SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

SAIRA PARVEEN,

Plaintiff(s),

-against-

INDEX No. 5514/05

MOTION DATE: 7/21/06

JP MORGAN CAHSE & CO., CHASE MANHATTAN BANKING CORPORATION, LEE WELDON TUTTLE, JR., ARLINE LYDIA TUTTLE and CLARITY WHITTINGTON TUTTLE,

MOTION SEQ. No. 1-MD
2-MD

Defendant(s).

The following papers read on this motion:
Notice of Motion/Affirmation/Exhibits
Notice of Cross Motion/Affirmation/Exhibits
Affirmation in Opposition
JP Morgan Chase's Reply Affirmation
Tuttles' Reply Affirmation

Defendants LEE, ARLINE and CLARITY TUTTLE as well as JP MORGAN and CHASE MANHATTAN, all seek Orders granting them summary judgment dismissing all claims against them. Plaintiff opposes.

This action arises out of an incident on September 16, 2004. On that date plaintiff slipped and fell over a concrete parking barrier at the CHASE MANHATTAN BANK located at 163 Merrick Road, Valley Stream, New York. Plaintiff alleges that she suffered serious injuries due to the defendants' negligence in that the barrier was broken, cracked, uneven and dangerous. The moving defendants, CHASE and JP MORGAN occupy the premises. The TUTTLEs are the owners of the property, and concededly are not in possession of the premises.

All of the defendants seek a dismissal of the plaintiff's claim contending that they had no duty to the plaintiff which was breached.

Counsel for the TUTTLES argues that his clients were out of possession landlords with no duty to the plaintiff. They also argue that the alleged defective condition was open and obvious readily observable by those employing the reasonable use of their senses. Finally, he argues that his client landlords should be granted summary judgment against the tenants for their breach of the lease.

In this instance he argues that the defendants JP MORGAN and CHASE breached their lease with the TUTTLEs in their failure to maintain liability insurance for the property as agreed to and required.

Counsel for defendants JP MORGAN and CHASE MANHATTAN also seeks summary judgment in contending that the plaintiff has offered no proof of a dangerous and defective condition, and further, that the complained of concrete barrier is open and obvious and not an inherently dangerous condition. He also argues that the TUTTLES are not entitled to attorneys fees from his client in their cross claim for breach of contract. Counsel argues that there has been no breach of contract as there is no clause in the lease agreement which requires the tenant to provide contractual indemnification, hold the landlord harmless or name the landlord as an additional insured on the tenant's policy. He argues that all of the cases cited by the TUTTLES seeking their attorneys fees for a tenant's failure to maintain insurance, all involved contracts where the landlord was to be named as an additional insured on those insurance policies or otherwise provide insurance for or indemnification for landlords. *Seneny v. Kee Associates*, 15 AD3d 383 (2nd Dept. 2005); *Keelan v. Sivan*, 234 AD2d 516 (2nd Dept. 1996); *Schumaker v.Lutheran Community Services*, 177 AD2d 568 (2nd Dept 1991).

Plaintiff opposes both applications arguing that the photos of the alleged defective condition do not establish that the alleged defective condition was "open and obvious". Further he argues that the motions are premature as there have been no depositions of the parties to date, and thus the Court cannot find as a matter of law that the defendants did not breach any duty of care to the plaintiff.

The Court agrees. The photographs submitted are undated and not accompanied by any affidavit stating that they depict the condition of the barrier at the time of the incident. Further, evidence that a defect was "open and obvious" does not relieve a landowner of his duty to take reasonable measures to keep property in a safe condition. A landowner can still be found to maintain his property in a safe condition, the obviousness

of the defect being a consideration of whether a plaintiff is comparatively negligent for any fall. *Cupo v. Carfunkel*, 1 AD3d 48 (2nd Dept 2003).

As to whether an out of possession landlord can be found responsible, a determination cannot be made at this time, as there have been no depositions of the landlords which would reveal their control over the property. An out of possession owner/landlord is not generally liable for conditions upon the land after transfer of possession and control to the tenant. A plaintiff must demonstrate that the owners still exercised control over the area, or were contractually obligated to repair the premises, or created the alleged defective condition. *Santiago v. Gartenberg*, 178 AD2d 640 (2nd Dept. 1991); *Lynch v. Lom-Sun Co.*, 161 AD2d 885 (3rd Dept. 1990); *Del Giacco v. Noteworthy Co.*, 175 AD2d 516 (2nd Dept. 1991); *Putnam v. Stout*, 38 NY2d 607 (1976).

Plaintiff must establish that a defendant either created a condition, or had actual or constructive notice it existed, and failed to correct it in a reasonable time. To be considered constructive notice, a defect must be visible and apparent and must exist for a sufficient length of time prior to an accident to permit the defendant to discover and remedy it. *Gordon v. American Museum of Natural History*, 67 NY2d 836 (1986).

Based on the proof presented, the motions of both defendants are Denied. CPLR § 3212(f).

It is, SO ORDERED.

Dated: Aug 24, 2006

HON. GEOFFREY J. O'CONNELL, J.S.C.