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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN J.S.C.
Justice

PART 11

Index Number : 118311/2009
VAUGHN, DOROTHY
vs.
HARLEM RIVER YARD VENTURES
SEQUENCE NUMBER : 001
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 determined in accordance with the annexed decision and order.

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

Dated: April 22, 2013

_____, 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: PART 11

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DOROTHY VAUGHN,

Plaintiff,

-against-

INDEX NO. 118311/09

HARLEM RIVER YARD VENTURES, INC. a/k/a HARLEM RIVER YARD VENTURES II, INC., HRY HOLDINGS, LLC, NEWS AMERICA INCORPORATED, NYP HOLDINGS, INC. d/b/a THE NEW YORK POST and NYP STATUTORY TRUST-1998,

Defendants.

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JOAN A. MADDEN, J.:

In this action for damages for personal injuries, defendants Harlem River Yard Ventures, Inc. a/k/a Harlem River Yard Ventures II, Inc. (hereinafter "Harlem River Yard"), HRY Holdings, LLC, News America Incorporated, NYP Holdings, Inc. d/b/a The New York Post and NYP Statutory Trust--1998 (collectively "defendants") are moving for summary judgment dismissing the complaint and all cross-claims asserted against them. Plaintiff opposes the motion.

Plaintiff alleges that on April 12, 2009, at approximately 11:40 p.m., when employed by non-party Bowles Security as a security guard at a New York Post printing facility located at 900 East 132 Street, Bronx, New York, she fell outside near the main gate when attempting to step up from the road onto the curb.[1] Specifically, plaintiff alleges that as she placed her foot onto the edge of the curb, her foot slipped off the edge, and she fell forward as she tried to regain her

[1]Plaintiff refers to the place where she fell as the edge of the sidewalk. Based on her deposition testimony and affidavit, it is clear she is referring to the curb, which is the area she circled and indicated with an "F" on the photographs marked as defendants' Exhibits A and B. The photographs show the curb is directly adjacent to a grass leading to the concrete sidewalk.

balance, "stumbled over the grass" and "hit the concrete" on her hands and knees. After her fall, plaintiff alleges she saw that the edge of the curb where she had slipped was "broken and chipped," and "debris and little rocks" from the edge of the curb were lying in the road below the curb where she slipped. Plaintiff alleges she suffered injuries to her left and right knees which required surgery, and has not been able to return to work since the accident.

Plaintiff commenced this action in January 2010, asserting a first cause of action for negligence and a second cause of action for private nuisance against all defendants. Defendant NYP Holdings, Inc. d/b/a The New York Post occupies the premises pursuant to a Sublease Agreement dated January 5, 1999, between defendant Harlem River Yard, as sublessor, and defendant News America Incorporated, as sublessee. Defendant News America Incorporated is the parent corporation of defendant NYP Holdings, Inc. d/b/a The New York Post.

All defendants are represented by one counsel, and are collectively moving for summary judgment dismissing the complaint and all cross-claims asserted against them. In support of the motion, defendants submit an affidavit of J. Jordan Lippner, Senior Vice President and Deputy General Counsel of defendant News America Inc, the pleadings, photographs, plaintiff's bill of particulars and deposition, and the depositions of Jose Rivera, the Post's security manager, Steven Keller, the Post's engineering manger, and Kenneth Dancer, a security guard who witnessed plaintiff's accident.

As the grounds for summary judgment, defendants argue that: 1) plaintiff's negligence claim without merit, as she cannot establish that defendants created or had actual or constructive notice of the allegedly defective condition; 2) plaintiff's nuisance claim, originating out of defendants' alleged negligence, is without merit, as she cannot establish any negligent act by

defendants or any conduct affecting the public; 3) defendant Harlem River Yard was an out-of-possession landlord with no contractual obligation to maintain or repair the premises; and 4) defendants HRY Holdings LLC and NYP Statutory Trust – 1998 were not parties to the subject lease agreement and had no nexus to the property

In opposition, plaintiff submits her own affidavit and deposition, defendants' photographs, 2008 maintenance records, and the depositions of Jose Rivera, Steven Keller and Kenneth Dancer. Plaintiff argues that: 1) triable issues of fact exist as to actual and constructive notice, and whether Post employees created the dangerous condition; 2) she has a viable private nuisance claim based on negligence; 3) a triable issue of fact exists as to whether the out-of-possession landlord, defendant Harlem River Yard, relinquished all control over the premises, citing the "right of entry" clause in its sublease with News America Incorporated; and 4) defendants HRY Holding LLC and NYP Statutory Trust –1998 offer no evidentiary proof to support their assertion that they had no nexus to the subject property.

