SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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SHARYN HINSON,

Plaintiff,

Index No. 152489/2013

-against-

DECISION/ORDER

AIMCO 2232-2240 ACP, LLC and 132 DELI & GROCERY CORP.,

Defendants.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross-Motion and Affidavits Annexed	
Answering Affidavits.....	2
Replying Affidavits.....	3

Plaintiff commenced the instant action seeking damages arising from personal injuries she allegedly sustained when she tripped and fell on a public sidewalk. Defendant 132 Deli & Grocery Corp. ("Deli") now moves for summary judgment dismissing plaintiff's complaint as asserted against it. For the reasons set forth below, Deli's motion is granted.

The relevant facts are as follows. Plaintiff alleges that on November 29, 2012, she tripped and fell on a broken sidewalk in front of a building owned by defendant AIMCO 2232-2240 ACP, LLC ("Aimco") and leased to defendant Deli. Specifically, plaintiff alleges that "she was caused to trip and fall on a triangular shaped broken area at the junction of sidewalk seams"

and that there was a difference in elevation between the two sidewalk flags in excess of an inch. The lease between AIMCO and Deli provides, in relevant part, that "Tenant shall, at Tenant's expense (a) maintain and repair the sidewalks abutting the Premises and (b) keep those sidewalks free of rubbish, dirt, snow, ice and other obstructions, and otherwise in a safe and clean condition."

On or about March 19, 2013, plaintiff commenced the instant action alleging that defendants had actual and constructive notice of the alleged sidewalk defect and asserting a claim for negligence. Deli now moves for summary judgment dismissing plaintiff's negligence claim on the ground that it owed no duty of care to plaintiff.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

In the instant case, Deli's motion for summary judgment dismissing plaintiff's negligence claim is granted as Deli has established that it owed no duty of care to plaintiff and plaintiff has failed to raise an issue of fact. It is well established that in order for a defendant to be held liable for negligence, the plaintiff must establish that the defendant owes some duty of care to the plaintiff. *See Pulka v. Edelman*, 40 N.Y.2d 781 (1976); *see also Palsgraf v. Long Is. R. R. Co.*, 248 N.Y. 339, 342 (1928). "[A]bsent such duty, as we have said before, there can be no breach of duty, and without breach of duty there can be no liability." *Kimbar v. Estis*, 1 N.Y.2d 399,

405 (1956).

Pursuant to Administrative Code § 7-210, owners, not tenants, have a nondelegable duty to maintain abutting sidewalks in "reasonably safe condition." Moreover,"[p]rovisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party, such as plaintiff." *Collado v. Cruz*, 81 A.D.3d 542 (1st Dept 2011) (citing *Tucciarone v. Windsor Owners Corp.*, 306 A.D.2d 162, 163 (1st Dept 2003)). Indeed, in the absence of a lease that is "so 'comprehensive and exclusive' as to sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk," *Abramson v. Eden Farm, Inc.*, 70 A.D.3d 514 (1st Dept 2010) (quoting *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 140 (2002)), a tenant will be liable only if it "created the defective condition, negligently made repairs, or used the sidewalk for a special purpose," *Berkowitz v. Dayton Const., Inc.*, 2 A.D.3d 764, 765 (2nd Dept 2003); *see also Collado*, 81 A.D.3d at 542.

Here, Deli has made a prima facie showing of its entitlement to summary judgment by establishing that it did not make any repairs to the sidewalk, use it for a special purpose or create the defective condition that caused plaintiff's accident. As an initial matter, plaintiff does not claim that Deli negligently repaired the sidewalk, used it for a special purpose or created the condition that caused her to trip and fall. Indeed, the record is completely devoid of any evidence suggesting that the alleged dangerous condition that caused plaintiff's accident was created directly by Deli or by Deli making special use of the sidewalk or due to Deli making negligent repairs. Moreover, Deli presents the deposition transcript of its manager Ali Nakeeb ("Nakeeb") who explicitly testified that Deli never inspected, maintained or repaired any portion of the sidewalk in front of the building where plaintiff's accident occurred.

In opposition, plaintiff has failed to raise an issue of fact. Plaintiff contends that Deli owed her a duty of care as Deli had the comprehensive and exclusive duty to repair the sidewalk under its lease with AIMCO as to displace AIMCO's duty to maintain the sidewalk. However, such contention is without merit. Whether or not such duty existed is a question of law for the court. *See Espinal*, 98 N.Y.2d at 138. Here, upon review of the lease, the court finds no merit to plaintiff's assertion. While Deli agreed to "maintain and repair" the sidewalk and keep it clean from debris, this language does not evidence a clear and complete displacement of the landlord's statutory duty to maintain the sidewalk. Simply put, the lease terms regarding maintenance of the sidewalk are simply to vague to establish that Deli had a comprehensive and exclusive duty to repair the sidewalk.

Additionally, to the extent plaintiff argues in it opposition papers that defendants' attorney should be disqualified, such relief is denied. As an initial matter, plaintiff failed to formally cross-move for such relief. Moreover, there is no merit to plaintiff's contention. The lease between AIMCO and Deli contained an obligation for Deli to defend and indemnify AIMCO in this action and Deli and its insurer have honored that obligation by accepting AIMCO's tender of defense. AIMCO will continue to be defended and indemnified under Deli's policy regardless of whether Deli is dismissed from the action and, contrary to plaintiff's assertion, there exists no direct conflict between the parties.

Accordingly, Deli's motion is granted and it is hereby ORDERED that this action is dismissed as to Deli. This constitutes the decision and order of the court.

Dated: 4/10/15

Enter: CK

J.S.C.

CYNTHIA S. KERN
J.S.C.