SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

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TOBY KOSA STRUSSER,

Plaintiff,

-against-

TISHMAN SPEYER A/K/A TISHMAN SPEYER ASSIGNOR CORP., and BANANA REPUBLIC, LLC

Defendants.

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Index # 524613/2021

Decision and Order

Motion Seq. # 1

HON. LISA S. OTTLEY

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion for Summary Judgment submitted on April 15, 2024.

Papers	Numbered
Notice of Motion and Affirmation	1, 2, 3, and 4 [Exh. A-G]
Affirmation/Affidavit in Opposition	5 [Exh. 1]
Reply Affirmations	6

Plaintiff, Toby Kosa Strusser, commenced this action due to a trip and fall as a result of a broken, cracked, unlevel, uneven, raised, damaged and/or defective condition on a sidewalk, which occurred in front of 626 Fifth Ave., in New York, New York, on or about June 2, 2019. Defendant, Banana Republic, is located at 630 Fifth Ave., New York, New York, however, the street entrance to its store has a separate address of 626 Fifth Ave., New York, New York. The plaintiff has conceded in her opposition papers that the address of Banana Republic was erroneously listed as 626 Fifth Ave., New York, New York in her pleadings. In addition, the plaintiff concedes that defendant Tishman Speyer was an improper defendant and does not oppose summary judgment being granted as to Tishman Speyer.

Defendant, Banana Republic, moves pursuant to CPLR § 3212 for an order granting summary judgment dismissing plaintiff's complaint, on the grounds that it did not have a common-law duty, contractual duty, nor statutory duty to repair the sidewalk; did not cause or create the allegedly dangerous condition on the sidewalk; and did not have a special use of the sidewalk. Plaintiff opposes Banana Republic's motion on the grounds that the motion is premature, and Banana Republic has failed to make a prima facie showing entitling it to summary judgment as there are issues of fact for a trier of fact to determine as to Banana Republic causing and creating the defect; having actual and/or constructive notice of the defect; and having special use of the abutting sidewalk.

Discussion

It is well settled that to grant summary judgment, it must clearly appear that no material issue of fact has been presented. *See, Grassick v. Hicksville Union Free School District*, 231 A.D.2d 604, 647 N.Y.S.2d 973 (2nd Dept., 1996), "where the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring the trial of the action." *See also, Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). The papers submitted in the context of the summary judgment motion are viewed in the light most favorable to the party opposing the motion. *See, Marine Midland Bank, N.A. v. Dino v. Artie's Automatic Transmission Co.*, 168 A.D.2d 610, 563 N.Y.S.2d 449 (2nd Dept., 1990). If the *prima facie* showing has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. *See, CPLR 3212[b]; Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 [1986].

Banana Republic argues that as a tenant there is no common-law duty imposed on it to repair or maintain a public sidewalk, unless it caused or created the alleged dangerous condition; no contractual or statutory duty to maintain or repair the sidewalk, nor does it have special use of the sidewalk. Banana Republic argues that it did not cause or create the structural condition of the sidewalk. Banana Republic argues that New York City Administrative Code § 7-210, nor any other statutory provision, requires the tenant in possession to maintain and repair the sidewalk. Plaintiff has not alleged in the pleadings that Banana Republic is liable based on a special use of the sidewalk and there is no indication that Banana Republic derived any special use from the sidewalk.

According to Banana Republic, it operated a retail store at 626/630 Fifth Avenue pursuant to a commercial lease agreement between its parent corporation, The Gap Inc. and the then owner/landlord of 626/630 Fifth Avenue, RCPI Trust. In support, Banana Republic provided its lease agreement which did not obligate Banana Republic to maintain or repair the public sidewalk in front of its store. Instead, the landlord agreed to repair and maintain the structural elements of the building, both exterior and interior. Banana Republic was not allowed to place or maintain any merchandise or other articles in the concourse or in any other area outside of the premises, or on the sidewalks, corridors or other common areas of Rockefeller Center. Banana Republic argues that it did not maintain or repair the sidewalk on or before June 2, 2019, and therefore, owed no duty to plaintiff and was not negligent. In further support, Banana Republic provided an affidavit from its claim's specialist for risk management and safety, Robin Crawford. Ms. Crawford authenticated the lease agreement and attested that pursuant to the agreement, Banana Republic did not have any responsibility to perform any maintenance or repair to the public sidewalk adjacent to 626/630 Fifth Avenue. She also attested to Banana Republic not performing any maintenance or repair to the subject sidewalk at any time from the inception of the lease agreement, at the time of the accident and to the present.

In opposition, the plaintiff argues that Banana Republic's claims specialist's affidavit only states general conclusions and offers no specifics as to the bases for her statements. Moreover,

the plaintiff has not demonstrated that it did not have actual and/or constructive notice of any sidewalk defect and plaintiff's moving papers are silent as to the issue of prior complaints and prior incidents at the subject sidewalk location. Plaintiff also argues that Banana Republic has not produced any records related to cleaning, maintenance, service, repairs, or inspections. The plaintiff sets forth several theories and scenarios in which Banana Republic could be responsible for the alleged hazardous condition of the sidewalk. Plaintiff posits that there are many potential ways that Banana Republic could have made special use of the sidewalk without placing any merchandise on the sidewalk and/or without the landlord's permission. Alternatively, Banana Republic could have received special permission from the landlord to hold sidewalk sales or one of its employees could have created the sidewalk condition by bringing merchandise into the store from a delivery truck. Regarding the motion being premature, plaintiff argues that Banana Republic has not responded to its discovery demands, nor has nor has plaintiff had the opportunity to depose any witness with actual knowledge of the specific store and its operations directly from Banana Republic. Plaintiff argues that Banana Republic cannot affirmatively state that it did not create the alleged defect and did not have actual and /or constructive notice since the plaintiff has not been deposed. Without deposition testimony from the plaintiff, Banana Republic does not know the specific location on the sidewalk where plaintiff fell or the size/shape/depth/width of the alleged defect.

In reply, Banana Republic argues that it has responded to all discovery demands, including the demand for a bill of particulars as to affirmative defenses, on January 23, 2023. Plaintiff has also failed to point out any specific evidence that may be uncovered with a deposition of Banana Republic that goes beyond the information provided in the lease and affidavit annexed to the subject motion. Banana Republic asserts that it has not provided any records related to cleaning, maintenance, or repair of the sidewalk because it was it did not perform any cleaning, maintenance, or repairs and was not obligated to perform such services based on its lease agreement.

It is fundamental that, in order to be held liable in tort, the alleged tortfeasor must have owed the injured party a duty of care. See, *Forbes v Aaron*, 81 A.D.3d 876, 918 N.Y.S.2d 118 (2nd Dept., 2011). As a general rule, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of that property. See, *Kydd v Daarta Realty Corp.*, 60 A.D.3d 997, 877 N.Y.S.2d 352 (2nd Dept., 2009). Where none of these factors is present, a party cannot be held liable for injuries caused by a dangerous or a defective condition. See, *Sanchez v 1710 Broadway, Inc.*, 79 A.D.3d 845, 915 N.Y.S.2d 272 (2nd Dept., 2010). Ordinarily, a defendant moving for summary judgment in a trip and fall case has the burden of establishing that it did not create the hazardous condition that allegedly caused the fall and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it. See, *Adzei v. Edward Builders*, et.al., 221 A.D.3d 639, 198 N.Y.S.3d 755 (2nd Dept., 2023).

Here, Banana Republic has satisfied its burden in making a prima facie showing of its entitlement to summary judgment by submitting the lease agreement and claims specialist's affidavit showing that it did not owe a duty to the plaintiff as it did not own, occupy, control, or

have a special use of the subject sidewalk at the time of the accident and, thus, could not be held liable for injuries caused by the allegedly dangerous condition. See, *Mitchell v Icolari,* 108 A.D.3d 600, 969 N.Y.S.2d 503 (2nd Dept., 2013). This lease agreement did not obligate Banana Republic to maintain or repair the public sidewalk but instead placed the onus on the landlord to repair and maintain the sidewalk. As a tenant, rather than the owner of the premises, Banana Republic owed no duty to the plaintiff to maintain the sidewalk. See, *Zorin v City of New York*, 137 A.D.3d 1116, 28 N.Y.S.3d 116 (2nd Dept., 2016).

Further, Banana Republic established prima facie that it did not create the alleged hazardous condition, did not violate a statutory duty to maintain or repair the sidewalk, and did not make special use of the sidewalk. In opposition, plaintiff failed to raise a triable issue of fact as they did not offer proof beyond an attorney's affirmation and mere speculation that Banana Republic created the alleged defect in the sidewalk, had special use of the sidewalk, or had actual and/or constructive notice of the alleged defect. The plaintiff's arguments as to actual and/or constructive notice have failed since Banana Republic has satisfied its prima facie burden by demonstrating that it did not owe a duty to the plaintiff, did not create the alleged hazardous condition, did not violate a statutory duty to maintain or repair the sidewalk, and did not make special use of the sidewalk.

As to the defendants' argument that the plaintiff's motion for summary judgment is premature due to outstanding discovery and depositions, the court finds the argument unavailing especially in light of Banana Republic providing proof that it did respond to the plaintiff's discovery demands. A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant. See, *Singh v Avis Rent A Car Sys., Inc.*, 119 A.D.3d 768, 989 N.Y.S.2d 302 (2nd Dept., 2014). Here, the mere hope or speculation that evidence may be uncovered during the discovery process is insufficient to deny the motion. See, *Lopez v WS Distrib., Inc.*, 34 A.D.3d 759, 825 N.Y.S.2d 516 (2nd Dept., 2006).

Accordingly, the defendants' motion for summary judgment is hereby granted in its entirety.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York
October 10, 2024

HON. LISA S. OTTLEY, J.S.C.

HON. LISA S. OTTLEY

FILED
KINGS COUNTY CLERK
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