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SHORT FORM ORDER

INDEX No. 09-36614

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 11-13-12 (#004)
MOTION DATE 12-18-12 (#005)
ADJ. DATE 3-5-13
Mot. Seq. # 004 - MD
005 - XMD

PAULINE CAMPISI and ALBERT CAMPISI,

Plaintiffs,

- against -

GAMBAR FOOD CORP. and MONTAUK PROPERTIES, LLC,

Defendants.

SCHWARTZ, GOLDSTONE & CAMPISI, LLP
Attorney for Plaintiffs
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New York, New York 10004

MARTYN, TOHER & MARTYN, ESQS.
Attorney for Gambar Food Corp.
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Mineola, New York 11501

ANDREA G. SAWYERS, ESQ.
Attorney for Montauk Properties
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P.O. Box 9028
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MONTAUK PROPERTIES,

Third-Party Plaintiff,

-against-

JAY CARDS & GIFTS 2001, INC.,

Third-Party Defendant.

STEWART H. FRIEDMAN, ESQ.
Attorney for Jay Cards & Gifts 2001, Inc.
401 Franklin Avenue, Suite 314
Garden City, New York 11530

Upon the following papers numbered 1 to 58 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 42 ; Notice of Cross Motion and supporting papers 43 - 49 ; Answering Affidavits and supporting papers 50 - 52; 53 - 54 ; Replying Affidavits and supporting papers 55 - 56; 57 - 58 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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ORDERED that the motion by defendant Montauk Properties, LLC, for summary judgment dismissing plaintiff's complaint against it is denied; and it is further

ORDERED that the cross motion by third-party defendant Jay Cards & Gifts 2001, Inc., for summary judgment dismissing the third-party complaint is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Pauline Campisi as a result of a trip and fall accident that allegedly occurred on May 6, 2009. Plaintiff allegedly tripped and fell when she was walking from the parking lot of a shopping center to the entrance of a store known as IGA Supermarket located in Copiague, New York. The shopping center is owned by defendant Montauk Properties, LLC, and the supermarket is operated by defendant Gambar Foods Corp. The complaint alleges that defendant Gambar Foods was negligent in allowing the subject premises to remain in a broken, dilapidated, and crumpled trap-like manner, thereby causing plaintiff to fall. Her husband, plaintiff Albert Campisi, sues derivatively for loss of services. As a third-party claim, Montauk Properties seeks indemnification from third-party defendant Jay Cards & Gifts 2001, Inc. (hereinafter Jay Cards).

Montauk Properties now moves for summary judgment dismissing the complaint against it on the ground that it is an out-of-possession owner and, therefore, not responsible for maintaining the subject sidewalk. It further argues that it is entitled to contractual and common law indemnification from Gambar Foods and Jay Cards based on the provisions of their respective leases. In support of the motion, Montauk Properties submits, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, and a copy of the lease agreement between Gambar Foods and Montauk Properties. Jay Cards cross-moves for summary judgment dismissing the complaint against it on the grounds that there is no evidence the alleged defect was located on premises owned by it and that it is not responsible for repair of the sidewalk pursuant to its contractual agreement with Montauk Properties.

Plaintiff opposes the motion by Montauk Properties and the cross motion by Jay Cards, arguing that Montauk Properties is not an out-of-possession landlord, as it retained control over the common sidewalk and that the leases entered into between defendants raise triable issues of fact as to who is responsible for maintenance of the sidewalk. Plaintiff also argues that defendants have failed to establish that they did not have notice of the alleged defect. In opposition, plaintiff submits photographs of the area where she fell.

At her examination before trial, plaintiff testified that she goes to the subject IGA Supermarket daily, and that Jay Cards is located next to the supermarket. She testified that at the time of the subject accident, she was walking from the parking lot towards the supermarket. She further testified that her right foot got stuck in a hole on the sidewalk in front of the supermarket, causing her to trip and fall. She testified that her shoe remained in the hole after the fall, and she described the hole as an oblong shape which was about one foot wide and an inch or an inch and a half deep. She stated that the concrete was broken up, and that there was debris, such as bottle caps and cigarette butts, in the hole.

At his examination before trial, James Dalton, an owner of Montauk Properties, which is a real estate holding company, testified that it owns the retail strip mall that includes IGA Supermarket and Jay Cards. He testified that the strip mall contains eight to nine retail stores and a parking lot. He testified that he would visit the subject strip mall six to eight times a year and never observed any broken concrete on the

sidewalk or the parking lot. He testified that pursuant to each lease between Montauk Properties and the retail stores in the strip mall, the tenant is responsible for repairing the sidewalk in front of its store.

At his examination before trial, William Lukeman, manager of the subject IGA supermarket, testified that he inspects the store, the sidewalk and the parking lot area outside of the supermarket everyday. He testified that he never observed any cracks or broken concrete on the sidewalk in front of the supermarket. He further testified that Montauk Properties is responsible for repairing the sidewalk in front of the supermarket, and that he has observed repairs to the sidewalk and parking lot in front of his store.

At his examination before trial, Haresh Shah testified that he is the manager of Jay Cards, a card and gift store. He testified that Montauk Properties is responsible for repairs to the sidewalk, and that he never observed any missing pieces of concrete on the sidewalk in front of his store.

The lease agreement between Montauk Properties and Gambar Food states in relevant part as follows:

> That throughout said term the Tenant will take good care of the demised premises, fixtures and appurtenances and all alterations, additions and improvements to either..forever indemnify and save harmless the Landlord for and against any and all liability, penalties, damages, expenses and judgments arising from injury during said term to person or property of any nature, occasioned wholly or in part by any act or acts, omission or omissions of the Tenant, or of the employees, guests, agents, assigns or undertenants of the Tenant and also for any matter or thing growing out of the occupation of the demised premises or of the streets, sidewalks or vaults adjacent thereto.

Under the caption "Tenant's Obligation to Repair" in the lease agreement, it states that the tenant shall, at its own expense "make all repairs and replacements to any sidewalks and curbs adjacent to the Premises made necessary by the negligence of Tenant, and Sub-Tenant or concessionaire or their respective employees, agents, invitees, licensees, or contractors, or by the use or occupancy of the Premises."

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

It is well settled that an out-of-possession owner or lessor is not liable for injuries that occur on the premises unless the owner or lessor has retained control over the premises or is contractually obligated to repair or maintain the premises (*see* ***Stein v Harriet Mgt., LLC***, 51 AD3d 1007, 859 NYS2d 243 [2d Dept 2008]; ***Eckers v Suede***, 294 AD2d 533, 743 NYS2d 129, 130 [2d Dept 2002]; ***Wilson v Laung Hang Realty Corp.***, 281 AD2d 414, 721 NYS2d 290 [2d Dept 2001]). Furthermore, to prove a prima facie case of negligence in a trip 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, 628 NYS2d 807 [2d Dept 1995]; ***Gaeta v City of New York***, 213 AD2d 509, 624 NYS2d 47 [2d Dept 1995]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Bykofsky v Waldbaum's Supermarkets, Inc.***, 210 AD2d 280, 619 NYS2d 760 [2d Dept 1994]).

When the terms of a written contract are clear and unambiguous, the contract should be enforced in accordance with the plain meaning of its terms (*see* ***Consedine v Portville Cent. School Dist.***, 12 NY3d 286, 879 NYS2d 806 [2009]; ***Greenfield v Philles Records***, 98 NY2d 562, 750 NYS2d 565; ***W.W.W. Assoc. v Giancontieri***, 77 NY2d 157, 565 NYS2d 440 [1990]). "A contract is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion'" (***Greenfield v Philles Records***, 98 NY2d 562, 569, 750 NYS2d 565, quoting ***Breed v Insurance Co. of N. Am.***, 46 NY2d 351, 355, 413 NYS2d 352 [1978]). Conversely, ambiguity is present in a contract if the language used renders it susceptible to more than one reasonable interpretation (*see* ***Brad H. v City of New York***, 17 NY3d 180, 928 NYS2d 221 [2011]; ***Evans v Famous Music Corp.***, 1 NY3d 452, 775 NYS2d 757 [2004]).

Montauk Properties has failed to establish its prima facie entitlement to summary judgment as a matter of law. Here, a triable issue of fact exists as to whether Montauk Properties was obligated under the terms of the lease agreement with Gambar Foods to maintain or repair the sidewalk (*see* ***Lee v Second Ave Vil. Partners, LLC***, 100 AD3d 601, 953 NYS2d 259 [2d Dept 2012]; ***Reyderman v Meyer Berfond Trust #1***, 90 AD3d 633, 935 NYS2d 28 [2d Dept 2011]; ***Ever Win, Inc. v. 1-10 Indus. Assoc., LLC***, 33 A.D.3d 845, 827 NYS2d 63 [2d Dept 2006]). Contrary to Montauk Properties' contention, the lease agreement is ambiguous as to who is responsible for maintaining the subject area. While the lease agreement states that the tenant is responsible for making repairs to the subject sidewalk when caused by the tenant's negligence or by its use or occupancy of the premises, Montauk Properties has failed to establish that the alleged defect was created by either tenant's negligence or use of the premises. Likewise, with regard to Montauk Properties' assertion that Gambar Foods must indemnify it, the lease states that the tenant must "indemnify and save harmless the Landlord" arising from injury which is "wholly or in part by any act or acts, omission or omissions of the Tenant." However, Montauk Properties has failed to submit any evidence that the alleged defect was caused by an act or omission by Gambar Foods. Accordingly, the motion for summary judgment by Montauk Properties is denied.

Jay Cards' cross motion for summary judgment dismissing the third-party complaint is denied. Here, counsel for Jay Cards asserts that there is no evidence that it is responsible for maintaining the subject sidewalk area pursuant to its lease with Montauk Properties, but fails to submit a copy of the lease agreement

to support its claim. While Jay Cards references the lease agreement submitted in Montauk Properties' motion papers, that lease agreement was between Montauk Properties and Gambar Food Corp. As to Jay Cards' argument that there is no evidence that the alleged defect was on its property, it cannot obtain summary judgment by pointing to gaps in Montauk Properties' proof; rather, it must adduce affirmative evidence that the alleged defect was not on its property (*see* ***Vittorio v U-Haul Co.***, 52 AD3d 823, 861 NYS2d 726 [2d Dept 2008]; ***Pappalardo v Long Is. R.R. Co.***, 36 AD3d 878, 829 NYS2d 173 [2d Dept 2007]; ***Torres v Industrial Container***, 305 AD2d 136, 760 NYS2d 128 [1st Dept 2003]; ***Antonucci v Emeco Indus.***, 223 AD2d 913, 636 NYS2d 495 [3d Dept 1996]).

The foregoing constitutes the Order of this Court.

Dated: June 12, 2013
Riverhead, NY

HON. HECTOR D. LASALLE, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION