

Kardeman v Citydrug & Surgical, Inc.

2013 NY Slip Op 33132(U)

December 10, 2013

Supreme Court, New York County

Docket Number: 150013/12

Judge: Eileen A. Rakower

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: _____
Justice

PART 15

Index Number : 150013/2012
KARDEMAN, RITA
vs
CITY RUG & SURGICAL
Sequence Number : 003
RENEWAL

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). 1, 2, 3

Answering Affidavits — Exhibits _____ | No(s). 4, 5

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 12/9/2013


HON. EILEEN A. RAKOWER.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 5

-----X
RITA KARDEMAN and HARRY KARDEMAN,

Plaintiffs,

Index No.
150013/12

- against -

Mot. Seq. No.: 003

DECISION/ORDER

CITYDRUG & SURGICAL, INC., REGENT ASSOCIATES
and CITY OF NEW YORK,

Defendants.

-----X

HON. EILEEN A. RAKOWER

Plaintiff Rita Karedeman (“Plaintiff”) brings this action for personal injuries allegedly sustained when Plaintiff slipped and fell on the sidewalk in front of 719 West 181 Street, New York, New York. Specifically, Plaintiff claims to have tripped over a misleveled sidewalk.

On December 10, 2012, defendant The City of New York moved for an Order granting summary judgment and dismissing the Complaint and all claims and cross-claims asserted against The City of New York. On January 31, 2013, defendant Heights Pharmacy Inc. d/b/a City Drug & Surgical I/S/H/A CityDrug & Surgical, Inc. (“Heights Pharmacy”), served a cross motion for summary judgment and dismissal of Plaintiff’s Complaint and all cross claims asserted against Heights Pharmacy. On April 18, 2013, Justice Margaret Chan issued an Order granting defendant City of New York summary judgment on its motion, but did not make a ruling on Heights Pharmacy’s cross motion. The matter was thereafter subsequently transferred out of the City Part.

Heights Pharmacy now moves for an Order granting renewal of its summary judgment motion. Heights Pharmacy submits the attorney affirmation of Robert S. Cypher, which annexes Heights Pharmacy's original cross motion for summary judgment. Plaintiffs and co-defendant Regent Associates oppose Heights Pharmacy's renewed cross-motion for summary judgment, and resubmit and rely upon their opposition papers to Plaintiff's original motion.

Heights Pharmacy, in support of its cross-motion for summary judgment, submits the following: the attorney affirmation of Robert S. Cypher, which annexes among, other documents, the following: a copy of Plaintiffs' Complaint, Heights Pharmacy's Answer, and Plaintiff's Bill of Particulars, photographs, the affidavit of Yelena Yoffee, owner of Heights Pharmacy, and ten year lease between Regent Associates, as owner, and Heights Pharmacy with respect to the Premises.

In the affidavit of Yelena Yoffee, Yoffee avers that Heights Pharmacy is a pharmacy located at 719 West 181st Street in New York, space which it leases from Regent Associates. Yoffee avers that "[t]here is another business located on the ground floor of 719 West 181st Street, which had previously been a shoe store, and is now being renovated for dental offices." Yoffee avers that she has reviewed the lease which Heights Pharmacy has with Regent Associates, which requires that Heights Pharmacy clean the sidewalk in front of its store, but that all structural repairs are to be made by the landlord.

Paragraph 4 of the Lease annexed to Cypher's attorney affirmation provides, in relevant part:

Repairs: Owner shall maintain and repair the public portions fo the building . . . Tenant shall, throughout the term of this lease, take good care of the demised premises . . . and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition . .

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual

issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

“It shall be the duty of the owner of real property abutting any sidewalk... to maintain such sidewalk in a reasonably safe condition.” (See Administrative Code of the City of New York 7-210[a]). Liability for dangerous conditions existing upon property is generally predicated upon proof of ownership, occupancy, control or special use, any one of which may be sufficient to give rise to a duty to exercise reasonable care (*Morrison v. Gerlitzky*, 724 NYS2d 73 [2001]). Where one or more of these elements is present, liability can be imposed upon an owner or lessee who either creates the defective condition allegedly giving rise to plaintiff’s injury, or had actual or constructive notice of said condition and a reasonable time to cure. (See, *Gordon v. The American Museum of Natural History*, 501 NYS2d 646 [1986]).

CPLR §3212(f) provides that, “[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.”

Here, there are issues of fact concerning whether the alleged defect is a structural or non-structural defect as anticipated under the lease. Furthermore, as Defendants point out, depositions of Heights Pharmacy and Regent Associates have not yet been held and discovery is not complete.

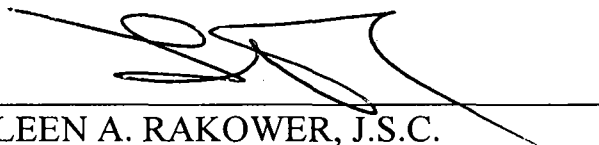
Wherefore it is hereby

ORDERED that defendant Heights Pharmacy Inc. d/b/a City Drug & Surgical I/S/H/A CityDrug & Surgical, Inc.’s renewed cross-motion for summary judgment is denied.

This constitutes the Decision and Order of the Court. All other relief

requested is denied.

DATED: DECEMBER 10, 2013



A handwritten signature in black ink, appearing to read 'ER', is written over a horizontal line.

EILEEN A. RAKOWER, J.S.C.