SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

SUSAN VITIELLO,

Plaintiff,

- against -

ALDRICH MANAGEMENT CO., LLC , TOWN OF HEMPSTEAD, CVS PHARMACY, INC. and CVS ALBANY, LLC,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 15212/09
Motion Seq. Nos.: 02, 03, 04
Motion Dates: 01/18/11
03/02/11
03/10/11

XXX

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 02), Affirmation and Exhibits	1
Notice of Motion (Seq. No. 03), Affirmation, Affidavit and Exhibits	2
Notice of Motion (Seq. No. 04), Affirmation and Affidavit	3
Affirmation in Opposition and Exhibits	4
Reply Affirmation (Seq. No. 02)	5
Reply Affirmation (Seq. No. 03) and Exhibit	6
Reply Affirmation (Seq. No. 04)	7

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendants CVS Pharmacy, Inc. and CVS Albany, LLC (collectively "CVS") move (Seq. No. 02), pursuant to CPLR § 3212, for an order granting it summary judgment and dismissing plaintiff's Verified Complaint and any and all cross-claims. Defendant Aldrich Management Co., LLC ("Aldrich") moves (Seq. No. 03), pursuant to CPLR § 3212, for an order granting it summary judgment and dismissing plaintiff's Verified Complaint and any and all

cross-claims. Defendant Town of Hempstead ("Town") moves (Seq. No. 04), pursuant to CPLR § 3212, for an order granting it summary judgment and dismissing plaintiff's Verified Complaint. Plaintiff opposes the motions.

Plaintiff commenced the underlying negligence action against the three defendants when she slipped and fell on a black ice condition in defendants CVS's parking lot. The three defendants cross-claimed against each other for indemnification and/or contribution in the event that they are found liable to the plaintiff.

FACTS

On January 11, 2009, at approximately 2:00 p.m., plaintiff, after exiting defendants CVS's store located at 646 Wantagh Ave., Levittown, New York, sustained injuries when she slipped and fell on an alleged black ice condition in the adjacent parking lot. The temperature at the time was below freezing. Defendant Aldrich is the landlord and owner of the improved real property where defendants CVS are tenants and certain parking areas that are adjacent to the store. The parking area also consists of public parking. Defendant Town owned the particular public parking area where plaintiff fell. Defendant Town performed snow and ice removal operations in said parking area one day before plaintiff's accident. Further, it had snowed about one week prior to the date of the subject incident.

Paragraph 27 of the lease agreement between defendants Aldrich and CVS provides in relevant part:

> "...The Landlord agrees...to maintain in good condition...the parking areas within the area owned by the Landlord..Landlord further agrees to...maintain adequate lighting...for said parking areas, and to clean same...If the Town of Hempstead shall fail to maintain the parking area...Landlord will exercise all available remedies, including but not limited to, exercising its reversionary rights....The Landlord covenants that there is not now,,,,any legal impediment to the use of the premises by the Tenant for its business...or to the use of or access to the parking areas...owned by the Town of Hempstead..."

Plaintiff filed the underlying Summons and Verified Complaint on or about July 30, 2009, alleging that the three defendants were negligent in that they breached their duty by failing to maintain the parking area and exacerbating and/or creating the hazardous condition in said

parking area. Plaintiff avers that such conduct was the proximate cause of her accident and resulting injuries.

PROCEDURE

Defendants CVS, argue that, as tenants, they did not own, possess or control the area where plaintiff's accident occurred. Their lease agreement provides that the responsibility for the cleaning and maintenance of the parking lot is that of the landlord, defendant Aldrich. In addition to the lease agreement and copies of the pleadings, defendants CVS attach transcripts of the Examinations Before Trial ("EBT") of plaintiff, Manuel Duran (the CVS manager on duty at store on the date of the accident), Milton Altschuler (defendant Aldrich managerial employee) and Joseph DelMestro (defendant Town foreman responsible for maintaining roads in the southern area of Levittown).

Defendant Aldrich argues that it had never undertaken the responsibility of performing snow and ice removal on the defendant Town owned property, that it was not aware of any complaints regarding the alleged dangerous and defective condition and that it never received any complaints regarding such a condition. As such, defendant Aldrich submits that, as a non-owner, it has no duty to plaintiff and it did not have actual or constructive notice of any dangerous and/or hazardous condition. In support, defendant Aldrich attached basically the same documents as defendants CVS, while including a survey and/or site plan of the subject parking area and adjacent buildings.

Defendant Town contends that prior written notice of any defective and/or dangerous condition, including snow and ice conditions, is required by local and/or State law. As defendant Town produced evidence that it received no such notice, plaintiff was required to present

evidence that defendant Town affirmatively caused the condition by its actions. Defendant Town argues that, since plaintiff failed to produce said evidence, the Verified Complaint against defendant Town should be dismissed. In support of its motion, defendant Town submits an affidavit from its Records Access Officer of the Highway Department, Sheila Dauscher, Deputy Superintendent of Public Works.

DISCUSSION

The standards for summary judgment are well settled. A Court may grant summary judgment where there is no genuine issue of a material fact and the moving party is therefore entitled to summary judgment as a matter of law. *See Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989); *Miller v. Journal-News*, 211 A.D.2d 626, 620 N.Y.S.2d 500 (2d Dept. 1995).

The burden on the party moving for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of material issue of fact. *See Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of the opposing papers. *See Alvarez v. Prospect Hospital, supra.*

Once the initial burden has been met by movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form, sufficient to create material issues of fact requiring a trial. Mere conclusions and unsubstantiated allegations or assertions are

insufficient. *See Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

To impose liability upon a defendant in a slip and fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it. A defendant has constructive notice of a defect when the defect is visible and apparent and has existed for a sufficient length of time before the accident that it could have been discovered and corrected. *See Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 501 N.Y.S.2d 646 (1986); *Larsen v. Congregation B'Nai Jeshurun of Staten Island*, 29 A.D.3d 643, 815 N.Y.S.2d 187 (2d Dept. 2006).

As a general rule, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control or special use of the property. The determinative question is one of possession or control. Here, the evidentiary submissions by defendants CVS and Aldrich demonstrated that they did not have an exclusive right to possession of the parking lot and that they had no right or obligation to maintain the subject area. *See Welwood v. Association for Children With Down Syndrome, Inc.,* 248 A.D.2d 707, 670 N.Y.S.2d 556 (2d Dept. 1998); *Franks v. G & H Real Estate Holding Corp.*, 16 A.D.3d 619, 793 N.Y.S.2d 61 (2d Dept. 2005). As to defendants CVS, without possession, or a right to maintain or control the parking area, they owe no duty of care with respect to any unsafe condition existing there. *See Cusano v. Staff*, 191 A.D.2d 918, 595 N.Y.S.2d 248 (3d Dept.1993).

The record indicates that neither defendants CVS nor Aldrich own the subject real property. However, plaintiff argues that their duty arises out of a special use, possession and/or control. For instance, plaintiff contends that defendant Aldrich's right of re-entry and reversionary provisions in the lease agreement, establishes control for purposes of liability. The Court finds this line of argument to be unavailing and the supporting cases cited by plaintiff to

be distinguishable. The Courts in *Tkach v. Montefiore Hospital for Chronic Diseases*, 289 N.Y. 387 (1943) and *Guzman v. Haven Plaza Housing Development Fund Co., Inc.*, 69 N.Y.2d 559, 516 N.Y.S.2d 451 (1987) held that an out-of-possession owner, having reserved a right to re-enter the premises to make inspection and repairs, is liable for injuries as such re-entry would subject the landlord defendants to constructive knowledge of defective conditions. Additionally, the landlord's liability in *Guzman* arose out of a statute.

In the case at bar, plaintiff, herself, could not state as to how long such alleged defective and/or dangerous condition existed. As such, a right of re-entry would not necessarily uncover the black ice condition. There was no evidence that defendant Aldrich was informed of the alleged icy condition in the subject parking lot, nor that its limited right of re-entry constituted constructive notice of alleged hazard on the premises. Additionally, there is no right of re-entry in the lease that provides for inspection for purposes of repair of the lot owned by defendant Town.

The terms of the subject lease agreement are clear and unambiguous. There is no proof in the record that defendant Aldrich retained any control over the property owned by defendant Town, nor proof that defendant Aldrich retained any degree of possession or control over said land. The fact that defendant Aldrich retained a reversionary interest in the property is insufficient to create a fiction of ownership. *See Lynch v. Lom-Sur Co., Inc.*, 161 A.D.2d 885, 555 N.Y.S.2d 930 (3d Dept. 1990).

Regarding defendants CVS, their employees merely had a license to park in the lot, but the right to use the parking lot does not establish control for the purposes of liability. As such, there is no evidence to demonstrate a special use of the subject premises. *See Masterson v. Knox,* 233 A.D.2d 549, 649 N.Y.S.2d 108 (3d Dept. 1996).

In sum, plaintiff failed to prove *prima facie* that defendants Aldrich and CVS had ownership, possession or control over the area where she allegedly fell such that said defendants could be held liable. Moreover, there was no evidence to support plaintiff's postulation that the use of defendant Town's parking lot by either defendants Aldrich or CVS constituted a special use thereof. *See Magner v. Southland Corp.*, 261 A.D.2d 450, 690 N.Y.S.2d 106 (2d Dept.1999).

Finally, assuming that ownership was established regarding defendant Aldrich, defendant Aldrich established a *prima facie* case in that it had no constructive notice of any alleged dangerous and/or black ice condition pursuant to Milton Altschuler's EBT testimony that he received no prior complaints regarding any such condition. In opposition, plaintiff failed to establish that the alleged hazardous condition was visible and apparent and existed for a sufficient length of time before the accident for defendant Aldrich to discover and remedy it. Plaintiff presented no evidence concerning the length of time the ice was on the ground before the fall or whether defendant Aldrich received prior complaints about the condition. *See Gjoni v. 108 Rego Developers Corp.*, 48 A.D.3d 514, 852 N.Y.S.2d 255 (2d Dept. 2008); *Murphy v. 136 Northern Blvd. Associates,* 304 A.D.2d 540, 757 N.Y.S.2d 582 (2d Dept 2003).

Defendant Town established its *prima facie* entitlement to judgment as a matter of law by submitting the affidavit of Sheila Dauscher stating that her search of defendant Town's records (extending to three months prior to plaintiff's accident) revealed no prior written notice of an icy condition at the parking lot. *See Gianna v. Town of Islip*, 230 A.D.2d 824, 646 N.Y.S.2d 707 (2d Dept. 1996); *Goldberg v. Town of Hempstead*, 156 A.D.2d 639, 549 N.Y.S.2d 138 (2d Dept. 1989). Such notice requirement arises out its local law contained in Hempstead Town Code § 6-1 and New York State Town Law § 65-a(1). *See Stallone v. Long Island Rail*

Road, 69 A.D.3d 705, 894 N.Y.S.2d 65 (2d Dept. 2010). The Town Law provides in relevant part:

> "... No civil action shall be maintained against any town...for damages or injuries to person...sustained by reason of any highway, bridge or culvert being defective, out of repair, unsafe, dangerous or obstructed unless written notice of such defective, unsafe, dangerous or obstructed condition of such highway, bridge or culvert was actually given to the town clerk or town superintendent of highways, and that there was a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger or obstruction complained of, or, in the absence of such notice, unless such defective, unsafe, dangerous or obstructed condition existed for so long a period that the same should have been discovered and remedied in the exercise of reasonable care and diligence; but no such action shall be maintained for damages or injuries to person or property sustained solely in consequence of the existence of snow or ice upon any highway, bridge or culvert, unless written notice thereof, specifying the particular place, was actually given to the town clerk or town superintendent of highways and there was a failure or neglect to cause such snow or ice to be removed, or to make the place otherwise reasonably safe within a reasonable time after the receipt of such notice..." New York State Town Law § 65-a(1).

Once defendant Town satisfied its burden showing a lack of prior written notice, plaintiff was required to come forward with admissible evidence to raise an issue of fact as to whether written notice was given or whether defendant Town created or exacerbated the alleged icy condition through its affirmative negligent acts. *See Amabile v. City of Buffalo*, 93 N.Y.2d 471, 693 N.Y.S.2d 77 (1999); *Zwielich v. Incorporated Village of Freeport*, 208 A.D.2d 920, 921, 617 N.Y.S.2d 871 (2d Dept. 1994). The conclusory and speculative assertions by plaintiff and her witnesses were insufficient to raise a triable issue of fact. *See Romano v. Stanley*, 90 N.Y.2d 444, 661 N.Y.S.2d 589 (1997); *Shannon v. Village of Rockville Centre,* 39 A.D.3d 528, 834 N.Y.S.2d 537 (2d Dept. 2007).

In sum, plaintiff failed to meet her burden in that she presented no evidence that defendant Town's plowing efforts immediately resulted in a dangerous condition or exacerbated a previously existing dangerous condition.

Accordingly, it is hereby

ORDERED that defendants CVS' motion (Seq. No. 02) is **GRANTED**; and it is further

ORDERED that defendant Aldrich's motion (Seq. No. 03) is **GRANTED**; and it is further

ORDERED that defendant Town's motion (Seq. No. 04) is **GRANTED**; and it is further

ORDERED that plaintiff's Verified Complaint is dismissed in its entirety and all defendants' cross-claims are rendered moot.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
June 23, 2011