SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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JUDY CHERIS,

Plaintiff,

-against-

NEW YORK CONVENTION CENTER OPERATING AUTHORITY, NEW YORK CONVENTION CENTER DEVELOPMENT CORPORATION, and SERVICE AMERICA CORPORATION d/b/a CENTERPLATE,

Defendants.

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Index No. 152220/14

Motion seq. nos. 002, 003

DECISION AND ORDER

BARBARA JAFFE, J.

For plaintiff:
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White Plains, NY 10606
914-686-3700

For movants:
Jedidiah M. Bernstein, Esq.
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By notice of motion, defendants move for order dismissing the action as against defendants New York Convention Center Operating Corporation (CCOC), sued herein as New York Convention Center Operating Authority (CCOA), and New York Convention Center Development Corporation (CCDC) (movants). Plaintiff opposes. (Motion seq. no. 002).

By notice of motion, pursuant to CPLR 3108 movants seek an order issuing an open commission to obtain the deposition of a nonparty witness residing outside New York. Plaintiff opposes. (Motion seq. no. 003). The motions are consolidated for decision.

I. BACKGROUND

This action arises from an alleged slip and fall in the lower level food court of the Jacob K. Javits Convention Center in Manhattan (Javits Center). Defendant CCDC is a public benefit

corporation that owns the premises and facilities construction; defendant CCOC is also a public benefit corporation charged with operating the Javits Center, which in 2006 entered into a concession agreement with defendant Service America Corporation d/b/a Centerplate (Centerplate), whereby Centerplate agreed to

> at all times maintain the kitchen and food preparation areas . . . in a clean and sanitary condition. . . . permit and facilitate inspection of the food service operation by [CCOC] and its representatives at all times[, and]
> . . . .
>
> organize, put into service and manage efficiently the Concession Services operation to provide high quality food, beverages and service within a clean, attractive and pleasant environment and [ ] maintain the Concession Services facilities in first class condition.
> . . . .
>
> [and] be responsible for keeping all food service areas, all meeting rooms when food service is being provided, and other areas where food service is being provided, and all areas within a radius of 25 feet of each food service stand, clean and free from all rubbish
> . . . .

(NYSCEF 52). CCOC retained the right to "enter upon and have reasonable access to all spaces occupied by [Centerplate]." (*Id.*).

On August 20, 2013 at approximately 3 pm, as she was walking in the lower food court level, plaintiff allegedly slipped and fell on a streak of liquid. (NYSCEF 1, 15, 57). On or about November 12, 2013, plaintiff served notices of claim pursuant to the General Municipal Law (GML) on CCDC and CCOC. (NYSCEF 41).

On March 12, 2014, plaintiff commenced this negligence action. (NYSCEF 1). Movants thereafter interposed an answer wherein they admitted, as pertinent here, that plaintiff had served notices of claim on CCDC and CCOC. (NYSCEF 4). On December 8, 2015, plaintiff served an amended complaint, naming Centerplate as a defendant, and on January 16, 2015, movants

interposed an amended answer denying service of the notices of claim. (NYSCEF 15, 45).

On July 10, 2014, plaintiff served movants with discovery responses wherein she identified a potential out-of-state witness whom she identified again at her February 5, 2015 deposition, and again in discovery responses dated February 24, 2015. (NYSCEF 48, 86, 88).

At his April 8, 2015 deposition, a public safety officer employed by CCOC testified that Centerplate was responsible for cleaning the food court area while open, that CCOC cleaned the area after Centerplate closed, and that CCOC was generally responsible for safety in the building and would, among other duties, patrol the premises. A Centerplate employee testified that Centerplate was responsible for maintaining areas in the food court within 25 feet of each food service area, that Centerplate was solely responsible for garbage removal, and that he did not recall ever seeing a CCOC employee cleaning the food court area. (NYSCEF 49-50).

On July 22, 2015, plaintiff filed a note of issue. (NYSCEF 85). On October 28, 2015, I orally denied movants' motion to strike the note of issue, observing that if they wished to depose nonparty witnesses, they could file a motion, but "[w]hether I grant it or not is another issue." (NYSCEF 55, 81).

II. MOTION FOR SUMMARY JUDGMENT

A. Contentions

Movants contend that plaintiff failed to comply with GML § 50-e as she served CCOA instead of CCOC, and that as compliance with section 50-e is a prerequisite for commencing an action against any municipal entity, and as the correct entity was not named and served, the complaint should be dismissed as against CCOC. They also argue that pursuant to the 2006 agreement with Centerplate, CCOC had no duty to clean the area where plaintiff was injured, and

that CCDC was an owner only to the extent of construction and was not responsible for maintenance of the food court area. Relying on the testimony of Centerplate and CCOC employees, movants assert that the accident occurred during Centerplate's hours of operation when CCOC was not responsible for cleaning that area. They offer the affidavit of CCOC's vice-president who attests to these facts, and denies that CCDC is responsible for the operation and maintenance of the food court. (NYSCEF 39-40).

In response, plaintiff contends that movants admitted in their answer that CCOC was served with a notice of claim, that they never before addressed an alleged misnomer in the notice and thereby waived it, that the notices were served at CCOC's place of business, and that plaintiff relied on their admission when she did not cure the misnomer during the limitations period. (NYSCEF 57).