On a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, by submitting evidentiary proof in admissible form sufficient to establish the absence of any material issues of fact. See CPLR 3212 [b]; Winegrad v. New York University Medical Center, 64 NY2d 851, 853 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980); Meridian Management Corp v. Cristi Cleaning Service Corp, 70 AD3d 508, 510 (1st Dept 2010). Once such showing is made, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR 3212 (b); see Zuckerman v. City of New York, supra at 562. In reviewing a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party, see Branham v. Loews Orpheum

Cinemas, Inc, 8 NY3d 931, 932 (2007), and the motion must be denied if there is any doubt as to the existence of a triable issue of fact, see Rotuba Extruders, Inc v Ceppos, 46 NY2d 223, 231 (1978). However, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a material question of fact. Zuckerman v City of New York, supra at 562.

I. Private Nuisance Claim

Defendants are entitled to summary judgment dismissing the private nuisance claim. "Where, as here, a nuisance arises solely from negligence, the nuisance and negligence elements may be so intertwined as to be practically inseparable, as they are here. The plaintiff may recover only once for harm suffered, regardless of how the causes of action are denominated." Murphy v. Both, 84 AD3d 761, 763 (2nd Dept 2011); see Caldwell v. Two Columbus Ave Condominium, 92 AD3d 441 (1st Dept 2012). Plaintiff has failed to demonstrate that defendants engaged in intentional and unreasonable conduct or that they engaged in abnormally dangerous activities, which are necessary elements of a private nuisance claim. See Copart Industries, Inc v. Consolidated Edison Co of New York, 41 NY2d 564, reargmt den 42 NY2d 1102 (1977); Caldwell v. Two Columbus Ave Condominium, supra. Thus, since plaintiff's nuisance claim is based solely on negligence it must be dismissed as duplicative of the first cause of action for negligence. See id; Murphy v. Both, supra.

II. Out-Of-Possession Landlord

Defendant Harlem River Yard is entitled to summary judgment dismissing the complaint and all cross claims asserted against it. As an out-of-possession landlord, defendant Harlem River Yard's "duty to repair a dangerous condition on leased premises is imposed by statute or

regulation, by contract, or by a course of conduct." Goggins v. Nidoj Realty Corp, 93 AD3d 757, 758 (2nd Dept 2012); see Lee v. Second Ave Village Partners, LLC, 100 AD3d 601 (2nd Dept 2012). Liability may also "attach to an out-of-possession owner who has affirmatively created a dangerous condition or defect." It is undisputed that none of the foregoing circumstances is present in the instant case.

Rather, in seeking to impose liability on defendant Harlem River Yard, plaintiff relies on the "right of entry" provision in the parties' Sublease Agreement, which plaintiff argues creates a question of fact exists as to whether defendant Harlem River Yard relinquished all supervisory control over the premises. Plaintiff's reliance on the "right of entry" provision is misplaced. "An out-of-possession owner who retained the right to reenter the premises for repairs and inspections cannot be held liable under a theory of constructive notice in the absence of 'a significant structural or design defect that is contrary to a specific safety provision.'" Torres v. West Street Realty Co, 21 AD3d 718 (1st Dept 2005), lv app den 7 NY3d 702 (2006) (quoting McDonald v. Riverbay Corp, 308 AD2d 345, 346 [1st Dept 2003]); accord Stryker v. D'Agostino Supermarkets Inc, 88 AD3d 584 (1st Dept 2011). Since the instant case does not involve "a significant structural or design defect that is contrary to a specific safety provision," defendant Harlem River Yard cannot be held liable under the right of entry provision in the Sublease Agreement. Torres v. West Street Realty Co, supra. The complaint and all cross-claims are therefore dismissed as against defendant Harlem River Yard.

III. Defendants HRY Holdings LLC and NYP Statutory Trust – 1998.

Defendants HRY Holdings LLC and NYP Statutory Trust – 1998 are entitled to summary judgment dismissing the complaint and all cross-claims asserted against them. Defendants

submit an affidavit from J. Jordan Lippner, Senior Vice President and Deputy General Counsel of defendant News America Incorporated ("News America"), stating that News America is the parent corporation of defendant NYP Holdings, Inc., d/b/a The New York Post, the entity which occupies the premises at issue pursuant to a Sublease Agreement between Harlem River Yard, as sublessor, and NYP Holdings, Inc., d/b/a The New York Post as sublessee. Lippner states that the Sublease Agreement expires on September 29, 2092, it was in full force and effect on the date of plaintiff's accident, April 12, 2009, and that "no alternative or additional sublease agreements [were] in effect on April 12, 2009 relative to the subject premises, separate and apart from the annexed Sublease Agreement."

Since it is clear from the Sublease Agreement that neither defendant NYP Statutory Trust –1998 nor defendant HRY Holdings, LLC is a party to that agreement, and plaintiff has produced no testimony or documentary evidence showing or suggesting that either entity owned, leased, occupied or controlled the premises at issue, no arguable basis exists for imposing liability on them for any dangerous condition that existed therein, and they are entitled to judgment as a matter of law dismissing the complaint and all cross-claims as against them. See Kaplan v. New York Mercantile Exchange, 55 AD3d 406 (1st Dept 2008); Richardson v. Lenox Terrace Development Assocs, 41 AD3d 108 (1st Dept 2007); Gibbs v. Port Authority of New York, 17 AD3d 252 (1st Dept 2005).

IV. Negligence Claim

The final issue is whether the two remaining defendants, News America Incorporated and NYP Holdings, Inc d/b/a the New York Post (hereinafter collectively "defendants"), are entitled to summary judgment dismissing the negligence claim asserted against them, based on the

absence of notice. Where, as here, defendants in a slip-and-fall action are moving for summary judgment, they have the initial burden of making a prima facie showing that they neither created the dangerous condition that caused plaintiff's injury, nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it. See Amendola v. City of New York, 89 AD3d 775 (2nd Dept 2011); Ross v. Betty G. Reader Revocable Trust, 86 AD3d 419 (1st Dept 2011); Mauge v. Barrow Street Ale House, 70 AD3d 1016 (2nd Dept 2010).

Defendants have made a sufficient prima facie showing that they neither created, nor had actual or constructive notice of the dangerous condition, which consists of the broken edge of the curb at the location where plaintiff fell. Defendants submit the deposition testimony of Jose Rivera, the Post's Security Manager and plaintiff's supervisor, that prior to the date of plaintiff's accident, he had not received any complaints from plaintiff regarding the condition of the "sidewalk and/or curb" at the particular location where she fell, and he had not received any complaints at all regarding the condition of any of the "sidewalks and/or curbs" in other areas of the Post facility. Defendants also submit the deposition of Steven Keller, the Post's Maintenance Engineering Manager, who testified that his department did not have any records of complaints about or repairs to the curb at the location where plaintiff fell. Defendants additionally submit plaintiff's deposition testimony that she did not observe the broken curb prior to the accident, did not know how long it was broken, and when asked if prior to the accident, she had ever discussed the broken curb with any co-workers from Bowes or the Post, plaintiff answered, "[n]o, because I didn't know that was there." Defendants point to plaintiff's further testimony when asked, "do you know how the sidewalk [curb] got broken and chipped like that," she answered that she could only "assume" the curb was broken "from that truck pushing the

snow up against the – you known making piles around the facility," and when asked "did you ever observe any truck or any vehicle damage that portion of the sidewalk [curb]," she answered "no."

Based on the foregoing deposition testimony, defendants have demonstrated prima facie entitlement to judgment as a matter of law. The burden now shifts to plaintiff to raise a triable issue of material fact as to whether defendants created, or had actual or constructive notice of the dangerous condition. The court finds that plaintiff has failed to proffer sufficient evidence to satisfy her burden.

First, in seeking to establish actual notice, plaintiff submits her deposition testimony and an affidavit that prior to the accident, she had verbally reported to her supervisor, "similar conditions" or "this particular type of condition throughout the Post facility"; in the back of the facility and in the area of the south and north gates, "there was the same kind of breakage . . . that I tripped on"; and in October or November 2008, she called in over her radio to report to her supervisor that "the sidewalk, the ground was chipped, like broken." Plaintiff's testimony fails to raise a triable issue as to actual notice. At best, such testimony shows that defendants had a "general awareness" of potentially dangerous conditions in other areas of the facility, but not the specific location where plaintiff fell, which is "legally insufficient to constitute notice of the particular condition that caused plaintiff to fall." Piacquadio v. Recine Realty Corp, 84 NY2d 967 (1994); see Dunson v. Riverbay Corp, 103 AD3d 578 (1st Dept 2013); Mauge v. Barrow Street Ale House, supra at 1017; DeJesus v. New York City Housing Authority, 53 AD3d 410 (1st Dept), aff'd 11 NY3d 889 (2008); Mitchell v. New York University, 12 AD3d 200 (1st Dept 2004); McCabe v. Town of Riverhead, 2 AD3d 416 (2nd Dept 2003). Notably, plaintiff admits

that prior to the accident, she could not have notified her supervisor or anyone else that the curb was damaged at the specific location where she fell, since she admits that she had no prior knowledge herself of that dangerous condition until she actually fell.

Second, as to the issue of constructive notice, such notice is generally found when the dangerous condition is visible, apparent and exists for a sufficient period so as to afford defendants an opportunity to discover and remedy the condition. See Ross v. Betty G. Reader Revocable Trust, supra. It is well settled that photographs may be used to establish constructive notice, but they must be taken close in time to the accident and there must be testimony that the conditions depicted in the photographs are substantially the same as those on the day of the accident. See Batton v. Elghanayan, 43 NY2d 898 (1978); Gennaro v. Cord Meyer Development Co & LLC, 57 AD3d 725 (2nd Dept 2008), lv app den 12 NY3d 706 (2009); Rios v. New York City Housing Authority, 48 AD3d 661 (2nd Dept 2008); Calderon v. Noonan Towners Co LLC, 33 AD3d 495 (1st Dept 2006).

Here, plaintiff submits photocopies of 18 color photographs[2] taken by defendants on March 5, 2010, nearly one year after the accident. Plaintiff also submits her deposition testimony and the deposition testimony of Jose Rivera that the three photographs marked as defendants' Exhibits A, B and C were a fair and accurate representation of the way the area looked on the day of the accident. While those three photographs satisfy the requirement for testimony as to substantially same conditions, plaintiff has failed to satisfy the requirement that the photographs be taken close in time to the accident, since they were not taken until nearly one year later. See

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[2]Plaintiff explains that the 18 photographs are the "complete set" of photographs taken by defendants on March 5, 2010, and include the three photographs marked as defendants' Exhibits A, B and C.

e.g. Rios v. New York City Housing Authority, supra (photographs taken more than 16 weeks after the accident were not taken within a reasonable time of the accident); see also Batton v. Elghanayan, supra (photographs taken one day after the accident created an issue of fact as to constructive notice); Denyssenko v. Plaza Realty Services, Inc, 8 AD3d 297 (1st Dept 2004) (photographs taken within two weeks of the accident raised a triable issue of fact as to constructive notice).

Moreover, all of the photographs lack probative value as to the duration of the alleged defective condition at the time of the accident. Contrary to plaintiff's assertion, the photographs are neither clear nor detailed enough to show broken or chipped cement on the area of the curb where she fell. Rather, most of the photographs were taken from a distance and are blurry, and simply show that the curb was painted yellow and that the yellow paint is worn away in certain areas. Worn paint, however, is not the equivalent of broken or chipped cement. Significantly, plaintiff has not submitted a clear close-up photograph depicting visible details of the specific area of the curb responsible for her fall. The photographs are therefore insufficient to raise an issue as to constructive notice. See Gennaro v. Cord Meyer Development Co LLC, supra; Singer v. St. Francis Hospital, 21 AD3d 469 (2nd Dept 2005).

Plaintiff also argues that evidence of wear and tear is sufficient to establish that a defective condition existed over a period of time. Plaintiff is correct, but has failed to produced evidence as to how long the defect existed prior to the accident, which is a necessary element of constructive notice. See Gibbs v. Port Authority of New York, supra; Berger v. ISK Manhattan, 10 AD3d 510 (1st Dept 2004). At her deposition plaintiff admitted she had not seen the defect before the day of the accident. Moreover, under the circumstances here, there is nothing inherent

in the nature of the alleged defect which supports a reasonable inference that the condition existed for a sufficient time to permit defendants to discover and remedy it, as opposed to being created shortly before the accident, particularly in light of plaintiff's testimony that she saw broken pieces of rocks or cement lying in the road immediately after her fall. See Vasquez v. Figuero, 262 AD2d 179 (1st Dept 1999); Ben Aharon v. New York City Saks, LLC, 15 Misc3d 71 (App Term 2007). While plaintiff submits defendants' "End of Shift" reports and "Work Orders," those maintenance records simply state that the "curb in parking lot" was painted in September and October 2008, and provide no information as to specific locations, or whether the curb was broken or repaired.

Finally, with respect to the issue of whether defendants created the defective condition, as noted above, when plaintiff was asked at her deposition how the curb "got broken and chipped," she testified that she assumed it was caused by snow removal trucks pushing piles of snow up against the curb. When she was directly asked "did you ever observe any truck or any vehicle damage that portion of the sidewalk [curb]," she answered "no." Now, in opposition to defendants' motion, plaintiff submits an affidavit stating that "for about two months prior to April 12, 2009, I would work the third shift (11:00 p.m. - 7:00 a.m.) at the Main Gate Booth approximately two times per week. While I was working that shift, I would observe over 100 Post delivery trucks exiting the facility. During each shift I would observe approximately 20 Post delivery truck scrape or drive over the sidewalk area [curb] where I fell as they were exiting the Post facility."

Under these circumstances, where plaintiff's affidavit directly contradicts her prior deposition testimony, the affidavit must be disregarded as tailored to create an issue of fact to

defeat defendants' motion. See Beahn v. New York Yankees Partnership, 89 AD3d 589 (1st Dept 2011); Gogos v. Modell's Sporting Goods, Inc, 87 AD3d 248 (1st Dept 2011); Gloth v. Brusco Equities, LLC, Inc, 1 AD3d 294 (1st Dept 2003); Phillips v. Bronx Lebanon Hospital, 268 AD2d 318 (1st Dept 2000). While plaintiff's affidavit refers to the snow removal trucks, she offers no explanation for her failure to testify at her deposition in response to direct questioning as to how the curb "got broken and chipped," that she had frequently observed Post delivery trucks riding over or scraping the curb. See Beahn v. New York Yankees Partnership, supra.

In the absence of plaintiff's affidavit, the record is devoid of competent evidence raising an issue of fact as to whether defendants created the dangerous condition. Plaintiff submits the deposition testimony of Kenneth Dancer, the security guard on duty at the front gate who apparently saw her fall.[3] Dancer, however, testified that prior to April 12, 2009, he had not witnessed any delivery trucks or snow removal vehicles "hitting," "scraping against," or "coming into contact" with the particular area of the curb where plaintiff fell. He also testified that delivery trucks are the only vehicles that "tend to scrape up against" the curb, but he had not personally seen those vehicles, and only knew about it because his "coworkers" would tell him when "one of the truck drivers dinged something again." When Dancer was questioned about repairs to the curb area where plaintiff fell, he testified that he witnessed repairs on two occasions, but only after plaintiff's accident. Thus, since Dancer did not personally observe

[3]After hearing oral argument on defendants' motion, the court gave the parties an opportunity to depose Dancer, and submit additional papers, if necessary, based on his testimony. Plaintiff submitted a Supplement Affirmation in Opposition, which includes the transcript of Dancer's deposition, and defendants submitted a Supplemental Reply Affirmation in Further Support of Motion. The court notes that while Dancer testified that he witnessed plaintiff's accident, his description of the events is not consistent with plaintiff's description.

trucks or vehicles scraping against or driving over the curb where plaintiff fell, and he did not observe any pre-accident repairs to the curb, his testimony is insufficient to defeat defendants' motion.

Based upon the foregoing, the court concludes that plaintiff has failed to submit evidence sufficient to raise a triable issue fact as to whether defendants created, or had actual or constructive notice of the dangerous condition. The remaining defendants are, therefore, entitled to judgment as a matter of law dismissing the negligence claim.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted in its entirety, and the complaint and all cross-claims are dismissed in their entirety as against all defendants, and the Clerk is directed to enter judgment accordingly.

DATED: April 22, 2013

ENTER:

J.S.C.