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

PRESENT: HON. PAUL WOOTEN Justice

PART 7

PHYLLIS HORSLEY,

Plaintiff,

- against-

R.S.M. REALTY COMPANY, R.S.M. REALTY CORP., ROBIN REALTY, LLC, 1465 THIRD AVENUE, LLC, 1465 THIRD AVENUE RESTAURANT CORP., GEORGE A. BOWMAN, INC. and ARRIBA ARRIBA MEXICAN RESTAURANTS, INC. d/b/a ARRIBA ARRIBA,

Defendants.

INDEX NO. 119063/2006

MOTION DATE

MOTION SEQ. NO. 004

MOTION CAL. NO.

The following papers, numbered 1 to 5, were read on this motion for summary judgment by defendant 1465 Third Avenue Restaurant Corp., pursuant to CPLR 3212.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2,3
Replying Affidavits (Reply Memo)	4,5

Cross-Motion: ☐ Yes ■ No

This is a negligence trip-and-fall action by plaintiff Phyllis Horsley ("plaintiff") to recover damages for injuries she allegedly sustained when she tripped and fell on a sidewalk abutting two buildings located at 1465 Third Avenue ("1465 Third") and 1463 Third Avenue ("1463 Third"), New York, New York, purportedly due to a height differential and a "seam" or "groove" in the sidewalk. Defendants are R.S.M. Realty Company ("R.S.M. Co."), R.S.M. Realty Corp. ("R.S.M. Corp."), Robin Realty, LLC ("Robin"), 1465 Third Avenue, LLC ("1465 LLC"), 1465 Third Avenue Restaurant Corp. ("Restaurant Corp."), George A. Bowman, Inc. ("Bowman") and

Arriba Arriba Mexican Restaurants, Inc. d/b/a Arriba Arriba ("Arriba Arriba Restaurant").[1] At the time of the incident, 1465 Third was owned by 1465 LLC and leased to Restaurant Corp., and 1463 Third was owned by R.S.M./Robin and leased to an entity that is not a party to this action.

Plaintiff alleges in the bill of particulars that Restaurant Corp., 1465 LLC and R.S.M./Robin were negligent in failing to maintain and repair the sidewalk where the incident occurred. In their answer to the second amended complaint, 1465 LLC and Bowman bring a cross-claim against Restaurant Corp. seeking indemnification and contribution in the event that plaintiff obtains a judgment against them, on the basis that any damage sustained by plaintiff was due to Restaurant Corp.'s negligence. The Note of Issue was filed on April 26, 2010. Before the Court is Restaurant Corp.'s motion for summary judgment, pursuant to CPLR 3212, seeking dismissal of the complaint and all cross-claims as against it on the grounds that: (1) Restaurant Corp., as lessee of 1465 Third, had no duty to maintain or repair the sidewalk; (2) plaintiff has failed to adequately identify where she fell or the cause of her fall; and (3) Restaurant Corp. did not create the alleged defective condition or have actual or constructive notice of a defect in the sidewalk. Plaintiff has responded in opposition to the motion, and 1465 LLC and Bowman have also filed an opposition. Restaurant Corp. has filed reply papers.

BACKGROUND

In support of its summary judgment motion, Restaurant Corp. submits, *inter alia*, an affidavit of its Vice-President, Eugene Lennon ("Lennon"); plaintiff's depositions; a deposition of Robert Von Ancken ("Von Ancken"), a principal of 1465 LLC; a deposition of Eugene Lennon ("Lennon"), the owner of Gael Pub; the lease between 1465 LLC and Restaurant Corp. for 1465 Third; photographs of the accident scene; and the bill of particulars. Plaintiff submits no evidence in opposition and relies upon the exhibits submitted by Restaurant Corp. In support of

[1] R.S.M. Co., R.S.M. Corp. and Robin are referred to collectively as "R.S.M./Robin." The action as against Arriba Arriba Restaurant has been discontinued.

their opposition, 1465 LLC and Bowman submit portions of Von Ancken's deposition; the lease for 1465 Third; and their answer to the second amended complaint. The following facts are undisputed.

A. The Incident

According to plaintiff's deposition testimony, on August 22, 2006, plaintiff was walking on the sidewalk between two buildings located at 1465 Third and 1463 Third at around 6:30 p.m. The two buildings were occupied by businesses -- 1465 Third by an Irish Pub known as Gael Pub, and 1463 Third by a Mexican Restaurant known as Arriba Arriba Restaurant. It was still daylight and the weather was clear.

There were two blocks of sidewalk in front of the two buildings, one of which plaintiff alleges was more than an inch higher than the other. Plaintiff was looking straight ahead as she walked, and when she reached the section that was higher she tripped on the sidewalk and fell to the ground resulting in alleged injuries. She claims that she tripped on a "seam" or "groove" in the sidewalk, and described what caused her to fall as follows:

> "Q. Can you describe the seam?
>
> A. Yes, I was walking and the part of the sidewalk that I was leaving was a little lower than the sidewalk I was approaching and in that seam in the sidewalk, the sidewalks are in blocks. In that seam in the sidewalk, there was a large flaw and the part I was approaching was a little higher, quite a bit higher than the one I left. It caught my foot, it caught my shoe and I couldn't stay on my feet" (Not. of Mot., Ex. O at 10).

Plaintiff also testified that the portion of the sidewalk where she fell was a "very rough area like a groove, the sidewalk wasn't smooth" (*id.* at 11). She indicated that her fall was caused by both the groove that was missing concrete and the height differential. She identified the area where the accident occurred in photographs, indicating that the spot where she fell was somewhere in the middle area.

Plaintiff was a resident of the neighborhood and had often walked in the area where the

accident occurred. She had never previously noticed a height differential in the sidewalk, and was not aware of any prior accidents or complaints about that portion of the sidewalk.

B. The Lease

On the date of the accident, 1465 Third was owned by 1465 LLC and leased to Restaurant Corp., pursuant to a written lease that was executed on September 22, 2004 ("the Lease"). With respect to maintenance and repairs of the sidewalk, the Lease provided at Paragraph 4 in pertinent part:

> "Tenant shall . . . take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense make all non-structural repairs thereto as and when needed to preserve them in good working order and condition" (*id.*, Ex. R).

In addition, Paragraph 72 of Rider #2 to the Lease, which was controlling in the event of a conflict with the main lease document, provided in pertinent part:

> "Supplementing and modifying Paragraph 4 -- Throughout the term of this Lease, the Landlord at its expense shall be solely responsible for making all structural repairs and keeping in repair the utility lines servicing the premises and all the exterior of the building including the roof, exterior walls and sidewalk. . . ." (*id.*)

C. 1465 Third

Restaurant Corp. took possession of 1465 Third in February 2005. Prior to taking possession, Lennon, the owner of Gael Pub, and his business partner William Ferguson, the President of Restaurant Corp., performed a visual inspection of the premises that included inspecting the sidewalk. According to Lennon's affidavit, they did not observe any cracks or defects in the sidewalk at that time. Lennon was also present at the premises four to five times per week around the time of plaintiff's accident, and never observed any defects or cracks in the sidewalk prior to the date of the accident. Lennon was not aware of any prior accidents resulting from a cracked or broken sidewalk near the front of Gael Pub, and had not received any complaints regarding the sidewalk.

Lennon further stated in his affidavit that Restaurant Corp. did not make any repairs or alterations to the sidewalk prior to or during its possession of the premises, nor had it made any special use of the sidewalk. Lennon testified at his deposition that it was his understanding that the owner of the building was responsible for maintenance of the sidewalk regarding cracks and "things of that nature" (*id.*, Ex. Q at 14). He also testified that Gael Pub did not have a sidewalk café in August 2006, and did not place tables and chairs on the outside of the premises at that time.

Von Ancken, a partial owner of 1465 LLC, testified at his deposition that the exterior maintenance of 1465 Third was handled by a management company. If there was a crack in the sidewalk, management would handle it upon being notified by the tenant. Von Ancken believed that the Lease required Restaurant Corp. to notify the manager of any sidewalk defects that needed to be repaired, though he did not identify a specific provision in the Lease imposing such a requirement. Von Acken was aware of no prior complaints regarding the condition of the sidewalk, and Restaurant Corp. never informed 1465 LLC of any of the alleged defects that are at issue in the instant action.

DISCUSSION

Restaurant Corp. argues that it is entitled to summary judgment dismissing the complaint and all cross-claims against it, as a matter of law, on three grounds: first, it had no duty under the Lease to maintain or repair the sidewalk; second, any inference of negligence on its part would be mere speculation because plaintiff is unable to establish where she fell or what caused her to fall; and third, it did not create or have actual or constructive notice of the alleged defective condition in the sidewalk. Plaintiff opposes the motion as unsupported by the evidence. 1465 LLC and Bowman assert that the motion should be denied on the basis that Restaurant Corp. is liable to 1465 LLC for indemnification and contribution because Restaurant Corp. failed to advise 1465 LLC of the alleged defects in the sidewalk, as Von Ancken indicated

was required by the Lease.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

Restaurant Corp.'s first and threshold argument is that there is no basis upon which to impose liability for negligence against it because Restaurant Corp. had no duty under the Lease to maintain or repair the sidewalk. It argues that under New York City Administrative Code ("Administrative Code") § 7-210, the abutting property owner, not its tenant, had the duty of maintaining the sidewalk in a reasonably safe condition and making any necessary repairs. It

also claims that 1465 LLC did not pass its duty to maintain and repair the sidewalk onto Restaurant Corp., since the Lease affirmatively states in Paragraph 72 of Rider #2 that it was the building owner's duty to maintain and repair the sidewalk.

Plaintiff argues that Restaurant Corp. had a duty to warn of potentially dangerous conditions that were not readily observable, and that Restaurant Corp. was aware of the cracked and unlevel sidewalk and had ample opportunity to repair it but instead chose to do nothing. Plaintiff also adopts 1465 LLC and Bowman's argument that Restaurant Corp. was obligated by the Lease to notify 1465 LLC of any defective conditions on the sidewalk.

In reply, Restaurant Corp. argues that the contention that it was obligated to advise 1465 LLC of any sidewalk defects is immaterial to 1465 LLC's duty to maintain and repair the sidewalk. It also argues that 1465 LLC has failed to dispute that Administrative Code § 7-210 and Paragraph 72 of Rider #2 to the Lease placed the burden of maintaining and repairing the sidewalk on 1465 LLC.

The Court finds that Restaurant Corp. has established its entitlement to judgment as a matter of law dismissing plaintiff's negligence claims as against it. Generally, liability for injuries sustained as a result of dangerous and defective conditions on public sidewalks is placed on the municipality and not the abutting landowner or tenant (*see Biondi v County of Nassau*, 49 AD3d 580, 580 [2d Dept 2008]). It is well established, however, that an "abutting landowner or tenant will be liable to a pedestrian injured by a defect in a sidewalk where the landowner or the tenant negligently constructed or repaired the sidewalk, otherwise caused the defective condition, caused the defect to occur by some special use of the sidewalk, or breached a specific ordinance or statute which obligates the owner to maintain the sidewalk" (*id.*; *see also Collado v Cruz*, 81 AD3d 542, 542 [1st Dept 2011]; *Taubenfeld v Starbucks Corp.*, 48 AD3d 310, 311 [1st Dept 2008]; *Ali v Sequins Int'l, Inc.*, 2011 WL 2464748, at *3 [Sup Ct Queens County 2011]).

Administrative Code § 7-210 imposes a non-delegable duty upon the property owner to

maintain and repair the sidewalk abutting its premises, and specifically imposes liability upon the property owner for injuries resulting from a violation of the statute (*see Collado*, 81 AD3d at 542; *Stein v 1394 Housing Corp.*, 2011 WL 1759802, at *1 [Sup Ct NY County 2011]). Section 7-210 provides in pertinent part:

> "It shall be the duty of the owner of real property abutting any sidewalk . . . to maintain such sidewalk in a reasonably safe condition. 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. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk."

Thus, Restaurant Corp., which was undisputedly the tenant of the property abutting the purported accident location, could only be liable to plaintiff if it actually created the condition that caused plaintiff's injuries, made repairs to the sidewalk before the accident, or caused the defect to occur by some special use of the sidewalk (*see Collado*, 82 AD3d at 542; *Otero v City of New York*, 213 AD2d 339, 339-40 [1st Dept 1995]; *Williams v Azeem*, 62 AD3d 988, 989 [2d Dept 2009]; *Biondi*, 49 AD3d at 580-81; *Ali*, 2011 WL 2464748, at *3).

Here, Restaurant Corp. has proffered sufficient evidence to establish, prima facie, that none of the elements necessary to impose liability upon an abutting tenant are present (*see Collado*, 81 AD3d at 542; *Biondi*, 49 AD3d at 580-81). Notably, plaintiff does not allege that Restaurant Corp. created the condition that caused her to trip-and-fall in the sidewalk, but premises her claims upon a failure to maintain and repair the sidewalk. Indeed, there is no evidence demonstrating that Restaurant Corp. actually created the defects upon which plaintiff's claims are based (*see Collado*, 81 AD3d at 542 [granting summary judgment dismissing complaint as against tenant premised on sidewalk liability where "it was undisputed that the tenant did not create the condition or make special use of the sidewalk"]).

Furthermore, Lennon's affidavit indicates that Restaurant Corp. did not make any repairs or alterations to the sidewalk prior to or during its possession of the premises (*see Tucciarone v Windsor Owners Corp.*, 306 AD2d 162, 163 [1st Dept 2003]; *Santana v City of New York*, 282 AD2d 208, 209 [1st Dept 2001]). Lennon, Von Ancken, and plaintiff herself also testified that they were not aware of any prior complaints, defects or accidents regarding the sidewalk. Nor is there any evidence establishing some special use of the sidewalk (*see Weiskopf v City of New York*, 5 AD3d 202, 202 [1st Dept 2004] [quotations omitted] ["A special use has been characterized as involving the installation of some object in the sidewalk or street or some variance in the construction thereof"]), or any allegation that a special use actually caused the sidewalk defects at issue here (*see Santana*, 282 AD2d at 208 [use of public sidewalk in front of private school as a children's playground constituted a special use; however, as the special use did not cause the crack on which the plaintiff tripped and fell, the school could not be held liable]; *McGee v Denson*, 2008 WL 5005242, at *5 [Sup Co Queens County 2008] [in order to impose liability, "the special use must be the cause of the sidewalk defect which allegedly resulted in injury"). To the extent plaintiff alleges that the premises were used as a sidewalk café, Lennon testified that at the time of the accident Gael Pub did not have a sidewalk café or place tables and chairs outside, a fact which remains undisputed.

In opposition, plaintiff has failed to raise a triable issue of fact (*see Biondi*, 49 AD3d at 581; *Cannizzaro v Simco Mgt. Co.*, 26 AD3d 401, 402 [2d Dept 2006]). She submits no evidence in opposition to Restaurant Corp's summary judgment motion, and it is well-settled that "rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact" (*Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 [1st Dept 2010]).

Moreover, plaintiff's reliance upon 1465 LLC and Bowman's argument that Restaurant Corp. should be held liable because it failed to give notice of the allegedly defective condition to

1465 LLC does not raise a triable issue of fact. Plaintiff points to no provision in either the Lease or Administrative Code § 7-210 imposing such a requirement. In any event, such a provision in the Lease would not impose a duty to a third party, such as plaintiff (*see Collado*, 81 AD3d at 542 ["Provisions of lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party, such as plaintiff"]; *Tucciarone*, 306 AD2d at 163).

Therefore, since Restaurant Corp. has met its prima facie burden of proof, and plaintiff has failed to raise a triable issue of fact requiring a trial, summary judgment dismissing the complaint as against Restaurant Corp. is warranted (*see Collado*, 81 AD3d at 542; *Ali*, 2011 WL 246478, at *3). In view of this finding, the Court need not address Restaurant's Corp.'s two additional grounds for relief. The Court further notes, however, that were it to consider Restaurant Corp.'s second argument premised upon plaintiff's alleged failure to adequately identify the location or cause of her accident, the Court would find that plaintiff's testimony was not speculative since plaintiff testified that the accident was due to a height differential and a "seam" or "groove" in the middle area of the sidewalk, and her testimony was supported by photographic evidence (*see Aller v City of New York*, 72 AD3d 563, 564 [1st Dept 2010] ["The court erred in finding plaintiff's deposition testimony to have been unduly speculative with respect to the location and cause of her injury since she clearly testified that she fell due to 'unlevel' ground in the middle of the sidewalk between two buildings. This was consistent with the photographic evidence showing an uneven sidewalk at the location of the accident."]).

With respect to the cross-claims, 1465 LLC and Bowman seek indemnification and contribution from Restaurant Corp. on the basis that any damage to plaintiff was the result of the negligence of Restaurant Corp. Their sole argument in opposition to the summary judgment motion is that Restaurant Corp. is liable to 1465 LLC since it failed to advise 1465 LLC of any sidewalk defects in front of the premises. Although they claim that the Lease imposed an obligation upon Restaurant Corp. to provide such notice, they reference no specific provision in

the Lease requiring such notice.

The Court finds that 1465 LLC and Bowman have failed to raise a triable issue of fact sufficient to defeat summary judgment dismissing their cross-claims against Restaurant Corp. (*see Cucinotta v City of New York*, 68 AD3d 682, 684 [1st Dept 2009]). They cite to no provision in the Lease providing for contractual indemnification or contribution. Further, Restaurant Corp. cannot be held liable to 1465 LLC and Bowman for common-law indemnification and contribution since the Court finds that Restaurant Corp. is not liable to plaintiff for negligence (*see id.* [granting summary judgment dismissing owner's cross-claims for common-law and contractual indemnification against tenant arising from sidewalk trip-and-fall where condition of sidewalk was not due to tenant's negligence]; *Priestly v Montefiore Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]; *Correia v Professional Date Mgmt.*, Inc., 259 AD2d 60, 65 [1st Dept 1999]; *Ali*, 2011 WL 246478, at *3). 1465 LLC and Bowman's opposition based upon the failure to give notice of the alleged sidewalk defects likewise fails to raise a triable issue of fact, as they have cited to no provision in the Lease imposing such a requirement (*cf. Collado*, 81 AD3d at 542). Summary judgment dismissing 1465 LLC and Bowman's cross-claims against plaintiff is thus warranted.

Accordingly, Restaurant Corp.'s motion for summary judgment dismissing the complaint and all cross-claims against it is granted.

For these reasons and upon the foregoing papers, it is,

ORDERED that Restaurant Corp.'s motion for summary judgment dismissing the complaint and all cross-claims as against it is granted, and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED that the remainder of the action shall continue; and it is further,

ORDERED that Restaurant Corp. shall serve a copy of this Order, with notice of entry, upon all parties.

This constitutes the Decision and Order of the Court.

Dated: June 29, 2011

Paul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**
Check if appropriate: ☐ **DO NOT POST**

FILED

JUL 05 2011

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