

<b>Mora v Altheim Sunog Realty</b>
2016 NY Slip Op 30832(U)
May 5, 2016
Supreme Court, New York County
Docket Number: 155243/2012
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 32**

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**VIRGINIA MORA,**

**Index No. 155243/2012  
Motion Sequence: 002**

**Plaintiff,**

**-against-**

**ALTHEIM SUNOG REALTY, ERNEST SUNOG,  
INDIVIDUALLY, ERNEST SUNOG D/B/A  
“ALTEIM SUNOG REALTY,” RUTH ALTHEIM,  
CO-TRUSTEE OF SOLOMON ALTHEIM LIVING  
TRUST, HELEN STEVENS, CO-TRUSTEE OF  
SOLOMON ALTHEIM LIVING TRUST AND  
VENUS BEAUTY CORP.,**

**Defendants.**

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The motion by Venus Beauty Corp., (Venus) for summary judgment dismissing plaintiff's complaint against it and dismissing any and all cross-claims against Venus is granted.

This action arises out of an alleged injury suffered by plaintiff after she tripped and fell near 1906 3rd Avenue, New York, New York on April 13, 2010 around 4 p.m. Plaintiff claims that she had just finished shopping at a \$0.99 store when she fell on a portion of the sidewalk near a store operated by Venus. Plaintiff testified that she fell in front of a black door, which was apparently an entrance to an apartment building located next to Venus' store. Plaintiff claims that she fell when her right foot was caught in a hole in the sidewalk, causing her to fall forward and land on her left arm, fracturing it.

To be entitled to the remedy of summary judgment, the moving party “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Soşa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court’s task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d’Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

### **Trivial Defect**

“It is a well-established principle of law that a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances” (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500, 856 NYS2d 573 [1st Dept 2008]). Circumstances “include

the likelihood of injury to a third party, the potential that such an injury would be of a serious nature, and the burden of avoiding the risk” (*id.*).

“[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury” (*Trincere v County of Suffolk*, 90 NY2d 976, 977, 665 NYS2d 615 [1997] [internal quotations and citation omitted]). “Of course, in some instances, the trivial nature of the defect may loom larger than another element. Not every injury allegedly caused by an elevated brick or slab need be submitted to a jury” (*id.*). A court must examine “the facts presented, including the width, depth, elevation, irregularity, and appearance of the defect along with the time, place and circumstance of the injury” (*id.* at 978).

“A small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses” (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 78, 19 NYS3d 802 [2015]). “The relevant questions are whether the defect was difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances” (*id.* at 80).

Venus argues that even if it were responsible for repairing the sidewalk, the defect is trivial and therefore, they cannot be held liable for plaintiff’s injuries. In support of this claim, Venus submits photographs of the alleged defect and argues that these photographs along with the weather conditions, plaintiff’s alleged unobstructed view of the alleged defect and its appearance and location make this supposed defect trivial. Notably, Venus does not assert the

dimensions of the alleged defect and instead simply asks the Court to review the photographs and consider the circumstances.

The building owner, Altheim Sunog Realty, Ernest Sunog, Ernest Sunog d/b/a “Altheim Sunog Realty,” Ruth Altheim, co-trustee of Solomon Altheim Living Trust, Helen Stevens, co-trustee of Solomon Altheim Living Trust (Altheim), joins in this argument and claims that the testimony of Mr. Eberhart and Mr. Gueits’ affidavit demonstrate that the alleged defect is trivial. Altheim claims that Mr. Eberhart testified that he would not have performed any work on the alleged defect because it was not a hazard. Mr. Gueits asserts that he “determined” the alleged defect “to be 3 inches wide by 4 inches long and less than ½ deep” (affirmation of Altheim’s counsel, exhibit C, ¶ 6). Mr. Gueits does not claim that he measured the alleged defect, how he measured it, or the date of this determination. Mr. Gueits also fails to provide any contemporaneous record of this measurement.

Even if Venus had made a prima facie showing that the defect was trivial and the burden shifted to plaintiff to raise triable issues of fact.

In opposition, plaintiff demonstrates that at her deposition she testified that the hole was approximately two inches deep, eight inches long and three feet wide (Plaintiff tr at 73-75, 106-107). This raises an issue of fact (*Grullon v. Queens Ballpark Co.*,— NY3d —, 2016 NY Slip Op 03449 (1st Dept 2016)). It is up to the jury to determine credibility regarding the dimensions of the sidewalk defect.

### Venus' Lease

In the alternative to its trivial defect argument, Venus moves for summary judgment on the ground that it did not have a duty pursuant to its lease (Lease) to maintain or repair the sidewalk that contained the alleged defect. Venus claims that the Lease does not require it to make repairs to the sidewalk.

In opposition, Altheim claims that the Lease requires Venus to make repairs to the sidewalk and that the affidavit of Luis Gueits demonstrates that Venus made repairs to the sidewalk after the accident.

In opposition, plaintiff joins in Altheim's arguments regarding the Lease and claims that Venus undertook an obligation to make repairs to the sidewalk because it swept the sidewalk and used a cellar door close to the alleged defect. Plaintiff also suggests that an issue of fact exists because the alleged defect arose from a previous effort to patch the sidewalk by Venus and/or Altheim.

Altheim fails to raise an issue of fact with respect to the Lease. The Lease does not require Venus to make repairs to the sidewalk. The Lease states "That the Tenant shall take good care of the premises and shall, at the Tenant's own cost and expense make all repairs to facilities occupied [by] tenant and at the end or other expiration of the term, shall deliver up the demised premises in good order or condition" (affirmation of Venus' counsel, exhibit I, ¶ 2). Venus claims that it was assigned this lease from a previous tenant (*see* affirmation of Venus' counsel ¶

48). Nowhere is the sidewalk included in the definition of “premises” and of course the landlord could not lease the public sidewalk to the tenant.

“[I]nterpretation of a contract is a question of law for the court” (*Natl. Union Fire Ins. Co. of Pittsburgh, Pa. v Robert Christopher Assocs.*, 257 AD2d 1, 11, 691 NYS2d 35 [1st Dept 1999]). “Where a contract is straightforward and unambiguous, its interpretation presents a question of law for the court to be made without resort to extrinsic evidence” (*Ruttenberg v Davidge Data Sys. Corp.*, 215 AD3d 191, 192, 626 NYS2d 174 [1st Dept 1995]). “Mere assertion by one that contract language means something to him, where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract, is not in and of itself enough to raise a triable issue of fact” (*id.* at 193).

The central issue for the Court is the definition of “premises” under the Lease, and whether Venus’ responsibility to make repairs to the premises includes making repairs to the sidewalk. The Lease references “sidewalk” at least twice (*see* affirmation of Venus’ counsel, exhibit I, ¶¶ 10, 37).<sup>1</sup> The most important provision is Paragraph 10, which states “That the Tenant shall neither encumber nor obstruct the sidewalk in front of, entrance to, or halls and stairs of said premises, nor allow the same to be obstructed or encumbered in any manner” (*id.* ¶ 10).

“The use of different terms in the same agreement strongly implies that the terms are to be accorded different meanings” (*NFL Enters. LLC v Comcast Cable Communications, LLC*, 51 AD3d 52, 60-61, 851 NYS2d 551 [1st Dept 2008]). “In construing a contract, one of a court’s

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<sup>1</sup>The Court observes that the copy of the operative lease that was provided is nearly illegible on certain pages.

goals is to avoid an interpretation that would leave contractual clauses meaningless” (*Two Guys from Harrison-N.Y., Inc. v S.F.R. Assocs.*, 63 NYS2d 396, 403, 482 NYS2d 465 [1984]). In the instant action, Altheim’s argument requires that the Court consider the term “sidewalk” to be subsumed within the term “premises.” This interpretation is inconsistent with the Lease and specifically, paragraph 10. If sidewalk was part of the premises, then part of paragraph 10 would be superfluous; it would render the reference to sidewalk meaningless. There would be no need to instruct a tenant to avoid encumbering or obstructing the sidewalk in front of the premises if the sidewalk was part of the premises.

The Lease is clear that premises and sidewalk have different meanings because they are not used interchangeably in the Lease and the Court must interpret the Lease to give each provision meaning. To adopt Altheim’s interpretation would require the Court to ignore the unambiguous provisions in paragraph 2 and 10. It would also require the Court to assign one meaning to premises in paragraph 2 and another meaning in paragraph 10. And it would also require this Court to conclude that the landlord rented the sidewalk to the tenant which, of course, is preposterous.

Altheim fails to raise issues of fact through the deposition of Mr. Eberhart and the affidavit of Mr. Gueits. Although these individuals may have a different interpretation of the Lease, that does not raise an issue of fact. Further, the affidavit of Mr. Gueits is conclusory and lacks sufficient detail. Mr. Gueits claims that he saw a Venus employee patch the alleged defect in the sidewalk sometime after the date of the accident (affirmation of Altheim’s counsel, exhibit C, ¶¶ 2-3). However, Mr. Gueits provides neither the name of this Venus employee nor how he knew that it was a Venus employee. Mr. Gueits also fails to provide the exact date or even an

approximate date for when this alleged repair took place. Yet Mr. Gueits concludes that Venus performed this patchwork on their own accord.

Even if Venus did repair the patch after the accident, it does not affect the clear and unambiguous language in the Lease nor does it suggest that they were responsible for repairing this particular sidewalk flag. Venus may have simply wanted to prevent another accident regardless of whose responsibility it is to maintain the particular portion of the sidewalk.

Plaintiff's efforts to raise issues of fact fail as well. Claims that a Venus employee swept the sidewalk (affirmation of plaintiff's counsel, ¶ 18) or that Venus used a cellar door allegedly close to the alleged defect (*id.* ¶ 22) do not raise issues of fact. Sweeping a sidewalk does not mean that Venus accepted an obligation to maintain and repair the sidewalk. Further, the portion of the Shin (a Venus employee) deposition cited by plaintiff does not establish that Venus' employees swept the portion of the sidewalk that contained the alleged defect (*see* Shin tr at 46, lines 4-14). Plaintiff's testimony and the photographs submitted show that the alleged defect is in front of a black door rather than Venus' storefront (Plaintiff tr at 37, lines 19-24; affirmation of Altheim's counsel, exhibit B). Similarly, the photographs indicate that the cellar door is in front of Venus' store while the defect is in front of the black door (affirmation of Altheim's counsel, exhibit B). The use of the cellar door does not create an obligation to repair an alleged defect in front of what appears to be an apartment building.

Plaintiff's claim that the alleged defect was actually a previously-patched portion of the sidewalk does not create an issue of fact. Plaintiff fails to offer expert evidence in support of this argument. Even if plaintiff's speculative theory is correct, plaintiff presents no evidence that

Venus made this repair or when the repair occurred. Therefore, the Court cannot conclude that Venus voluntarily assumed an obligation to fix the sidewalk.

### **Section 7-210**

Venus also claims that it cannot be held liable for structural defects in the sidewalk pursuant to Section 7-210 of the Administrative Code of the City of New York. Venus maintains that this provision provides that a landlord has a non-delegable duty to fix the sidewalk and because the sidewalk is structural, Venus had no duty to repair the sidewalk.

Althem does not appear to directly address this argument and instead spends much of its opposition focused on the Lease and whether the alleged defect was trivial.

Similarly plaintiff does not appear to oppose this argument except to cite cases including, *Canaie v G&G II Realty Properties, LLC* and *George v Chios* to claim that summary judgment should be denied.

To the extent that plaintiff or Althem oppose this branch of Venus' motion, they fail to raise an issue of fact. Plaintiff's cases are inapposite. The *Canaie* case held that "A lease provision placing a duty on the tenant to maintain the premises does not affect the landowner's statutory nondelegable duty and does not provide a defense to a claim based upon section 7-210" (*Canaie v G&G II Realty Properties, LLC*, 35 Misc3d 1203(A), \*4, 950 NYS2d 721(Table) [Sup Ct, Queens County 2012]). Even if the Lease imposed a duty on Venus, which it did not, Althem would still be responsible for a claim under section 7-210 if it applied. The *George* case is inapplicable because it involved a lease that specifically instructed the tenant to repair the sidewalk adjacent to its premises (*George v Chios*, 2009 WL 646150 [Sup Ct, Queens County,

Mar. 2, 2009, No. 729/07]). In the instant action, the Lease did not require Venus to repair the sidewalk.

Further, “Administrative Code § 7-210 imposes a non-delegable duty on the owner of the abutting premises to maintain and repair the sidewalk” (*Collado v Cruz*, 81 AD3d 542, 542, 917 NYS2d 178 [1st Dept 2011]). “Provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party” (*id.*). However, “the tenant may be held liable to the owner for damages resulting from a violation of . . . [a] lease, which imposed on the tenant the obligation to repair or replace the sidewalk in front of its store” (*id.*).

Here, Venus had no duty to plaintiff, a third party, to fix the sidewalk and there are no facts to suggest that Venus created the alleged defect or made special use out of this sidewalk flag (*see id.*). Although Section 7-210 of the Administrative Code does not, by itself, absolve a tenant of liability, Venus’ Lease does not contain a provision that obligates Venus to indemnify or contribute to a finding of liability against Altheim for failure to repair the sidewalk.

### **Constructive or Actual Notice**

Venus also claims that the complaint should be dismissed because there is no evidence that it created or had actual or constructive notice of the alleged dangerous condition. Altheim joins in this argument.

In opposition, plaintiff argues that Venus’ claim must fail because the alleged defect existed for a lengthy period of time such that Venus had constructive notice. Plaintiff further claims that Venus’ witnesses failed to testify that they regularly inspected the sidewalk. Plaintiff argues that Venus was responsible, under the Lease, to report to the landlord the existence of a

dangerous or defective condition and that this requirement is not limited to the interior of the premises.

“In order to make out a prima facie case of negligence in cases involving defective or dangerous conditions present on property, a plaintiff must demonstrate either that the defendant created the alleged hazardous condition or that the defendant had actual or constructive notice of the defective condition” (*Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006] [internal quotations and citation omitted]). “A defendant owner is charged with having constructive notice of a defective condition when the condition is visible, apparent, and exists for a sufficient length of time prior to the occurrence of an accident to permit the defendant to discover and remedy the condition” (*Early v Hilton Hotels Corp.*, 73 AD3d 559, 561 904 NYS2d 367 [1st Dept 2010] [citation omitted]).

As discussed above, because Venus is not the owner of the building and Venus is not responsible for maintaining and repairing the sidewalk pursuant to the Lease, it is immaterial whether Venus had actual or constructive notice of the alleged defect. There is also no evidence that Venus created the alleged defect. The portion of the lease requiring the tenant to report a dangerous or defective condition would not apply to the alleged defect at issue in this action (*see* affirmation of Venus’ counsel, exhibit I, ¶ 5). This provision appears to refer to conditions in the premises, which this Court has held does not include the sidewalk. Even if it did, the alleged defect is located in front of an entrance to an adjacent building. The Court cannot read the Lease to impose an affirmative duty on Venus to report any alleged defect it may observe in the vicinity of its store.

**Summary**

Under the terms of the Lease, Venus was not responsible for maintaining or repairing the sidewalk. The parties' differing interpretations of the Lease are immaterial because the terms of the Lease relating to the premises and the sidewalk are unambiguous. Therefore, Venus is entitled to summary judgment dismissing plaintiff's complaint and any and all cross-claims against it.

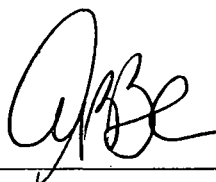
Accordingly, it is

ORDERED that the motion by Venus Beauty Corp seeking summary judgment dismissing plaintiff's complaint and dismissing any and all cross-claims against it is granted, and all claims and cross-claims against defendant Venus Beauty Corp. are severed and dismissed.

This constitutes the Decision and Order of the Court.

**Dated: May 5, 2016**

**New York, New York**



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**HON. ARLENE P. BLUTH, JSC**