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SHORT FORM ORDER

INDEX No. 07-31204
CAL. No. 10-01673OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 11-5-10 (#003)
MOTION DATE 1-19-11(#004)
ADJ. DATE 1-19-11
Mot. Seq. # 003 - MD
004 - XMD

CYNTHIA WRIGHT, Plaintiff, - against - H. LEE BLUMBERG, JOANN BLUMBERG, JUDITH ARON BLUMBERG AS EXECUTRIX FOR THE ESTATE OF ROBERT C. BLUMBERG AND STYLES ON BROADWAY, INC., Defendants.	SVETLANA SOBEL, ESQ. Attorney for Plaintiff 121 West Oak Street Amityville, New York 11701 KRAL, CLERKIN, REDMOND, RYAN, PERRY & VAN ETTEN, LLP Attorney for Defendants Blumberg 496 Smithtown Bypass, Suite 204 Smithtown, New York 11787

Upon the following papers numbered 1 to 66 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 25; Notice of Cross Motion and supporting papers 33 - 41; Answering Affidavits and supporting papers 26 - 32; Replying Affidavits and supporting papers 42 - 56; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (003) by defendants H. Lee Blumberg, Joann Blumberg, Judith Aron Blumberg as Executrix for the Estate of Robert C. Blumberg (hereinafter Blumberg defendants) is denied in all respects; and it is further

ORDERED that the cross-motion (004) by plaintiff Cynthia Wright is denied; and it is further

ORDERED that the Blumberg defendants are directed to serve a copy of this decision and order by regular mail upon all parties.

The instant action arises from a slip and fall that occurred at approximately 3:40 p.m. on October 5, 2004 on the sidewalk in front of a multi-tenant commercial building located at 183 Broadway, Amityville, New York. The plaintiff was injured when she tripped and fell on a raised portion of the sidewalk. Specifically, the plaintiff claims that the height differential of

approximately between one and three quarter inches and two inches that existed between the two concrete slabs comprising the sidewalk, caused her to fall. The premises consists of a one-story building subdivided into four individual stores. On the date of the accident, defendant H. Lee Blumberg and his brother Robert C. Blumberg (now deceased) owned the premises as tenants in common. At the time of the accident, the Village of Amityville, New York, Code, (hereinafter Village Code) § 152-8, imposed a duty upon the owner and occupant of a building to maintain the sidewalk abutting the premises and specifically prescribed liability to either or both the owner and occupant, for any injury resulting from the omission, failure or negligence to maintain the abutting sidewalk. On May 3, 2000, defendant H. Lee Blumberg executed a lease agreement on behalf of himself and his brother Robert C. Blumberg with non-parties Wilma L. Bettis and Elliott H. Bettis, which lease was subsequently assigned to defendant Styles on Broadway, Inc.(hereinafter Styles) which lease was then assigned to non-party Eve Hair Salon. This is the purportedly controlling contract regarding the rights and obligations of the landlord and tenant at the time of the accident.

The Blumberg defendants now move for summary judgment dismissing the complaint against them and for summary judgment against the co-defendant Styles on their claims for indemnification, contribution and legal fees. As to the plaintiff, the Blumberg defendants argue that they have no duty to repair or maintain the sidewalk as they are out-of-possession landlords, and that such duty to maintain and repair belongs to co-defendant Styles pursuant to the lease in effect at the time of the plaintiff's accident. The Blumberg defendants also argue that even if they bear responsibility, any defect is trivial and they had no notice of it in any event.

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 demonstrate the absence of any material issues of fact **(*Alvarez v. Prospect Hosp.*,** 68 NY2d 320, 324, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Center,*** 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York,*** 49 NY2d 557, 562, 427 NYS2d 925 [1980]**).** Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers **(*Alvarez v. Prospect Hosp.*,** *supra*; ***Winegrad v New York Univ. Med. Center,*** *supra*, 853**)**. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action **(*Alvarez v. Prospect Hosp.*,** *supra,* 324**; *Zuckerman v City of New York,*** *supra,* 562**).**

In support of their motion for summary judgment, the Blumberg defendants submit an affirmation in support, the pleadings, various demands, responses and objections, deposition testimony (hereinafter EBT) of the plaintiff, the 50 (h) hearing minutes of the plaintiff's testimony, and the EBT testimony of H. Lee Blumberg. Attached to the exhibit containing plaintiff's responses and objections to the Blumberg defendants' combined demands are black and white copies of photographs depicting the accident site. Attached to the exhibit containing the Blumberg defendants' response to the plaintiff's discovery notice is the original lease with its attendant rider and subsequent assignments. Contrary to the Blumberg defendants' position, this evidence fails to demonstrate the Blumberg defendants' right to summary judgment, as a matter of law, dismissing the complaint against them.

Generally, liability for injuries sustained as a result of a dangerous condition on a public sidewalk such as in this case is placed on the municipality, not the owner of the abutting land (***James v Blackmon***, 58 AD3d 808, 872 NYS2d 179 [2d Dept 2009]). Liability may be imposed on an abutting landowner, however, where the landowner violated an ordinance expressly imposing liability on the landowner for a failure to maintain the sidewalk (***James v Blackmon***, *supra*; ***Rocco v Marder***, 42 AD3d 516, 517, 839 NYS2d 803 [2d Dept 2007]). An out-of-possession owner cannot be held liable unless that owner exercised some control over the sidewalk or was contractually obligated to repair the unsafe condition (***Rocco v Marder***, *supra*). The reservation of a right to re-enter the premises for the purposes of inspection and repair may constitute sufficient retention of control to impose liability for injuries caused by a dangerous condition provided the plaintiff shows that the landlord breached specific provisions of a statute or code (***Nikolaidis v La Terna Restaurant***, 40 AD23d 827, 835 NYS2d 726 [2d Dept 2007]; ***Flores v Baroudos***, 27 AD3d 517, 518 [2d Dept 2006]).

In this case, there is a specific provision of the relevant Village Code requiring the owner and occupant to maintain the sidewalk abutting the premises and imposing liability for the failure to do so. Village Code § 152-8 states:

> Duty: It shall be unlawful for the owner or occupant of any real property or premises in the village to suffer the sidewalk or sidewalks adjacent to or in front of the same to become out of repair and in an unsafe condition. Such owner or occupant, and each of them, shall be liable for any injury or damage by reason of omission, failure or negligence to maintain or repair such sidewalk and shall indemnify and hold the village harmless from any such claim of damage.

The Blumberg defendants were out-of-possession landlords at the time of the accident. It is less clear which tenant was party to the lease at the time of the accident.

The Blumberg defendants argue that the lease in effect at the time of the plaintiff's accident is comprised of : (1) the original lease that was between Triangle Stores (hereinafter Triangle) as owner and Wilma L. Bettis and Elliott H. Bettis as tenants, dated December, 1986 (no specific day was listed), signed by the individual tenants and H. Lee Blumberg as "landlord" for Triangle, along with a Rider to Lease between Triangle and Wilma L. Bettis and Elliott H. Bettis with a date of "December ___, 1986;" and (2) an "Assignment, Assumption, Extension, Amendment, Consent & Agreement", dated May 3, 2000, wherein Wilma L. Bettis and Elliott H. Bettis assigned their tenancy obligations to Rosemarie Brown and defendant Styles. This assignment and assumption agreement contains the consent of "H. Lee Blumberg and Robert C. Blumberg landlords" and is signed by "Wilma Bettis, Assignor," "Elliott Bettis, Assignor," "Rosemarie Brown, Individually and as Assignee and principal of Styles....." and by "H. Lee Blumberg, Landlord" on behalf of 'H. Lee Blumberg/Robert C. Blumberg." There is no submission by the Blumberg defendants evidencing the assignment of the lease or the change in ownership of the premises from Triangle to H. Lee Blumberg and Robert C. Blumberg as individual owners. Therefore, it is unclear to the Court what portions of the original lease pertain to the landlord Blumberg defendants as they were not the listed parties to the original lease. Such a question cannot be answered on the papers submitted. Accordingly, whether the

Blumberg defendants retained sufficient control over the sidewalk or were contractually obligated to repair any unsafe condition cannot be determined, as a matter of law.

In addition, there is a further "Assignment/Assumption/Modification of Lease & Landlord's Consent" that appears to be dated July 22, 2003[1], which assigns the tenancy again, this time from Rosemarie Brown and Styles to non-party "Eve Hair Salon, Inc. a corporation owned by Marie Joseph" and contains the consent of H. Lee Blumberg and Robert C. Blumberg as "Landlord." This second assignment is signed by the assignee, the assignor and "H. Lee Blumberg, Landlord." Once again, there is no assignment evidenced in this document from Triangle, the party to the original lease, to H. Lee Blumberg and Robert C. Blumberg.

However, even if this Court should consider the Blumberg defendants' position that the original lease provisions were in full force and effect as to H. Lee Blumberg and Robert C. Blumberg at the time of the accident in issue, paragraph "13" to the original lease provisions of the 1986 lease creates a question of fact regarding whether the individual landlord defendants retained control of the premises or were contractually obligated to repair any unsafe condition regarding the sidewalk. Paragraph 13 of the lease states[2], in part:

> The owner . . . shall have the right (but shall not be obligated) to enter the demised premises in any emergency at any time, and, at other reasonable times, to examine the same and to make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to any portion of the building or which Owner may elect to perform, in the premises, following Tenant's failure to make repairs or perform any work which Tenant is obligated to perform under this lease, or for the purpose of complying with laws, regulations and other directives of governmental authorities.

Thus, it cannot be stated, as a matter of law, that the Blumberg defendants as landlords were not obligated to enter the premises to effectuate compliance with Village Code § 152-8, or that they

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[1]*While the date of this second assignment to Eve Hair Salon has an errant line from the signature below passing through the last digit of the year, making it unclear whether the assignment took place in 2003 (before the accident) or 2005 (after the accident), it is clear from the terms of this second assignment that the year was 2003. In paragraph "7" the "present rent" at the time of execution of this second assignment is listed as $1,125 and the assignment states that said rent was to increase to $1,175 on "July 01, 2004 thru June 30,2005" and then to increase from $1,175 to $1,225 from "July 01, 2005 thru June 30, 2006." Said increases would not be stated as future increases if the second assignment were executed July 22, 2005, which is more than a year after the first rental increase was scheduled to begin, and twenty-two days after the second rental increase was scheduled to begin. In addition, paragraph "12" of the second assignment changes "lease clause # 41" from a base year of 1987 to a base year of 2002/2003, further evidencing that the date of this second assignment of the lease is 2003.*

[2]*The lease attached to the Blumberg defendants' motion at the end of exhibit "G" is almost totally illegible.*

did not retain sufficient control of the sidewalk and premises. In fact, the Blumberg defendants seem to have obligated themselves to enter or at least to inspect the sidewalk to ensure compliance with the relevant Village Code, § 152-8. Accordingly, pursuant to the lease which the Blumberg defendants argue controls, there is a question of fact whether the landlords' reservation of the right to re-enter the premises subjects the Blumberg defendants to liability if there is a proven dangerous defect in violation of Village Code § 152-8.

As to the alleged dangerous defect, whether a dangerous or defective condition exists so as to create liability depends on the circumstances of each case and is generally a question of fact for the jury (***Perez v 655 Montauk, LLC***, 81 AD3d 619, 916 NYS2d 137 [2011]**)**. In determining whether a defect is trivial, as a matter of law, a court must examine all of the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect, along with the time, place, and circumstances of the injury **(*Perez v 655 Montauk, LLC*,** *supra,* 619**)**. Here the evidence submitted by the Blumberg defendants, including EBT testimony, hearing testimony and black and white copies of photographs of the sidewalk, was insufficient to demonstrate, as a matter of law, that the alleged defect was trivial and therefore not actionable **(*see Perez v 655 Montauk, LLC*,** *supra,* 619**)**. Indeed, the copies of the photographs are completely without any evidentiary value to this Court as they are impossible to decipher.

Also, given the nature of the alleged defect i.e. raised concrete slabs, the Blumberg defendants have failed to demonstrate, as a matter of law, that they did not have constructive notice of the alleged defect and have failed to establish prima facie that the raised sidewalk was not visible and apparent, and that it did not exist for a sufficient length of time to permit the Blumberg defendants to discover and remedy it **(*Perez v 655 Montauk, LLC*,** *supra,* 619**).**

As to the Blumberg defendants' motion for summary judgment against the co-defendant Styles, the Court must deny such requested relief as CPLR § 3212 (a) requires that issue be joined before this motion may be made. The Blumberg defendants' submissions seem to indicate that Styles failed to answer the summons and complaint and thus issue has not been joined. Moreover, from the lease assignment agreements, it is not apparent that Styles was in fact the tenant at the time of the accident. Accordingly, this branch of the Blumberg defendants' motion is denied as well.

Finally, the plaintiff's cross-motion for summary judgment must be denied as there are questions of fact as discussed above concerning, *inter alia*, whether the defect was actionable. In support of her motion, the plaintiff submits an affirmation by her attorney, the pleadings and a copy of the Village Code § 152-8 .[3] Given the submissions of the parties, this Court is unable to conduct the required examination of the width, depth, elevation, irregularity, and appearance of the defect, along with the time, place, and circumstances of the injury and therefore cannot determine, as a matter of law, whether the defect was dangerous **(*Perez v 655 Montauk, LLC*,**

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[3]*While the plaintiff states that she would present the original color photographs to the Court upon request , such offer in her moving papers does not assist the plaintiff in meeting her prima facie burden to demonstrate, as a matter of law, her right to summary judgment against the answering defendants.*

supra). In addition, even if the defect is actionable and the plaintiff proves that the Blumberg defendants breached Village Code § 152-8, there are questions of fact regarding which lease provisions control the Blumberg defendants so as to determine whether they retained a sufficient right to re-enter the premises for the purposes of inspection, repair and compliance with the Village Code such as to constitute sufficient retention of control and thus impose liability for injuries caused by the alleged dangerous condition ***(Nikolaidis v La Terna Restaurant***, *supra*; ***Flores v Baroudos***, *supra*). Accordingly, the cross-motion is denied.

The above constitutes the decision and order of the Court.

Dated: JUN 01 2011

Peter Fabrizio
J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**