[* 1]

SHORT FORM ORDER

INDEX No. 08-15119
CAL No. 12-00763OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 6-6-12 (#003)
MOTION DATE 9-18-12 (#004 & #005)
ADJ. DATE 11-13-12
Mot. Seq. # 003 - MD # 005 - XMD
004 - XMotD

MARY HENDERSON and JOHN HENDERSON,

Plaintiffs,

- against -

GYRODYNE COMPANY of AMERICA, INC.,

Defendant.

GYRODYNE COMPANY of AMERICA, INC.,

Third-Party Plaintiff,

- against -

TOWNE BUS CORP.,

Third-Party Defendant.

GYRODYNE COMPANY of AMERICA, INC.,

Second Third-Party Plaintiff,

- against -

PIONEER PAVING, INC.,

Second Third-Party Defendant.

FABER & TROY, ESQS.
Attorney for Plaintiffs
180 Froehlich Farm Boulevard
Woodbury, New York 11797

STEWART H. FRIEDMAN, ESQ.
Attorney for Defendant/Third-Party Plaintiff
Gyrodyne
401 Franklin Avenue, Suite 314
Garden City, New York 11530

GALLO, VITUCCI, KLAR & PINTER
Attorney for Third-Party Defendant Towne Bus
90 Broad Street, 3rd Floor
New York, New York 10004

BELLO & LARKIN
Attorney for Second Third-Party Defendant
Pioneer Paving
150 Motor Parkway, Suite 405
Hauppauge, New York 11788

RR

Upon the following papers numbered 1 to 58 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; ; Notice of Cross Motion and supporting papers 30 - 39; 48-51; Answering Affidavits and supporting papers 17 - 23; 24 - 27; 28 - 29; 40 -41; 42 - 43; 52 - 53; 54 - 55; Replying Affidavits and supporting papers 44 - 45; 46 - 47; 56 - 58; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that these motions are consolidated for purposes of this determination; and it is further

ORDERED that the motion by third-party defendant Towne Bus Corp. for an order pursuant to CPLR 3212 granting summary judgment dismissing the third-party complaint is denied; and it is further

ORDERED that the motion (incorrectly denominated as a cross motion) by second third-party defendant Pioneer Paving, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the second third-party complaint and cross claims against it is granted to the extent that the second third-party complaint is dismissed, and is otherwise denied; and it is further

ORDERED that the cross motion by defendant Gyrodyne Company of America, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and cross claims against it is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Mary Henderson ("the plaintiff") during the course of her employment on October 11, 2005 at approximately 5:30 a.m., when she tripped and fell on a ball of asphalt in a parking lot within the Flowerfield Complex located on Mills Pond Road in Saint James, New York. The parking lot was owned by Gyrodyne Company of America, Inc. ("Gyrodyne") and leased by defendant Towne Bus Corp. ("Towne Bus"). According to the plaintiff, while she was inspecting her bus that morning, she tripped and fell on a ball of asphalt in the parking lot.

In their complaint and the bill of particulars, the plaintiffs allege that defendant Gyrodyne was negligent in, *inter alia*, failing to maintain the premises in a safe and suitable condition and by permitting a dangerous condition to exist and persist on the premises.

Gyrodyne commenced a third-party action against Towne Bus for contribution, common-law and contractual indemnification, and breach of contract. In addition, a second third-party action was commenced by Gyrodyne against Pioneer Paving, Inc. ("Pioneer Paving"), the company which re-paved the parking lot and performed various repairs to the parking lot prior to the accident, for contribution, common-law and contractual indemnification, and breach of contract.

In their answers, Gyrodyne and Towne Bus do not assert any cross claims. In its answer, Pioneer Paving asserts cross claims against Gyrodyne and Towne Bus for contribution.

Towne Bus now moves for summary judgment dismissing the third-party complaint, Pioneer Paving cross-moves for summary judgment dismissing the second third-party complaint, and Gyrodyne cross-moves for summary judgment dismissing the complaint and cross claims asserted against it.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141 [1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

It is well settled that "[a]n employer's liability for an employee's on-the-job injury is ordinarily limited to workers' compensation benefits . . . However, when an employee sustains a grave injury, as enumerated in Workers' Compensation Law § 11, a primary defendant may commence a third-party action against the injured plaintiff's employer for common-law indemnification and/or contribution" (***Maxwell v Rockland County Community Coll.***, 78 AD3d 793, 794, 911 NYS2d 130, 132 [2d Dept 2010] [internal citations and quotation marks omitted]). A grave injury is defined as "death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability (Workers' Compensation Law § 11).

As a preliminary matter, the Court notes that it cannot consider the unsigned deposition transcript of non-party witness Jose Fuentes since it was submitted without an explanation as to why it was not signed (*see* ***McDonald v Mauss***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]).

In response to the *prima facie* showing by Towne Bus that the causes of action in the third-party complaint which sought common-law indemnification and contribution should be dismissed on the ground that the plaintiff did not sustain a grave injury (*see id.*; ***Maxwell v Rockland County Community Coll.***, *supra*; ***Spiegler v Gerken Bldg. Corp.***, 35 AD3d 715, 826 NYS2d 674 [2d Dept 2006]), Pioneer and Gyrodyne raised a triable issue of fact as to whether the plaintiff was actually an employee of We Transport and not Towne Bus, thereby making Towne Bus ineligible to receive the protections and limitations of liability under the Workers' Compensation Law. While the plaintiff testified at her deposition that she was employed by Towne Bus, Pioneer and Gyrodyne submit a copy of the plaintiff's bill of particulars, the accident report filled out by the plaintiff on the date of the accident, the plaintiff's application for employment, and the plaintiff's W2 forms for the years 2004 through 2006, all of which list "We Transport LP" as the plaintiff's employer. Since a triable issue of fact exists as to whether the plaintiff was an employee of Towne Bus, that branch of the motion by Towne Bus to dismiss the causes of action in the third-party complaint for common-law indemnification and contribution based on Workers' Compensation Law § 11 is denied.

Turning to the branch of the motion by Towne Bus which is to dismiss the causes of action in the third-party complaint for contractual indemnification and breach of contract, Workers' Compensation Law § 11 also provides that a primary defendant may commence a third-party action against the injured plaintiff's employer "based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution or indemnification of the claimant or person asserting the cause of action for the type of loss suffered" (Workers' Compensation Law § 11; ***Rodrigues v N & S Bldg. Contrs., Inc.***, 5 NY3d 427, 429, 805 NYS2d 299, 300 [2005]). As stated above, there is an issue of fact as to whether Towne Bus is the plaintiff's employer. However, even if Towne Bus is not the plaintiff's employer, since the lease entered into between Gyrodyne and Towne Bus contained a contractual indemnification clause, Gyrodyne could still assert a cause of action against Towne Bus for contractual indemnification since a party's right to contractual indemnification is not dependent upon an employer/employee relationship but is dependent upon the specific language in the contract entered into between the parties (*see* ***Zastenchik v Knollwood Country Club***, 101 AD3d 861, 955 NYS2d 640 [2d Dept 2012]; ***Reisman v Bay Shore Union Free School Dist.***, 74 AD3d 772, 902 NYS2d 167 [2d Dept 2010]).

Here, Towne Bus failed to establish its *prima facie* entitlement to judgment as a matter of law dismissing the causes of action in the third-party complaint for contractual indemnification and breach of contract. While Towne Bus submits a copy of the lease agreement entered into between the parties and the deposition testimony of Clint Borkstrom, the property/facility manager for Gyrodyne, establishing that the lease agreement, which contained an indemnity provision, expired on August 31, 2005, one month before the accident, it is undisputed that upon the expiration of the lease, Towne Bus became a holdover tenant. Since it is well settled that when a tenant holds over, the tenancy impliedly continues on the same terms and subject to the same covenants as those contained in the original lease (*see* ***Matter of Casamento v Juaregui***, 88 AD3d 345, 929 NYS2d 286 [2d Dept 2011]; ***Logan v Johnson***, 34 AD3d 758, 825 NYS2d 242 [2d Dept 2006]), the lease between Towne Bus and Gyrodyne and the indemnity provision therein continued to be in full force and effect on the date of the accident.

In addition, Towne Bus asserts that even if the lease was in effect on the day of the accident, the indemnity provision therein was never triggered since it did not create or have notice of the defect in the parking lot. On a motion for summary judgment dismissing a complaint in a trip and fall action, the defendant bears the burden of proving that it neither created the hazardous condition nor had actual or constructive notice of its existence (*see* ***Indelicato v Parkway N. Assoc.***, 98 AD3d 946, 950 NYS2d 585 [2d Dept 2012]; ***Kielty v AJS Constr. of L.I., Inc.***, 83 AD3d 1004, 922 NYS2d 467 [2d Dept 2011]). Since Towne Bus did not proffer any evidence demonstrating when the parking lot was last inspected prior to the plaintiff's accident, it failed to eliminate all triable issues of fact (*see* ***Indelicato v Parkway N. Assoc.***, *supra*; ***Tsekhanovskaya v Starrett City, Inc.***, 90 AD3d 909, 935 NYS2d 128 [2d Dept 2011]). Accordingly, the motion by Towne Bus for summary judgment dismissing the third-party complaint is denied.

As to the motion by Pioneer Paving, Pioneer Paving asserts that the second third-party complaint should be dismissed since it did not create the defect in the parking lot nor did it have a duty to repair it. Pioneer Paving established its *prima facie* entitlement to judgment as a matter of law by demonstrating, through the deposition testimony of Anthony DeRosa, the president of Pioneer Paving, and Clint Borkstrom, the property/facility manager for Gyrodyne, that while Pioneer Paving made pothole repairs and re-paved

the subject parking lot in the spring of 2005, after the work was completed, they both inspected the parking lot and there were no defects in the parking lot. In addition, they did not receive any complaints from anyone regarding the work that was completed by Pioneer Paving.

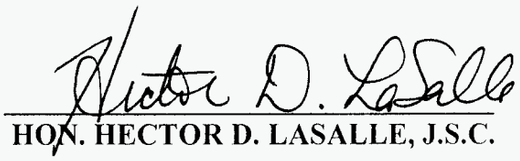
In opposition, Gyrodyne failed to raise a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*). Gyrodyne's speculation that in the normal course of repairing potholes and re-paving a parking lot a spillage of asphalt could have occurred and that Mr. DeRosa may not have seen the ball of asphalt on the parking lot after Pioneer Paving completed the work because he inspected the parking lot while he drove through it in his car, is insufficient to raise a triable issue of fact (*see* ***Smith v City of Mount Vernon***, 101 AD3d 847, 955 NYS2d 635 [2d Dept 2012]). Since there are no cross claims asserted against Pioneer Paving, Pioneer Paving's cross motion for summary judgment is granted to the extent that the second-third party complaint is dismissed, and is otherwise denied.

Turning to Gyrodyne's motion for summary judgment, generally, "[a]n out-of-possession landlord is . . . not responsible for injuries that occur on [the] premises unless [it] has retained control over the premises or is contractually obligated to maintain or repair the alleged hazard" (***Utica Mut. Ins. Co. v Brooklyn Navy Yard***, 83 AD3d 817, 817, 921 NYS2d 287, 287 [2d Dept 2011]; ***Kane v Port Auth. of N.Y. & N.J.***, 49 AD3d 503, 503, 855 NYS2d 176, 177 [2d Dept 2008]). "Control may be evidenced by a course of conduct demonstrating that the landlord has assumed responsibility to maintain a particular portion of the premises" (***Euvino v Loconti***, 67 AD3d 629, 631, 888 NYS2d 571, 573 [2d Dept 2009]). Here, Gyrodyne failed to establish its *prima facie* entitlement to judgment as a matter of law. Although the lease provided, and Frank Carpenter, the director of maintenance for Towne Bus, testified at his deposition that Towne Bus was responsible for the maintenance and repairs to the parking lot, Mr. Borkstrom testified at his deposition that approximately once a year, he would perform an inspection of the parking lot, and that when Towne Bus needed a contractor to make repairs to the parking lot, he would contact Pioneer Paving, the contractor used by Gyrodyne, to make the repairs and would pay Pioneer Paving's bill for that work. Thereafter, he would bill Towne Bus for the cost of the repairs. Mr. Borkstrom testified that he followed that same procedure when Towne Bus needed the repairs made to the parking lot in the spring of 2005 and that he personally inspected the parking lot after Pioneer Paving completed the work. Thus, an issue of fact exists as to whether Gyrodyne, through its course of conduct, assumed the responsibility of maintaining the parking lot (*see* ***Gronski v County of Monroe***, 18 NY3d 374, 940 NYS2d 518 [2011]).

Accordingly, the motion for summary judgment by Towne Bus is denied, the motion for summary judgment by Pioneer Paving is granted to the extent that the second-third party complaint is dismissed, and the motion for summary judgment by Gyrodyne is denied.

The foregoing constitutes the Order of this Court.

Dated: February 13, 2013
Riverhead, NY



HON. HECTOR D. LASALLE, J.S.C.

_____**FINAL DISPOSITION** __X__**NON-FINAL DISPOSITION**