evidence that Ms. Talento overextended or improperly manipulated [plaintiff's] shoulder."

Most notably, at the time of plaintiff's December 8, 2005 visit with Dr. Zeits, just six days after the alleged incident at Hands On, plaintiff's condition seemed to be improving, or, at least, it was not any worse than it was at the time of plaintiff's visit of November 10, 2005. Plaintiff testified that she told Dr. Zeits about the events of her December 2, 2005 physical therapy session with Talento at her follow-up visit with him on December 8, 2005. At this time, Dr. Zeits told her that his surgical repair of plaintiff's shoulder was so "strong," and that he could not imagine that Talento could have re-torn it. Dr. Zeits then prescribed more "conservative physical therapy" in an attempt to strengthen her shoulder.

Also, as noted on the Hands On chart, in plaintiff's physical therapy prescription, dated December 8, 2005 (six days after the physical therapy session with Talento), Dr. Zeits no longer listed any restrictions regarding the movement of plaintiff's arm whatsoever. This particular prescription also noted that plaintiff "[m]ay [discharge] sling next week.." Indeed, plaintiff did not undergo further surgery on her rotator cuff until February of 2006.

Also, on January 18, 2006, plaintiff filled out a Hands On "Quality Assurance Questionnaire" regarding her treatment. In response to the question "were you cared for well as a person by the clinicians?" plaintiff checked the box "yes." (Defendants' Notice of Motion, Exhibit E, Hands On Therapy Chart). Notably, plaintiff also noted on the questionnaire that she would refer a friend or family member to Hands On, and she rated the overall service of Hands On as "Excellent."

In opposition to defendants' motion, in addition to her own testimony regarding the events that transpired, plaintiff puts forth only the deposition testimony and affidavit of her husband, Tesher, and the somewhat vague affidavit of a physical therapist, Eva Larino ("Larino"), who is still relatively new to the field.

Tesher testified that, on the day of the incident, while at Hands On, plaintiff was treated by a substitute therapist who improperly externally rotated her arm, causing her immediate and severe pain. Tesher maintained that plaintiff's arm was swollen and more tender than it had been a day or two earlier, and that his wife complained of being in a lot

of pain. In addition, although he advised one of the owners of Hands On that his wife "suffered severe pain, prolonged post-op physical therapy and required a second surgery to repair the tear" as a result of Talento's treatment, Tesher never spoke to any of the physical therapists about his wife's treatment.

In his affidavit of October 12, 2010, Tesher, who is not a physical therapist or an orthopedist, stated that it was his opinion, within a reasonable degree of medical certainty, that plaintiff's rotator cuff was re-torn as a result of the treatment rendered to her by Talento on December 2, 2005, when she externally rotated plaintiff's shoulder to 90 degrees.

In her affidavit, Larino, who has been in private practice since graduating from Dominican College in Orangeburg, New York in 2007, stated that plaintiff told her that Talento externally rotated her arm 90 degrees, rather than 30 degrees, as prescribed by Dr. Zeits. Based upon plaintiff's testimony to this effect, as well as a review of the Hands On medical records, Larino opined, within a reasonable degree of physical therapy and medical certainty, that Talento's conduct in externally rotating plaintiff's shoulder 90 degrees was a substantial cause of plaintiff's re-injury.

While conflicting medical opinions may serve to defeat summary judgment (*see Koeppel*, 228 A.D.2d at 290), here, both Tesher and Larino's opinions are based primarily on plaintiff's unproven assertion that Talento wrongfully externally rotated her arm to 90 degrees. Neither Tesher nor Larino address Dr. Zeits' subsequent removal of restrictions

on rotation, the anticipated discharge of the sling or the lag in time before plaintiff's subsequent surgery, all of which show that Talento's treatment of plaintiff's shoulder did not cause a re-tear of her rotator cuff.

Thus, as defendants Hands On and Talento have shown that Talento did not deviate from good and accepted medical practice, and plaintiff has not sufficiently shown that a question of fact exists regarding whether Talento deviated from accepted medical practice, and that this deviation proximately caused plaintiff's injury, defendants Hands On and Talento are entitled to summary judgment dismissing plaintiff's complaint and all cross claims as against them.

The Goldman Defendants' Summary Judgment Motion (Motion Sequence Number 004)

The Goldman defendants move for summary judgment on the basis that, according to the building's deed, defendant 219 East is the exclusive owner of the building which abuts the sidewalk where plaintiff fell. As the plain language of Administrative Code § 7-210 makes evident that only legal title owners, and not their agents, can be charged with the duty of maintaining and/or repairing a public sidewalk adjoining its property, as non-owners of the building, the remaining Goldman defendants do not owe a legal duty to plaintiff under either common law or Administrative Code § 7-210. *See Cook v Consolidated Edison Co. of New York*, 51 A.D.3d 447, 448 (1st Dep't 2008) (finding that where plaintiff tripped on a gap between two boards placed on a sidewalk in front of tenant's restaurant, both tenant and owner had a duty to maintain the provisional sidewalk

structure, but only owner was under a statutory nondelegable duty to maintain the sidewalk pursuant to Administrative Code § 7-210).

Administrative Code § 7-210, commonly known as the "sidewalk law," states, in pertinent part:

> a. It shall be the duty of the owner of real property abutting any sidewalk ... to maintain such sidewalk in a reasonably safe condition.
>
> b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk ... shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition.

"The Sidewalk Law does not impose strict liability upon landowners from injuries arising from allegedly dangerous conditions on a sidewalk abutting their property." *Martinez v Khaimov*, 74 A.D.3d 1031, 1032 (2nd Dep't 2010). "As the Sidewalk Law is a municipal ordinance, a violation of the Sidewalk Law is only evidence of negligence." *Id.* As a result, "the injured party has the obligation to prove the elements of negligence to demonstrate that an owner is liable under the Sidewalk Law." *Id.* "To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty, a breach of that duty, and that the breach of such duty was the proximate cause of his or her injuries." *Marasco v C.D.R. Electronics Security & Surveillance Systems Co.*, 1 A.D.3d 578, 580 (2nd Dep't 2003); *Zavaro v Westbury Property Inv. Co.*, 244 A.D.2d 547, 547-548 (2nd Dep't 1997).

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In her opposition papers, plaintiff does not assert that defendants Estate, Solil or Allan and Jane Goldman owed any legal duty to plaintiff under either common law or Administrative Code § 7-210. Thus, as plaintiff has abandoned her claims as against these defendants, they are entitled to summary judgment dismissing plaintiff's complaint and all cross claims as against them. *See Genovese v Gambino*, 309 A.D.2d 832, 833 (2nd Dep't 2003) (finding that where plaintiff did not oppose that branch of defendant's summary judgment motion dismissing the wrongful termination cause of action, his claim that he was wrongfully terminated was deemed abandoned); see also *Musillo v Marist College*, 306 A.D.2d 782, 784 (3rd Dep't 2003).

As to defendant SGI, a review of the facts in the record indicates that, although the building's deed may have been in the name of 219 East, an entity owned by SGI, in fact, defendant SGI was not only the party in exclusive control of the premises, but it was also the actual owner of the premises. As such, defendant SGI owed plaintiff a duty to keep the sidewalk in good repair under Administrative Code § 7-210.

Perry Beek ("Beek"), Solil's comptroller, testified as to the relationship between the various limited liability companies owned by the Goldman family. Beek explained that SGI is the owner of the more than 100 residential properties that it manages. Each of these buildings is set up as an individual limited liability company.

Beek further explained that SGI is the sole entity empowered to make management decisions affecting the subject properties, which includes the unrestricted responsibility to

order, arrange for and pay for all repairs. SGI also asserts financial control over the properties, collecting all rents and depositing them into its own account. Out of this account, SGI pays for all expenditures necessary for the properties that it owns and manages. Beck noted that there is no contract in effect between SGI and 219 East regarding SGI's exclusive control over the physical building and its finances.

Beek further explained that Solil is a payroll company with no revenues. Solil, merely in charge of cutting payroll checks, owns no property and has no connection with the management of any of the properties. In addition, Solil, which has no relationship with SGI or 219 East, has no financial interest in 219 East.

Importantly, Beek testified that 219 East, a limited liability company, was created by SGI for the sole purpose of holding the deed to the property. Aside from appearing as the owner of the building, 219 East does not perform any functions. It does not have any employees and it does not maintain any bank accounts. 219 East is not party to any contracts with SGI, nor does it pay any money for any services rendered on its behalf. Beek explained that, in fact, 219 East is owned entirely by SGI, which is, in turn, jointly owned by the Estate and eight separate trusts, which were created under the Will of Sol Goldman (the trusts). The trusts are directed by Sol Goldman's surviving children, Allan and Goldman, as co-trustees. Both Jane Goldman and Allan Goldman are involved in the day-to-day affairs of SGI.

Beek also testified that Solil, 219 East, SGI, as well as all of the other buildings managed by SGI, share a single principal address on the third floor of 640 Fifth Avenue, New York, New York ("the Fifth Avenue office"). There is no physical separation of the companies at the Fifth Avenue office, and all employees of these entities work in concert for all of the buildings.

Kathleen Weeks ("Weeks"), 219 East's claims risk manager, also testified as to the relationships between the defendants in this action. Weeks explained that she received her pay checks from Solil, which was a bank account used to pay the salaries of employees who worked for all of the buildings controlled by SGI. Weeks testified that 219 East merely existed as a title owner, and that it performs no functions, has no employees or bank accounts and generates no paperwork. In addition, Weeks stated that SGI performs all ownership functions, such as making decisions regarding work to be performed or repairs, despite the fact that there exists no contract between SGI and 219 East.

Concietta Ferrari-Miletic ("Miletic"), who serves as the office manager for the entities with offices located at the Fifth Avenue office, testified that 219 East exists solely to serve as the property deed holder for the building. To that effect, 219 East does not generate any paperwork, transact any business, collect any rents or perform any ownership duties. Miletic asserted that all ownership duties, such as the collection of rent, the management and maintenance of property and the performing and paying for

repairs, are performed exclusively by SGI. Moreover, Miletic maintained that there was never a contract between SGI and 219 East, further indicating that 219 East is completely and wholly owned by SGI.

Thus, pursuant to Administrative Code § 7-210, as the actual owner of the property, SGI can be charged with the duty of maintaining and/or repairing a public sidewalk adjoining the property, thus SGI's motion for summary judgment dismissing the complaint against it is denied.

The Goldman defendants also argue that they are entitled to summary judgment because, as the 7/8 inch height differential between the sidewalk slabs was both open and obvious and not inherently dangerous, they did not breach any duty to plaintiff. "Although a property owner has a duty to maintain his or her property in a reasonably safe condition, there is 'no duty to protect or warn against an open and obvious condition, which, as a matter of law, is not inherently dangerous.'" *Russ v Fried*, 73 A.D.3d 1153, 1154 (2nd Dep't 2010), quoting *Fernandez v Edlund*, 31 A.D.3d 601, 602 (2nd Dep't 2006); *Matthews v Vlad Restoration Ltd.*, 74 A.D.3d 692, 692 (1st Dep't 2010) (finding that defendants met their burden by showing that the lower brace of the scaffold plaintiff tripped on was open and obvious as a matter of law); *Ramos v Cooper Investors, Inc.*, 49 AD3d 623, 624 (2nd Dep't 2008) [where plaintiff tripped when she failed to notice a curb separating the walkway area in front of defendants' hotel and an adjacent roadway, respondents established their prima facie entitlement to judgment as a matter of law by

tendering evidence that the height differential between the walkway and roadway was both open and obvious and not inherently dangerous); *Westbrook v WR Activities-Cabrera Markets*, 5 A.D.3d 69, 71 (1st Dep't 2004) ("[i]f a hazard or dangerous condition is open and obvious, the owner of the property has no duty to *warn* a visitor of the danger").

"The hazard or dangerous condition must be of a nature that could not reasonably be overlooked by anyone in the area whose eyes were open." *Westbrook*, 5 A.D.3d at 71. In addition, just because "a condition is visible does not necessarily mean it is open and obvious." *See Cook v Consolidated Edison Company of New York, Inc.*, 51 A.D.3d at 448 (ruling that the alleged gap between two shunt boards was not open and obvious in light of the plaintiff's testimony that her line of sight of the gap was obstructed by other pedestrians on the crowded sidewalk; *see also Westbrook*, 5 AD3d at 72.

"At the outset, the question of whether a condition is open and obvious is generally a jury question, and a court should only determine that a risk was open and obvious as a matter of law when the facts compel such a conclusion." *Westbrook*, 5 AD3d at 72.

In support of their motion, the Goldman defendants cite cases wherein the defendants established their prima facie entitlement to judgment as a matter of law by tendering evidence of a mere height differential, without more. *See Russ v Fried*, 73 A.D.3d at 1154; *Ramos v Cooper Investors, Inc.*, 49 A.D.3d at 624. Here, however, in addition to the subject height differential, plaintiff has also asserted that the sidewalk

defect was easily overlooked due to the uniform color of the sidewalk, the pedestrian viewing angle and the fact that it was necessary for her to look ahead, rather than downwards, in order to avoid other pedestrians on the street.

Moreover, even if the claimed hazard in this case was open and obvious, plaintiff is not claiming a violation of the duty to warn, but a violation of the broader duty to maintain the premises in a reasonably safe condition. *See Westbrook*, 5 AD3d at 72. "The open and obvious nature of a hazard merely negates the duty to *warn* of the hazard, not necessarily all duty to maintain premises in a reasonably safe condition." *Id.* at 73. As such, "proof that a dangerous condition is open and obvious does not preclude a finding of liability against a landowner for the failure to maintain the property in a safe condition, but is relevant to the issue of the plaintiff's comparative negligence." *Cupo v Karfunkel*, 1 A.D.3d 48, 52 (2nd Dep't 2003).

Thus, the Goldman defendants are not entitled to summary judgment on the ground that the defect was open and obvious and not inherently dangerous as a matter of law.

The Goldman defendants further raise an additional ground for dismissal, arguing that, as the subject defect was trivial and bore no resemblance to a trap or a snare, it could not constitute a dangerous condition as a matter of law.

The issue of whether a dangerous or defective condition exists is generally a question of fact for the jury. *DeLaRosa v City of New York*, 61 A.D.3d 813, 813 (2nd Dep't 2009); *Nin v Bernard*, 257 A.D.2d 417, 417 (1st Dep't 1999). Sometimes, however,

"the defect is so trivial as to warrant disposition on summary judgment." *Herrera v City of New York*, 262 AD2d 120, 120 (1st Dep't 1999); *Trincere v County of Suffolk*, 90 N.Y.2d 976, 977 (1997). For example, "a property owner may not be held liable for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip." *DeLaRosa*, 61 AD3d at 813.

"There is no per se rule that a sidewalk defect must be of a certain minimum elevation or width differential in order to be actionable; rather, it depends on the particular facts and circumstances of each case." *Herrera*, 262 A.D.2d at 120; *Nin*, 257 AD2d at 417. "In determining whether a defective condition is trivial as a matter of law, a court must examine the facts presented, including the width, depth, elevation, irregularity, and appearance of the condition, along with the time, place, and circumstances of the injury." *DeLaRosa*, 61 A.D.3d at 813-814; *see also Trincere*, 90 N.Y.2d at 978. "The precise dimensions of the defect, be they in feet or inches, are not dispositive." *Nin*, 257 A.D.2d at 417). "[E]ven a trivial defect can sometimes have the characteristics of a snare or a trap." *Herrerra*, 262 A.D.2d at 120.

Here, the Goldman defendants failed to make a prima facie showing that the allegedly defective condition at issue was trivial, and, thus, not actionable. As discussed previously, the photographs put forth in this case reveal that the height differential between the two sidewalk flags was almost an inch. In addition, as plaintiff testified, the

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sidewalk defect was easily overlooked due to the uniform color of the sidewalk, the pedestrian viewing angle, as well as its location on a pedestrian-filled street.

Moreover, as stated in Administrative Code § 19-152, the standard for determining what constitutes a substantial defect for purposes of liability under section 7-120 is "one half inch." Specifically, section 19-152 imposes a duty upon an abutting property owner to repair, repave or reconstruct sidewalk flags abutting the property where there exists "4. a trip hazard, where the vertical grade differential between adjacent sidewalk flags is greater than or equal to one half inch."

In his affidavit, dated September 12, 2006, plaintiff's expert, Scott M. Silberman, P.E., maintained that the height differential between the sidewalk slabs was approximately 7/8 of an inch and that the sidewalk violated certain building standards and the Administrative Code of the City of New York.

Finally, as further evidence that the subject sidewalk defect was not trivial, Vincentry, the building manager, testified that a one inch differential in the height of the sidewalk slabs, such as the one at issue in this case, would typically result in a work order being generated for subsequent repair.

Thus, the Goldman defendants are not entitled to summary judgment dismissing the complaint and all cross claims as against them on the ground that, as the subject defect was trivial and bore no resemblance to a trap or a snare, it could not constitute a dangerous condition as a matter of law.

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Finally, the Goldman defendants assert that plaintiff's failure to comply with CPLR 1003 constitutes a jurisdictional defect that renders the supplemental summons and amended complaint as against 219 East and Allen and Jane Goldman a legal nullity, requiring dismissal of the action as against these defendants. *See Yadegar v Intern'l Food Market*, 306 AD2d 526, 526 (2nd Dep't 2003).

In pertinent part, CPLR 1003 provides for a mechanism to amend a pleading joining a new party:

> Parties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared, or once without leave of court within twenty days after service of the original summons or at anytime before the period for responding to that summons expires or within twenty days after service of a pleading responding to it.

However, "[t]he failure to obtain leave required under CPLR 1003 [creates] the opportunity for a defendant to claim that the court lacks personal jurisdiction over it because the summons and complaint served were nullities." *McDaniel v Clarkstown Central District No. 1*, 83 A.D.2d 624, 625 (2nd Dep't 1981).

"[T]he failure to obtain prior leave of court is a waivable defect, and is not fatal in all instances." *He-Duan Zheng v American Friends of the Mar Thoma Syrian Church of Malabar, Inc.*, 67 A.D.3d 639, 640 (2nd Dep't 2009); *see also Santopolo v Turner Construction Company*, 181 A.D.2d 429, 429 (1st Dep't 1992). "The purported defect in joinder thus requires a prompt motion to dismiss or preservation by way of defense in the answer, lest it be deemed waived." *McDaniel*, 83 AD2d at 625. Unless waived, a

plaintiff's failure to obtain leave pursuant to CPLR 3025 (b) and 1003 "normally requires dismissal of the action against a party so joined." *Gross v BFH*, 151 A.D.2d 452, 452 (2nd Dep't 1989).

Plaintiff commenced Action 2 by the filing of a Summons and Verified Complaint on May 29, 2008. On August 26, 2008, as the statute of limitations was about to expire and without leave of court or stipulation of the parties, plaintiff filed a supplemental summons and amended complaint in Action 2, in which plaintiff purported to add 219 East and Allan and Jane Goldman as defendants to Action 2. On October 17, 2008, the summary judgment motion in Action 1 was withdrawn without prejudice. On May 26, 2009, Actions 1 and 2 were consolidated under Index Number 115878/2006.

While the Goldman defendants concede that parties may be added without leave of court pursuant to the rules of CPLR 1003, they argue that, as neither Hands On nor Talento were ever served with an original summons in the first place, plaintiff cannot demonstrate that the supplemental summons and amended complaint were filed within 20 days after the service of the original summons, that they were filed before the period for responding to that original summons, or that they were filed 20 days after service of a pleading responding to it.

However, as plaintiff asserts, the conduct of the Goldman defendants in waiting until this point in the litigation, and after the statute of limitations has allegedly expired,

to object to 219 East and Allan and Jane Goldman being joined as parties without prior leave of court constitutes a waiver of this right.

The Goldman defendants did not object to joinder at any time prior to the filing of this motion, despite having consented to consolidation and despite having participated in extensive discovery. In addition, Weeks testified that the service of the Summons and Complaint was effectuated on her at the office of the Estate, where all defendants, including defendant 219 East, are located. Weeks accepted the pleadings for all defendants in her capacity as claims risk manager for all the buildings managed by SGI, including 219 East. She also accepted for Solil, which is listed with the Department of State as the agent for 219 East. As it was her job to accept claims, record them and then copies of them to the insurance companies, she forwarded said complaint to Greater New York Insurance Company (Greater), which had previously issued an insurance policy on behalf of all of the named defendants. *See He-Duan Zheng*, 67 A.D.3d at 640 (finding that Church waived its improper joinder defense by its conduct in attending and participating in a preliminary conference setting forth a schedule for discovery, in failing to raise said defense in a timely pre-answer motion to dismiss the complaint, in failing to raise said defense in its answer, and in waiting until after the applicable statute of limitations had expired prior to making its motion); *see also Gross v BFH*, 151 A.D.2d at 453 [finding a waiver to improper joinder where appellants participated in discovery without objection, and the documentary evidence and examinations before trial showed

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that appellant's parent corporation's predecessor in interest was served and answered for the appellants); *Santopolo v Turner Construction Company*, 181 A.D.2d 429, *supra* (defendant, which was joined to suit by supplemental summons and complaint, waived any jurisdictional defect in the manner in which it was joined by answering plaintiff's amended complaint and then delaying approximately three months until after the statute of limitations had run before moving to dismiss).[1]

In any event, as to the joinder of 219 East, "[t]he relation-back doctrine, which is codified in CPLR 203 (b), allows a claim asserted against a defendant in an amended complaint to relate back to claims previously asserted against a co-defendant for statute of limitations purposes where the two defendants are 'united in interest.'" *Shapiro v Good Samaritan Regional Hospital Medical Center*, 42 A.D.3d 443, 444 (2nd Dep't 2007), quoting *Baran v Copal*, 87 N.Y.2d 173, 177 (1995).

> In order for a claim asserted against a new defendant to relate back to the date the claim was filed against another defendant, the plaintiff must establish that (1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new defendant is united in interest with the original defendant, and by reason of that relationship can be charged with notice of the institution of the action such that he or she will not be prejudiced in

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[1] As stated above, plaintiff did not oppose dismissal of the complaint as to Allan and Jane Goldman on the ground that they do not own the property at issue. Similarly, in opposition to the Goldman defendants' joinder arguments, plaintiff only addresses whether or not the Goldman defendants waived their right to object to the joinder of 219 East, never mentioning defendants Allan and Jane Goldman. Accordingly, as plaintiff has abandoned her quest to add Allan and Jane Goldman to this action, the Goldman defendants are entitled to summary judgment dismissing the complaint and all cross claims as against defendants Allan and Jane Goldman on this additional ground.

> maintaining a defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against the new defendant as well

Shapiro, 42 A.D.3d at 444; *see also Baran*, 87 N.Y.2d at 178; *Nagi v Gould*, 39 A.D.3d 508, 509 (2nd Dep't 2007); *Porter v Annaba*, 38 A.D.3d 869, 870 (2nd Dep't 2007).

"'Parties are united in interest only where "the interest of the parties in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other."'" *GATT v Smith-Heisenberg*, 280 A.D.2d 640, 641 (2nd Dep't 2001), quoting *Decider v Rubin*, 234 A.D.2d 581, 583 (3rd Dep't 1996), *quoting Prudential Insurance Company v Stone*, 270 N.Y. 154, 159 (1936); *Miller v Telugu*, 255 A.D.2d 563, 564 (2nd Dep't 1998). "The question of unity of interest requires consideration of '(1) the jural relationship of the parties whose interests are said to be united and (2) the nature of the claim asserted against them.'" *Halliard v Roc-Newark Assoc.*, 287 A.D.2d 691, 692 (2nd Dept 2001), quoting *Cornell v Hayden*, 83 A.D.2d 30, 42-43 (2nd Dep't 1981). "In a negligence action, 'the defenses available to two defendants will be identical, and thus their interests will be united, only where one is vicariously liable for the acts of the other.'" *See Halliard*, 287 A.D.2d at 692, quoting *Cornell.*, 83 A.D.2d at 45; *Miller*, 255 A.D.2d at 564; *Decider*, 234 A.D.2d at 583.

Here, plaintiff has met her burden of establishing that SGI and 219 East were, in reality, the same entity for all intent and purposes, and thus, 219 East and SGI are vicariously liable for the acts of the other. As discussed previously, SGI was the owner of

and the responsible entity for the building, also owning 219 East, which was merely the deed holder with no other functions or powers whatsoever. As 219 East and SGI are united in interest for the purposes of the relation back doctrine, plaintiff's claim asserted against 219 East relates back to the original complaint, and thus, is not time-barred. Accordingly, plaintiff is entitled to summary judgment in her favor on her cross motion seeking continued joinder of defendant 219 East, as set forth in the supplemental summons and amended complaint.

For the foregoing reasons, it is hereby

ORDERED that defendants Hands On Physical Therapy's and Rona Talento's motion (motion sequence number 003), pursuant to CPLR 3212, for summary judgment dismissing plaintiffs Lynn E. Tesher and Martin Tesher's complaint and all cross claims against them is granted, and the complaint and all cross claims are severed and dismissed as to these defendants, and the Clerk is directed to enter judgment accordingly in favor of these defendants; and it is further

ORDERED that the part of defendants Sol Goldman Investments, LLC's, Estate of Sol Goldman s/h/a Sol Goldman Real Estate's, Solil Management Corporation's, Allan Goldman's, Jane Goldman's and 219 East 69th Street, LLC's motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint and all cross claims as against them on the basis that they do not own the building abutting the public sidewalk where plaintiff allegedly fell is granted, with the exception of defendant SGI, and the

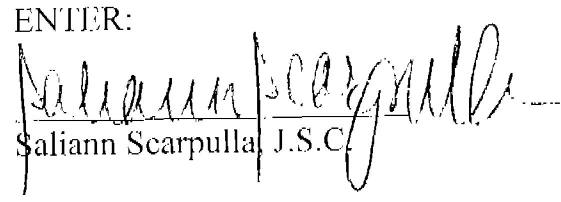
complaint and all cross claims are severed and dismissed as to these defendants, with costs and disbursements as taxed by the Clerk of Court, and the Clerk is directed to enter judgment accordingly in favor of these defendants; and it is further

ORDERED that plaintiffs' cross motion, pursuant to CPLR 203 ©, permitting the continued joinder of defendant 219 East, as set forth in the supplemental summons and amended complaint, is granted; and it is further

ORDERED that the remainder of the action shall continue.

DATED: May 31 2011
New York, New York

ENTER:



Saliann Scarpulla, J.S.C.

FILED
JUN 03 2011
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