SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART** **62**

Justice

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RONKE OLANIYI,

Plaintiff,

- v -

WESTBURY REALTY ASSOCIATES, LLC, SHOWCASE DESIGNS CORP., THE CITY OF NEW YORK

Defendants.

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INDEX NO. 451855/2019

MOTION DATE 02/02/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 55, 56, 57, 58, 60, 61, 62, 63, 64, 65, 66, 67

were read on this motion to/for JUDGMENT - SUMMARY.

In the underlying action, plaintiff RONKE H. OLANIYI alleges that she sustained personal injuries as a result of a trip and fall accident on February 20, 2018 on the sidewalk abutting the property located at 24 John Street, New York, New York 10038 (the "premises"). Attached to the filings were photographs of the alleged condition that were marked by plaintiff at her deposition that was held on March 26, 2021 (NYSCEF Document #48). Plaintiff filed this action against the City of New York (the "City"); Westbury Realty Associates, Llc d/b/a WESTBURY REALTY CORP, LLC, which, generally, owns the premises (the "Owner"); and a contractor named Showcase Designs Corp. ("Showcase").

Pending now before the court is a motion filed by Showcase seeking an order, pursuant to Section 3212 of the Civil Practice Law and Rules ("CPLR"), granting summary judgment to Showcase and dismissing plaintiff's complaint and any cross-claims asserted against Showcase.

Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

The 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, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, "We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Showcase's *Prima Facie* Case

In its motion, Showcase argues that its involvement as a contractor on the premises ended "years prior to the date of plaintiff's alleged injury." It argues that as a former contractor involved with the property, Showcase had no obligation to control or direct the means, methods or procedures involved in the construction that was happening at the time plaintiff had her accident; that it did not create the defect; and that as a former contractor, Showcase had no continuing duty to maintain the subject sidewalk. Showcase argues that the record is devoid of any evidence that it owed or breached any duty to the plaintiff, and there was no nexus or proximate cause between plaintiff's claimed injury and Showcase's prior work permit.

In support of its argument, Showcase submitted the sworn Affidavit (the "First Affidavit") of Philip Loria, (NYSCEF Document #51), the Vice President and one of the owners of Showcase, which read, in part:

> 3. The complaint, which I have reviewed, alleges that SHOWCASE DESIGNS CORP. owned the property adjoining the sidewalk in front of 24 John Street on February 20, 2018. The allegation is untrue. SHOWCASE DESIGNS CORP. had no ownership or possessory interest in the subject premises on or prior to February 20, 2018.
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> 4. In addition, SHOWCASE DESIGNS CORP. did not own, maintain, operate, control, supervise, repair or operate any portion of the adjoining sidewalk, located at 24 John Street, New York, on or prior to February 20, 2018.

5. SHOWCASE DESIGNS CORP. did not provide any repairs, maintenance, or construction services, nor hire or retain anyone to perform any maintenance, repairs construction or any work, or provide any services, in connection with the adjoining sidewalk at any time on or prior to February 20, 2018.

6. Similarly, no agent or employee of SHOWCASE DESIGNS CORP. was responsible for, controlled, supervised or managed, repaired or maintain any portion of the property located at 24 John St. including the adjoining sidewalk at any time on or on or prior to February 20, 2018.

7. SHOWCASE DESIGNS CORP. did not submit any invoices for any repairs maintenance or work performed for any portion of the sidewalk, adjoining the property on or prior to February 20, 2018.

8. SHOWCASE DESIGNS CORP. did not submit any invoices for any work performed and did not receive any compensation for any possessory or ownership interest in the subject premises, including the adjacent sidewalk, located at 24 John St. on or prior to February 20, 2018.

9. Accordingly, SHOWCASE DESIGNS CORP. has no responsibility for any alleged negligence with regard to plaintiff's trip and fall accident on the sidewalk adjoining the premises 24 John St , where plaintiff was injured, and SHOWCASE DESIGNS CORP. did not cause or create any defective sidewalk condition and did not own, install, operate, or control, manage, repair or maintain any metal plate cover, nor did it cause or create any cracked or broken conditions in the sidewalk adjacent to the subject premises, aforementioned.

"A defendant moving for summary judgment in a slip-and-fall action has the initial burden of showing that it neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff's injury" (Ross v Betty G. Reader Revocable Tr., 86 AD3d 419 [1st Dept 2011]). Here, given the contents of Mr. Loria's First Affidavit, the court finds that Showcase has made a *prima facie* case in support of summary judgment, and the burden now shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *See also* Aller v City of New York, 72 AD3d 563 (1st Dept 2010) ("Thus, both Feroma [Contracting, Inc.] and C & E [Plaster & Construction Co.] established their *prima facie*

entitlement to summary judgment by showing that they neither created nor had actual or constructive notice of the alleged defect").

Opposition and Reply

Neither the City nor the Owner opposed this motion, and the only opposition was filed by plaintiff.

Plaintiff argues that the assertions made by Mr. Loria about Showcase's lack of involvement on the premises is belied by the record. In support of his argument, plaintiff submitted a photo (NYSCEF Document #58) that plaintiff avers was attached to the Notice of Claim (NYSCEF Document #57) and that was also attached to the Bill of Particulars dated June 25, 2019. The photograph shows a sign that states, "GENERAL CONTRACTOR: SHOWCASE DESIGN CORP." According to plaintiff, at the time that she fell, there was a wooden "sidewalk fence" that had been erected around the premises and this sign was affixed to the sidewalk fence.

Plaintiff argues that New York City Construction Code Section 3301.9.1.1 ("Project information panel content") provides that signage is required at a construction site and the signage is to be affixed to a sidewalk fence. The provision further provides that this signage shall contain the corporate name, address and telephone number of the owner of the property, and the corporate name and telephone number of the general contractor." Plaintiff argues that this signage is a clear indication that Showcase was still involved with the property around the time of plaintiff's accident.

In Reply, Showcase argues that the signage is outdated and that Showcase had not been the contractor on the premises since 2013. It argues that the sign was inadvertently not removed back in 2013 when Showcase ended its involvement with the premises. Showcase also argues that plaintiff is proceeding in bad faith, as during Mr. Loria's deposition, which was held on April 22,

2021, plaintiff never showed this photograph to Mr. Loria or questioned Mr. Loria about the contents of the photograph. (Transcript at NYSCEF Document #50).

In support of this argument, Showcase submitted another sworn Affidavit (the "Second Affidavit") by Philip Loria, (NYSCEF Document #67), that states, in part:

> 2. In further support of SHOWCASE DESIGNS CORP.'s motion for summary judgment, I have provided my attorney with all the permits relating to the 24 John Street Project ("the Project") (See Exhibit "1"). The permits will show that during a limited period of time from July 26, 2011 through December 03, 2013 SHOWCASE DESIGN CORP. was the General Manager on the Project.
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> 3. During the short period of time SHOWCASE DESIGN CORP. served as the General Contractor, they supervised the steel, electrical, HVAC and plumbing subcontractors. SHOWCASE DESIGN CORP. did no work whatsoever on the sidewalk, nor did it supervise, subcontractors or manage any work relating to the sidewalk abutting 24 John Street.
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> 4. For the majority of the Project the General Contractor on the job was DUC Construction Corp., which is supported by the Work Permits. (See Exhibit "1"). SHOWCASE DESIGN CORP. has not been on the Project since 2013.
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> 5. I have reviewed the photograph that Plaintiff's Counsel has attached in her Opposition Papers, showing a sign affixed to the sidewalk fence and identifies the General Contractor as SHOWCASE DESIGN CORP. The photograph was never shown during my deposition nor was I asked any questions regarding the sign at my deposition.
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> 6. While a sign on the sidewalk fence identified SHOWCASE DESIGN as the General Contractor, the sign was inadvertently not taken down and should have been removed in 2013 when SHOWCASE DESIGN was last on the Project.
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> 7. In 2018, including the time of the Plaintiffs incident, the Project was substantially completed with only minor punch list items being done that did not involve major construction, including any work to any sidewalks.
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> 8. In 2018 the sidewalk fence was kept up in order to protect the storefronts and the facade from the deliveries of hotel furniture and fixtures. The sidewalk fence was not there at that time for any construction related activities.

Conclusions of Law

Summary judgment can only be granted when there is an absence of any material issue of fact. This court finds that Showcase has not met that standard.

Here, in the First Affidavit, Mr. Loria stated that "no agent or employee of SHOWCASE DESIGNS CORP. was responsible for, controlled, supervised or managed, repaired or maintain any portion of the property located at 24 John St. including the adjoining sidewalk at any time on or on or prior to February 20, 2018," but the Second Affidavit states that "from July 26, 2011 through December 03, 2013 SHOWCASE DESIGN CORP. was the General Manager on the Project" and "as the General Contractor, they supervised the steel, electrical, HVAC and plumbing subcontractors." Importantly, in the second affidavit, Mr. Loria states that in 2018, including the time of plaintiff's incident, Showcase's work on the Project was "substantially completed" but there were "punch list items being done."

For all the aforementioned reasons, it is hereby

ORDERED that the motion is DENIED.

6/2/2022
DATE

J. MACHELLE SWEETING, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE