SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 18
NASSAU COUNTY

CATHY ROBINS and ARTHUR ROBINS,

Plaintiffs,

-against-

INDEX No. 035262/97

MOTION DATE: Sept. 8, 2000
Motion Sequence #001, 002 & 003

1152 WILLIS BAGELS, LTD., BENHACO MANAGEMENT ASSOCIATES, INC. and GENOVESE DRUG STORES, INC.,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Cross-Motion..... XX
Affirmation in Opposition..... X
Reply Affirmation..... XXX
Sur-Reply Affirmation..... X
Memorandum of Law..... XX

This motion, by defendant Genovese Drug Stores, Inc. (hereinafter "GDS"), for an order pursuant to CPLR §3212, granting summary judgment and dismissing the plaintiffs' complaint and any and all cross claims, with prejudice, against Genovese Drug Store, Inc. and for such other and further relief as to this Court may deem just and proper; and a cross-motion, by defendant Benhaco Management Associates, Inc. (hereinafter "BMA"), for an order pursuant to CPLR 3212 granting summary judgment and dismissing plaintiffs' complaint and any cross-claims with prejudice against the defendant, Benhaco Management Associates, Inc., and for such other and further relief as to the Court may seem just and proper; and a cross-motion, by defendant 1152 Willis Bagels, Ltd., (hereinafter "1152"), for an order granting summary judgment and dismissing plaintiffs' complaint and all cross claims against defendant, 1152 Willis Bagels, Ltd., and for such other and further relief as to the Court may seem just and proper, are **all** determined as hereinafter set forth.

Factually, the plaintiff alleges that she tripped over a broken, uneven, unlevel and deteriorated paved portion of walkway "between the square in which the water meter covers were situated and the square in which 'Bagels and Bialys' was inscribed".

GDS asserts that the plaintiff's testimony places her, at the time of her accident, south and approximately 10 feet from the nearest entranceway to 1152, and 50 feet from the GDS store. The attorney for GDS avers that the lease between GDS, as tenant, and BMA, as landlord, demises that parcel of land and building which ends at the property line between 1152 and GDS' store. That lease also limits GDS' obligation to maintain the sidewalk to that in front of its store and not to that in front of 1152, where the accident occurred. The attorney argues that there is no admissible proof that GDS was obligated to maintain or repair that area of sidewalk where plaintiff fell and no negligence is established as against GDS. He also argues that the defect in the sidewalk where the plaintiff's accident occurred was so open, obvious and trivial that it cannot be considered a dangerous condition that is actionable.

The plaintiff's affidavit describes her accident and does not dispute the GDS description of the situs of her accident. The plaintiff's attorney argues that GDS' lease requires GDS to maintain and repair the sidewalk where the defect existed. He also argues that the sidewalk defect that caused the plaintiff's accident is of such a size, shape and existed for such a length of time as to constitute constructive notice and was a trap to the unwary plaintiff.

In reply, GDS' attorney argues that the lease language does not obligate GDS to maintain and repair the sidewalk on the "Bagel Parcel" (1152's premises), and notes that the plaintiff's affidavit does not support her attorney's contention that GDS is responsible for the maintenance and repair of the sidewalk defect which caused her accident.

The attorney for BMA contends that, as an absentee landlord, it is not responsible for the maintenance of the sidewalk in front of 1152 and cannot be liable for the plaintiff's accident. He also contends that it is well-settled law that an owner of property abutting a public sidewalk is not liable to maintain the sidewalk solely by reason of ownership of the abutting land. With respect to the co-defendant GDS, he argues that the lease language imposes a repair obligation upon GDS.

In reply GDS' attorney disagrees with the lease interpretation and characterizes BMA's attorney's rationale as "tortured", because the "demised premises" is specifically defined as that part leased to GDS.

1152's attorney argues that his client is not liable herein because "(1) The defendant, 1152 Willis Bagels did not have a duty to maintain the public sidewalk in front of the premises it leased from co-defendant, Benhaco Management Associates. (2) The condition complained of by the plaintiff is non-actionable due to its trivial and obvious nature. (3) The defendant, 1152 Willis Bagels, did not create the alleged defective condition, nor did it have actual or constructive notice of the alleged defective condition". He asserts that no evidence places the blame for the plaintiff's alleged accident upon his client. He also asserts that there

is no lease language that obligates his client to maintain or repair the sidewalk, and his client only swept it and the testimony was that no defect was ever observed.

Regarding the cross-motions of the defendants BMA and 1152, the plaintiff's attorney argues that the lease language places responsibility for the sidewalk in front of 1152 upon either BMA, the landlord, or 1152, the tenant and that determination is the issue which should be left to a jury to decide. He also argues that a review of the photographs and the dimensions of the property as given in the deed's property description reveals that the Town of North Hempstead does not own or control that portion of the sidewalk where the plaintiff fell, and that that part of the sidewalk "is part of the actual property owned or controlled by either Benhaco or Bagel Store". This is further demonstrated by the affidavit of a land surveyor.

He also contends that, pursuant to pertinent case law, the defendant BMA is under a duty to maintain the sidewalk and is liable to the plaintiff herein.

In reply, 1152's attorney argues that lease language regarding maintenance of premises does not impose liability on his client, only that it has the burden of removing "debris, garbage and snow" and this accident involves none of that. He also argues that since it is conceded by plaintiff that the size of the defect made it plainly visible, then since it is a trivial defect, it is not actionable.

GDS' attorney points out that the plaintiff's attorney, in his improper additional opposition to the original motion, repeatedly refers to the co-defendants BMA and 1152 as the liable parties for the plaintiff's accident and injuries.

## DECISION

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in (**Stewart Title Insurance Company, Inc. v Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651, 1994):

> "It is well established that a party moving for summary judgment must make a **prima facie** showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (**Winegrad v New York Univ. Med. Center**, 64 NY2d 851, 853, 487 NYS2d 316, 476 NE2d 642; **Zuckerman v City of New York**, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (**State Bank of Albany v McAuliffe**, 97 AD2d 607, 467 NYS2d 944), but once a **prima facie** showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in

> admissible form sufficient to establish material issues of fact which require a trial of the action (**Alvarez v Prospect Hosp.**, 68 NY2d 320, 324, 508 NYS2d 923, 501 NE2d 572; **Zuckerman v City of New York**, **supra**, 49 NY2d at 562, 427 NYS2d 595, 404 NE2d 718)".

Applying these legal principles to the facts of the case at bar has warranted an intensive examination of the record as presented to this Court, which includes the pleadings, deposition transcripts and other relevant data.

Every reasonable inference that can be reasonably drawn from the evidence provided shall be viewed in the light most favorable to plaintiff **Museums at Stony Brook v Village of Patchogue Fire Dept.**, 146 AD2d 572, 573 (App. Div., 2nd Dept., 1989). For the case at bar to proceed, that is, for defendants' respective motions for summary judgment to be defeated, a question of fact must exist that would require a jury to assess the issue of defendants' respective liability.

Factually, there is no dispute as to the exact situs of the plaintiff's accident, i.e., "The exact location of the accident was the concrete square, between the square in which the water meter covers were situated, and the square in which Bagels & Bialys was inscribed", that being in front of 1152 Willis Avenue and approximately 35 feet from the entrance to GDS. Critical to consideration of liability is ¶ 20 of the lease between BMA and GDS, which provides:

> "20. Subject to such changes as are required by law or by reason of eminent domain and to such Alterations as Tenant shall desire to make thereto during the term of this Lease as same may be extended, as otherwise provided herein, Tenant shall keep and maintain the Land Areas of the Premises in good condition and repair including, without limitation, such obligations as sweeping, lighting, plowing, snow, ice and debris removal, and repair of any necessary sidewalk, curbs and entrances. The use of the Land Areas of the Premises shall be the exclusive domain of Tenant (except as hereinafter set forth) and neither Landlord nor any other party or entity shall have any rights in and to the use of the same and Tenant may erect such fences, barriers, impediments or obstructions as it may from time to time determine at its own cost and expense to prevent any such use. Notwithstanding the foregoing, however, it is agreed that so long as the existing bagel store occupies the contiguous premises known as "Bagel Parcel" on Exhibit "B" to this Lease (the "Bagel Parcel"), then

such tenant and its customers only (but not its employees, contractors, agents, or others) shall have the right to use the Land Areas of the Premises as same from time to time exist, for ingress and egress to and from said Bagel Parcel and for the utilization of the parking accommodations as same from time to time exist and/or as modified which are a part of the Premises provided, however, that the same shall not apply in the event that the existing building on Bagel Parcel is changed, enlarged or added to or if a different use is made thereof to which Tenant has not consented in writing in advance, which consent shall not be unreasonably withheld or delayed, it being understood that such rights of ingress and egress and use of the Land areas of the Premises shall be limited to such existing tenant of the Bagel Parcel unless Tenant shall otherwise consent prior thereto in writing as aforesaid. Notwithstanding the foregoing, in no event shall Tenant be required to consent to any use of the Bagel Parcel which is of a nature as enumerated on a Exhibit "D" to this Lease, nor shall Tenant be required to consent to any use thereof which is otherwise restricted under any other provision of this Lease nor to any use which is other than of a retail nature. The foregoing shall not be deemed to limit any other reasonable basis which Tenant may have for withholding such consent.

During any such period that ingress or egress and/or use of the Land areas and/or the parking areas of the Premises is made by the tenant or occupant of said "Bagel Parcel" or its customers or any other party consented to by Tenant as above provided then Landlord shall pay to Tenant ten (10%) percent as Landlord's contribution to Tenant's costs of maintenance, repair and replacement of said Land areas including, without limitation, all costs for sweeping, plowing, snow, ice and debris removal, lighting, landscaping, sidewalks, curbing, striping, paving, patching, repaving, relining, liability and any casualty insurance, utility repairs and installations under or on the same and all other expenses thereto as are necessary and reasonable to maintain the same in good condition and repair which contribution by Landlord shall be made to Tenant upon the furnishing to Landlord by Tenant of a reasonably itemized statement of the costs and expenses thereof and which contribution need not be made more often than quarterly and which obligation shall survive

> the expiration or sooner termination of this Lease. It is agreed that Landlord shall not be responsible for any contribution to any capital improvement which is made to the Land areas and the parking areas prior to November 1, 1987 but the foregoing shall not release Landlord from its contribution to Tenant's costs of maintenance, repair and other costs thereto (other than capital improvements) made at any time after the commencement of the term hereof nor for Landlord's contribution to capital improvements made after the aforesaid date".

The demised premises is defined in the lease as 1140 Willis Avenue, Albertson; and legally described (in pertinent part) as:

> "Beginning at the corner formed by the intersection of the easterly side of Willis Avenue with the northerly side of Netz Place;
>
> Running Thence from said point of beginning along the easterly side of Willis Avenue the following two courses and distances: (1) north B degrees 02' 00" west a distance of 152.10 feet".

Simply stated, the import of ¶ 20 is that GDS has the obligation to maintain the demised premises as its own in good condition, and those premises also include the parking area to the rear of the GDS store.

BMA is responsible to contribute 10% of GDS' cost of maintaining that parking area, and such area does not include the public sidewalk in front of the contiguous parcels that constitute the "Bagel Parcel" and the Demised Premises. Put another way, GDS cannot, under any contractual interpretation, be held to a responsibility to maintain a sidewalk in front of 1152, especially where a concrete flag in front of that premises is clearly inscribed "Bagels & Bialys".

Accordingly, GDS owed no legal duty to the plaintiff or any party under these facts, and the co-defendants' attempt to cast GDS in liability herein has no merit. Therefore, GDS' motion for summary judgment in its favor is **granted**.

The Court now turns to the application for similar relief made by BMA, the landlord and owner of both the property occupied by GDS and that designated as 1152 Willis Ave., occupied by defendant 1152. The law is "well-settled that in the absence of an ordinance or statute imposing liability, an abutting landowner can only be held liable for a defect in a public sidewalk if the landowner created the defective condition or caused the defect to occur because of some special use (see, e.g., **Gianna v Town of Islip**, __AD2d__ [2d Dept., Aug, 19, 1996]; **Figueroa v City of New York**, __AD2d__ [2d Dept., May 6, 1996]". (**Carbone v Baby Pathrose**, 236 AD2d 352, 654 NYS2d 324, 2nd Dept., 1997). Clearly, there is no

extant liability-imposing statute in the Town of North Hempstead. There is no proof that BMA either created the defective condition nor exercised any special use over the sidewalk. Alternatively, considering that the situs of the accident was actually on the 1152 property owned by defendant BMA, any liability by BMA is cast upon it as an absentee landlord. As such, the state of the law is clear: the plaintiff must establish that the landlord retained sufficient control over the leased premises to render BMA liable for plaintiff's injuries (see, **Blackwell v Jamal Holding Corp.**, 240 AD2d 527, 658 NYS2d 684, 2nd Dept., 1997, and cases cited therein). The plaintiff has not done so. The lease for 1152 Willis Avenue provides for the landlord's re-entry only upon certain events of default listed in paragraph 15.01 and not for maintenance and repair. Accordingly, BMA is not liable herein (**Ortiz v RVC Realty Co.**, 253 AD2d 802, 677 NYS2d 598, 2nd Dept., 1998), and that cross-motion is **granted**.

Turning now to the cross-motion of defendant 1152, the Court will address the issues presented. As to notice, clearly there is no proof adduced herein that 1152 created the condition which the plaintiff alleges caused her accident. The defendant 1152 has established its lack of actual or constructive notice by the testimony of its principal. (**Park v Caesar Chemists, Inc.**, 245 AD2d 425, 666 NYS2d 679, 2nd Dept., 1997). It is incumbent on the plaintiff to submit evidence, in opposition, that the alleged defect existed for such a length of time and was visible or apparent over that period, that the defendant 1152 should have known of it and in the exercise of reasonable care, remedied the defect.

The plaintiff's testimony clearly demonstrates that she had regularly (two times per week), over at least a one year period of time prior to her alleged accident, traversed the very site of her accident. She has testified that she never noticed any defect prior to her accident (Tr, p.72, lines 21-25, p.73, lines 1-25, p.74, lines 1-7) or knew how or when that defect was made. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time to permit the defendant's employees to discover and remedy it" (citations omitted) (**Gordon v American Museum of Natural History**, 67 NY2d 836, 837-838). Plaintiff's proof demonstrates that such defect was not "visible and apparent" because she never noticed it, therefore the defendant did not have constructive notice of the defect.

Without any notice, the lack of notice to the defendant 1152 "does not give rise to a cause of action or give rise to an inference of negligence" (**Pizzi v Bradlee's Div.**, 172 AD2d 504, 505, quoting **Silver v Brodsky**, 112 AD2d 213, 214).

Accordingly, notwithstanding plaintiff's other contentions, regarding insurance coverage, or that there may be a question of fact as to the triviality of the alleged defect, or the applicability of cited case law, without notice, no duty of care can be held against the defendant 1152. Moreover, an examination of the applicable lease does not reveal any contractual obligation to repair the sidewalk.

Therefore, the motion for summary judgment in favor of the defendant 1152 is **granted**, as well.

In sum, the motion and two cross-motions for summary judgment in favor of the respective defendants are **all granted**.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

Dated SEP 2 6 2000

XXX J.S.C.