Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES J. GOLIA, JSC IA Part 33
Justice

BAHMAL ALAYEV AND YAKOV ALAYEV,

Plaintiff(s),

– against –

JUSTER ASSOCIATES, LLC AND FC LIQUOR & WINES CORPORATION A/K/A FC DISCOUNT LIQUOR & WINES, INC. AND JIMMY CHAN,

Defendant(s).

Index Number 5728 2011

Motion Date March 19, 2013

Motion Cal. No. 3 & 4

Motion Seq. Nos. 2&3

The following papers numbered 1 to 21 read on this motion by defendant Juster Associates LLC ("Juster") for summary judgment on its cross claims and dismissing the plaintiffs' complaint; and the separate motion by defendants F.C. Discount Liquor & Wines NY, Inc. s/h/a F C Liquor & Wines Corporation a/k/a F C Discount Liquor & Wines a/k/a K V & C Liquors & Wines, Inc (FC Discount Liquor) and Jimmy Chan for summary judgment dismissing plaintiffs' complaint and all cross claims against them.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits	1-8
Answering Affidavits - Exhibits	9-17
Reply Affidavits	18-21

Upon the foregoing papers it is ordered that the motions are consolidated and determined as follows:

This is an action by plaintiffs seeking damages for personal injuries allegedly sustained by plaintiff Bahmal Alayev on February 18, 2011, when she tripped and fell in a hole or depression on an uneven sidewalk adjacent to premises located at 94-19A 63rd Drive, Rego Park, County of Queens, State of New York, a commercial building, owned by defendant Juster. The subject building had five tenants occupying the ground floor thereof, each with separate street-level storefronts. Defendant Juster leased 94-19A 63rd Drive to

defendant FC Discount Liquor, pursuant to a lease dated October 8, 1997, and riders dated October 1, 1997, December 31, 2002, and October 1, 2007. Defendant Chan is the owner and president of defendant FC Discount Liquor. Defendant Chan executed the lease between Juster and FC Discount Liquor in his capacity as President of FC Discount Liquor.

Pursuant to the terms of the lease and riders thereto, defendant owner, Juster, is to maintain the public portions of the building, both exterior and interior, and defendant tenant, FC Discount Liquor, is to make all repairs, structural and/or otherwise, to the demised premises. Defendant FC Discount Liquor is also required under the lease and riders to keep the sidewalks adjacent to the demised premises free from debris, ice and snow.

Defendant Juster moves for summary judgment dismissing the complaint and granting its cross claims for common-law and contractual indemnification as against defendant FC Discount Liquor; defendants FC Discount Liquor and Chan seek summary judgment dismissing the complaint and all cross-claims by defendant Juster.

It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (*See Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980].) Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers. (*See Winegrad v New York Univ. Med. Ctr.*, *supra*.) Once this showing has been made, however, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a triable issue of fact. (*See Alvarez v Prospect Hosp.*, *supra*.)

We turn first the motion by defendant FC Discount Liquor and Chan. These defendants argue, among other things, that they did not have any lease obligation to maintain and repair the sidewalk where the incident occurred and that there is no basis on which defendant Chan can be held personally liable.

While an out-of-possession owner or lessor is generally not liable for injuries that occur on its premises, one who retains control of the premises, or contracts to repair or maintain the property, may be liable for defects. (*See Ever Win, Inc. v 1-10 Industry Associates, LLC*, 33 AD3d 845 [2006]; *see also Winby v Kustas*, 7 AD3d 615 [2004]; *Eckers v Suede*, 294 AD2d 533 [2002].) Control may be evidenced by lease provisions making the owner or landlord responsible for repairs or by a course of conduct demonstrating that the owner or landlord has assumed responsibility to maintain a particular portion of the premises. (*See Winby v Kustas*, *supra*.)

Pursuant to the provisions contained in the subject lease and riders , defendant Juster agreed to maintain and repair the public portions of the building and its tenant, defendant FC Discount Liquor, agreed only to be responsible for nonstructural maintenance of the adjacent sidewalks, that is, debris, ice and snow removal. In addition, Barbara Rosenthal, a managing member of defendant Juster, testified that Juster employed one of the other commercial tenants of its building as an "on-site person" to oversee the property, and another individual to perform cleaning services, additionally, Juster paid for prior sidewalk repair work, including repairs made to the sidewalk in front of defendant FC Discount Liquor's storefront.

Moreover, defendant Juster had a nondelegable duty to maintain and/or repair the subject sidewalk. The sidewalk is not part of the demised premises since it is owned by the City of New York and the Sidewalk Law (Administrative Code of the City of New York § 7-210) imposes upon the owner of real property abutting any sidewalk "the duty . . . to maintain such sidewalk in a reasonably safe condition" and provides that the owner "shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition." (Administrative Code of the City of New York § 7-210[a], [b].) Thus, defendant Juster could not assign and/or delegate its obligations under the Code to the tenant in possession, defendant FC Discount Liquor. (*See Castillo v Bangladesh Society, Inc.*, 12 Misc 3d 1170A [2006].)

Therefore, defendant FC Discount Liquor and Chan have met their burden in establishing entitlement to summary judgment, dismissing the complaint and all cross claims against defendant FC Discount Liquor. Plaintiffs and defendant Juster, in opposition, failed to raise any triable issues of fact.

With respect to the argument by defendants FC Discount Liquor and Chan that there is no basis on which defendant Chan can be held personally liable in this action, these defendants presented competent evidence entitling them to summary judgment on this issue as well.

Defendant Chan executed the lease agreement between defendants Juster and FC Discount Liquor, in his capacity as President of FC Discount Liquor. When an officer or agent enters into a contract on behalf of a corporation, he or she will not be held personally liable for breach of that contract unless there is clear and explicit evidence that he or she intended to be personally bound. (*See Stamina Products, Inc. v Zintec USA, Inc.*, 90 AD3d 1021 [2011]; *see also Colucci v AFC construction*, 54 AD3d 798 [2008]; *Weinreb v Stinchfield*, 19 AD3d 482 [2005].)

On the record before the court there is no clear and explicit evidence that defendant Chan intended to be personally bound, and therefore, the defendants FC Discount Liquor and Chan have met their burden and plaintiff and defendant Juster have failed to raise any issues of facts.

Based on the foregoing, the motion by defendants FC Discount Liquor and Chan to dismiss the complaint and all cross claims is granted.

We turn now to the motion by defendant Juster, which seeks summary judgment on its cross claims for common-law and contractual indemnification as against defendant FC Discount Liquor and dismissal of plaintiffs' complaint on several different grounds.

As the complaint and all cross claims have been dismissed as against defendant FC Discount Liquor and Chan, the branch of defendant Juster's motion for summary judgment on its cross claims is denied.

With respect to the branch of the motion seeking to dismiss plaintiff's complaint we address defendant Juster's arguments. First, defendant Juster contends that the condition complained of is trivial as a matter of law.

Whether a dangerous or defective condition exists depends on the particular facts of each case and is generally a question of fact for the jury unless the defect is demonstrated to be trivial as a matter of law. (*See Trincere v County of Suffolk*, 90 NY2d 976 [1997]; *see also Guidone v Town of Hempstead*, 94 AD3d 1054 [2012]; *DeLaRosa v City of New York*, 61 AD3d 813 [2009].) In determining whether a defect is trivial as a matter of law, the court must examine the facts presented, including the width, depth, elevation, irregularity and appearance of the condition, along with the time, place and circumstances of the injury. (*See Trincere v County of Suffolk*, *supra*.) "There is no minimal dimension test or per se rule that a defect be of a certain minimum height or depth in order to be actionable." (*Boxer v Metropolitan Transportation Auth.*, 52 AD3d 447, 448 [2008], quoting *Trincere v County of Suffolk*, *supra* at 977.)

The moving defendants have not made a prima facie showing that the alleged defective condition was merely a non-actionable trivial defect as there is no competent evidence to demonstrate the size or significance of the alleged defective condition.

Further any contention of defendant Juster that they did not have actual or constructive notice of the alleged defect is unavailing. The defendants failed to provide any evidence showing that they properly maintained the sidewalk as the Administrative Code of the City of New York requires, or that any failure to properly maintain the sidewalk was not a

proximate cause of the plaintiff's injuries. Since the plaintiff's deposition testimony indicates that the she tripped and fell on a raised portion of the sidewalk and the photographs marked as exhibits at the EBT corroborate that testimony there are triable issues of fact exist as to whether the alleged defect was visible and apparent, or existed for a sufficient length of time to permit the defendants to discover and remedy it (Perez v 655 Montauk, LLC, 81 AD3d 619, 916 N.Y.S.2d 137 [2d Dept. 2011]; Bolloli v Waldbaum, Inc., 71 AD3d 618, 896 N.Y.S.2d 400 [2d Dept. 618]]). The alleged defect was not transient, temporary or moveable in nature such that defendants may claim that they did not have actual or constructive notice thereof. (*Langston v Gonzalez*, 3 Misc 3d 371 [2013]). Therefore, this court finds that the defendant failed to establish, prima facie, that it lacked actual or constructive notice of the defective condition that allegedly caused the plaintiff to slip and fall (see Alvarez v Prospect Hosp., 68 NY2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]).

Defendant Juster further contends that plaintiffs failed to identify the cause of plaintiff Bahmal Alayev's fall. However at her deposition plaintiff Bahmal Alayev, clearly identified the cause of her fall as a hole on the uneven sidewalk adjacent to the premises owned by defendant Juster and leased to defendant FC Discount Liquor. (*See Howe v Flatbush Presbyterian Church*, 48 AD3d 419 [2008]; *see also Jackson v Fenton*, 38 AD3d 495 [2007]; *Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920 [2005].) Given this testimony, defendants failed to establish, as a matter of law, that plaintiffs are unable to identify the cause of plaintiff Bahmal Alayev's fall.

Accordingly, the motion by defendants FC Discount Liquor and Chan for summary judgment dismissing the complaint and all cross claims is granted and the motion by defendant Juster seeking summary judgment on its cross claims against defendant FC Discount Liquor and dismissal of plaintiffs' complaint is denied.

This constitutes the order of the court.

Dated: June 6, 2013

.James J. Golia, J.S.C.