Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable MARTIN J. SCHULMAN IAS PART 7
Justice

MARIA VELASQUEZ,

Plaintiff,

-against-

METROPOLIS NIGHT CLUB, PREMIER PROPERTIES, LLC, and P. DEVELOPMENT ASSOCIATES,

Defendants.

Index No.: 19677/00

Motion Date: 4/13/04

Motion Cal.: 44

The following papers numbered 1 to 10 read on this motion and cross-motion by the defendants for leave to file late motions for summary judgment pursuant to CPLR § 3212

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	1-3
Notice of Cross-Motion-Affidavits-Exhibits.	4-6
Answering Affidavits-Exhibits.....	7-9
Replying Affidavits-Exhibits.....	10

Upon the foregoing papers, it is hereby ordered that this motion and cross-motion by the defendants for leave to file late motions for summary judgment pursuant to CPLR § 3212 are decided as follows:

The motion by defendant Premier Properties LLC and P. Development Associates ("Premier") for leave to file a late motion for summary judgment is granted. Premier filed its motion in advance of trial, and the plaintiff has demonstrated no prejudice as a result of the court's consideration of the motion. *See, Coumbes v Taylor, 298 AD2d 351.*

On the merits, the motion by Premier for summary judgment is denied. It is well settled that a property owner is not liable in negligence unless he or she created the allegedly dangerous

condition, or had actual or constructive notice of its existence. *See, Voss v D & C Parking, 299 AD2d 346.* While an out of possession owner is generally not liable for injuries that occur on leased premises, one who retains control of the premises, or contracts to repair or maintain the property may be liable for defects. *See, Eckes v Suede, 294 AD2d 533; Gilbert v 4905 Ave. D. Realty, 224 AD2d 659.* "Control of the premises may be established by proof of the landlord's promise, either written or otherwise, to keep certain premises in repair (*see, Putnam v Stout, 38 NY2d 607),* or by a course of conduct demonstrating that the landlord has assumed responsibility to maintain a particular portion of the premises." *Gelardo v ASTHMA Realty Corp., 137 AD2d 787.*

Premier has failed to meet its prima facie burden of proof on this motion for summary judgment of showing that it did not retain control over the subject premises and, in any event, lacked notice of the allegedly dangerous condition where the plaintiff fell. *See, Winby v Kustas, 2004 N.Y. App. Div. LEXIS 6906(2nd Dept., May 10, 2004); Jenkins v Ehmer, 272 AD2d 976.* Premier has failed to tender sufficient evidence to demonstrate the absence of a triable issue of fact. *See, Alvarez v Prospect Hosp., 68 NY2d 320.*

The court notes initially that Premier has never produced a witness for deposition. Annexed to its moving papers is an affidavit from Connie Buico, who was a "managing member" of Premier at the time of the accident. Although Ms. Buico relies upon a copy of a lease between Premier and co-defendant Metropolis to prove that maintenance and control of the property was the responsibility of Metropolis, the copy of the lease annexed to the moving papers is unreadable.

The burden therefore does not shift to the plaintiff to raise a triable issue of fact, and the motion is denied. *See, Winograd v New York Univ. Med. Ctr., 64 NY2d 851.*

The motion by co-defendant Metropolis Night Club ("Metropolis") for leave to file a late motion for summary judgment is denied.

By Order dated February 3, 2004, this court granted a motion by the plaintiff which sought to strike the answer of Metropolis

unless a witness for Metropolis appeared for examination before trial on February 19, 1994.

Pursuant to the affirmation submitted by counsel for plaintiff, a witness for Metropolis was never produced on February 19, 2004. As a result of the defendant's failure to comply with the conditional Order dated February 3, 1999, that conditional Order became absolute. *See, Lopez v City of New York, 2 AD3d 693; Frankel v Hirsch, 2 AD3d 399; Cornea v Tscherne, 296 AD2d476.* The answer has therefore been stricken, and this motion is denied as moot.

Dated: May 24, 2004

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J.S.C