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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Saliann Scarpulla Justice

PART 19

Index Number : 102265/2010
RAISANEN, NANCY
vs.
ARTE LIRA
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 and cross motion are determined in accordance with the accompanying decision/order. Motions 002 + 003 are consolidated for disposition

RECEIVED JAN 24 2013 MOTION SUPPORT OFFICE NYS SUPREME COURT - CIVIL

FILED JAN 24 2013 NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 1/22/13

Saliann Scarpulla 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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NANCY RAISANEN,

Plaintiff,

Index No.: 102265/10
Submission Date: 10/17/12

- against-

ARTE LIRA D/B/A ARTEPASTA & LIPS, ROSEBUD REALTY, LLC, DANIEL PERLA ASSOCIATES, LLP AND 81 GREENWICH PARTNERS, LLC,

DECISION AND ORDER

Defendants.

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For Plaintiff:
Goidel & Siegel, LLP
122 East 42nd Street
New York, NY 10168

For Defendants Arte Lira d/b/a ArtePasta & Lips & Rosebud Realty, LLC:
Lewis Brisbois Bisgaard & Smith LLP
77 Water Street, 21st Floor
New York, NY 10005

For Defendants Daniel Perla Associates, LLP and 81 Greenwich Partners, LLC:
Rebore, Thorpe & Pisarello, P.C.
500 Bi-County Boulevard, Suite 214N
Farmingdale, NY 11735

Papers considered in review of these motions and cross motion for summary judgment:

Notice of Motion 1
Notice of Motion 2
Notice of Cross Motion 3
Affs in Opp 4-6
Reply 7

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendants Arte Lira d/b/a Artepasta & Lips ("Arte") and Rosebud Realty, LLC ("Rosebud") move for summary judgment dismissing the complaint and cross claims insofar as asserted against them; plaintiff Nancy Raisanen ("Raisanen") cross moves for summary judgment on the issue of

liability, or in the alternative, to strike defendants' answers for willful spoliation of evidence; and defendants Daniel Perla Associates, LLP ("Perla") and 81 Greenwich Partners, LLC ("Greenwich") move for summary judgment dismissing the complaint and cross claims insofar as asserted against them, or in the alternative, for conditional summary judgment on their cross claim for common law indemnification asserted against defendant Arte Lira d/b/a Artepasta & Lips.

On February 17, 2009, Raisanen slipped and fell on the sidewalk in front of Arte's restaurant on Bank Street at 81 Greenwich Avenue. Raisanen commenced this action seeking to recover damages for the injuries she sustained to her wrist as the result of her fall. Defendant Arte owned and operated the restaurant. Defendants Perla, Rosebud and Greenwich were the fee owners of the premises in which Arte's restaurant was located. Pursuant to a triple net lease, Rosebud was responsible for management and control of the premises.

In a supplemental bill of particulars, Raisanen claimed that she slipped on an icy condition. She alleged that the defendants were negligent in their use of water or a cleaning agent to hose down the subject sidewalk in cold weather, thereby causing an accumulation of ice on the sidewalk and causing the sidewalk to be slippery and unsafe.

At an examination before trial, Raisanen testified that the weather was cold and dry on the day of her accident and it had not snowed or rained during the week prior to the accident. She did not see any ice on the ground before she fell. She claimed that the

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sidewalk was completely dry except for the section where she slipped. She did not know how long ice had been on the ground prior to her accident. When she fell, she did not notice if her clothes were damp or wet. She did not see any ice after she fell either, because she claims she was in "too much pain to observe much of anything." After she fell, she had to "gingerly" walk off of the spot where she had fallen, into the street. She claimed that the sidewalk was icy because someone from Arte had watered the sidewalk, and the water had frozen due to the cold weather. However, she did not see anyone from Arte water the sidewalk where she fell and did not know of anyone else who saw someone from Arte water the sidewalk where she fell.

According to one of Arte's owners, Edward Lafaye ("Lafaye"), general sidewalk cleaning was performed daily prior to the restaurant's opening. In good weather, when the outdoor café was open, employees would hose down the sidewalks as well. Lafaye explained that the outdoor café was rarely open in January or February. There were also times when the sidewalk would be hosed down if the café was not open, if the sidewalk needed to be cleaned. It was the porter's decision whether to hose down the sidewalk on any given day. However, the porters were instructed to not hose down the sidewalk if it was raining or snowing or if it was so cold that the water from the hose would freeze. Porters would also water the plants that were located in planter boxes outside of the restaurant.

Lafaye further explained that Arte ceased operations in May 2010 and all records and receipts were thrown out. Lafaye testified that there is nothing he could do and there is no one with whom he could speak to determine whether the sidewalk was hosed down with water on the day of Raisanen's accident. Lafaye further provided that Arte never received any complaints with regard to the sidewalk being cleaned with water.

Arte and Rosebud now move for summary judgment dismissing the complaint and cross claims insofar as asserted against them. In support of their motion, they argue that the claims asserted against them must be dismissed because (1) Raisanen can not identify how or why she fell, or what caused her to fall; and (2) they did not create or have actual or constructive notice of any alleged condition that caused Raisanen's fall.

Raisanen cross moves for summary judgment on the issue of liability, or in the alternative, to strike defendants' answers for willful spoliation of evidence. Raisanen first argues that she is entitled to summary judgment on the issue of liability because the defendants created the condition that caused her fall.

In support of her position, she submits the June 22, 2012 affidavit of Kevin Taylor, in which he averred that he lived across the street from Arte and saw an Arte employee hose down the subject sidewalk on the day of Raisanen's accident and leave the sidewalk wet with water; and the July 19, 2012 affidavit of Ron Decavalcanti, who maintained that he walked on the subject sidewalk every morning on his way to work, and provided that he saw an Arte employee hose down the sidewalk each morning during the winter of 2009,

regardless of the weather. She further submits her own affidavit, dated July 18, 2012, in which she avers that she first noticed the ice on the ground when she slipped and fell.

Raisanen further submits meteorological reports from the National Climatic Data Center, which she claims provide that it was 27 degrees during the hours leading up to Raisanen's accident. Raisanen argues that Arte violated NYC Administrative Code §24-332 by hosing down the sidewalk on the day of her accident. She further argues that defendants can not meet their burden of proving that they did not create or have notice of the condition upon which she fell because they destroyed all of their records.

With regard to spoliation, Raisanen argues that defendants destroyed relevant documents both after they became aware of her claims in May 2009 and after they were served with the summons and complaint in March and April 2010. They did not make any effort to preserve the documents or to notify Raisanen of their intention to destroy them. Then, they did not even inform Raisanen that the documents were destroyed, rather, in their discovery responses, indicated that they were conducting a search for the documents, which they knew had already been destroyed.

In opposition, Arte and Rosebud argue that with regard to spoliation, they were not put on notice that certain evidence would be needed for future litigation until July 21, 2010 when Raisanen, in her bill of particulars, identified the general location, type and cause of the accident for the first time. She first identified the specific cause of her fall in her supplemental bill of particulars in September 2010, four months after Arte's dissolution.

She first demanded copies of documents in September 2010. Further, Raisanen has not established that she is prejudiced by the failure to examine the employee handbook and roster.

They further argue that the non-party affidavits submitted by Raisanen, one of which was provided by her live-in boyfriend Decavalcanti, must be disregarded because (1) the two non-parties were subpoenaed to appear for depositions and did not appear; and (2) the affidavits were contradictory to her prior examination before trial testimony that she did not see anyone water the sidewalk prior to her accident and that she did not know of anyone who saw an Artepasta employee water the sidewalk prior to her accident.

Finally, they argue that the weather reports submitted by Raisanen do not reflect the temperature at the time the sidewalk was allegedly hosed down or at the time of the accident. Rather, the reports only provide the maximum and minimum temperatures for the month.

Defendants Perla and Greenwich move for summary judgment dismissing the complaint and cross claims insofar as asserted against them, arguing that (1) they are out of possession property owners that did not create or have notice of any allegedly dangerous condition on the subject sidewalk; (2) Raisanen can not properly identify the cause of her accident; (3) the cross claims are baseless because Arte was solely responsible for maintenance of the premises, and because the anti-subrogation rule precludes Rosebud's cross claims against Perla and Greenwich. They submit the affidavit of

Greenwich principal Robert DeBenedictis who maintains that Perla and Greenwich did not provide any on-side maintenance or management of the subject building, had no employees working at the subject building and did not maintain any records in connection with the cleaning of the building or employees working at the premises.

In opposition, Arte and Rosebud argue that even though Perla and Greenwich are out of possession owners, they can still be held liable pursuant to Administrative Code §7-210, which imposes strict liability on property owners for their failure to maintain the sidewalks adjacent to their premises.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party to demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

Here, in her bill of particulars, Raisanen alleges that she slipped and fell due to a icy condition on the subject sidewalk created by defendants' negligence in watering the sidewalk adjacent to the restaurant in freezing weather. However, her deposition testimony that she (1) did not see any ice on the ground before she fell; (2) did not know how long ice had been on the ground prior to her accident; (3) did not notice if her clothes

were damp or wet after her fall; (4) did not see any ice after she fell; (5) did not see anyone from Arte water the sidewalk where she fell; and (6) did not know of anyone else who saw someone from Arte water the sidewalk where she fell, *prima facie* establishes defendants' entitlement to judgment as a matter of law. *Siegel v City of New York,* 86 A.D.3d 452 (1st Dept. 2011); *Fishman v. Westminster House Owners, Inc.*, 24 A.D.3d 394 (1st Dept. 2005).

Further, the meteorological data submitted by Raisanen does not, as she claims, establish that the temperature was below freezing in the hours leading up to her accident. Rather, it just provides that the high temperature on the date of her fall was 41 degrees and the low was 26 degrees.

In addition, the June 22, 2012 affidavit of Kevin Taylor, July 19, 2012 affidavit of Ron Decavalcanti and Raisanen's July 18, 2012 affidavit submitted by Raisanen in support of her cross motion are insufficient to raise an issue of fact to defeat defendants' respective motions for summary judgment. Raisanen specifically testified at her deposition that she did not know of anyone who saw someone from Arte water the sidewalk where she fell.[1] The affidavits, sworn to over three years after the accident, denote an effort to avoid the consequences of Raisanen's earlier testimony and are insufficient to defeat defendants' respective motions for summary judgment. *Caraballo v. Kingsbridge Apt. Corp.*, 59 A.D.3d 270 (1st Dept. 2009).

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[1] Allegedly, Decavalcanti was Raisanen's live-in boyfriend at the time of her accident.

Raisanen's "mere conclusions, expressions of hope or unsubstantiated allegations or assertions" that she slipped and fell on ice created by defendants' negligence in watering their sidewalk during freezing weather, are insufficient to defeat defendants' respective motions for summary judgment. *Zuckerman v. New York*, 49 N.Y.2d 557, 562 (1980).

Further, Raisanen's claims with regard to spoliation of evidence are without merit. Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them. *Kirkland v. New York City Hous. Auth.*, 236 A.D.2d 170, 173 (1st Dept. 1997). A pleading may be stricken "even if the evidence was destroyed before the spoliator became a party, provided it was on notice that the evidence might be needed for future litigation." *Baglio v. St. John's Queens Hosp.*, 303 A.D.2d 341, 342 (2nd Dept. 2003).

Raisanen argues that defendants destroyed the documents that would have identified the employees who worked at Arte on the day of her accident, who could have admitted to hosing down the sidewalk and who could have testified as to the condition of the sidewalk on the date of the accident. However, given, as discussed above, that Raisanen can not identify the specific cause of her fall, any claim that she is prejudiced by defendants' failure to preserve certain documents is based on mere speculation and is insufficient to require the imposition of spoliation sanctions. In addition, she only

specified her theory of liability in a September 2010 supplemental bill of particulars, which was four months after Arte was dissolved. Before that, she made no mention of her theory that she fell due an icy condition on the sidewalk created by defendants' hosing of the sidewalk in freezing weather. Therefore, defendants would not have been on notice, before September 2010, that evidence relating to Arte employees hosing down the sidewalks adjacent to the restaurant would have been requested for litigation purposes.

In accordance with the foregoing, it is hereby

ORDERED that defendants Arte Lira d/b/a Artepasta & Lips and Rosebud Realty, LLC's motion for summary judgment dismissing the complaint and cross claims insofar as asserted against them is granted; and it is further

ORDERED that plaintiff Nancy Raisanen's cross motion for summary judgment on the issue of liability, or in the alternative, to strike defendants' answers for willful spoliation of evidence is denied; and it is further

ORDERED that defendants Daniel Perla Associates, LLP and 81 Greenwich Partners, LLC's motion for summary judgment dismissing the complaint and cross claims insofar as asserted against them is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
January 22, 2013

ENTER:

J.S.C.

FILED
JAN 24 2013
NEW YORK
COUNTY CLERK'S OFFICE