SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

MARY ELIZEBETH BARTHOLOMEW,

Plaintiff,

-against-

NINTH AVENUE REALTY LLC and LENNY'S IX LLC,

Defendants.

INDEX NO. 162798/14
MOTION DATE 06-07-2017
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this motion pursuant to CPLR §3212 for Summary Judgment :

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits ____cross motion ____	5 - 6
Replying Affidavits ____	7 - 8

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that defendant Lenny's IX LLC n/k/a Lenwich 43rd LLC's (hereinafter referred to as "Lenny's"), motion for summary judgment dismissing the complaint and all cross-claims asserted against it, is denied. Defendant Ninth Avenue Realty LLC's motion filed under Motion Sequence 002 for summary judgment on the cross-claim for contractual and common law indemnification asserted against Lenny's and dismissing the complaint and all cross-claims asserted against it, is denied. Plaintiff's cross-motion filed under Motion Sequence 002 for partial summary judgment on the issue of liability against all of the named defendants and for an assessment of damages, is denied.

Plaintiff alleges that on October 3, 2014 at approximately 8:15 am, while walking south on the west side of Ninth Avenue to go to the bus stop, she sustained serious injuries after tripping and falling on the uneven sidewalk flag abutting the property owned by defendant Ninth Avenue Realty LLC, located at 613 9th Avenue, New York, New York (hereinafter referred to as the "premises"). It is alleged that the ball of plaintiff's right foot came into contact with the raised edge of broken cement in the middle of the sidewalk in front of Lenny's restaurant where a piece of cement was higher than the rest. Plaintiff claims the defective condition was a crack three feet and three inches long from north to south, with an approximate 3/4 inch height differential. On October 18, 2006 Lenny's entered into a twelve (12) year commercial lease with Ninth Avenue Realty LLC c/o Beach Lane Management, to run a restaurant at the premises.

On December 30, 2014 plaintiff commenced this action asserting negligence causes of action against both of the named defendants. On February 23, 2015 Ninth Avenue Realty LLC filed a Verified Answer asserting a cross-claim against Lenny's for common law and contractual indemnification or contribution. On April 29, 2015 Lenny's filed a Verified Answer asserting cross-claims against Ninth Avenue Realty LLC for contribution, common law and contractual indemnification, for insurance coverage, and damages for breach of the lease agreement.

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

Lenny's motion seeks an order pursuant to CPLR §3212 granting summary judgment and dismissing plaintiff's Complaint and all cross-claims asserted against it.

Ninth Avenue Realty LLC under Motion Sequence 002 seeks an order granting summary judgment on the cross-claim asserted against Lenny's, and dismissing plaintiff's Complaint and all cross-claims asserted against it.

Plaintiff's cross-moves filed under Motion Sequence 002 for partial summary judgment on the issue of liability against all of the named defendants and seeking an assessment of damages.

Plaintiff did not file or submit any opposition papers to Motion Sequence 001 and raised arguments in opposition for the first time in the cross-motion filed under Motion Sequence 002. Plaintiff filed the Note of Issue on July 13, 2016. The Preliminary Conference Order directed that "dispositive motions shall be made and filed on or before 120 days post-filing of Note of Issue" (NYSEF Docket # 19). Plaintiff's cross-motion filed under Motion Sequence 002 seeks relief against Lenny's ignoring the rule "that a cross-motion is an improper vehicle for seeking relief from a non-moving party" (Kershaw v. Hospital for Special Surgery, 114 A.D. 3d 75, 978 N.Y.S. 2d 13 [1st Dept., 2013]). Plaintiff's cross-motion filed under Motion 002 was filed on December 2, 2016, more than 120 days after the Note of Issue was filed and there was no good cause shown for the delay, warranting denial of the relief sought against Lenny's without considering the merits (Rubino v. 330 Madison Co., LLC, 150 A.D. 3d 603, 2017 N.Y. Slip Op. 04210 [1st Dept. 2017]).

Plaintiff erroneously argues that the relief sought in the cross-motion is "nearly identical" to that sought by the movant, Ninth Avenue Realty LLC and excuses the delay. Plaintiff's cross-motion is not a true cross-motion because it seeks summary judgment against Lenny's, and it seeks to address issues pertaining to Administrative Code §7-210 and common law negligence against Ninth Avenue Realty LLC that are distinct from arguments that the alleged defect is trivial and non-actionable (See Rubino v. 330 Madison Co., LLC, 150 A.D. 3d 603, supra at page 603 citing to Kershaw v. Hospital for Special Surgery, 114 A.D. 3d 75, supra at pages 87-88 and Puello v. Georges Units, LLC, 146 A.D. 3d 561, 46 N.Y.S. 3d 28 [1st Dept. 2017). Plaintiff's cross-motion for summary judgment is untimely and denied.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to produce contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645, 569 N.Y.S. 2d 337 [1999]). Conclusory assertions, speculation, surmise and conjecture without admissible evidence are insufficient to raise any issues of fact (Smith v. Johnson Prods. Co., 95 A.D. 2d 675, 463 N.Y.S. 2d 464 [1st Dept., 1983]).

Lenny's argues that it is not liable for plaintiff's injuries as a lessor that did not create the defect, use the sidewalk for a special benefit, or have notice of the alleged condition. It is argued that pursuant to New York City Administrative Code §7-210, Lenny's owed no duty to the plaintiff to maintain the sidewalk abutting the premises and that pursuant to New York City Administrative Code §19-152 only the owner of the premises, Ninth Avenue Realty LLC, is required at its expense to install, construct, re-pave, reconstruct, and repair the sidewalk flags abutting the property. Lenny also argues that as the owner of the premises, Ninth Avenue Realty LLC, under the lease,

contractually retained responsibility for maintaining the structural repairs to the sidewalk and is liable. Lenny's initially argued that the alleged defect in the sidewalk was de minimus in nature and not actionable, but subsequently withdrew those arguments.

Ninth Avenue Realty LLC, under Motion Sequence 002, argues that under paragraph 4 of the lease Lenny's is required to make non-structural repairs to the sidewalk, and under paragraph 8 of the lease to provide contractual indemnification for damages resulting from failure to do so, warranting summary judgment on its cross-claim. Ninth Avenue Realty LLC also seeks summary judgment dismissing plaintiff's complaint and Lenny's cross-claims. It adopts Lenny's arguments that the alleged defect was trivial, and claims the defect was non-structural, which under paragraph 4 of the lease makes Lenny's liable. Ninth Avenue Realty LLC claims that Lenny's could have a sidewalk café/garden under paragraph 62 of the lease and there was a special use.

Liability resulting from notice of a broken sidewalk requires a showing that the defendant created, or had actual or constructive notice of the dangerous condition that precipitated the injury. A defendant who moves for summary judgment has the initial burden of showing that it neither created the alleged dangerous condition, or had actual or constructive notice of its existence (Vaughn v. Harlem River Yard Ventures II, Inc., 118 A.D.3d 604, 989 N.Y.S.2d 464 [1st Dept., 2014]). The issue of whether a defect creates a dangerous condition for purposes of establishing liability is generally an issue of fact for the jury. In some instances the nature of the defect is trivial and dismissal is warranted (Nigro v. Cervinara LLC, 106 A.D. 3d 428, 963 N.Y.S .2d 871 [1st Dept. 2013] citing to Trincere v. County of Suffolk, 90 N.Y. 2d 976, 688 N.E. 2d 489, 665 N.Y.S. 2d 615 [1997]).

Ninth Avenue Realty LLC in Mot. Seq. 002 adopted arguments made by Lenny's which were withdrawn, and has not provided sufficient evidence to show that the defect was trivial.

New York City Administrative Code §7-210, imposes a non-delegable duty upon the owner of the property abutting a sidewalk to repair and maintain it (Collado v. Cruz, 81 A.D. 3d 542, 917 N.Y.S. 2d 178 [1st Dept., 2011]). New York City Administrative Code §7-210 "mirrors the duties and obligations of property owners with regard to sidewalks set forth in New York City Administrative Code §19-152 (Vucetovic v. Epsom Downs, Inc., 10 N.Y. 3d 517, 890 N.E. 2d 191, 860 N.Y.S. 2d 429 [2008]). This does not prevent a tenant from being held liable to the owner for damages from violations of lease provisions imposing obligations to repair or replace the side walk. Although sidewalks are considered structural elements, the lease must be read as whole with the circumstances to determine liability and responsibility for repairs (Wahl v. JCNYC,133 A.D. 3d 552, 20 N.Y.S. 3d 65 [1st Dept. 2015]).

Lenny's arguments pursuant to New York City Administrative Code §7-210 and §19-152, do not avoid liability to the extent it exists, under the terms of the lease.

The lease at paragraph 4 titled "Repairs," in subsection 4.2, states in relevant part,

> "Tenant shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolescence and damage from the elements, fire or other casualty, excepted."

A rider to paragraph 4.2 of the lease states: "provided, however Tenant shall not be obligated to repair damage resulting from any act, omission or negligence of Owner or Owner's agents, contractors or employees." (Mot. Exh. N)

Paragraph 4.3 in the rider includes the following pertinent language:

> "Nothwithstanding anything herein to the contrary, Tenant shall not be required to make any repairs (whether structural or nonstructural) to the extent the same same are necessitated by the act, omission or negligence of Owner's agents, contractors or employees, and Tenant shall not be required to (a) make structural repairs...compliance with each of which shall be Owner's responsibility and shall be accomplished by Owner at its sole cost and expense unless the condition necessitating the repair and/or compliance shall have been caused by Tenant, its agents, employees, contractors, agents, invitees and/or licensees." (Mot. Exh. N).

Ninth Avenue Realty LLC relies on its superintendent Jose Castro's deposition testimony that a post-accident grinding repair was made on the sidewalk where plaintiff is alleged to have fallen, and claims that it was done by Lenny's (Mot. Seq. 002, Exh. G, pg. 41 lines 5-9, 42 line 20, 44 lines 23-25, 45 lines 2-8). Ninth Avenue Realty LLC also relies on the expert affidavit of Scott Derector, a professional engineer, to show Lenny's liability. Mr. Director reviewed the discovery materials and states that "within a reasonable degree of engineering certainty" the subsequent grinding repair to the subject sidewalk was non-structural, showing Lenny's liability (Mot. Seq. 002, Exh. N).

Lenny's relies on the deposition testimony and affidavit of Sung Yoon Lim (aka Sung Joon Lim), its construction project manager responsible for maintenance, stating that there was no repair work performed on the sidewalk, or a sidewalk cafe/garden placed on the sidewalk adjacent to the premises at any time before the accident occurred on October 3, 2014 (Mot. Exh. M page 18 lines 11-17, and Mot. Seq. 002, Opp. Exh. B). Lenny's provides the expert report of Douglas W. Peden, Registered Architect, as part of the opposition papers to Motion Sequence 002, arguing that the damage to the sidewalk is structural (Mot. Seq. 002, Opp. Exh. C). Mr. Peden states that "with a reasonable degree of architectural and technical certainty," the sidewalk flag is defective and that there is a substantial defect that is structural, requiring replacement and not repair in the form of grinding the sidewalk (Mot. Seq. 002, Opp. Exh. C).

An expert's affidavit must be based on sufficient evidentiary proof of its allegations and foundational facts as to the asserted claims, it must not be conclusory. The claims presented in an expert's affidavit must be more than mere speculation to prevail on a motion for summary judgment (Romano v. Stanley, 90 N.Y. 2d 444, 684 N.E. 2d 19, 661 N.Y.S. 2d 723 [1997]).

The entity performing the post-accident grinding of the sidewalk was not identified by Jose Castro's deposition testimony (Mot. Seq. 002, Exh. G, pg. 43 lines 13-16, pg. 44 lines lines 9-17). Scott Derector's affidavit concludes the work was done by Lenny's, and does not rely on an inspection of the work performed, or provide an explanation for the determination that the defect was non-structural other than it was ground down. Sung Yoon Lim (aka Sung Joon Lim) does not provide testimony or proof to establish the defect was structural (Mot. Seq. 002, Opp. Exh. B). Douglas W. Peden, does not specifically identify industry standards or New York City Department of Transportaion Highway rules requiring the entire sidewalk flag be replaced or defining the defect as structural. Both of the expert reports provided are conclusory and insufficient for either defendant to prevail on a motion for summary judgment.

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact cannot be resolved on conflicting affidavits (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341 [1966]). Summary Judgment is "issue finding" not "issue determination"(Vega v. Restani Const. Corp., 18 N.Y. 3d 499, 965 N.E. 2d 240, 942 N.Y.S. 2d 240 [2012] citing to, Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y. 2d 395, 144 N.E. 2d 387, 165 N.Y.S. 2d 498 [1957]). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve (Brunetti, v. Musallam, 11 A.D. 3d 280, 783 N.Y.S. 2d 347 [1st Dept. 2004]).

The conflicting testimony and evidence produced fails to establish which defendant caused the defect, or any defendant's liability under the terms of the lease, warranting denial of summary judgment. Ninth Avenue Realty LLC has not shown clear entitlement to summary judgment under the terms of the lease warranting denial of any conditional judgment on the indemnification counter-claim.

New arguments raised for the first time in reply papers deprive the opposing party of an opportunity to respond, and are not properly made before the Court (Ambac Assur. Corp. v. DLJ Mtge. Capital Inc., 92 A.D. 3d 451, 939 N.y.S. 2d 333 [1st Dept.,2012] and Chavez v. Bancker Const. Corp., Inc., 272 A.D. 2d 429, 708 N.Y.S. 2d 325 [2nd Dept., 2000]). Arguments raised by Ninth Avenue Realty LLC in Motion Sequence 002, about Lenny's special use of a bicycle rack on the sidewalk, raised for the first time in reply papers are improper and will not be addressed.

Accordingly, it is ORDERED that defendant Lenny's IX LLC n/k/a Lenwich 43rd LLC's, motion for summary judgment dismissing the complaint and all cross-claims asserted against it, is denied, and it is further,

ORDERED that Ninth Avenue Realty LLC's motion filed under Motion Sequence 002 seeking an order granting summary judgment on the cross-claim asserted against Lenny IX LLC n/k/a Lenwich 43rd LLC and dismissing plaintiff's Complaint and all cross-claims asserted against it, is denied, and it is further,

ORDERED that plaintiff's cross-motion filed under Motion Sequence 002, for partial summary judgment on the issue of liability against all of the named defendants and seeking an assessment of damages, is denied, and it is further,

ORDERED that the action shall continue to mediation and/or trial.

ENTER:

MANUEL J. MENDEZ,
J.S.C.

Dated: July 14, 2017

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE