[*1] SCANNED ON 3/5/2014

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

INDEX NO. 108651-11

MOTION DATE

MOTION SEQ. NO. 2

Susanna Gruninger

-v-

Gawker Media, LLC et al

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

MAR 05 2014

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 2/28/14

LBY, J.S.C.

LOUIS B. YORK
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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

----------X

SUSANNA GRUNINGER,

Index No. 108651/11,
Motion 002

Plaintiff,

-against-

GAWKER MEDIA, LLC, and
OSCAR Z. IANELLO ASSOCIATES,
INC.,

Defendants.

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YORK, J.:

In this action for personal injury, defendant Oscar Z. Ianello Associates, Inc. (Ianello Associates) moves, pursuant to CPLR 2221 (e), to renew or reargue its motion for summary judgment.

Ianello Associates is the owner of a four-story, commercial building at 210 Elizabeth Street, New York, New York, 10012 (the Premises).

Defendant Gawker Media, LLC (Gawker) is the tenant on the fourth floor of the Premises pursuant to a lease agreement (Lease).

The facts and allegations underlying the parties' dispute have been discussed at length in a prior decision by this court.[1] Summarized, this litigation involves plaintiff, Susanna Gruninger, who alleges that on September 14, 2010, while attending an event sponsored by Gawker at the Premises, she slipped and fell on the roof-top deck due to inadequate lighting, and sustained a fracture to her right foot. As a result, plaintiff commenced this lawsuit asserting causes of action

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[1] Index No. 108561/11, June 24, 2012 (see exhibit A to affirmation of Wendy Jean-Bart, dated April 23, 2013) (Jean-Bart Aff.).

for negligence. On January 12, 2012, Ianello Associates moved for summary judgment of the complaint. On June 24, 2012, this court denied Ianello Associates's motion for summary judgment, granting the parties leave to renew at the conclusion of discovery.

Ianello Associates argues that it is entitled to summary judgment because: (1) there are new facts from various examinations before trial that would reverse this court's prior determination to deny its motion for summary judgment; (2) Ianello Associates is an out of possession landlord, and thus, is not liable for plaintiff's injuries; (3) the rooftop deck is part of the leased Premises and therefore Gawker has a duty to maintain that area; and (4) Gawker failed to provide Ianello Associates with contractual indemnification according to the terms of the Lease.

Plaintiff argues that Ianello Associates is not entitled to summary judgment because: (1) as an owner of the Premises, Ianello Associates has a nondelegable duty to plaintiff to maintain the Premises in a reasonably safe condition; and (2) there are issues of fact as to whether Ianello Associates failed to maintain the Premises in a reasonably safe condition when it neglected to install handrails, lighting, and warning signs on the roof-top deck.

Gawker argues that Ianello Associates is not entitled to summary judgment because there are questions of fact as to whether Ianello Associates: (1) suffered damages beyond what was reimbursed by its insurer; (2) had notice of a defect on the Premises; (3) reserved a right under the Lease to enter the Premises for the purpose of inspection, maintenance or repair; (4) had a nondelegable obligation to maintain its premises in a reasonably safe condition; and (5) has made a prima facie showing of entitlement to summary judgment on either the issue of contractual indemnification or the issue of liability.

Pursuant to CPLR 2221 (e) (2) and (e) (3), respecitvely a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination . . . " and "shall contain reasonable justification for the failure to present such facts on the prior motion." A motion for leave to renew is "intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention" (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). Here, there are no new facts to augment this court's prior decision.

Ianello Associates submitted deposition testimony from Robert Ianniello, property manager and general manager (*see* exhibit C to Jean-Bart Aff.), Scott Kidder, executive director of operations (*see* exhibit D to Jean-Bart Aff.), and Julia Schweitzer, operations/event manager (*see* exhibit E to Jean-Bart Aff) to demonstrate that the roof deck was considered to be a part of the leased premises and thus, no liability could be attached to Ianello Associates as an out of possession landlord. All three deponents aver that liability from any injury sustained on the roofdeck should be born by Gawker, pursuant to the Lease.

It is well settled that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Zaidi v New York Bldg. Contrs., Ltd.*, 99 AD3d 705, 706 [2d Dept 2012] [internal quotation marks and citation omitted]).

> "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. Thus, if the agreement on its face is

> reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity"

(*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007] [internal quotation marks and citations omitted]). "A lease, like any other contract, is to be interpreted in light of the purposes sought to be attained by the parties" (*Farrell Lines v City of New York*, 30 NY2d 76, 82 [1972]). Despite testimony that the rooftop was considered as part of the Lease, the Lease is silent as to that fact (exhibit B to Jean-Bart Aff.). The parties failed to include said term as part of the Lease.

The record demonstrates that Ianello Associates is not an out of possession landlord. The company was involved in the inspection, maintenance, and repair of the Premises. Ianello Associates inspected the rooftop following the expiration of the lease held by the prior tenant of the Premises. That inspection took place a "couple of months" prior to Gawker and Ianello Associates execution of the Lease (*see* pages 36-50 to exhibit C to Jean-Bart Aff.). Once the Lease was executed, Gawker paid for the renovations to the rooftop. However, prior to the commencement of any work on the Premises, Oscar Ianello, the general manager and property manager at Ianello Associates, inspected Gawker's architectural plans for the proposed renovations, and subsequently had them reviewed and approved by his personal architect (*see* pages 24-35 to exhibit C to Jean-Bart Aff.). Some time after that work was completed, the parties discovered that the roof leaked. There was resulting water damage to the fourth floor of the building. Ianniello Associates hired Kingdom Roofing to repair the roof and the water damage (*see* pages 36-50 to exhibit C to Jean-Bart Aff.).

Ianello Associates has failed "to draw the court's attention to new or additional facts" that would change its prior determination (*Pahl Equipment Corp. v Kassis*, 182 AD2d at 27). The

deposition testimony submitted in the case at bar fails to conclusively establish that Ianello Associates was an out of possession landlord.

Secondly, "[a] defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (*Britto v Great Atl. & Pac. Tea Co., Inc.*, 21 AD3d 436, 436 [2d Dept 2005]). "As a general rule, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of that property" (*Gover v Mastic Beach Prop. Owners Assn.*, 57 AD3d 729, 730 [2d Dept 2008]). If the factors of ownership, occupancy or control are not present, "a party cannot be held liable for injuries caused by an allegedly defective condition" (*id.*). Here, there is evidence demonstrating Ianello Associate's ownership and control of the Premises and, thus, potential liability for a dangerous condition is predicated upon that fact.

Notwithstanding the issue of whether Ianello Associates had actual or constructive notice of the dangerous condition, a landowner also has a duty to maintain its premises in a reasonably safe condition (*Tagle v Jakob*, 97 NY2d 165, 168 [2001]; *Sciara v Morey*, 67 AD3d 481, 481 [1st Dept 2009]). "A landowner has a duty to exercise reasonable care in maintaining its property in a safe condition under all the circumstances, including the likelihood of injury to others, the seriousness of the potential injuries, the burden of avoiding the risk, and the forseeability of a potential plaintiff's presence on the property" (*Toes v National Amusements, Inc.*, 94 AD3d 742, 742 [2d Dept 2012]). The deposition testimony submitted in the case at bar fails to conclusively establish that Ianello Associates had no duty to maintain the subject area in a reasonably safe

condition. Ianello Associates's failure to tender "sufficient evidence to demonstrate the absence of any material issues of fact," requires denial of this motion (*Smalls v AJI, Indus. Inc.*, 10 NY3d 733, 735 [2008]).

On the issue of Gawker's failure to obtain general liability coverage, a landlord may recover damages for a tenant's breach of a sublease provision following a breach of a lease requiring the subtenant to procure liability insurance covering the landlord (*Falkowski v Krasdale Foods, Inc.*, 50 AD3d 1091, 1093 [2d Dept 2008]). However, any damages would be limited to the landlord's costs of purchasing substitute insurance and other out-of-pocket expenses arising from the liability claim not covered by the substitute insurance, such as any deductibles or any increase in premiums resulting from the liability claim (*Inchaustegui v 666 5th Ave.. Ltd. Partnership*, 96 NY2d 111, 114 [2001]). Here, Ianello Associates has failed to set forth the facts of its purchase of substitute insurance entitling it to recoup those expenses as damages.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied.

Dated: 2/28/14

ENTER:

J.S.C.

LOUIS B. YORK
J.S.C.

FILED

MAR 05 2014

COUNTY CLERK'S OFFICE
NEW YORK