Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **ALLAN B. WEISS** IA PART_2_

GREGORY KING

Plaintiff,

-against-

16 JOHN STREET OWNER, L.L.C.

Defendants.

Index Number: 3831/13

Motion Date: 10/19/17

Motion Seq. No. 3

The following papers numbered 1 to 4 read on this motion by plaintiff Gregory King for an order restoring this case to the trial calendar and on this cross motion by defendant 116 John Street, LLC for summary judgment dismissing the complaint and all other claims against it

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1 - 4
Notice of Cross Motion - Affidavits - Exhibits	5 - 8
Answering - Reply Affidavits - Exhibits.....	9 - 12
Reply Affidavits.....	13 - 14

Upon the foregoing papers it is ordered that the motion by the plaintiff is granted. The cross motion by the defendant is denied.

I. The Allegations of the Parties

A, The Allegations of the Plaintiff

Plaintiff Gregory King alleges that on July 20, 2012, during the course of his employment with MacKenzie Door Company, he went to premises located at 116 John Street, New York, New York to fix a door. The property has been improved by an office building open to the public which was undergoing a conversion to a mixed used commercial and residential building, It was raining on that day, and, as he stepped into the vestibule area

of the building through an entrance open to the public, he "slid" on the floor and fell. More specifically, the accident occurred in the space between the main entrance interior door and the main entrance exterior door. The black marble floor was wet along its entire length, as people had been entering and leaving the building. There were runner mats on the floor inside the lobby, but not on the black marble floor. He slipped and fell on rainwater on the floor because of the failure of defendant 116 John Street Owner, LLC to mop, dry, or place mats on the floor in the vestibule area of the premises.

Defendant 116 John Street Owner LLC owns the property where the plaintiff fell, and the defendant leases the property to a tenant who in turn subleases the premises to 116 John Street Subtenant LLC. Metro Loft Management LLC is the managing agent for the building, and it had originally signed a management agreement with Hacienda Intercontinental Realty, Inc. The latter subsequently assigned the management agreement to the defendant. The defendant owner, the subtenant, and the managing agent have common principals.

I. The Defendant's Allegation

Defendant 116 John Street Owner, LLC owns property located at 116 John Street, New York, New York. Metro Loft Management, LLC is the building manager.

The defendant is an out-of-possession lessor which did not retain control over the premises, did not bind itself in the lease to repair unsafe conditions or defects, and did not violate any applicable laws.

On or about November 10, 2011 the defendant owner and 116 John Street Master Lease, LLC entered into a master lease, and on or about November 10, 2011, 116 John Street Master Lease and 116 John Street Subtenant LLC entered into a master sublease. The Master Lease and the Master Sublease do not require the defendant owner to mop, dry, or place mats in the vestibule area of the premises.

On or before July 12, 2012, the subtenant employed all maintenance and lobby personnel. .At or about the time of the accident, Metro Loft Management and/or 116 John Street Subtenant LLC personnel were mopping and/or laying mats for tracked in water.

II. Relevant Procedural History

Plaintiff Gregory King began this personal injury action by the filing of a summons and a complaint on February 28, 2013.

A note of issue and certificate of readiness were filed on October 17, 2014. The defendant moved to strike the note of issue and certificate of readiness, and the motion was disposed of by a so- ordered stipulation dated November 18, 2014 which allowed the conduct of further discovery while the case remaining on the trial calendar. On December 2, 2015, at a pre-trial conference, the cased was marked administratively disposed and marked off the calendar with the consent of the parties. Despite being marked administratively disposed, discovery continued. According to this court's electronic records, the plaintiff's attorneys filed a new note of issue on November 19, 2016. Attached to the note of issue is an affidavit of service by mail executed by Kathy Zaprudskiy stating that on November 28, 2016 she served the note of issue upon the attorney for the defendant owner. The note of issue is stamped "Queens County Clerk's Office." However, on or about December 6, 2016 the Ex Parte Support Office returned the new note of issue with a memo stating: "Matter is marked as disposed . Court order is required." The plaintiff's attorney spoke with the Ex Parte Office and learned that a so-ordered stipulation would be adequate, but when the attorney for the plaintiff contacted the attorney for the defendant about signing a stipulation, the latter refused.

On October 19, 2017, the plaintiff submitted the instant motion for an order restoring this case to the trial calendar. The defendant owner served the instant cross motion for summary judgment on August 15, 2017.

III. Discussion

A. The Cross Motion for Summary Judgment

1. Timeliness

The issue presented is whether the defendant owner's time to move for summary judgment ran from October 17, 2014, the date of the filing of the first note of issue. There is some relevant appellate authority. In *Rivera v. City of New York* (73 AD3d 413 [First Department, 2010), the appellate court stated : " At least where, as here, the 120–day time limit had expired before the case was struck from the calendar, we reject defendant's argument that the 120–day limit does not apply to cases that have been struck from the calendar ***."In *Valentin v. MTA/New York City Transit Auth*., (108 AD3d 421, [First Department, 2013]), the appellate court held : " the 120–day limit imposed by CPLR 3212(a) applies to cases that have been stricken from the trial calendar, at least where, as here, the 120–day period had expired before the case was struck from the calendar ***." Plaintiff King, relying on First Department authority, argues that the instant cross motion is untimely. However, in *DiRosario v. Williams* (276 AD2d 583 [Second Department 2000]), where a note of issue was filed, the case was subsequently marked off the trial calendar, and

the plaintiff filed a new note of issue after d iscovery was completed, the appellate court held that a motion for summary judgment made within 120 days after filing of the new note of issue, was timely. In *Thaler v. Aspen Ready Mix Corp*. (286 AD2d 763, [Second Department, 2001]), the appellate court, simply citing *DiRoario,* again held that a motion for summary judgment was timely. In *Johnson v. Ladin* (18 AD3d 439 [Second Department, 2005]), the appellate court stated : "Contrary to the Supreme Court's determination, the defendant's motion, made well within 120 days after the filing of the new note of issue, was timely ." In *Williams v. Peralta* (37 AD3d 712 [Second Department, 2007]), the appellate court, again measuring from the filing of a new note of issue, held that the motion for summary judgment was timely.

This court concludes that the rule in the Second Department is that the time to bring a motion for summary judgment runs from the filing of the new note of issue. Moreover, in fairness, that rule should be applied under the circumstances of this case where the defendant moved to strike the first note of issue and the court permitted further discovery. A motion for summary judgment would be expected after the conclusion of discovery.

The cross motion by the defendant owner for summary judgment is timely.

2. The Defendant's Burden

"[T]he proponent of a summary judgment motion 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 ***." (*Alvarez v. Prospect Hospital*, 68 NY2d 320, 324.) The defendant owner successfully carried this burden. The defendant owner submitted evidence that it was an out of possession landlord without the duty to correct the condition that caused the plaintiff's accident. (*See*, *Seawright v. Port Auth. of New York & New Jersey*, 90 AD3d 1017.)

3. The Plaintiff's Burden

The burden on this cross motion shifted to the plaintiff, requiring him to show that there is an issue of fact which must be tried. Plaintiff King successfully carried this burden.

Because the defendant owner itself employed Metro Loft Management LLC, the managing agent for the building, there is an issue of fact as to whether the defendant was actually an out of possession landlord without any duty to keep the area where the plaintiff fell in a safe condition.

There are other issues of fact as well. The liability of an out-of-possession landlord for an injury ocurring on rented premises does not depend solely on the landlord's retention of control. (*See* , *Alnashmi v. Certified Analytical Grp., Inc*., 89 AD3d 10.) New York City Administrative Code §28-301.1 provides in relevant part: "The owner shall be responsible at all times to maintain the building and its facilities and all other structures regulated by this code in a safe and code-compliant manner and shall comply with the inspection and maintenance requirements of this chapter." An out-of-possession landlord may be liable for injuries which occur on leased premises where he has breached a duty "imposed by statute or assumed by contract or a course of conduct" (*Alnashmi v. Certified Analytical Group, Inc*., *supra*, 18; *Seawright v. Port Auth. of New York & New Jersey*, 90 AD3d 1017.) " A landowner's duty may arise under the common law, by statute, or by regulation ***or it may be assumed by agreement or by a course of conduct ***." (*Alnashmi v. Certified Analytical Grp., Inc*., *supra*, 14.) In the case at bar, the defendant owner cannot escape liability for the plaintiff's accident by arguing that the duty to maintain the premises shifted to the tenant under a written lease (*see, Paez v. 1610 Saint Nicholas Ave. L.P.*, 103 AD3d 553), because " [a] building owner's statutory duty to maintain its premises in a reasonably safe condition remains nondelegable as between the owner and an injured party despite any contractual delegations of maintenance obligations by the owner to another party ***." (*Paez v. 1610 Saint Nicholas Ave. L.P.*, *supra*, 554.)

Moreover, "[w]here *** premises are open to the public, the owner has a nondelegable duty to provide the public with a reasonably safe premises and a safe means of ingress and egress ***." (*Backiel v. Citibank, N.A*., 299 AD2d 504, 505; *see, Blatt v. L'Pogee, Inc*., 112 AD3d 869.) Owners and operators of an office building which is open to the public, have a duty to provide the public with reasonably safe premises, which includes a safe means of ingress and egress, and this duty may not be delegated to others. (*See*, *Grizzell v. JQ Assocs., LLC*, 110 AD3d 762.) The court notes that the defendant did not argue that plaintiff King was not a person protected by the non-delegable duty exception. (*See*, *Blatt v. L'Pogee, Inc*., 112 AD3d 869.)

Finally, the record in this case shows that, at best for the defendant owner, there is an issue of fact concerning notice of the defective condition. "A landowner has constructive notice of a dangerous or defective condition on property when the condition is visible and apparent, and has existed for a length of time sufficient to afford a reasonable opportunity to discover and remedy it." (*Walsh v. Super Value, Inc*., 76 AD3d 371, 375.)

B. The Motion to Restore the Case to the Trial Calendar

This case was not marked off the calendar because of the default of any party, and the court did not deem it abandoned. The case was not marked off the trial calendar pursuant to CPLR 3404, "Dismissal of abandoned cases," for "neglect to prosecute. (*see*, *Leinas v. Long Island Jewish Med. Ctr.,* 72 AD3d 905), and the requirements to have a case restored to the trial calendar after the application of CPLR 3404 (*see,Leinas v. Long Island Jewish Med. Ctr*, *supra*) do not apply. The activity of the parties after the case was struck demonstrates that there has been no intent to abandon the action. There have been depositions taken on May 3, 2016 and November 28, 2016. On January 30, 2017, the plaintiff had a vocational rehabilitation IME performed. The defendant did not demonstrate that it will be prejudiced if this case resumes its procedural course. Under all of the circumstances of this case, the court finds that this action should be restored to the trial calendar.

Accordingly, the plaintiff shall file a new Note of Issue on or before March 30, 2018. The action is restored to the April 30, 2018 Trail Scheduling Part calendar for a pretrial conference.

A copy of this Order is being mailed to the attorneys for the parties.

Dated: March 8, 2018

J.S.C.