SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. Justice

PART 8

Fenaldis, Kiki

-v-

Weinberg Properties, LP et al.,

INDEX NO. 106625/11
MOTION DATE 5/3/13
MOTION SEQ. NO. 004

The following papers, numbered 1 to 20, were read on this motion to/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s). 1-18

Answering Affidavits — Exhibits No(s). 19

Replying Affidavits No(s). 20

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

In this trip and fall matter, defendant, JPMorgan Chase Bank, NA s/h/a JPMorgan Chase & Co., (Chase), seeks an Order, pursuant to CPLR 3212, dismissing this action and any cross claims asserted against Chase.

Plaintiff, cross-moves for an Order amending the Bill of Particulars to assert that defendants' violated two additional statutory provisions: NYC Administrative Code §19-152 and §27-2005.

Briefly, it is that on November 30, 2010, plaintiff was walking on the sidewalk adjacent to the premises known as 360 East 57th Street NYC (the premises), when she was caused to trip and fall as her foot came in contact with a raised, uneven and un-leveled metal construction plate which caused plaintiff personal injuries (the accident).

Movants contend that the within action must be dismissed against them because Chase: (1) did not owe a duty of care to plaintiff; (2) did not create the dangerous condition upon which plaintiff allegedly tripped and fell (to wit, the metal plate on the sidewalk); and (3) did not have actual and/or constructive notice of the alleged metal plate on the sidewalk.

It is undisputed that Chase was the tenant at the premises during the time of the accident. Chase asserts that pursuant to a lease agreement between Chase and the landlord, defendant, Weinberg Properties, LP, it was the landlord not Chase that was responsible for maintaining and/or repairing the surrounding sidewalk. Chase further contends that it never had any notice of an alleged dangerous condition with the "construction plate" and

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

Dated: October 21, 2013

JOAN M. KENNEY 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

09.1084

that Chase did not place the construction plate on the sidewalk adjacent to the premises and therefore, did not create the alleged dangerous condition.

In opposition, plaintiff contends that the lease referred to movants is actually between an entity known as, Washington Mutual Bank, FA and the landlord. As such, plaintiff contends that movants cannot rely on said lease to claim that the landlord, rather than movant, is responsible for maintaining the sidewalk. Nevertheless, plaintiff asserts that even if the lease were accepted as that between movant and the landlord, said lease refers to several provisions in which the tenant "shall keep the sidewalks and curb in front of the premises clean and free from ice snow etc. (see, for example, paragraph 2 of the Rule and Regulations attached to the pertinent lease). Plaintiff further contends that movants failed to "disprove" the: (1) creation of the dangerous condition; and (2) constructive and actual notice.

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The rule governing summary judgment is well established: "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." (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 Ad2d 201 [1st Dept 1999]).

In order to establish a prima facie case of negligence in a trip and fall action, a plaintiff must demonstrate that a defendant either created a dangerous condition, or had actual and/or constructive notice of the defective condition alleged (see *Judith D. Arnold v New York City Housing Authority*, 296 AD2d 355 [1st Dept 2002]). A genuine issue of material fact exists when defendant fails to establish that it did not have actual or constructive notice of a watery or hazardous condition (*Aviles v. 2333 1st Corp.*, 66 A.D.3d 432, 887 N.Y.S.2d 18 [1st Dept. 2009]; *Baez-Sharp v. New York City Tr. Auth.*, 38 A.D.3d 229, 830 N.Y.S.2d 555 [1st Dept. 2007]). In Baez, the Court stated that defendant "failed in its initial burden, as movant, to establish, as a matter of law, that it did not create and did not have actual or constructive notice of the watery and hazardous condition." 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 *Strowman v. Great Atl. & Pac. Tea Co., Inc.*, 252 A.D.2d 384, 675 N.Y.S.2d 82 [1998]). A personal injury plaintiff may satisfy burden of showing landowner's constructive notice of hazardous condition by evidence that an ongoing and recurring dangerous condition existed in the area of accident (see *O'Connor-Miele v. Barhite & Holzinger, Inc.*, 234 A.D.2d 106, 650 N.Y.S.2d 717 [1996]).

Movants' application seeking an Order dismissing cross claims asserted by co-defendant(s) against movants, is granted, on default and without opposition.

Although a factual dispute may have been raised respecting whether or not the tenant or the landlord was responsible for maintaining the sidewalk, such dispute would be relevant to whether or not indemnification provisions would be applied. This issue of indemnification between Chase and the landlord, is moot to the extent that this Court is dismissing any counterclaims asserted by co-defendants against Chase. In any event, this Court cannot rely on the terms of the lease which fails to identify movant as the tenant at the premises and therefore will not apply the terms of the lease to demonstrate, one way or the other, that Chase had a duty (or not) to maintain the sidewalk in question. The footnote explanation provided by movants, in Reply papers (to wit, that Washington Mutual, Inc.'s assets were sold to Chase), is also rejected by this Court. First, this argument was presented to this Court, for the first time in Reply papers, without affording plaintiff an opportunity to address same. Second, there is no evidentiary proof presented that the pertinent assets were sold to Chase.

However, plaintiff has failed to present a prima facie case of negligence in this trip and fall action against Chase. Plaintiff erroneously places the burden on Chase to "disprove" actual and/or constructive notice and to "disprove" that it created the alleged dangerous condition. Movants have set forth a prima facie entitlement to the relief sought by demonstrating, through various deposition testimony and affidavits from persons with knowledge of the facts, that movants neither created the alleged dangerous condition nor had actual/constructive notice of the condition which caused plaintiff to trip and fall. It is the opposing party's burden to "assemble, lay bare and reveal his proof in order to show that claims are real and capable of being established on trial" (*Sony Corporation of America v. American Express Company et* al., 115 Misc.2d 1060 [Civ Ct, NY County, 1982]). It is well settled that absent a showing of evidence in an admissible form to demonstrate the presence of triable issues of fact, plaintiff has failed to defeat defendant's summary judgment motion, particularly where plaintiff has not demonstrated that Chase created the alleged dangerous condition and/or had actual/constructive knowledge of the purported defect which caused plaintiff's trip and fall. In fact, it is asserted by movants that co-defendant Con Edison Company of New York, Inc. (ConEd) placed the metal construction

plate down on the sidewalk. ConEd, having failed to submit any papers, has not disputed this assertion.

Plaintiff's cross motion application to amend the Bill of Particulars at the juncture of the litigation, is denied. The prejudice to the remaining parties is apparent. The parties would have to be re-deposed and additional documents would need to be produced respecting the two additional claims of violations of NYC Administrative Codes which plaintiff now seeks to have asserted against defendants. Moreover, plaintiff has failed to state a reasonable excuse for not amending the Bill of Particulars in a timely fashion before the Note of Issue and Certificate of Readiness was filed and after discovery on this matter, which has been pending since 2011, was deemed completed. Accordingly, it is

ORDERED that JPMorgan Chase Bank, NA s/h/a JPMorgan Chase & Co.'s motion to dismiss, pursuant to CPLR 3212, is granted and the Clerk of the Court shall enter judgment in favor of defendant, JPMorgan Chase Bank, NA s/h/a JPMorgan Chase & Co. and against plaintiff, dismissing the action against this defendant, only; and it is further

ORDERED that any and all cross claims asserted against JPMorgan Chase Bank, NA s/h/a JPMorgan Chase & Co.'s by co-defendants, Weinberg Properties, LP, Delaurentis Management Corp., and Consolidated Edison Company of New York, Inc., if any, are hereby dismissed and judgment shall be entered accordingly; and it is further

ORDERED that plaintiff's motion to amend the Bill of Particulars to add additional claims of violations of statutory provisions, is denied; and it is further

ORDERED that the remaining parties proceed to mediation/trial, forthwith.

10/21/13

JOAN M. KENNEY
J.S.C.