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SHORT FORM ORDER

INDEX No. 10-34076
CAL. No. 13-01339OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 12-23-13 (#003)
MOTION DATE 4-14-14 (#005)
ADJ. DATE 5-13-14
Mot. Seq. # 003 - MD
005 - MD

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WILLIAM M. REDLICH,

Plaintiff,

- against -

BROOKWOOD CORAM II LLC, HERCULES CORP., and SENTRY PROPERTY MANAGEMENT, INC.,

Defendant.

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Upon the following papers numbered 1 to 51 read on this motion for summary judgment and for leave to amend; Notice of Motion/ Order to Show Cause and supporting papers 1 - 29; 30 - 46 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 47 - 51 ; Replying Affidavits and supporting papers __; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#003) by defendant Brookwood Coram II LLC for summary judgment and the motion (#005) by plaintiff for leave to amend the pleadings are consolidated for the purposes of this determination; and it is

ORDERED that the motion (#003) by defendant Brookwood Coram II LLC for summary judgment dismissing the complaint as against it is denied; and it is further

ORDERED that the motion (#005) by plaintiff for leave to amend the pleadings is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff William Redlich as a result of a slip and fall accident that occurred on November 10, 2008, at an apartment complex in Coram, New York, known as Brookwood Village Apartments. The accident allegedly happened on an exterior stairway that leads to a basement of a building in the apartment complex allegedly owned by

defendant Brookwood Coram II LLC (hereinafter referred to as Brookwood). By his bill of particulars, plaintiff alleges that defendant Brookwood was negligent in failing to maintain the premises in a reasonably safe and proper condition by allowing wet leaves to accumulate on the exterior stairway. A stipulation discontinuing the action with prejudice against defendant Hercules Corp. was executed September 13, 2012, and a stipulation discontinuing the action with prejudice against defendant Sentry Property Management, Inc. was executed April 17, 2013.

Brookwood now moves for summary judgment dismissing the complaint against it on the ground that it does not own the subject stairway. Brookwood also argues that plaintiff does not know the cause of the accident, that there was no notice of the alleged dangerous condition, and that the alleged dangerous condition was open and obvious. In support of its motion, Brookwood submits copies of the pleadings; transcripts of the parties' deposition testimony; expert affidavits of Howard Altschule, a forensic meteorologist, and Stanley Fein, an engineer; photographs of the subject stairway; and an affidavit of Steven Auerbach, property manager of the Brookwood Village Apartments.

Plaintiff moves for leave to amend the complaint to add Brookwood Coram I LLC and S&N Auerbach Management Inc. as defendants. Plaintiff also opposes the motion by Brookwood, arguing that it failed to demonstrate it did not own or control the subject premises, and that it did not have notice of the subject condition. In addition, plaintiff argues that the conflicting expert affidavits raise a triable issue of fact as to whether the stairway was defective. In support of his motion and in opposition to Brookwood's motion, plaintiff submits, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, photographs of the subject stairway, the business certificate of Brookwood Management Company, and an expert affidavit of Richard Berkenfeld. Brookwood opposes plaintiff's motion, arguing that his claims against Brookwood Coram I LLC and S&N Auerbach Management Inc. are barred by the statute of limitations, and that the doctrine of relation back does not apply.

Auerbach, managing member of both Brookwood Coram I LLC and Brookwood Coram II LLC, states that he is the property manager of the Brookwood Village Apartments. He states that the apartment building where the accident occurred is owned by Brookwood Coram I LLC, and not by Brookwood Coram II LLC, which is a separate entity and has no ownership interest or maintenance responsibility for the building where the accident occurred. He further avers that there were no accidents reported to have occurred on the subject stairway prior to the accident, and no complaints about the stairway.

At his examination before trial, plaintiff, who is employed as a Verizon field technician, testified that on the day of the accident, he was walking down an exterior stairway of an apartment building at the Brookwood Village Apartments to install a telephone line. He described the stairway as concrete steps in the middle with slopes on both sides of the steps. He explained that he was descending the stairs by putting his left foot on the slope while holding on to the wall, and placing his right foot on the steps. He testified that the stairway does not have handrails, and that he did not place his left foot on the steps because they were full of leaves, and he wanted to support himself against the wall. Plaintiff testified that he was halfway down the stairway when he slipped on the leaves and fell. He further testified that the top layer of leaves was dry, but that the bottom layer of leaves was wet.

At his examination before trial, Agustin Mercado, who is employed by Brookwood and S&N Management as a superintendent testified that his responsibilities include general maintenance of the subject grounds. He testified that there are a total of three "supers" for the complex, and that each morning they would clean garbage and debris, including leaves, off the grounds, and walk around the 21 buildings that comprise the Brookwood Village Apartments to make sure everything is clean. He testified that the inspection would begin before 8:00 a.m and would last approximately 30 minutes. He stated that the supers would clean leaves from the stairways in the morning, as each stairway has a drain and removing leaves prevents blockage of the drains. Mercado stated that he also would clean any debris he observed throughout the day. When a photograph of the alleged accident site was shown to Mercado, he explained that the stairway leads to the boiler rooms in "Building 3," which also holds the phone line access panel and the electric meters. He testified that only the supers have access to the boiler room, as the doors are locked at all times, and that if anyone needed access to the area he or she would have to go to the office to ask for permission. He described the stairway as consisting of 8 to 10 concrete steps that are about 30 inches wide, with ramps on both sides of the steps. He also testified that employees from a landscaping company come to the property once a week to remove leaves from the stairway.

At his examination before trial, James Hayes testified that he is the owner of Sentry Property Management, a commercial landscape and lawn maintenance company, which has a contract with the Brookwood Village Apartments in Coram to provide lawn care. He testified that in the fall, his company would go to the subject complex weekly to rake up leaves, blowing them into piles and vacuuming them up into a dump truck. He further testified that the services included blowing leaves out of the stairways.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; 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 [2004]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, 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]).

It is axiomatic that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005]). As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (*see* ***Suero-Sosa v Cardona***, 112 AD3d 706, 977 NYS2d 61 [2d Dept 2013]; ***Kydd v Daarta Realty Corp.***, 60 AD3d 997, 877 NYS2d 352 [2d Dept 2009]; ***Dugue v 1818 Newkirk Mgt. Corp.***, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]). To establish liability for a dangerous or defective condition, a plaintiff must establish that the defendant created the condition which caused the injury or had actual or constructive notice of its existence (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Chia Yun Tsai v Duane Reade, Inc.***, 63 AD3d 1096,

883 NYS2d 89 [2d Dept 2009]; ***Goldin v Riker***, 273 AD2d 197, 709 NYS2d 119 [2d Dept 2000]).

Here, Brookwood failed to establish its entitlement to judgment as a matter of law. Brookwood relies mainly on the testimony of Mr. Mercado, who testified that the supers of the building complex would inspect the subject premises in the morning to make sure there was no garbage and debris. Furthermore, he testified that they would clean leaves from the stairways in the mornings to prevent blockage of the drains. However, plaintiff testified that the stairway was full of leaves when he descended the steps around 10:00 to 11:00 a.m. Thus, the conflicting testimony of the parties 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]).

As to Brookwood's argument that it did not own or control the subject property, the affidavit of the property manager stating that Brookwood does not own the subject premises is insufficient to demonstrate that fact. The Court notes that the copies of the deeds to the buildings in the subject complex submitted for the first time with the reply cannot be considered (*see* ***GJF Constr. Corp. v Cosmopolitan Decorating Co., Inc.***, 35 AD3d 535, 828 NYS2d 409 [2d Dept 2006]; ***Rengifo v City of New York***, 7 AD3d 773, 776 NYS2d 865 [2d Dept 2004]; ***Jackson-Cutler v Long***, 2 AD3d 590, 768 NYS2d 360 [2d Dept 2003]). Moreover, Brookwood had an adequate opportunity to come forward with proof that it did not own the subject premises and failed to do so to the detriment of plaintiff who because of the applicable statute of limitations will be unable to add the correct defendants (*see* ***Triple Cities Constr. Co. v Maryland Casualty Co.***, 4 NY2d 443, 176 NYS2d 292 [1958]; ***Meaney v Loew's Hotels, Inc.***, 26 AD2d 263, 273 NYS2d 856 [1st Dept 1966]). Moreover, "[a] party may not, even innocently, mislead an opponent and then claim the benefit of his deception (***Provosty v Lydia E. Hall Hospital***, 91 AD2d 658, 659, 457 NYS2d 106 [2d Dept 1982], *quoting* ***Romano v Metropolitan Life Ins. Co.***, 271 NY 288, 293, 2 NE2d 661 [1936]). In Brookwood's answer as to the allegations in the complaint that it owned or controlled the subject premises, it denied the allegations and referred "all questions of law and of ownership, leasing, doing business, operation, maintenance, management, control, inspection, supervision and repair to determination by the Court." Furthermore, Brookwood's answer did not include an affirmative defense stating that it was not a proper party. Accordingly, Brookwood's motion for summary judgment dismissing the complaint against it is denied.

With regard to plaintiff's motion for leave to add defendants Brookwood Coram I LLC and S&N Auerbach Management Inc., the Court notes that the statute of limitations has expired (*see* CPLR 214 [5]). As codified in CPLR 203(c), "what is commonly referred to as the relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for Statute of Limitations purposes where the two defendants are 'united in interest'" (***Buran v Coupal***, 87 NY2d 173, 177, 638 NYS2d 405 [1995]). For the rule allowing relation back to the original date of filing under CPLR 203(c) to apply, a plaintiff is required to prove that: "(1) both claims arose out of the same conduct, transaction, or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement, and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would

have been brought against that party as well" (***Austin v Interfaith Med. Ctr.***, 264 AD2d 702, 703, 694 NYS2d 730 [2d Dept 1999]; *see* ***Sally v Keyspan Energy Corp.***, 106 AD3d 894, 896-897,966 NYS2d 133 [2d Dept 2013]).

Here, plaintiff failed to demonstrate that Brookwood and the proposed new defendants are united in interest, since they have manifestly different defenses to plaintiff's claims and would not stand or fall together (*see* ***Arsell v Mass One LLC***, 73 AD3d 668, 900 NYS2d 380 [2d Dept 2010]; ***Xavier v RY Mgt. Co., Inc.***, 45 AD3d 677, 846 NYS2d 227 [2d Dept 2007]; ***Monir v Khandakar***, 30 AD3d 487, 818 NYS2d 224 [2d Dept 2006]). One defendant's defense would be that it does not owe a duty to plaintiff as it does not own or control the subject premises, whereas the proposed defendants' defense would be that it did not have notice of the alleged dangerous condition. Inasmuch as plaintiff failed to demonstrate the element of the relation-back doctrine that Brookwood and defendants Brookwood Coram I LLC and S&N Auerbach Management Inc. are united in interest, the remaining elements need not be addressed (*see* ***Miner v City of New York***, 78 AD3d 669, 911 NYS2d 109). Thus, the statute of limitations has expired and plaintiff failed to demonstrate that the relation-back doctrine is applicable (*see* ***Comice v Justin's Rest.***, 78 AD3d 641, 909 NYS2d 670 [2d Dept 2010]). Accordingly, plaintiff's motion for leave to add new defendants is denied.

JUL 2 8 2014

Dated:_____

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HON. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION