| **Tadros v Ann Inc.** |
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| 2015 NY Slip Op 32271(U) |
| November 25, 2015 |
| Supreme Court, New York County |
| Docket Number: 152670/15 |
| Judge: Geoffrey D. Wright |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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ROBERT TADROS,

Plaintiffs,

-against-

ANN INC., d/b/a ANN TAYLOR, SRI NINE 850 LLC, 43 ORCHARD REALTY LLC, T&T REALTY MANAGEMENT LLC, QUALITY BUILDING SERVICES, CORP., and SHORENSTEIN REALTY SERVICES, L.P.,

Defendants.

Index # 152670/15

DECISION./ORDER

**Present:**
Hon. Geoffrey D. Wright
Acting Justice Supreme Court

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SRI NINE 850 LLC,

Third-Party Plaintiff,

-against-

QUALITY BUILDING SERVICES, CORP.,

Third-Party Defendant.

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RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the review of this Motion/Order for summary judgment.

| PAPERS | NUMBERED |
| --- | --- |
| Notice of Motion and Affidavits Annexed...... | 1 |
| Order to Show Cause and Affidavits Annexed | |
| Answering Affidavits........................................ | 2, 3 |
| Replying Affidavits........................................ | 4 |
| Exhibits........................................................... | |
| Other.................cross-motion.......................... | |

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Co-Defendant, Ann Inc., d/b/a Ann Taylor ("Ann Taylor") moves for an Order pursuant to CPLR 3212 dismissing all claims, cross-claims and counterclaims against them. For the reasons discussed below the motion is granted.

This is an action seeking money damages for personal injures sustained by Plaintiff, Robert Tadros ("Plaintiff") when he fell on an icy sidewalk. In his affidavit Plaintiff alleges defendants were negligent in the ownership, management, operation, maintenance and control and repair of the premises in that "the sidewalk was allowed to remain defective for an unreasonable amount of time and had failed to be cleaned in that it allowed snow and ice to accumulate thereon."

In support of their motion, Ann Taylor a tenant in the building, includes a copy of the lease covering the premises noted to be 5900 rentable square feet on the first floor of and 135 rentable square feet, Suite B10 of the basement level of the building known as 850 Third Avenue in the City and State of New York. Ann Taylor argues that the lease proves that it was a retail tenant and that none of the terms and conditions of the lease provide that it had anything to do with maintenance, control or operation of the sidewalk. Further, they argue there is no possible connection or duty that existed between Ann Taylor and the Plaintiff's accident which occurred outside the leased premises. In addition, after the filing of the instant motion, Sri Nine 850 LLC, the building owner and co-defendant, exchanged a surveillance video of the accident which shows Plaintiff's slip and fall. The video was included in Ann Taylor's Reply papers. They argue that the video proves the location where Plaintiff fell which was along the side of the building outside of its leasehold. Lastly, Ann Taylor includes the affidavit of the store manager, Tanikya Sandiford in which she states that pursuant to the lease, custom and practice, Ann Taylor had nothing to do with the sidewalk outside of the store.

In opposition to the motion, Plaintiff argues the affidavit of the store manager, Tanikya Sandiford should not be considered by this Court as she was not disclosed in defendant's June 22, 2015 response to Plaintiff's Combined Demands. In addition, Plaintiff argues that depositions have not been conducted in this action, and that the motion is premature. Notably, Plaintiff fails to address Ann Taylor's argument that the lease proves they had no duty to maintain the sidewalk in front of the premises, instead choosing to focus solely on the affidavit of the store manager while avoiding any mention of the lease.

At the time of the accident ,Co-Defendant/Third-Party Defendant, Quality Building Services Corp., ("QBS") was the maintenance contractor allegedly responsible for the sidewalk at the time of the accident. In their opposition, they argue the motion should be denied because there is a question as to which building the Plaintiff actually fell

in front of which warrants a denial of the motion. Like the Plaintiff, they argue that the affidavit of the store manager is insufficient, self-serving and does not settle the issue of whether Ann Taylor had a duty to maintain the sidewalk. However, they do not address Ann Taylor's argument that the lease proves they had no responsibility for the sidewalk and like Plaintiff, they argue that the motion should be denied as premature

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (Bush v. St. Clare's Hosp., 82 NY2d 738, 739, 621 N.E.2d 691, 602 N.Y.S.2d 324 [1993]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]; Wright v National Amusements, Inc., 2003 N.Y. Slip Op. 51390[U] [Sup Ct New York County, 2003]). Thus, the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (Winegrad v New York Univ. Med. Ctr., supra; Zuckerman v City of New York, 49 NY2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]; Silverman v Perlbinder, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; Thomas v Holzberg, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). A party can prove a prima facie entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (Zuckerman, supra; Prudential Securities Inc. v Rovello, 262 AD2d 172, 692 N.Y.S.2d 67 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (Vermette v Kenworth Truck Co., 68 NY2d 714, 717, 497 N.E.2d 680, 506 N.Y.S.2d 313 [1986]; Zuckerman, supra at 560, 562; Forrest v Jewish Guild for the Blind, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (Zuckerman, supra at 562). Opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (Kornfeld v NRX Technologies, Inc., 93 AD2d 772, 461 N.Y.S.2d 342 [1st Dept 1983], affd, 62 NY2d 686, 465 N.E.2d 30, 476 N.Y.S.2d 523 [1984]).

In this case, the lease does not convey a duty on Ann Taylor to maintain the sidewalk in front or on the side of the building which is where the video shows Plaintiff actually fell. As mentioned neither Plaintiff or QBS address the lease arguments by Ann

Taylor instead they focus on arguing that the motion is premature and depositions have not been completed. This is hardly a reason to deny summary judgment in this case. It is well settled that an argument opposing summary judgment on the grounds of insufficient discovery "is unavailing where the nonmoving party has failed to 'produce some evidence indicating that further discovery will yield material and relevant evidence'" (Heritage Hills Soc., Ltd. v Heritage Development Group, Inc., 56 AD3d 426, 427, 867 N.Y.S.2d 149 [2d Dept 2008], *quoting* Fleischman v Peacock Water Co., Inc., 51 AD3d 1203, 1205, 858 N.Y.S.2d 421 [3d Dept 2008]); Hayden v City of New York, 26 A.D.3d 262, 809 NYS2d 75, 76 [1st Dept 2006]).

Aside from the argument that the motion is premature and the argument in opposition to the affidavit of the store manager, neither Plaintiff or QBS have raised any issue of fact to refute Ann Taylor's evidence that they were not responsible for the sidewalk. ["Based on the record, the discovery that has already taken place, and the lack of a showing of what further evidence might be unearthed, the asserted need for further discovery reduces itself to a 'mere hope,' which is insufficient to defeat summary judgment"];( Steinberg v Abdul, 230 AD2d 633, 633, 646 N.Y.S.2d 672 [1st Dept 1996]) ["We add that the mere hope, expressed by plaintiffs, that evidence sufficient to establish defendants' assumption of a duty to plaintiffs' decedent may be obtained during discovery does not fulfill their obligation to demonstrate the likelihood of such disclosure (CPLR 3212[f]) and, thus, is insufficient to defeat defendants' motions for summary judgment"]; Frierson v Concourse Plaza Associates, 189 AD2d 609, 610, 592 N.Y.S.2d 309 [1st Dept 1993] ["Neither can [defendants] avoid summary judgment by claiming a need for discovery. The 'mere hope' of defendants that evidence sufficient to defeat such a motion may be uncovered during the discovery process is not enough . . . . Defendants were bound to show there was a likelihood of discovery leading to such evidence, i.e., that facts "may" exist but cannot be stated at that time (CPLR 3212[f]). This they failed to do"]; (Pro Brokerage, Inc. v Home Ins. Co., 99 A.D.2d 971, 472 NYS2d 661, 662 [1st Dept 1984] ["The plaintiff's later assertion that further discovery was necessary, not only was set forth in mere conclusory terms, but no attempt was made to explain what further discovery was necessary and to what extent such further discovery would overcome the legal insufficiency of the complaint."]).

Accordingly, it is Ordered that the motion for an Order pursuant to CPLR 3212 for summary judgment dismissing the claims, cross claims and any counter claims against it is granted and the clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: November 25, 2015

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court