[* 1]

SHORT FORM ORDER

INDEX No. 06-12542

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 12-17-10
ADJ. DATE 5-3-12
Mot. Seq. # 002 - MD
003 - XMD

RONALD D. BROWN and ROBYN BROWN,

Plaintiffs,

- against -

HAMPTON BAY FISH CO., AMERATA REALTY and FRANK CASSATA,

Defendants.

ASKINAS & MILLER, ESQS.
Attorney for Plaintiffs
1991 Union Boulevard, Suite B
Bay Shore, New York 11706

JOHN T. McCARRON, P.C.
Attorney for Defendant Hampton Bay Fish
445 Broadhollow Road, Suite 124
Melville, New York 11747

AMERATA REALTY and FRANK CASSATA

Third-Party Plaintiffs,

- against -

EAST COAST SEWER AND DRAIN,

Third-Party Defendant.

TROMELLO MCDONNELL & KEHOE
Attorney for Defendants/Third-Party Plaintiffs
Amerata Realty and Frank Cassata
P.O. Box 9038
Melville, New York 11747

MAZZARA & SMALL, P.C.
Attorney for Third-Party Defendant East Coast Sewer and Drain
800 Veterans Memorial Highway
Hauppauge, New York 11788

Upon the following papers numbered 1 to 51 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21; Notice of Cross Motion and supporting papers 22 - 35; Answering Affidavits and supporting papers 36 - 45; 46 - 47; Replying Affidavits and supporting papers 48 - 49; 50 - 51; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Amerata Realty and Frank Cassata for summary judgment dismissing the complaint against them is denied; and it is further

ORDERED that the cross motion by third-party defendant East Coast Sewer and Drain for summary judgment dismissing the third party complaint against it is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Ronald Brown on premises known as 2150 Deer Park Avenue, Deer Park, New York on September 29, 2004. Plaintiff's wife, Robyn Brown, asserts a derivative cause of action for loss of services. The accident allegedly occurred when plaintiff, who was returning to his vehicle after delivering fish to defendant Hampton Bay Fish Co., fell into a cesspool. Defendants Amerata Realty and Frank Cassata (hereinafter collectively referred to as the Amerata defendants) own the subject premises, which is improved with a strip shopping center, and leased one of the stores to Hampton Bay Fish Co. According to the bill of particulars, defendants were negligent in permitting the cesspool to be improperly covered, thereby creating a dangerous and defective condition. As a third-party claim, the Amerata defendants seeks indemnification from third-party defendant East Coast Sewer and Drain.

The Amerata defendants now move for summary judgment dismissing the complaint against them on the grounds that Hampton Bay Fish was responsible for maintaining the subject cesspool, and that the Amerata defendants did not have notice of the alleged defective condition. They also argue that they are out-of-possession owners and did not exercise any control over the subject premises during the pertinent time period. In support of their motion, they submit copies of the pleadings, transcripts of the parties' deposition testimony, a copy of the lease agreement between the Amerata defendants and Hampton Bay Fish, a photograph of the subject premises, and invoices from East Coast Sewer and Drain to Hampton Bay Fish.

Third-party defendant East Coast Sewer and Drain supports the Amerata defendants' motion for summary judgment and cross-moves for summary judgment dismissing the third-party complaint against it. East Coast Sewer and Drain argues that it did not have an affirmative duty to monitor and maintain the subject cesspool, and that it only serviced the cesspool when requested by Hampton Bay Fish. In support of its motion, it submits transcripts of the parties' deposition testimony and invoices it sent to Hampton Bay Fish.

Plaintiffs oppose the motion by the Amerata defendants, arguing that a triable issue of fact exists as to who is responsible for maintaining the subject cesspool. Plaintiffs further argue that as the subject cesspool is located in the common area of the premises, the Amerata defendants are responsible for maintaining that area. In addition, plaintiff opposes the cross motion by East Coast Sewer and Drain, arguing that it should have advised Amerata of the alleged defective condition. In opposition, plaintiff submits excerpts of the parties' deposition testimony, a copy of the lease agreement, a photograph of the subject cesspool, and invoices sent to Hampton Bay Fish by East Coast Sewer and Drain. Defendant Hampton Bay Fish Co. also opposes the motion by the Amerata defendants and by East Coast Sewer and Drain, adopting all the arguments and evidence submitted by plaintiff.

At his examination before trial, plaintiff testified that at the time of the accident he went to the backdoor of Hampton Bay Fish Co. to deliver fish, and that there was a "wooden pallet" by the door which he stepped on to enter the store. He testified that he took two trips to deliver all of the fish, and

that he fell on his second trip when he was returning to his van. He testified that the rotted wooden board covering the cesspool snapped when he walked on it, and he fell into the cesspool. Plaintiff further stated there was a cement cover for the cesspool, but that it had shifted.

At his examination before trial, Alan Haenel testified that he was an officer of Hampton Bay Fish Co. and that the business had been sold. He testified that the store had its own cesspool in the rear of the building, whereas the other tenants in the strip mall shared a cesspool. He further testified that the landlord was responsible for maintaining the area behind the store where the cesspool is located. He stated that an employee of Hampton Bay Fish would contact and pay a cesspool company to maintain the subject cesspool when necessary.

At his examination before trial, Robert Coleman, a financial officer of Amerata Realty, testified that Amerata Realty owns the commercial property located at 2150 Deer Park Avenue in Babylon which is a strip mall that has 12 units, including Hampton Bay Fish Company. He testified that the stores share common cesspools, but that Hampton Bay Fish has its own cesspool located behind the building. Mr. Coleman read a portion of the lease between Amerata Realty and Hampton Bay Fish into the record, stating that "leasee must at all times keep up the leased premises including maintenance of exterior, entrance, all glass, windows, moldings, all partitions, doors, fixtures, cesspools. Tenant shall pay landlord as additional rent its proportionate share of the cleaning of the cesspools." However, he stated that no cesspool fees were collected from Hampton Bay Fish, because it maintained its own cesspool. Mr. Coleman testified that Charles Selock, who is employed by Amerata Realty, usually visits the subject property weekly to inspection the area and to perform maintenance. He stated that Mr. Selock would maintain the area behind the building where the cesspool was located, by weeding and notifying tenants about debris in the area. He further testified that Selock never mentioned that the cover over the cesspool was out of place.

At his examination before trial, James Closs, who is the owner of East Coast Sewer and Drain, testified that his business involves cleaning sewer lines, pumping cesspools, and installing cesspool covers. He testified that in 2004, Hampton Bay Fish would contact him to perform maintenance on the cesspool behind its building. He explained that to access the subject cesspool, he would remove the plywood, and use a steel bar to lift up the 170-pound cement cover. He further stated that when he finished pumping out the cesspool, he would secure the cover over the cesspool and walk on it to make sure it was back in place. Mr. Closs testified that he told employees of Hampton Bay Fish to get a steel cover for the cesspool because every time he went to the premises, the cover would "float up in the air and float to the side," which is why "they put the plywood on it." He described the plywood as slimy and slippery and stated that the "delivery guys" at Hampton Bay Fish would yell at him because they would slip on the plywood. He further stated that the cesspool cover was caused to "float" because of a back up and overflow of the cesspool.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of***

New York, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

To prove a prima facie case of negligence in a trip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*see* ***Bradish v Tank Tech Corp.***, 216 AD2d 505, 628 NYS2d 807 [2d Dept 1995]; ***Gaeta v City of New York***, 213 AD2d 509, 624 NYS2d 47 [2d Dept 1995]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Bykofsky v Waldbaum's Supermarkets, Inc.***, 210 AD2d 280, 619 NYS2d 760 [2d Dept 1994]). Liability can be predicated only on failure of defendant to remedy the danger after actual or constructive notice of the condition (*see* ***Piacquadio v Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [1994]). Constructive notice will not be imputed where a defect is latent and would not be discoverable upon reasonable inspection (*see* ***Applegate v Long Is. Power Auth.***, 53 AD3d 515, 862 NYS2d 86 [2d Dept 2008]; ***Lal v Ching Po Ng***, 33 AD3d 668, 823 NYS2d 429 [2d Dept 2006]).

Here, the Amerata defendants failed to establish their entitlement to judgment as a matter of law. While the leasehold agreement states that the tenant is responsible for maintaining cesspools, it also states that the tenant shall pay landlord as additional rent its proportionate share of the cleaning of the cesspools. Moreover, contrary to the assertions of the Amerata defendants, they were not out-of-possession owners who did not exercise control over the land (*see* ***Stein v Harriet Mgt., LLC***, 51 AD3d 1007, 859 NYS2d 243 [2d Dept 2008]; ***Eckers v Suede***, 294 AD2d 533, 743 NYS2d 129 [2d Dept 2002]). Rather, the testimony of Mr. Coleman demonstrates that a maintenance employee of the Amerata defendants inspects and maintains the area where the subject cesspool is located. Furthermore, the Amerata defendants' evidence is insufficient to show that they lacked notice of the alleged dangerous condition. Here, the Amerata defendants rely mainly on the testimony of Mr. Coleman, who stated that he has never been to the back of the Hampton Bay Fish store and has never seen the subject cesspool. While Mr. Coleman testified that Mr. Selock inspected the subject property weekly and did not mention that the subject cesspool cover was out of place, Mr. Closs testified that "every time" he would go to perform maintenance on the subject cesspool, the cover had floated off. In addition, plaintiff described the plywood covering the cesspool cover as rotted, and Mr. Closs testified that it was slimy and slippery. As such, the testimony raises issues of credibility which may not be resolved on a summary judgment motion (*see* ***Tenkate v Top Mkts., LLC***, 38 AD3d 987, 831 NY2d 565 [3d Dept 2007]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). Having determined that the Amerata defendants failed to establish their prima facie burden on the motion, it is unnecessary to consider the sufficiency of plaintiff's papers in opposition (*see* ***Zambri v Madison Sq. Garden, L.P.***, 73 AD3d 1035, 901 NYS2d 377 [2d Dept 2010]).

With regard to the cross motion, third-party defendant East Coast Sewer and Drain has failed to

establish its prima facie entitlement to summary judgment. Although Mr. Closs testified that after maintenance of the cesspool he would replace the cover over the cesspool and walk on it to make sure it was secure, he could not recall whether he or another employee maintained the subject cesspool prior to the accident. Thus, Mr. Closs' testimony is insufficient to show that defendant East Coast Sewer and Drain properly installed the cesspool cover after the maintenance of the subject cesspool. Thus, as defendant East Coast Sewer and Drain failed to meet its prima facie burden, its motion for summary judgment dismissing the third-party complaint is denied.

Dated: 9/12/12

A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION