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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan Justice PART 36

Index Number : 114779/2008

BAULIEU, RENEE

VS.

ARDSLEY ASSOCIATES

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

FILED
OCT 13 2010
COUNTY CLERK'S OFFICE
NEW YORK

this motion to/for

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... PAPERS NUMBERED 1, 2

Answering Affidavits — Exhibits 3, 4, 5

Replying Affidavits

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendant Powerhouse Maintenance, Inc. is granted in accordance with the attached memorandum decision.

(Consolidated for disposition with motion Seq 002)

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10-12-10

J.S.C.
JUSTICE DORIS LING-COHAN

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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RENE BAULIEU and ROBERT BAULIEU,

Plaintiffs,

-against-

ARDSLEY ASSOCIATES, LP, ISJ MANAGEMENT CORP., ARDSLEY REALTY ASSOCIATES, LLC, ARDSLEY VILLAGE SQUARE, INC. d/b/a SUNNYDALE AND POWERHOUSE MAINTENANCE, INC.,

Defendants.

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Index No.: 114779/08
DECISION/ORDER

Motion Seq. No.: 002 & 003

HON. DORIS LING-COHAN, J.S.C.:

In this personal injury/negligence action, defendant ISJ Management Corp. (ISJ) and defendant Powerhouse Maintenance Inc. (Powerhouse) move separately for summary judgment to dismiss both the complaint and all cross claims asserted against them (motion sequence numbers 002 and 003). For the following reasons, the ISJ's motion is denied, and the motion by Powerhouse is granted.

BACKGROUND

On November 29, 2006, plaintiff Rene Baulieu (Baulieu) was injured when she slipped and fell in the parking lot of a shopping center (the Ardsley Mall) located at 717-725 Saw Mill River Road in the Village of Ardsley, County of Westchester, State of New York. *See* Notice of Motion (motion sequence number 002), Exhibit G (amended complaint), ¶ 64. Defendant Ardsley Associates, LP (Ardsley) owns the Ardsley Mall. *Id.*, Torino Affirmation, ¶ 3. Defendant ISJ is Ardsley's managing agent. *Id.* Defendant Ardsley Village Square, Inc. d/b/a Sunnydale (Sunnydale) is the tenant of the commercial space in the Ardsley Mall adjacent to

where Baulieu was injured.[1] *Id.* Powerhouse Maintenance, Inc. (Powerhouse) is a paving company that was hired to perform repair work on the Ardsley Mall parking lot. *Id.*, Exhibit G, ¶¶ 59-61.

At her deposition, Baulieu stated that her accident occurred while she was stepping from the Ardsley Mall sidewalk onto the parking lot. *Id.*, Exhibit L, at 64-79. Baulieu specifically stated that her left foot was still on the sidewalk, and her right foot in the parking lot, when she "pitched forward" as a result of a "buildup of asphalt against the curb." *Id.* at 76. Baulieu further stated that, at this point, her "right [foot] turned ... and [her] heel caught [a] pothole which turned [her] sideways" and she fell. *Id.* at 76.

Ardsley and ISJ were jointly deposed on two occasions. First, on January 5, 2010, code compliance manager Henry Poyker (Poyker) appeared and stated that ISJ is a corporation with three shareholders - Isaac, Samuel and Joseph Jemal - who also comprise a partnership that is a half owner and manager of Ardsley. *Id.*, Exhibit N, at 12-13, 56. Poyker also stated that Ardsley and ISJ share office space in Manhattan because one of "the [Ardsley] general partner[s] is also the vice president of ISJ." *Id.* at 56. With respect to the shopping center, Poyker stated that there was no written management agreement between Ardsley and ISJ, but that ISJ was responsible for "collect[ing] rental payments [and] maintain[ing] the basic structure of the building and the parking lot." *Id.* at 8. Poyker specifically stated that ISJ was responsible for "maintaining" the parking lot, and "keeping [the parking lot] free from debris", and for correcting any "structural defects" in the parking lot. *Id.* at 8, 44-46, 91-92. Poyker further stated that ISJ used outside contractors, including Powerhouse, to perform any actual work in the parking lot, and that Joseph

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[1] Sunnydale notes that its correct name is S&V Enterprises d/b/a Sunnydale s/h/a Ardsley Village Square, Inc. d/b/a Sunnydale. *Id.*, Exhibit H.

Jemal, as managing agent, would decide whether or not to hire such outside contractors in circumstances where the work that needed to be done was likely to cost approximately $5,000.00 or more. *Id.* at 19-20, 29-30. Poyker specifically noted that, in 2006, ISJ had hired Powerhouse to repair the asphalt in the parking lot, and that both Isaac and Samuel Jemal had signed off on Powerhouse's proposal for the work in their capacities as "principals of the management company," i.e., ISJ. *Id.* at 62, 66-69; Gorton Affirmation in Opposition, Exhibit D. Poyker stated that Powerhouse was not responsible for inspecting or repairing the parking lot on an ongoing basis. *Id.*, Exhibit N at 65.

On February 18, 2010, Ardsley and ISJ were again jointly deposed via bookkeeper Yvonne Moghraby (Moghraby), who stated that Ardsley was responsible for maintaining the Ardsley Mall parking lot, but admitted that ISJ discharged this function (among others) in its capacity as Ardsley's managing agent. *Id.*, Exhibit O, at 15-17, 71-76, 93. Moghraby also stated that Isaac and Samuel Jemal had approved and hired Powerhouse to perform the asphalt repair work on the parking lot in 2006. *Id.* at 54-55. Moghraby produced a copy of the paid bill for that work. *Id.* at 25-26; Gorton Affirmation in Opposition, Exhibit D. Moghraby denied, however, that ISJ had any direct relationship with either the tenants of Ardsley Mall or with any of the outside contractors who did work there. *Id.*, Exhibit O at 73-76. Moghraby also stated that there was no entity with an ongoing contractual responsibility for inspecting or repairing the parking lot, but asserted that, whenever Powerhouse was retained, it was first asked to inspect the entire lot and then to submit a proposal to perform all of the repair work that was then necessary. *Id.* at 17-18, 70-72.

Annexed to ISJ's moving papers is an affidavit from ISJ co-owner, Samuel Jamel, wherein he admits that there is no written management agreement between Ardsley and ISJ, but

states that "ISJ did not have the responsibility to maintain the premises in a safe condition." *Id.*, Exhibit R, ¶ 4. Jamel also states that "ISJ had no role whatsoever in the construction, maintenance, renovation, cleaning and repair of the walkways and/or asphalt parking lot." *Id.*, ¶ 6.

Sunnydale was deposed on January 18, 2010, via its owner, Tejinder Singh (Singh), who stated that he had observed the pothole that Baulieu claims to have tripped on in the Ardsley Mall parking lot before the date of her injury, and that he had called Moghraby an unspecified number of times to request that it be repaired. *See* Gorton Affirmation in Opposition, Exhibit G, at 14-17.

Powerhouse was deposed on January 6, 2010, and again on March 9, 2010, via its vice president, Todd Roy (Roy), who stated that there was no ongoing maintenance agreement between Ardsley and Powerhouse. *See* Notice of Motion (motion sequence number 003), Exhibit I, at 15, 64. Roy also stated that Powerhouse was usually contacted by either Poyker or Moghraby on an as-needed basis. *Id.* at 14, 22, 24, 26, 32, 48. Roy further stated that Poyker was present when Powerhouse performed asphalt repair work on the Ardsley Mall parking lot in 2006, and that Poyker specified which potholes and other items Powerhouse was to repair, and which ones not to repair. *Id.* at 37-39, 61, 76-77. Roy averred that the reason that he was usually given for not being ordered to make complete repairs to the Ardsley Mall parking lot was lack of money. *Id.* at 14, 23, 25, 31. Roy stated, however, that although Powerhouse had performed asphalt repair work in the Ardsley Mall parking lot on several occasions between 2004 and 2006, Powerhouse never did any such repair work in the vicinity of the pothole in front of Sunnydale that Baulieu alleges to have caused her injury. *Id.* at 43-48, 61-64. Roy admitted, however, that Powerhouse applied "seal coat" to that area of the parking lot. *Id.* at 58-59.

Baulieu initially commenced this action on October 6, 2008, and later filed an amended complaint on July 7, 2009, that sets forth one cause of action for negligence on her behalf, and one cause of action on behalf of her husband, Robert Baulieu. *See* Notice of Motion (motion sequence number 002), Exhibits A, G. Sunnydale filed an amended answer on July 15, 2009, and Powerhouse filed an amended answer on July 28, 2009. *Id.*; Exhibits H, I. Both of these amended answers set forth cross claims for contribution against the other defendants. *Id.* Ardsley and ISJ filed a joint amended answer on August 9, 2009 which sets forth a cross claim for contribution against Powerhouse only.[2] *Id.*; Exhibit J. ISJ now moves, and Powerhouse moves separately, for summary judgment to dismiss both Baulieu's amended complaint and the aforementioned cross claims (motion sequence numbers 002 and 003).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion 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 e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003). Because "it deprives the litigant of his [or her] day in court, [summary judgment] is considered a drastic remedy which should only be employed when there is no doubt as to the absence of [such] triable issues." *See e.g. Andre v Pomeroy*, 35 NY2d

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[2] At some point, Baulieu voluntarily discontinued this action against the last named defendant herein, Ardsley Realty Associates, LLC.

361, 364 (1974); *Pirrelli v Long Is. R.R.*, 226 AD2d 166 (1st Dept 1996). However, the court's reluctance to employ summary judgment "'only serve[s] to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated.'" *Blechman v Peiser's and Sons*, 186 AD2d 50, 51 (1st Dept 1992), quoting *Andre v Pomeroy*, 35 NY2d at 364. Here, ISJ has failed to meet its burden of proof, but Powerhouse has adequately demonstrated its entitlement to summary judgment.

ISJ's Motion

Pursuant to New York law, "the traditional common-law elements of negligence" are: "duty, breach, damages, causation and foreseeability." *Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218, 218 (1st Dept 2005). In its motion, ISJ requests summary judgment dismissing Baulieu's negligence claim on the ground that "ISJ did not owe the plaintiff a duty of care." *See* Notice of Motion (motion sequence number 002), Torino Affirmation, ¶¶ 42-56. ISJ refers to the Court of Appeals' holding in *Espinal v Melville Snow Contractors, Inc.* (98 NY2d 136, 140 [2002]) that:

> [there are] three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care - and thus be potentially liable in tort - to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launche[s] a force or instrument of harm"; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely [internal citations omitted].

ISJ argues that none of the foregoing exceptions apply to it. *See* Notice of Motion (motion sequence number 002), Torino Affirmation, ¶ 44. Baulieu admits that the second of these exceptions does not apply here, but argues that there are issues of fact with respect to the first and third that preclude ISJ from relying on the *Espinal* holding as a basis for its motion. *See* Gorton Affirmation in Opposition, ¶ 4. Upon review, the court disagrees with respect to the first

exception, but agrees with respect to the third.

With respect to "launching an instrument of harm," ISJ merely argues that "any construction or repairs on the property were performed by independent contractors hired by Ardsley." *See* Notice of Motion (motion sequence number 002), Torino Affirmation, ¶ 54. Baulieu argues that Singh's deposition testimony indicates that ISJ was aware of the existence of the pothole that caused her injury before the fact, and that Roy's testimony indicates that Poyker decided which potholes in the parking lot Powerhouse was to repair, and which to leave alone, based on monetary considerations. *See* Gorton Affirmation in Opposition, ¶¶ 27-29. Baulieu then argues that "a jury can well conclude that ISJ 'launched an instrument of harm' at the subject location by specifically directing Powerhouse not to repair defects in the lot." *Id.*, ¶ 29. The court disagrees.

In *Church v Callanan Industries, Inc.* (99 NY2d 104 [2002]), the Court of Appeals revisited its holding in *Espinal* in the context of a plaintiff who was injured in a car accident when a car in which he was a passenger went off the road at a point where a subcontractor had failed to place guardrails that it had been hired to install. The Court found that:

> There is no evidence in the record that [the subcontractor's] incomplete performance of its contractual duty to install 312.5 feet of guiderailing falls within the first exception--i.e., that it created or increased the risk of the [plaintiff's car's] divergence from the roadway beyond the risk which existed even before [the subcontractor] entered into any contractual undertaking. In this respect, [the subcontractor] classically exemplifies the promisor described in [*H.R. Moch Co. v Rensselaer Water Co.*, 247 NY 160 (1928)] who is immune from liability because the breach of contract consists "merely in withholding a benefit ... where inaction is at most a refusal to become an instrument for good" (Moch, 247 NY at 167-168). [The subcontractor's] failure to install the additional length of guiderail did nothing more than neglect to make the highway at Thruway milepost marker 132.7 safer--as opposed to less safe--than it was before the repaving and safety improvement project began.

99 NY2d at 112. With the foregoing as guidance, ISJ's purported neglect to repair the pothole that caused Baulieu's injury must similarly be deemed "a refusal to become an instrument for

good," rather than constituting "launching an instrument of harm." Therefore, the court concludes that ISJ has adequately demonstrated that the first *Espinal* exception does not apply to it.

With respect to the third *Espinal* exception, which concerns the "duty to maintain" premises, ISJ relies on Jemal's affidavit and Moghraby's deposition testimony to support its claim that ISJ's role as the Ardsley Mall's managing agent was "very limited," and did not include any responsibility for maintenance or control of the Ardsley Mall parking lot. *See* Notice of Motion (motion sequence number 002), Torino Affirmation, ¶¶ 50-53. Baulieu, on the other hand, relies on Poyker's and Moghraby's deposition testimony that ISJ was, in fact, responsible for maintaining and repairing the Ardsley Mall parking lot, and that Isaac and Samuel Jamel - who are officers of both Ardsley and ISJ - approved and paid for Powerhouse's work on the parking lot's asphalt. *See* Gorton Affirmation in Opposition, ¶¶ 11-25. Baulieu also argues that the lack of any written management agreement between Ardsley and ISJ complicates this issue, because the only parties who claim to know its terms - i.e., the three Jemals - are members and/or officers of both companies. *Id.*, ¶ 10. In view of the competing deposition testimony and the absence of any dispositive documentary evidence, the only manner in which to resolve the question of the extent of ISJ's maintenance and control of the Ardsley mall parking lot is by weighing the credibility of the deponents. However, it is axiomatic that issues of witness credibility are not appropriately resolved on a motion for summary judgment. *See e.g. Santos v Temco Serv. Indus.*, 295 AD2d 218 (1st Dept 2002). Thus, the court concludes that ISJ cannot, at this juncture, conclusively demonstrate that it failed to owe Baulieu a duty of care pursuant to the third *Espinal* exception. Therefore, the court finds that ISJ has failed to carry its burden of proving that it is entitled, on that ground, to summary judgment dismissing Baulieu's negligence

claim against it; accordingly, the branch of ISJ's motion that seeks such relief is denied.

The next branch of ISJ's motion seeks an order, pursuant to CPLR 510, to transfer this action to Westchester County Supreme Court. CPLR 510 provides that:

> The court, upon motion, may change the place of trial of an action where:
> 1. the county designated for that purpose is not a proper county; or
> 2. there is reason to believe that an impartial trial cannot be had in the proper county; or
> 3. the convenience of material witnesses and the ends of justice will be promoted by the change.

Here, ISJ argues that, *inter alia*, "upon the dismissal of the complaint against ISJ, the only nexus, or connection, between New York County and this litigation is eliminated altogether." *See* Notice of Motion (motion sequence number 002), Torino Affirmation, ¶ 57. However, as previously discussed, the court has denied ISJ's application for summary judgment to dismiss Baulieu's negligence claim against it. Therefore, the court rejects ISJ's first change of venue argument. In addition to other arguments, ISJ also argues that the convenience of the witnesses herein, including Baulieu and her medical providers, warrants a change of venue to Westchester County. *Id.*, ¶¶ 58-64. However, as Baulieu points out, any such argument must be supported by affidavits from the affected witnesses that detail their proposed testimony and explain why they will be inconvenienced by the plaintiff's chosen venue. *See e.g. Krochta v On Time Delivery Serv., Inc.*, 62 AD3d 579 (1st Dept 2009). Because ISJ has failed to provide any such affidavits, the court must reject its argument at this juncture. However, given that the affected witnesses (which include plaintiffs as well as plaintiff Baulieu's nine medical providers and non-party witnesses testifying on behalf of plaintiffs) appear to be in control of plaintiffs and all reside and/or work in Westchester County, within 30 days, plaintiff shall make such witnesses available to defendant for the limited purpose of providing information/affidavits, as to whether "the convenience of material witnesses and end of justice will be promoted by the change" of

venue to Westchester. CPLR 510(3). The court notes that there are many undisputed factors here favoring such a change of venue to Westchester County, including that the location of the accident, residence of plaintiff and that this case involves the interpretation of building codes local to the Village of Ardsely in Westchester, and the burden upon this heavily burdened court to hear this case with minimal connection to New York county. Therefore, the branch of ISJ's motion that seeks a change of the venue of this action to Westchester County is denied, without prejudice to move upon plaintiff providing such information, with a memorandum of law.

The balance of ISJ's motion seeks summary judgment dismissing the cross claims for contribution that Powerhouse and Sunnydale have asserted against it herein. In light of the court's decision to dismiss the complaint against Powerhouse (discussed below), ISJ's application is moot as regards Powerhouse. With respect to Sunnydale, ISJ supports its argument that it cannot be liable for contribution to Sunnydale by reasserting its claim that it owed no duty of care to Baulieu. *See* Torino Reply Affirmation, ¶¶ 1-14. However, as previously discussed, ISJ has failed to establish that claim at this juncture. Therefore, the court rejects, as legally insufficient, ISJ's application to dismiss Sunnydale's cross claim for contribution. Accordingly, the court denies ISJ's motion in its entirety.

Powerhouse's Motion

In its motion, Powerhouse also refers to the third *Espinal* exception in arguing that it owed no duty of care to Baulieu. Powerhouse specifically claims that the evidence herein shows that it completed all of the paving work that it had been hired to perform by Ardsley and/or ISJ, and that is was "under no obligation to routinely return to the subject premises to maintain the parking lot." *See* Notice of Motion (motion sequence number 003), Nyear Affirmation, ¶¶ 20-21. Powerhouse also notes that Roy's deposition testimony indicates that it never performed any

work in the vicinity of the pothole where Baulieu was injured. *Id.*, ¶ 24. Baulieu responds that Poyker's and Moghraby's deposition testimony contradicts Roy's allegations, and indicates that Ardsley and/or ISJ routinely retained Powerhouse to "inspect the entire lot and repair all potholes they observed," which, thus, raises a question of fact which could cause a jury to conclude that there "was an undertaking to perform comprehensive maintenance in the lot, the failure of which breached a duty of care to plaintiff." *See* Groton Affirmation in Opposition, ¶ 18. After reviewing this evidence, however, the court must disagree.

As previously discussed, issues of witness credibility are normally not appropriately resolved on a motion for summary judgment. *Santos v Temco Service Industries, Inc.*, 295 AD2d 218, *supra*. However, the deposition testimony herein does not disclose any issues that would implicate the credibility of the respective affiants. None of the deposed witnesses asserts that Powerhouse had an ongoing contract to clean and maintain the Ardsley Mall parking lot. Rather, all are in agreement that Powerhouse was retained on an as needed basis, and that it was required to submit a detailed proposal before performing any specific work, which one of the Jemals had to approve before Powerhouse could execute the work. Roy identified several such proposals that Ardsley and/or ISJ declined to approve, allegedly for financial reasons. *See* Notice of Motion (motion sequence number 003), Exhibit I, at 14, 23, 25, 31. Under these circumstances, there are no facts presented from which a jury could reasonably infer that Powerhouse had undertaken to perform comprehensive maintenance in the parking lot. The facts, instead, indicate that Powerhouse was only periodically retained, and rather closely supervised, in the discharge of its work. Thus, there is no basis to apply the third exception to the *Espinal* rule that subcontractors generally owe no duty of care to plaintiffs. Therefore, Powerhouse has demonstrated that it is entitled to summary judgment dismissing Baulieu's negligence claim

against it on this ground. Therefore, the court finds that this branch of Powerhouse's motion is granted.

Powerhouse also seeks summary judgment dismissing the cross claims for contribution that Ardsley/ISJ and Sunnydale have asserted against it. In light of the court's decision to dismiss Baulieu's amended complaint against Powerhouse, these cross claims are now moot. Therefore, the court finds that Powerhouse's application for summary judgment to dismiss said cross claims is also granted.

DECISION

ACCORDINGLY, for the foregoing reasons, it is

ORDERED that the motion, pursuant to CPLR 3212, of defendant ISJ Management Corp. (motion sequence number 002) is denied; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of defendant Powerhouse Maintenance, Inc. (motion sequence number 003) is granted and the complaint is severed and dismissed as against said defendant with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that balance of this action shall continue.

Dated: New York, New York
October 12, 2010

Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\baulieuvardsleyetal.lane.wpd