Yuk Ping Cheng Chan v Young T. Lee & Son Realty Corp.
2013 NY Slip Op 30327(U)
February 5, 2013
Supreme Court, New York County
Docket Number: 100690/10
Judge: Paul Wooten

[* 1]

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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

YUK PING CHENG CHAN,

Plaintiff,

- against -

YOUNG T. LEE & SON REALTY CORP and GREAT N Y NOODLETOWN, INC.,

Defendants.

INDEX NO. 100690/10

MOTION SEQ. NO. 001

The following papers, numbered 1 to 7, were read on motions by defendant Young T. Lee & Son Realty Corp for summary judgment pursuant to CPLR 3212.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answering Affidavits — Exhibits (Memo)	4, 5
Replying Affidavits (Reply Memo)	6, 7

Cross-Motion: ☐ Yes ☒ No

Motion sequences 001 and 002 are hereby consolidated for purposes of disposition. This is a negligence "slip and fall" action brought by Yuk Ping Cheng Chan (plaintiff), to recover damages for injuries allegedly sustained when she slipped and fell on a greasy condition in front of Great N.Y. Noodletown Restaurant on the sidewalk along the Bayard Street side, located at 28 Bowery Street, New York, New York (the premises) at approximately 9:00 p.m. on November 5, 2009. The premises is a corner building owned by the defendant Young T. Lee & Son Realty Corp (Young) and occupied on the street level by defendant Great N Y Noodletown, Inc. (Noodletown) (collectively, defendants) who operates a restaurant named Great N.Y. Noodletown.

Now before the Court in motion sequence 001, is a motion by Young for summary judgment pursuant to CPLR 3212, dismissing the complaint and all cross-claims against it on the basis that (1) Young did not have a duty to operate, maintain, control, repair or inspect the area where plaintiff allegedly fell; (2) Young owed no legal duty to plaintiff; and (3) there are no issues of fact with regard to any alleged negligence or obligations on behalf of Young. Before

the Court in motion sequence 002 is a motion by Noodletown for summary judgment dismissing the complaint and all cross-claims against it, pursuant to CPLR 3212, on the basis that there is no evidence that it caused or created the specific greasy condition on the sidewalk that plaintiff alleges caused her to fall. Plaintiff is in opposition to Noodletown's motion on the ground that it has not demonstrated that their restaurant was not responsible for creating the slippery condition that she avers caused her to fall. In opposition to Young's motion plaintiff maintains that Young is not entitled to summary judgment and cites to the duties contained in section 7-210 of the Administrative Code (Admin. Code) of the City of New York. Noodletown files in opposition to Young's motion, on the basis that it is not a signatory to the lease agreement between Young and nonparty Yen Hen Moy (Moy), and as such it has no contractual obligation to clean the sidewalk (*see* Affirmation of Candida Bologna, Esq. [Bologna Aff.], exhibit C). Young files in partial opposition to the portion of Noodletown's motion which seeks to dismiss Young's cross-claims asserted against it, on the basis that Noodletown is the party responsible for maintaining the sidewalk upon which plaintiff allegedly fell. Discovery is complete and Note of Issue has been filed.

STANDARD

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]).

It is well established that "a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, which include the likelihood of injury to a third party, the potential that such an injury would be of a serious nature, and the burden of avoiding the risk" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]). "A defendant who moves for summary judgment in a slip and fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*id.* at 500; *Tkach v Golub Corp.*, 265 AD2d 632, 632 [3d Dept 1999]). In order to constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length or time prior to the accident to allow the defense to discover and remedy it (*see Perez v Bronx Park South Assoc.*, 285 AD2d 402, 403 [1st Dept 2001]). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (*Smith*, 50 AD3d at 500). It is well settled, however, 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]).

DISCUSSION

Young proffers that it was not responsible for inspecting, cleaning or maintaining the sidewalks abutting the restaurant where plaintiff allegedly fell pursuant to the lease agreement, and as such Young maintains that it owes no duty to plaintiff. This argument is unavailing as an owner "has a statutory, nondelegable duty to maintain the sidewalk abutting its premises " pursuant to section 7-210 of the Admin. Code (*Spector v Cushman & Wakefield, Inc.*, 87 AD3d 422, 423 [1st Dept 2011]). Furthermore, the lease agreement is between Young and a nonparty, and thus it does not establish that Noodletown was responsible for the maintenance and cleaning of the relevant sidewalk as it was not a party to the agreement (*see* Bologna Aff., exhibit C). Howard Lee (Lee), President of Young, admits and acknowledges in his Examination Before Trial (EBT) that the relevant lease agreement was between Young and Mr. Moy as tenant (*see* Bologna Aff., Lee Transcript p. 12-13). Furthermore, when asked whether Young has "a written lease or arrangement" with Noodletown, Lee admits, "[n]o, we do not" (*id.* at 25). Lee also testified in his EBT that he goes to the building every day and inspects every floor to make sure that "all the garbage is cleaned out . . ." (id.).

In light of the foregoing the Court finds that Young has failed to meet its *prima facie* burden of establishing entitlement to summary judgment as a matter of law, as Young has not established that it did not have a duty to operate, maintain, control, repair or inspect the area where plaintiff allegedly fell or that Young owed no legal duty to plaintiff. As such Young's motion for summary judgment is denied, and the Court need not address plaintiff's papers in opposition *(see Smalls*, 10 NY3d at 735).

Noodletown's motion for summary judgment is denied, as the Court finds that it failed to meet its initial burden with respect to actual or constructive notice of the greasy condition on the sidewalk. Noodletown presents the EBT testimony of its manager, Stephen Li (Li), who testifies as to the general procedures of the restaurant's garbage disposal and sidewalk cleaning procedures, however Li does not provide "evidence regarding any particularized or specific

inspection or cleaning procedure in the area of plaintiff's fall on the date in question" (*Schiano v Mijul, Inc.*, 79 Ad3d 726, 727 [2d Dept 2010]; *see* Affirmation of James Aldag, Esq., exhibit K, p. 24-27, 38-42, 45, 47, 50-51). Noodletown fails to proffer affidavit or testimony based on personal knowledge as to when its employees last inspected the sidewalk or the sidewalks condition before plaintiff's accident (*Spector*, 87 AD3d at 423). Furthermore, plaintiff submits evidence in opposition which is sufficient to create material issues of fact as to notice of a recurring condition with the EBT testimony from non-party witness Sau Wah Lo, who testified that she has observed grease from Noodletown restaurant's garbage at the location of plaintiff's accident on three to five occasions, and has also seen garbage bags placed at night in the area where plaintiff fell (*see* Noodletown Not. of Mot., exhibit J at p. 28-30, 42; *see O'Connor-Miele v Barhite & Holzinger*, 234 AD2d 106, 107 [1st Dept 1996]). As such, defendants Noodletown's motion for summary judgment is denied.

CONCLUSION

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

ORDERED that motion sequence 001, brought by defendant Young T. Lee & Son Realty Corp for summary judgment, pursuant to CPLR 3212, is denied; and it is further,

ORDERED that motion sequence 002, brought by defendant Great N Y Noodletown, Inc.'s for summary judgment, pursuant to CPLR 3212, is denied; and it is further,

ORDERED that counsel for plaintiff Yuk Ping Cheng Chan is directed to serve a copy of this Order, with Notice of Entry, upon the defendants.

This constitutes the Decision and Order of the Court.

FILED
FEB 14 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/5/13

PAUL WOOTEN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE