[* 1]

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

PRESENT: _____ PART _____
*Justice*

Index Number : 114283/2008
POSADA, MARIO
vs.
572 WEST 173RD STREET REALTY
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

FILED
DEC 18 2012
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
DEC 18 2012
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

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

Dated: 12/14/12

_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

----------x

MARIO POSADA,

Plaintiff,

Index No. 114283/08

-against-

**DECISION/ORDER**

572 W. 173RD STREET REALTY CORP., KIMBERLY NAILS, INC., GABRIEL PIZHA and MARIA C. PIZHA,

Defendants.

----------x

**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

| Papers | Numbered |
|---|---|
| Notice of Motion and Affidavits Annexed | 1 |
| Affirmations in Opposition to the Motion | 2 |
| Replying Affidavits | 3 |
| Exhibits | 4 |



Plaintiff commenced the instant action to recover damages for personal injuries he allegedly sustained when he tripped and fell down a stairway leading from the sidewalk to the basement-level of a building on St. Nicholas Avenue in Manhattan on February 22, 2008. Defendants Kimberly Nails, Inc. ("Kimberly Nails"), Gabriel Pizha ("Mr. Pizha") and Maria C. Pizha ("Mrs. Pizha") (hereinafter the "moving defendants") now move for an Order pursuant to CPLR § 3212 for summary judgment dismissing the complaint and any cross-claims asserted against them on the grounds that (1) they are not liable because they were not tenants in the building in which plaintiff fell and that plaintiff has thus sued the wrong party; and (2) they were not liable for clearing the stairway of snow, ice and precipitation because there was a storm in

progress at the time of plaintiff's accident. For the reasons set forth below, the moving defendants' motion is denied.

The relevant facts are as follows. Defendant Kimberly Nails is a nail salon that leases space in a building located at 1252 St. Nicholas Avenue, New York, New York (the "building"). Its lease is for rental of the portion of the building known as Store #2, a street-level storefront which includes the basement-level storefront. Defendants Mr. and Mrs. Pizha own Kimberly Nails. Shortly before plaintiff's accident, the moving defendants leased the basement-level storefront to an entity known as Jacqueline Hair Salon.

Plaintiff testified that on February 22, 2008, he was on his way to meet a real estate agent about renting a room and he arranged to meet said agent at his office which, plaintiff thought, was located in the basement of the building. At plaintiff's deposition, he could not recall the address of the real estate office but testified that the address was printed on the business card given to him by the real estate agent. The address printed on the card was not that of Kimberly Nails, but rather 1228 St. Nicholas Avenue, New York, New York. When plaintiff was shown the business card at his deposition, he could not be sure that that was the card he was given by the real estate agent. However, plaintiff testified that on the date of his accident, he did not look at the address on the business card but that he walked in the direction of the office that rents rooms to which he was directed by his friend selling flowers on the street. He said that when he saw a sign for a "multi-service...apartments & rooms for rent," he erroneously thought this was the office of the agent he was supposed to meet with and attempted to enter the premises. However, Mr. Pizha testified that at no time on or before the date of the accident did a real estate office ever exist in the basement while the property was leased by the moving defendants.

In his bill of particulars, plaintiff alleges that he slipped and fell on the stairway leading from the sidewalk to the basement-level of the building at approximately 3:00 p.m. Plaintiff alleges that the stairway was slippery from precipitation and that its treads, risers, banisters and/or railings were defective. At plaintiff's deposition, he testified that his accident occurred between 4:30 and 5:30 p.m., that it had snowed lightly during the early morning hours but had stopped at around 11:00 a.m. and that no snow had accumulated on the ground. He further testified that the stairway was a "bit wet," possibly due to the little bit of snow that fell in the morning. Finally, plaintiff testified that after his accident, he sat in the real estate office and waited for medical help.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

The court first turns to the moving defendants' motion for summary judgment on the ground that plaintiff has sued the wrong party. In the instant case, the moving defendants have established their prima facie right to summary judgment as they have shown that the plaintiff did not slip and fall at the premises leased by the moving defendants. Plaintiff testified that he fell on a stairway leading from the sidewalk to the basement-level storefront where a hair salon and

real estate office were located. However, Mr. Pizha testified that no real estate office existed in the basement-level premises on the date of plaintiff's accident. Mr. Pizha testified and affirmed that the only business located in the basement-level of the premises was Jacqueline Hair Salon.

However, in response, plaintiff has raised an issue of fact sufficient to defeat the moving defendants' motion for summary judgment. Plaintiff has established through photographs of the moving defendants' storefront that a sign for "Multi Service - Apartments and Rooms for Rent" appeared in front of the gate leading to the basement-level storefront on the date of plaintiff's accident. Even if this is not the real estate office plaintiff was attempting to locate, there exists an issue of fact as to whether this was the stairway on which plaintiff slipped and fell because he thought that he had found the correct office. Although Mr. Pizha testified that he never placed the sign in front of the gate, it is entirely possible that Jacqueline Hair Salon put the sign there and that the hair salon was also operating as a real estate agency. Thus, as an issue of fact exists as to whether plaintiff's accident occurred on the moving defendants' premises, the moving defendants' motion for summary judgment must be denied.

To the extent the moving defendants' assert for the first time in their reply papers that even if plaintiff has sued the correct entity, defendant 572 W. 173rd Street Realty Corp. ("572"), the owner of the building, is the party liable for any structural defect to the subject stairway that may have caused or contributed to plaintiff's accident pursuant to their lease, that argument is without merit. The court will not address a movant's argument made for the first time in its reply papers as "the function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion". *Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560, 562 (1st Dept 1992); *see also*

*Lumbermens Mutual Casual Company v. Morse Shoe Company*, 218 A.D.2d 624 (1st Dept 1995)("[a]rguments advanced for the first time in reply papers are entitled to no consideration by a court entertaining a summary judgment motion"); *see also Allstate Insurance Company v. Dawkins*, 52 A.D.3d 826 (2d Dept 2008).

The court next turns to the moving defendants' motion for summary judgment on the ground that there was a storm in progress at the time of plaintiff's accident. The "storm in progress" doctrine holds that "the duty of a landowner to remedy a dangerous condition caused by a storm is suspended while the storm is in progress and for a reasonable time after it has ceased, even if there is a lull in the course of the storm." *Thompson v. Menands Holding, LLC*, 32 A.D.3d 622, 624 (3d Dep't 2006). The rule is available in order to "relieve the worker(s) of any obligation to shovel snow while continuing precipitation or high winds are simply re-covering the walkways as fast as they are cleaned, thus rendering the effort fruitless." *Powell v. MLG Hillside Assoc.*, 290 A.D.2d 345 (1st Dept 2002). Where the record makes clear that plaintiff's accident occurred while the storm was still in progress, defendants may avail themselves of the "storm in progress" defense as a matter of law. *See Id*; *see also Kay v. Flying Goose*, 203 A.D.2d 332 (2d Dept 1994). However, "if the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation, then the rationale for continued delay abates, and common-sense would dictate that the rule not be applied." *Powell*, 290 A.D.2d at 345-346. "Once there is a period of inactivity after cessation of the storm, it becomes a question of fact as to whether the delay in commencing the cleanup was reasonable." *Id.* at 346.

In the instant action, the moving defendants' motion for summary judgment on the

ground that there was a storm in progress at the time of plaintiff's accident is denied as they have not established that there was a storm in progress as a matter of law. The moving defendants have provided a climatology chart establishing that the snowfall on the date of plaintiff's accident totaled six inches and was followed by freezing rain. However, the climatology chart also shows that in the 2-3 hours prior to plaintiff's accident, approximately .01 inches of precipitation fell per hour. Because only trace amounts of snow or rain fell in the 2-3 hours prior to plaintiff's accident, a triable issue of fact exists as to whether the moving defendants should have begun to clear the area prior to plaintiff's accident. *See Powell*, 290 A.D.2d 345, 346 (finding an issue of fact as to whether defendants should have cleared the area where "trace amounts [of precipitation] fell during the 2-3 hours" prior to plaintiff's accident); *see also Tucciarone v. Windsor Owners Corp.*, 346 A.D.2d 162 (1st Dep't 2003)(finding an issue of fact as to whether any delay by appellants in commencing their clean up was reasonable where the snowfall had ceased for several hours by the time of plaintiff's alleged incident.) Further, plaintiff testified that the snowfall ended at approximately 11:00 a.m. on the date of his accident, which suggests that there was a sufficient amount of time for the moving defendants to begin clearing the area. As there exists an issue of fact as to whether any delay in clearing the stairway was reasonable as there was no storm in progress as a matter of law, the moving defendants' motion for summary judgment must be denied.



Accordingly, the moving defendants' motion for an order pursuant to CPLR § 3212 for summary judgment dismissing the complaint and any cross-claims asserted against them is denied. This constitutes the decision and order of the court.

Dated: 12/14/12

Enter: _____
J.S.C.