SHORT FORM ORDER

INDEX No. 09-1225
CAL. No. 12-00350OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 004 - MG

ELIZABETH FABRIZIO, Plaintiff, - against - CITIBANK, NA and SOUTHWALL ASSOCIATES, LLC, Defendants.	MICHAEL F. PERROTTA, ESQ. Attorney for Plaintiff 775 Park Avenue, Suite 205 Huntington, New York 11743 O'CONNOR, O'CONNOR, HINTZ, & DEVENEY, LLP Attorney for Defendant Citibank One Huntington Quadrangle, Suite 3C01 Melville, New York 11747 CONWAY, GOREN & BRANDMAN Attorney for Defendant Southwall Associates 58 South Service Road, Suite 350 Melville, New York 11747

Upon the following papers numbered 1 to 27 read on this motion to renew and reargue ; Notice of Motion/ Order to Show Cause and supporting papers (004) 1 - 15 ; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 16-21; 22-25; Replying Affidavits and supporting papers 26-27 ; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (004) by defendant, Citibank, N.A., pursuant to CPLR 2221 (e) for leave to renew its prior motion (003), for summary judgment dismissing the complaint and cross claims asserted against it is granted and upon renewal, the complaint and cross claims asserted against Citibank N.A. are dismissed; and it is further

ORDERED that the branch of the motion for a further order granting conditional judgment in favor of Citibank. N.A. as against defendant Southwall Associates, LLC. on the bases of common law indemnity has been rendered academic by dismissal of the complaint and cross claims asserted by Southwall Associates, LLC, and is denied as moot based upon dismissal of those cross claims.

This action was brought by the plaintiff, Elizabeth Fabrizio, for damages for personal injuries she alleges she sustained on October 2, 2008 when she tripped and fell on an uneven sidewalk in front of Citibank, N.A., located at 15 Southdown Road, Huntington, New York, allegedly due to the negligence of the defendants in the ownership, maintenance, operation and control of the premises. It is alleged that the subject property is owned by defendant Southwall Associates, LLC (Southwall), and was leased by Citibank, N.A. (Citibank) at the time.

Citibank, now seeks summary judgment dismissing the complaint and cross claims asserted against it on the bases that it did not have actual or constructive notice of the condition and never received any complaints about the alleged condition of the sidewalk; Southwall was responsible for maintenance of the sidewalk in front of the subject premises; Southwall engaged in regular site visits to the premises every week or two; and Southwall performed the subsequent repair of the alleged area of plaintiff's fall.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented, (Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]; Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395, [1957]). The movant has the initial burden of proving entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v N.Y.U. Medical Center); *supra*. Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact," CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]. The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (Joseph P. Day Realty Corp. v Aeroxon Prods., 148 AD2d 499 [1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (Castro v Liberty Bus Co., 79 AD2d 1014 [1981]).

In support of this motion, the moving defendant has submitted, inter alia, a copy of the order of the undersigned, dated November 8, 2012, which granted leave to Citibank to renew motion (003) within 20 days of the date of entry of said order, and upon submission of all the pleadings served in this action, which pleadings have now been provided; a copy of a Lease Agreement dated January 27, 1998 entered into between Southwall Associates and an entity known as European American Bank for property located at 15 South down Road, Huntington, New York, with amendments attached thereto; copies of the summons and complaint, defendants' respective answers with cross claims each against the other, and plaintiff's verified bill of particulars; unsigned but certified copies of the transcripts of the examination before trial of Elizabeth Fabrizio dated September 28, 2010, Robert Gordon on behalf of Southwall, and David Cordes on behalf of Citibank, each dated March 8, 2011, which have not been objected to by the parties and are thus considered; and photographs.

Elizabeth Fabrizio testified to the extent that on October 2, 2008, at about 1:00 p.m., she tripped and fell in front of Citibank on a raised part of the sidewalk located at 15 Southdown Road, Huntington. The area where she fell was immediately left of the door to Citibank. She was going to Citibank on her lunch break from work and parked her car to the west side of the Citibank entrance. Upon exiting her car, she stepped onto the sidewalk and began to walk towards Citibank. As she approached the entryway to Citibank, she reached out with her left hand to grab the handle on the door, but her left foot hit the raised concrete, causing her to fall. As she fell, she tried to grab onto the handle but could not reach it, and grabbed onto the wall of the building. Her entire right side made contact with the wall, her head struck the wall, and then she fell to the ground and sustained a fractured femur. The plaintiff continued that she went to Citibank every one to two weeks over a six month period, but usually parked to the right of Citibank. On this occasion, as she walked, she did not look down at the sidewalk.

Robert Gordon testified to the extent that he is an attorney. He stated that Southwall Associates, LLC is the owner of the premises and was on October 2, 2008. He stated that in 2002, Southwall Associates LLC became the successor in interest to a partnership known as Southwall Associates, the original owner of the premises. He managed the premises for Southwall Associates with his sister, Lisa Gordon Loomiz, while his father was alive. He testified that he is currently affiliated with Southwall Associates, LLC as the manager, but is not a member of the LLC. In October 2008, there was a lease between Southwall and Citibank. When shown a copy of the lease agreement, he testified that paragraphs 39 and 41 indicate who is responsible for the common areas of the property. He testified that the landlord is responsible for the maintenance of the sidewalk in front of the stores and which runs along the entrance doors. Maintenance did not include cleaning the sidewalk or snow removal, for which the tenant was responsible. Gordon testified that replacement and/or repair of the concrete portion of the sidewalk was the responsibility of the landlord, as "[that's what the lease seems to suggest." He had no recollection as to whether Southwall was involved in any repairs or maintenance of the sidewalk in front of the premises for a three year period prior to October 2, 2008. A contractor would have been hired if such work would have been done. He did not search records to determine if Southwall had performed any repairs or maintenance to the sidewalk in front of the subject premises.

Gordon continued that as the owner and manager of the subject premises, he did not have a regular time schedule for inspection of the premises, but either he or his sister made visits, possibly every week or two. When he did visit, it could have been a quick walk of the property, or he could have just stopped to visit his cousin who has a business at the premises. His visit might include looking at the parking lot and common areas, or the sidewalk. He maintained a diary for any complaints he may have received about the premises. He stated that on October 3, 2008, the plaintiff called him and advised him that she had fallen at the premises. He went to the premises that day and observed a "bit of a raised portion of the sidewalk immediately abutting the front entrance against the front wall of the bank, front exterior wall." He continued that he recalled "observing that if you would approach from the-walking straight ahead, the front door, it would not be that evident that there was a raised or flaw in the sidewalk. But, if you were to come from, I guess, the westerly direction going east, if you had been walking right against pretty much the wall, that you might encounter this raised portion." Gordon continued that he had not observed that raised portion of the sidewalk prior to the incident. He initiated the eventual repair to the sidewalk and testified that Citibank did not take part in the repair.

David Cordes testified to the extent that he has been the head teller at Citibank at 15 South down Road for the past five years and has been employed by Citibank for 24 years. He learned of the plaintiff's incident about a year after it occurred when he was advised that Vivian Beattie, his assistant manager, had to appear for a deposition even though she was not working at that branch at the time. He described the building leased by Citibank as a one-story building with one entry door which the employees use daily. He did not know who the landlord was for the premises. He did not know of any bank employees who were witness to the incident. Prior to the date of the accident, no one ever made complaints to him about the condition of the sidewalk outside the door of the bank, and he had never made any complaints about it. He stated that bank employees do not sweep the sidewalk outside the building. Tom Berger was the manager of the bank at the time.

While the barely legible lease agreement identifies the parties to the lease as Southwall, LLC and European American Bank, the parties do not dispute that Citibank is subject to that lease agreement. The issue among the parties concerns who bears liability for the maintenance of the premises and the

happening of the accident and whether Southwall is entitled to apportionment of liability, indemnification, contribution, to hold Southwall harmless, and for judgment over.

The rider to the lease at paragraph "39. Common Area Maintenance" provides" "[f]or maintenance of the parking filed (sic), exterior cleaning, snow removal, parking lot lighting, and other common area maintenance, the monthly charge is included in the rent. Landlord shall be responsible for maintaining, insuring, and repairing the common areas." Paragraph 41 Parking concerns parking, but the relevant portion of that paragraph provides that the Tenant shall "sweep the sidewalk" and keep it clean of debris.

Paragraph "54. Landlord's Insurance" provides "[l]andlord shall be responsible for insuring the structural portions of the demised premises and the common areas of the shopping center. Said insurance shall be for the benefit of Landlord and any mortgagee against loss or damage by fire and extended perils in companies qualified to do business in the State of New York and satisfactory to Landlord, in an amount determined by Landlord from time ot time...." This was signed by Rosalyn C. Gordon as attorney-in-fact for Harvey H. Gordon, partner, on behalf of Southwall Associates, as Landlord.

The second amendment to the lease is dated February 28, 2005 and extended the term of the lease from March 1, 2005 through and including February 29, 2012. Paragraph 6. Insurance, provides in pertinent part that "[t]enant shall have the option, either alone or in conjunction with Citigroup, Tenant's ultimate parent corporation, or any subsidiaries or affiliates of Citigroup, to maintain self insurance and/or provide or maintain any insurance required by this lease under blanket insurance policies maintained by the Tenant or Citigroup, or provide or maintain insurance through such alternative risk management programs as Citigroup may provide or participate in from time to time, provided the same does not thereby decrease the insurance coverage or limits set forth in Section 37 of the Lease."

In order to establish a prima facie case of negligence, a plaintiff must demonstrate either that the defendants created the dangerous or defective condition which caused the accident, or that they have actual or constructive notice of the condition (Dima v Breslin Realty, Inc. et al, 240 AD2d 359 [2nd Dept 1997]). While, to prove a prima facie case of negligence in a slip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (see, Bradish v Tank Tech Corp., 216 AD2d 505 [2nd Dept 1995]), the defendant, as the movant, is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law (see, Kucera v Waldbaums Supermarkets, 304 AD2d 531 [2nd Dept 2003]; Dwoskin v Burger King Corp., 249 AD2d 358 [2nd Dept 1998]). Liability can be predicated only upon failure of the defendant to remedy the danger after actual or constructive notice of the condition (Piacquadio v Recine Realty Corp. 84 NY2d 967 [1994]).

Based upon the evidentiary submissions, it is determined that defendant Citibank, N.A. has established prima facie entitlement to summary judgment dismissing the complaint on the basis that it did not receive actual or constructive notice of the claimed defect; and that it had no obligation to inspect, maintain (except for sweeping), or repair the subject sidewalk. Actual or constructive notice is irrelevant where the defendant has a duty to conduct reasonable inspections of the premises and fails to do so (see, Weller v Colleges of the Senecas, 217 AD2d 280 [4th Dept 1995]; Watson v New York, 184 AD2d 690 [2nd Dept 1992]). Robert Gordon testified that either he or his sister, on a somewhat consistent basis, visited the premises and at times inspected various areas. There was no requirement for

Citibank to conduct inspection of the common area for which it was not responsible. Robert Gordon testified, and the lease demonstrated, that the landlord was responsible for maintaining and repairing the common area of the premises, including the subject sidewalk outside of the Citibank building.

While the plaintiff opposes this motion and argues that defendant Citibank had actual and constructive notice of the defect, the record does not support this conclusory assertion, nor has the plaintiff raised a factual issue as to Citibank having a duty to inspect, repair or maintain the common area, including the sidewalk.

Southwall opposes Citibank's application on the basis that the second amendment to the lease "allowed" Citibank to maintain self-insurance and/or provide or maintain any insurance required by the lease under blanket insurance policies maintained by Citigroup..." provided the limits set forth at paragraph 37 of the rider to the lease were maintained." Paragraph 37. Insurance provides "[t]enant shall at tenant's cost and expense, but for the mutual benefits of the Landlord and Tenant, maintain general public liability insurance against claims for the personal injury, death or property damage occurring up\on, in, or about the demised premises, including, but not limited to the entire drive-thru area, the storefront, and the sidewalks at the front, side, and rear of the demised premises; such insurance to afford protection to the limit of not less than $1,000,000.00 with respect to injury or death of anyone one person...."

It is determined that Citibank is required to maintain a general liability policy which includes the sidewalk at the subject premises pursuant to the terms of paragraph 37. However, paragraph 39 provides that the landlord shall insure the common areas. While Southwall has asserted cross claims against Citibank wherein it seeks judgment over, indemnification, contribution, to hold Southwall harmless, and apportionment of responsibility with indemnification for an award to the plaintiff, it is determined that Southwall has not raised a factual issue to preclude summary judgment from being granted to Citibank on the issue of liability. Thus, Southwall has not demonstrated a basis for apportionment, contribution, indemnification, judgment over, and to hold Southwall harmless for this occurrence in the absence of liability relating to the occurrence of plaintiff's fall. Robert Gordon's testimony, and the lease agreement, conclusively establish that Southwall was responsible for maintenance and repair of the subject sidewalk. Pursuant to paragraph 39 of the lease agreement, the "[landlord shall be responsible for maintaining, insuring, and repairing the common areas]". It is concluded that Citibank has no liability for the occurrence of the accident. Based upon the foregoing, the arguments proffered by Southwall are unsupported by the record and its cross claims against Citibank are dismissed.

Accordingly, motion (004) is granted, and the complaint asserted by the plaintiff and the cross claims asserted by defendant Southwall Associates, LLC, are dismissed.

Dated: April 23, 2013

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION