Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

EMMETT CURRAN and DIANE CURRAN,

Plaintiffs,

-against-

201 WEST 87TH STREET, L.P. and DELI & GROUP CORP. I,

Defendants.

Index No. 20305/12

Motion Date July 29, 2014

Motion Cal. No. 44

Motion Sequence No. 2

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Upon the foregoing papers it is ordered that the branch of the motion by defendant, 201 West 87th Street, L.P. ("201") for summary judgment pursuant to CPLR 3212 and dismissing any and all claims and cross claims with prejudice as against them is hereby decided as follows:

At the outset, the Court notes that via moving defendant, 201's Reply Affirmation, 201 withdraws all portions of its motion except for that one seeking summary judgment pursuant to CPLR 3212 and dismissing plaintiff's complaint and any and all claims and cross-claims with prejudice as against them. Subsequently, via correspondence sent to this Court dated September 8, 2014, movant indicated that he recants his withdrawal and requests that the Court consider the motion as originally submitted, including all arguments.

This action by plaintiff, Emmett Curran arises out of an accident occurring on August 28, 2012 on commercial premises owned by defendant 201 West 87th Street, L.P. and allegedly leased by defendant, Deli & Group Corp. I, located at 201 West 87th Street a/k/a 562 Amsterdam Avenue. Plaintiff alleges that he was

caused to be seriously injured when, while a patron at the deli, he was caused to fall through an open door or hatch in the floor which led to the basement of the premises due to the negligence of the defendants. Plaintiff, Diane Curran sues derivatively.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (Andre v. Pomeroy, 32 NY2d 361 [1974]; Kwong On Bank, Ltd. v. Montrose Knitwear Corp., 74 AD2d 768 [2d Dept 1980]; Crowley Milk Co. v. Klein, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (Newin Corp. v. Hartford Acc & Indem. Co., 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (Bennicasa v. Garrubo, 141 AD2d 636 [2d Dept 1988]; Weiss v. Gaifield, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc., 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (Gervasio v. DiNapoli, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (Knepka v. Tallman, 278 AD2d 811 [4th Dept 2000]).

For defendants to be liable, plaintiff must prove that defendants either created or had actual or constructive notice of a dangerous condition (Gordon v. American Museum of Natural History, 67 NY2d 836 [1986]; Ligon v. Waldbaum, Inc., 234 AD2d 347 [2d Dept 1996]). To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient period of time prior to the accident to permit defendants to discover and remedy it (see id.).

Moving defendant established a prima facie case that plaintiff's claims against them should be dismissed because they were an out-of-possession landlord who did not retain control of the premises and were not contractually obligated to perform maintenance and repairs. It is well-established law that an out-of-possession landowner is generally not liable for injuries

occurring on its premises unless the landlord retains control of the premises or is contractually obligated to perform maintenance and repairs (see, Brewster v. Five Towns Health Care Realty Corp., 59 AD3d 483 [2d Dept 2009]; Chapman v. Silber, 97 NY2d 9 [2001]; Putnam v. Stout, 38 NY2d 607 [1976]). The determinative factor in premises liability cases is control (see, Siegel v. Hofstra University, 154 AD2d 449 [2d Dept 1989]). In support of the motion, moving defendant presents, inter alia: the examination before trial transcript testimony of Ido Gerber, who testified, *inter alia* that: on the date of the accident he was employed by SGS international Trade as VP and Operations Manager and they were the partner at general partnership with 201, 201 acquired the subject property in August 2011, the property was leased to a tenant, Jazz Hostels by agreement dated January 5, 2011, Jazz Hostels then assumed the commercial lease, including the lease for the deli on the ground floor from 201, Jazz Hostels entered into a management agreement with Kizner Associates to manage the property, and through a triple net lease, Jazz Hostels was responsible for the commercial space in the building, and he never had any complaints pertaining to a door of the commercial space and did not become aware of its existence until after the lawsuit was filed; and Basem Mohammed, who testified, inter alia that: he worked the cash register at the subject deli three times a week and was working at the cash register on the date of the subject accident, there was a safety procedure in place to prevent customers from walking in the area of the door in the floor that led to the basement, a two step A-frame ladder was placed in the area where the door in the floor is located to block people from entering the area, on the day of plaintiff's accident, Salvador, a stock worker, left the door in the basement floor open; plaintiff's own examination before trial transcript testimony; and photographs of the accident site. The movant establishes a prima facie case that it did not have a duty to maintain, supervise, control, or repair the subject deli and the accident was caused by defendant Deli & Group I's employee when he left the basement door open.

That branch of the motion by defendant 201 seeking summary judgment dismissing all cross claims as against movant on the grounds that no question of fact exists is denied as premature. Defendant, Deli & Group Corp. I asserts a cross claim against defendant 201 for indemnification. The issue of indemnification is not yet ripe as it has not been decided yet whether or not the defendant, Deli & Group Corp. I was negligent (Northland Associates v. Joseph Baldwin Construction Co., Inc., 6 AD3d 1214 [4th Dept 2004]). Since there are outstanding issues concerning the defendant, Deli & Grop Corp. I's own negligence, summary judgment on the cross claim is premature (see, Meyer v. City of

New York, 2009 NY Slip Op [Sup Ct, New York County; Prenderville v. International Service Systems, 10 AD3d 334 [1st Dept 1004]; Gomez v. National Center for Disability Services, Inc. 306 AD2d 103 [1st Dept 2003]).

In opposition, plaintiff established that there is a triable issue of fact as to whether moving defendant had constructive notice of a structural defect. Via submission of a Lease Agreement entered into between 201 and Kassim Salim Bubakar and Almed Saleh Zokari, plaintiff established that moving defendant reserved the right to conduct structural renovations, in that it states: "Tenant hereby acknowledges that Landlord has the right to conduct structural renovations on the building." It is well-established law that an out-of-possession landlord may be held liable for a third-party's injuries on the premises based on the theory of constructive notice where the landlord reserved the right to enter the premises pursuant to the terms of a lease for the purposes of inspection, maintenance, and repair and where a specific statutory violation exists (Briggs v. County Wide Realty Equities, Ltd., 276 AD2d 456 [2d Dept 2000]; Spencer v. Schwarzman, LLC, 309 AD2d 852 [2d Dept 2003]).

Accordingly, there are triable issues of fact in connection with, inter alia, whether a defective condition existed and whether defendants acted reasonably under the circumstances. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, moving defendant's motion for summary judgment is denied.

The branch of the motion by defendant 201 for contractual and common-law indemnification over and against co-defendant, Deli & Group Corp. is denied as premature. The issue of indemnification is not yet ripe as it has not been decided yet whether or not the defendant, 201 West 87th Street, L.P. was negligent (Northland Associates v. Joseph Baldwin Construction Co., Inc., 6 AD3d 1214 [4th Dept 2004]). Since there are outstanding issues concerning the moving defendant, 201's own negligence, summary judgment on the indemnification claims is premature (see, Meyer v. City of New York, 2009 NY Slip Op [Sup Ct, New York County; Prenderville v. International Service Systems, 10 AD3d 334 [1st Dept 1004]; Gomez v. National Center for Disability Services, Inc. 306 AD2d 103 [1st Dept 2003]).

The branch of the motion by defendant 201 for an order directing that co-defendant, Deli & Group Corp. I assume the defense of moving defendant is hereby granted.

Moving defendant established a prima facie case for this

branch of the motion. The lease entered into between co-defendants states at paragraph 8, in relevant part: "Tenant agrees, at Tenant's sole cost and expense, to maintain general public liability insurance in standard form in favor of Owner and Tenant against claims for bodily injury or death or property damage occurring in or upon the demised premises, effective from the date Tenant enters into possession and during the term of this lease. . . . tenant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance, including reasonable attorney's fees paid, suffered or as a result of any breach by Tenant … or the carelessness, negligence, or improper conduct of the Tenant, Tenant's agents, contractors, employees, invitees or licensees … In case any action or proceeding is brought against Owner by reason of any such claim, Tenant, upon written notice from Owner, will, at Tenant's expense, resist or defend such action or proceeding by counsel approved by Owner in writing . . ."

Additionally, the rider to the lease between the co-defendants indicates that "Tenant shall at its sole cost and expense, provide and keep in force for the benefit of the Landlord as an additional named insured, a general liability policy protecting both Landlord and Tenant against any liability occasioned by accident in the amount of $500,00 in respect to injuries to any one person and in the amount of $1 million in respect to any one accident in the demised premises."

The above-quoted language from the lease and accompanying rider creates an obligation on the part of defendant, DELI & GROUP I to assume the defense of the moving defendant in a lawsuit of this nature. Accordingly, this branch of the motion is granted.

This constitutes the decision and order of the Court.

Dated: September 26, 2014

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Howard G. Lane, J.S.C.