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FA 10/22/14 FE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

REBECCA B. ELLINGTON,

Plaintiff,

- v -

DORMITORY AUTHORITY OF THE STATE OF NEW YORK et al.,

Defendants.

INDEX NO. 116834/2005

MOTION DATE 7/11/14

MOTION SEQ. NO. 013

The following papers, numbered 1 to 11, were read on this motion for renewal

Notice of Motion—Affirmation — Exhibits 1-7—Affidavit of Service	No(s). 1-3
Affirmation in Partial Opposition—Affidavit of Service; Affirmation in Opposition—Exhibits A-C—Affidavit of Service;	No(s). 4-5; 6-7
Reply Affirmation — Exhibit 1 —Affidavit of Service; Reply Affirmation — Exhibits 7-16—Affidavit of Service	No(s). 8-9; 10-11

Upon the foregoing papers, it is ordered that plaintiff's motion is decided in accordance with the annexed memorandum decision and order.

HON. MICHAEL D. STALLMAN

Dated: 10/20/14
New York, New York

_____, J.S.C.

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

1. Check one:..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check if 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 21

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REBECCA B. ELLINGTON,

Plaintiff,

-against-

Index No.:
116834/2005

DORMITORY AUTHORITY OF THE STATE OF NEW YORK, CONSOLIDATED EDISON, INC., EMPIRE CITY SUBWAY COMPANY (LIMITED), WARREN GEORGE, INC., MITCHELL CONSTRUCTION CORP., GREEN ISLE CONTRACTING INC. OF BELLEROSE, INC., and D & S RESTORATIO INC.,

Defendants.

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MICHAEL D. STALLMAN, J.:

In this trip and fall personal injury action, plaintiff Rebecca B. Ellington moves, pursuant to CPLR 2221 (e), for leave to renew based upon new facts not previously offered which plaintiff contends will change the court's December 7, 2009 order granting defendant Dormitory Authority of the State of New York's (DASNY) cross motion for summary judgment which ultimately dismissed and severed plaintiff's complaint as against DASNY.

BACKGROUND AND FACTUAL ALLEGATIONS

Plaintiff alleges that she sustained injuries when, on November 1, 2004, she tripped and fell on a raised portion of a sidewalk, adjacent to the West Building at Hunter College, on the south side of 68th Street, west of Lexington Avenue, in Manhattan.

Plaintiff brought a motion for summary judgment seeking, among other relief, that the court declare that DASNY was solely responsible and liable for the sidewalk where plaintiff's accident occurred.[1] DASNY cross-moved for an order granting summary judgment in its favor and dismissing plaintiff's claims and any cross claims of the co-defendants as against it. Some of the relevant arguments from the prior motion are as follows:

The Sidewalk Law provides, in pertinent part, that the owner of real property abutting a sidewalk has the duty to "maintain such sidewalk in a reasonably safe condition." Administrative Code § 7-210 (a). According to plaintiff, DASNY, as owner of the property abutting the sidewalk, is

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[1] Plaintiff had previously moved for an order and declaratory judgment striking and dismissing DASNY's sixth and seventh affirmative defenses and for a declaratory judgment stating that the defect that caused plaintiff to fall was not trivial, but as a matter of law, was a substantial defect. The court noted that a declaratory judgment was inappropriate relief. In any event, as a result of the decision, plaintiff's other requested relief was moot. Plaintiff now seeks to reverse, in all respects, the December 7, 2009 order.

responsible for the alleged defective condition of the sidewalk.

According to DASNY, although it owns the property abutting the sidewalk where plaintiff's alleged accident took place, it is not liable for plaintiff's injuries, because it is an out-of possession owner. It claims that its relationship with the City University of New York (CUNY) is not like a typical landlord and tenant relationship, but solely a financing arrangement. At a deposition, DASNY's project manager testified that he was not the project manager for the building, and that he was not involved in the projects constructed by Hunter College. He testified that he had no control over what Hunter College did, and that Hunter College performed the maintenance, routine building work and construction. He also stated that neither CUNY, nor Hunter College, have to ask his permission or speak to him before either wishes to work on a building or sidewalk.

By order dated December 7, 2009, this court granted DASNY's cross motion for summary judgment dismissing plaintiff's complaint. The court held that DASNY, due to applicable case law and legislative intent, was considered an out of possession landlord which does not retain significant control or responsibility over the premises to make it liable for plaintiff's injuries.

DISCUSSION

According to CPLR 2221 (e) (2), in relevant part, a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination . . . ." *See e.g. Abu Dhabi Commercial Bank, P.J.S.C. v Credit Suisse Sec. (USA) LLC*, 114 AD3d 432, 432 (1st Dept 2014).

Plaintiff now moves for leave to renew the underlying motion and cross motion based upon new facts not previously offered, which, according to plaintiff, will change the court's prior determination. In support of her motion, plaintiff provides a contract between DASNY and defendant D & S Restoration, Inc. (D & S Restoration) for sidewalk repair. This contract is dated January 17, 2003 and states that the contractor, D & S Restoration, is to provide sidewalk replacement and complete the project no later than April 17, 2003. Visser affirmation, exhibit 3. Plaintiff further submits a change order request from D & S Restoration to DASNY, dated September 5, 2003, which includes a request to repair the damaged sections of the sidewalk on 68th Street by the West Building. Visser affirmation, exhibit 4. In addition, plaintiff provides a standard contractor/subcontractor agreement, dated July 2003, between D & S

Restoration and Gretalia Construction, Inc., for "sidewalk hunter college-thomas hunter hall." Visser affirmation, exhibit 5. An invoice from Gretalia Construction Inc. to D & S Restoration, dated July 22, 2003, for these repairs, is also included in the record. Visser affirmation, exhibit 6.

Defendant D & S Restoration, Inc. (D & S Restoration) submits an affirmation from its counsel in partial opposition to plaintiff's motion. The affirmation states, in pertinent part, "[p]laintiff makes unsupported and unfounded assertions that contract or change work order by [DASNY], D & S, or its subcontractors was performed in the subject location." Affirmation of Brian McLoughlin at 1.

Plaintiff cites to testimony from the president of D & S Restoration, who confirmed that, at some point, his company had a contract with DASNY for sidewalk repair. Plaintiff claims that these contracts and testimony confirm that DASNY was maintaining the sidewalks at Hunter College, in particular the one where plaintiff tripped.

In response, DASNY refers to its original cross motion papers where it outlined DASNY's status as an owner out of possession of the facilities at Hunter College, including the West Building. DASNY states that any sidewalk repair undertaken by DASNY or its contractors would be

completed only at CUNY's request. And, "once that work was completed, maintenance and repair of the sidewalks would be the responsibility of CUNY pursuant to the Agreements and Lease documents and the New York Education Law." Boydstun Affirmation, ¶ 20.

DASNY further notes that the invoice for sidewalk repair is dated over a year prior to plaintiff's fall. It continues, "[w]hatever portion of the East 68th Street sidewalk which was replaced in 2003 was under the control and management of CUNY on the date of plaintiff's accident." *Id.* DASNY also argues that neither the new documents nor the testimony proves that DASNY replaced the portion of the sidewalk where plaintiff fell.

It is undisputed that DASNY owns, by deed, the property adjacent to the sidewalk where plaintiff allegedly suffered injuries. However, upon renewal, as set forth below, the court adheres to its holding in its December 7, 2009 order that DASNY, due to its special status as an out of possession landlord, is not responsible for the sidewalk where plaintiff's injuries allegedly occurred.

In brief, as this court explained in its prior determination, Education Law § 6203 provides that the City University of New York (CUNY) "shall have the care, custody, control, and management of the lands, grounds,

buildings, facilities and equipment used for the purposes of the educational units of the city university and it shall have the power to protect, preserve and improve the same." As explained in *Perry v City of New York* (126 AD2d 714, 714 [2d Dept 1987]), the Court discussed how the City of New York was not a proper party in a personal injury action where the plaintiff alleged injuries as a result of the negligent maintenance of a CUNY campus located in Brooklyn. The Court stated that CUNY was the proper defendant, with the proper forum being the Court of Claims and explained, "The State Legislature has imposed upon CUNY the care, custody, control, and management of the lands, grounds, buildings, facilities and equipment used for the purposes of the educational units of the city university, and the State of New York now owns the senior college campuses of the CUNY system." *Id.* (internal quotation marks and citations omitted).

DASNY is a public benefit corporation which finances many of CUNY's structures, including many at Hunter College. Public Authorities Law § 1680 (f) authorizes DASNY to provide facilities for CUNY and states, "[n]otwithstanding any other provision of law, general or special, the dormitory authority may acquire, design, construct or otherwise provide and furnish and equip dormitories and attendant facilities for the use of

Hunter College ... ." After CUNY pays off the bonds, the ownership of the facilities is passed directly to CUNY. DASNY claims that it is an out-of-possession landlord, as it maintained ownership of the properties only as collateral until the bonds are paid off.

Pursuant to Section 6.03 of the lease between CUNY and DASNY, CUNY, "at its expense shall hold, operate, maintain, repair and replace the Project and its equipment in a careful and prudent manner and keep the Project and its equipment in a clean and orderly fashion." Boydstun Affirmation in opposition, exhibit L at 14. The lease further provides that if CUNY fails to maintain or repair the premises promptly, DASNY may make such repairs and pay the costs from the insurance proceeds and money from the building and equipment reserve fund. *Id.* at 15.

Courts have concluded that CUNY is charged with the care of its property and that "while DASNY remains the titled, out-of-possession, owner of the building, the rights reserved to DASNY in its lease with CUNY do not constitute a sufficient retention of control so as to subject it to liability." *Dempaire v City of New York*, 61 AD3d 816, 816 (2d Dept 2009) (DASNY was granted summary judgment dismissing a complaint brought by the plaintiff who was injured as she was exiting a building at a college in

Brooklyn that is part of CUNY); *see also Garcia v Dormitory Auth. of State of N.Y.*, 195 AD2d 288, 289 (1st Dept 1993) (Court dismissed plaintiff's complaint alleging that he was injured as a result of a fall outside of a building owned by DASNY holding "rights reserved to [DASNY] do not constitute sufficient retention of control to subject [DASNY] to liability for failure to maintain the premises in good repair. The lease is not a standard leasing agreement, but rather a part of an extensive financing arrangement"); *see also Green v Dormitory Auth. of State of N.Y.*, 173 AD2d 1, 5-6 (3d Dept 1991) (Court dismissed personal injury action against DASNY where plaintiff sought to recover for injuries she sustained in a dormitory. Court found that SUNY was plaintiff's landlord, not DASNY, that SUNY "operates, maintains and controls the dormitory where plaintiff was attacked," and that owing a duty to plaintiff would be outside the scope of DASNY's purposes and "require a finding of legislative intent that is nonexistent").

Recently, this court, as well as another Supreme Court Justice, reached the same result as the above cases, in sidewalk injuries occurring where DASNY was a defendant. For instance, in *Gardner v City of New York* (2013 WL 5656161, 2013 NY Misc Lexis 4609, 2013 NY Slip Op

32438 (U), *1 [Sup Ct, NY County 2013]), plaintiff was allegedly injured when he tripped and fell on a sidewalk in front of a building at Hunter College. A senior project manager at DASNY testified, among other things, that he had no responsibility for sidewalk repairs, that DASNY did not employ maintenance people, that Hunter had its own maintenance staff, that Hunter did not have to gain DASNY's permission to make repairs and that DASNY kept no records of maintenance to the building. This court noted that under similar circumstances, the Appellate Division had considered the lease between DASNY and the university not like "a standard leasing agreement, but rather part of an extensive financing arrangement" and that "the rights reserved to [DASNY] do not constitute sufficient retention of control to subject [DASNY] to liability for failure to maintain the premises in good repair." *Gardner v City of New York* (2013 WL 5656151, *7, 2013 NY Misc Lexis 4609, *13, 2013 NY Slip Op 32438 (U), * 10) (internal quotation marks and citation omitted). This court concluded, that, similar to *Garcia, supra,* the agreement between DASNY and the university required the occupant to repair and maintain the subject premises. Therefore, this court granted DASNY's cross motion dismissing plaintiff's complaint.

In another example, as discussed in the court's prior determination, in *Morris v City of New York* (21 Misc 3d 758, 762 [Sup Ct, Kings County 2008]), a pedestrian allegedly suffered injuries as a result of falling on a sidewalk in front of a hall on the Brooklyn College campus. The court, guided by the legislative intent as well as the treatment of DASNY in similar cases, found that the ownership of the hall had passed to CUNY and that DASNY was not responsible for maintaining the subject sidewalk; *compare Torres v City Univ. of N.Y.* (29 AD3d 892, 893 [2d Dept 2006]) (DASNY's motion for summary judgment was denied when Court determined that there was a triable issue of fact as to whether DASNY's allegedly defective repairs to the roof had contributed to the accident. Plaintiff noticed leaks for about a year prior to the accident).

This court finds similar circumstances in the instant case to those in *Green*, *Garcia*, *Morris*, and *Gardner*, *supra*. As a result, although plaintiff presented new evidence, the new evidence provided by plaintiff "does not change the prior determination" that DASNY does not retain enough control to be subjected to the same liability as CUNY. *Abu Dhabi Commercial Bank, P.J.S.C. v Credit Suisse Sec. (USA) LLC*, 114 AD3d at 433.

The repairs, even if conducted in the location where plaintiff fell, were completed prior to plaintiff's accident. Pursuant to the Education Law, CUNY is responsible for the building's maintenance and repair. As the plaintiff does not suggest that she was injured during the course of the repairs, by the time the accident occurred, the ownership of the West Building, and therefore the responsibility for the abutting sidewalk, had passed to CUNY. By using its contractual right, pursuant to the lease, to make repairs to the sidewalk, DASNY did not change its status. As a result, DASNY was an out-of-possession landlord which did not retain significant control over the sidewalk as to be responsible for plaintiff's injuries.

In addition, as discussed in the prior determination, holding DASNY liable for injuries sustained on CUNY's grounds would be inconsistent with what the Legislature intended and would expose the bondholders to increased risks. Therefore, although the motion to renew is granted, the court reiterates its prior determination severing and dismissing plaintiff's complaint as against DASNY.

CONCLUSION

Accordingly, it is

ORDERED that the plaintiff's motion for leave to renew is granted; and it is further

ORDERED, upon renewal, the Court adheres to its Decision and Order, dated December 7, 2009, which denied plaintiff's motion for summary judgment in its entirety and granted the cross motion for summary judgment by defendant Dormitory Authority of the State of New York and severed and dismissed plaintiff's complaint as against the Dormitory Authority of the State of New York.

Dated: October 20, 2014
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN