

Ayala v Associated Supermarket, I Bldg Co., Inc.

2013 NY Slip Op 30102(U)

January 22, 2013

Supreme Court, New York County

Docket Number: 109846/2009

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: KING-COHAN
Justice

PART 36

Index Number : 109846/2009
AYALA, MARGARITA
vs.
ASSOCIATED SUPERMARKET
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 006

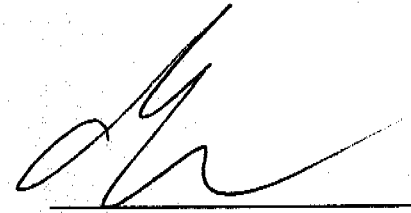
The following papers, numbered 1 to _____, were read on this motion to/for Summary judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1, 2
Answering Affidavits — Exhibits _____ No(s). 3, 4
Replying Affidavits _____ No(s). 5

Upon the foregoing papers, it is ordered that this motion ~~is~~ for summary judgment
by I Building Co, Inc, Irvyoy Partners, L.P.
and Bldg Mgmt Co, Inc. is granted in
accordance with the attached memorandum
decision.

FILED
JAN 23 2013
COUNTY CLERKS OFFICE
NEW YORK

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

Dated: 1-22-13


_____, J.S.C.

JUDGE DORIS LING-COHAN

- 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

FILED

JAN 23 2013

COUNTY CLERK'S OFFICE
NEW YORK

-----X
Margarita Ayala,

Plaintiff,

Index
Number:

-against-

FILED

109846/2009

Associated Supermarket, I Bldg
Co., Inc., Irvjoy Partners, L.P.,
Bldg Management Co., Inc., Janico
Meat Corp. and Triple Food Corp.

2013

Motion Seq.
No.: 006

COUNTY CLERK'S OFFICE
NEW YORK

Defendants.

-----X

Doris Ling-Cohan, J.:

I Building Co., Inc. (I Bldg.), Irvjoy Partners, L.P.
(Irvjoy), and Bldg Management Co., Inc. (Bldg.) (collectively,
the Landlord Defendants) move for summary judgment, pursuant to
CPLR 3212, dismissing plaintiff's complaint against them or,
alternatively, granting them summary judgment on their cross
claims for contractual and common-law indemnity against Triple
Food Corp. (Triple), Associated Supermarket (Supermarket) and
Janico Meat Corp. (Janico) (collectively, Associated).

Parties and Their Allegations

Plaintiff alleges that she slipped and fell on January 18,
2009 on the sidewalk outside the Associated supermarket located
at 125 East 116th Street, New York, New York (the Premises)
(complaint, ¶ 72; bill of particulars, items 1-3). I Bldg and
Irvjoy are the owners of the Premises and Bldg is the owners'
managing agent, which collects the rent (Wolf affidavit, ¶ 2).

Associated operates a supermarket at the Premises, pursuant to a net-net lease dated July 14, 1980 (the Lease), an assignment from the prior tenant dated May 22, 1980 (the Assignment) and an extension agreement dated August 10, 1999 (the Extension Agreement).

Plaintiff contends that, on January 18, 2009, at about 2:30 P.M., after she finished her shopping, she exited the Premises and slipped on a patch of ice on the ground, about five steps from the exit (plaintiff EBT, at 9-11, 16). She states that she fell backward onto the ground, hitting her head and her left foot and causing a fracture of her left fibula (*id.* at 16-18; bill of particulars, item 12). She also states that it had snowed the prior day, that she did not see any ice patches on 116th Street prior to her fall, that an unnamed store employee saw her fall and that there was no snow but only ice at the location of her fall outside the Premises (plaintiff EBT, at 17, 20, 77, 82).

Associated contends that store employees routinely clean the sidewalk in front of the premises of any debris, including snow and ice, as soon as the store opens in the morning, that on January 18, 2009, the porter had cleaned the sidewalk that morning and that the sidewalk was clear with no ice, but that it was "moist" and that there were a few snow flurries (Rodriguez EBT, at 9, 12, 14, 15, 17). According to Associated, the store manager saw plaintiff after her fall and heard her say that she

fell because her knee gave out and that there was no ice or snow at the location where plaintiff fell (*id.* at 14, 41).

The Landlord Defendants contend that I Bldg and Irvjoy are out-of-possession landlords, that Bldg only collects rent and that, under the Lease, the Assignment and the Extension Agreement, they have no responsibility for the condition of the Premises or of the sidewalk in front of it (Wolf affidavit, ¶¶ 2-4; Serrano EBT, at 12). They further assert that Associated actually performed debris removal, cleaning and maintenance of the premises and the sidewalk in front of it and that, consequently, they had no notice of the sidewalk's condition at the time of plaintiff's fall (Wolf affidavit, ¶¶ 4-5). They therefore seek dismissal of plaintiff's complaint and any cross claims against them.

Summary Judgment

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In

deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; *Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]).

Premises Liability

Generally, a landowner must act as a reasonably prudent person in maintaining its property in a reasonably safe condition under all the circumstances, including the likelihood of injury, the potential seriousness of injury and the burden of avoiding the risk (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003]). Additionally, a party must be aware of the alleged defective or dangerous condition, either through having created it, actual knowledge of the condition or constructive notice of it through the defect's visibility for a sufficient amount of time prior to the accident to enable a defendant to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Moreover, "[a] defendant moving for summary judgment in a slip-and-fall action has the initial burden of showing that it neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff's injury" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011];

Amendola v City of New York, 89 AD3d 775, 775 [2d Dept 2011];
Schiano v Mijul, Inc., 79 AD3d 726 [2d Dept 2010]).

Out-of-Possession Landlord

"An out-of-possession landlord is generally not liable for the condition of the demised premises unless the landlord has a contractual obligation to maintain the premises, or [the] right to reenter in order to inspect or repair, and the defective condition is 'a significant structural or design defect that is contrary to a specific statutory safety provision'" (*Ross*, 86 AD3d at 420 [internal citation omitted]; *Kase v H.E.E. Co.*, 95 AD3d 568, 569 [1st Dept 2012]). Also, "snow or ice is not a significant structural or design defect" (*Bing v 296 Third Ave. Group, L.P.*, 94 AD3d 413, 414 [1st Dept 2012], *lv denied* 19 NY3d 815 [2012]).

Discussion

The court notes that Associated has stated that it has no opposition to the dismissal of plaintiff's complaint against the Landlord Defendants (Lent affirmation, ¶ 2). While plaintiff opposes the motion, she has failed to present any evidence to rebut the Landlord Defendants' showing that I Bldg and Irvjoy were out-of-possession landlords under a net-net lease that transferred responsibility for maintenance of the Premises to Associated, that Bldg merely collected rents for I Bldg and Irvjoy and that Associated exercised its responsibility for

maintenance of the Premises by having the porter and, if necessary, other employees, clean the sidewalk in front of the Premises (Rodriguez EBT, at 12, 37-38) and that the porter had cleaned the sidewalk that morning (*id.* at 15).

Since "the undisputed evidence showed that [the Landlord Defendants were] out-of-possession landlord[s]," they are entitled to summary judgment dismissing the complaint against the (*Asante v JPMorgan Chase & Co.*, 93 AD3d 429, 430 [1st Dept], *lv denied* 19 NY3d 813 [2012]; *Bing*, 94 AD3d at 414). The allegedly defective condition of ice on the sidewalk is not the type of structural defect that an out-of-possession landlord would be responsible for and a landlord who has shifted responsibility for maintenance to a tenant is not in a position to have notice of this type of condition (*id.*; *Ross*, 86 AD3d at 420). Accordingly, the Landlord Defendants' motion for summary judgment dismissing the complaint against them must be granted.

Order

It is, therefore,

ORDERED that the motion of I Bldg Co., Inc., Irvjoy Partners, L.P. and Bldg Management Co., Inc. for summary judgment dismissing the complaint and any cross claims against them is granted, and said complaint and any cross claim against said parties are dismissed in their entirety, with costs and disbursements as taxed by the Clerk of the Court upon submission

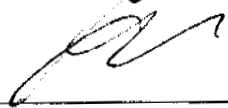
of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly in favor of said parties; and it is further

ORDERED that the action is severed and continued against the remaining parties; and it is further

ORDERED that within 30 days of entry of this order, movant shall serve a copy upon all partes, with notice of entry.

Dated: January 22, 2013

FILED
JAN 23 2013
COUNTY CLERKS OFFICE
NEW YORK



Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\ayala.michael saks.wpd