Plaintiff also argues that CCDC, undisputably the owner of the property, had a nondelegable duty to maintain the food court area in a safe condition, and that the provision of the 2006 agreement governing Centerplate's responsibilities does not displace CCOC's responsibility to clean and maintain the area. Plaintiff relies on the testimony of Centerplate and CCOC employees that the latter did not completely relinquish control of the food court area, and that it cleaned and inspected the area for dangerous conditions. (*Id.*).

In reply, movants contend that to the extent that CCOC had a duty to maintain or inspect the area, it was restricted to times when Centerplate was closed, and they observe that plaintiff concedes that CCDC was only the nominal owner of the premises and thus had no duty. They deny that they waived their defense of a lack of notice, and maintain that plaintiff may not assert an estoppel absent a showing that the prior admission was calculated to mislead or create a false

sense of security that notice had been timely served. (NYSCEF 62).

At oral argument of the motion, movants maintained that "normal business hours . . . would be between 9 and 4," which plaintiff does not dispute. (NYSCEF 95).

B. Analysis

1. Notice of claim

Pursuant to GML §§ 50-i and 50-e, no tort action against a city, county, town, village, fire district or school district may be commenced unless a notice of claim is served on the municipal entity within 90 days after the claim arises, and the claim has not been adjusted or paid for at least 30 days from such service. A party may move pursuant to GML § 50-e(5) to extend the time to serve a notice of claim, but must do so within one year and 90 days from the time the claim accrues. (GML § 50-i[1]; *Robinson v City of New York*, 138 AD3d 1093 [2d Dept 2016]).

Where a government entity "acts or comports itself negligently," thereby inducing the other party to change her position to her detriment, the government entity should be precluded "from asserting a right or defense which it otherwise could have raised" (*Bender v New York City Health & Hosps. Corp.*, 38 NY2d 662, 668 [1976]; *Feliciano v New York City Hous. Auth.*, 123 AD3d 876, 877 [2d Dept 2014]; *Delacruz v Metropolitan Transp. Auth.*, 45 AD3d 482, 483 [1st Dept 2007]), such as the defense of a defect in the notice of claim (*Bender*, 38 NY2d at 668). However, a government entity will be so precluded only where its conduct was "calculated to, or negligently did, mislead or discourage a party from serving a timely notice of claim," and if the party was justified in relying on the conduct. (*Attallah v Nassau Univ. Med. Ctr.*, 131 AD3d 609, 609 [2d Dept 2015]).

Movants' admission in their answer that CCOC had been served with notice induced

plaintiff to forego curing the misnomer and seeking leave to re-serve CCOC before expiration of the limitations period. (*See Valentin v New York City Trans. Auth.*, 2001 WL 36387756 [Sup Ct, New York County 2001] [Transit Authority precluded from raising issue of timeliness of notice of claim where it affirmatively pleaded that claim was timely], and authority cited therein). Movants' denial of service in their amended answer does not change the effect of their earlier admission, as it was filed more than one year and 90 days after plaintiff's claim accrued, yielding the reasonable inference that their admission was calculated to discourage plaintiff from seeking leave to serve a late notice. Consequently, movants are precluded from defending based on a lack of service on CCOC.

In any event, as movants admit that it received the notice, the defect is waived. (*See* CPLR 2101[f]; *Pion v New York City Hous. Auth.*, 125 AD3d 462, 462 [1st Dept 2015] [defendant's failure to object to defect in notice of claim within 15 days of receipt operated as waiver]).

2. Duty

"[W]henever the general public is invited into stores, office buildings and other places of public assembly, the owner is charged with the duty of providing the public with a reasonably safe premises, including a safe means of ingress and egress." (*Peralta v Henriquez*, 100 NY2d 139, 143 [2003]; *Angulo v Concourse One Co., LLC*, 84 AD3d 504, 505 [1st Dept 2011]).

In an action to recover for injuries resulting from a slip and fall, a defendant must establish, *prima facie*, that it did not create the condition that allegedly caused the fall, and that it had no actual or constructive notice of that condition for a sufficient length of time to remedy it. (*Oliveri v Vassar Bros. Hosp.*, 95 AD3d 973, 974-975 [2d Dept 2012], *lv dismissed* 20 NY3d

965). "Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises." (*Branch v County of Sullivan*, 25 NY3d 1079, 1082 [2015], *citing Jackson v Bd. of Educ. of City of New York*, 30 AD3d 57, 60 [1st Dept 2006]; *see also Mitchell v Icolari*, 108 AD3d 600, 601 [2d Dept 2013]).

> [W]hen a landowner and one in actual possession have committed their rights and obligations with regard to the property to a writing, [the court] looks not only to the agreement but to the parties' course of conduct–including, but not limited to, the landowner's ability to access the premises–to determine whether the landowner in fact surrendered control over the property such that the landowner's duty is extinguished as a matter of law.

(*Gronski v County of Monroe*, 18 NY3d 374, 380-381 [2011]; *Yehia v Marphil Realty Corp.*, 130 AD3d 615, 616-617 [2d Dept 2015]; *Contreras v Randi's Enter., LLC*, 126 AD3d 1199, 1199 [3d Dept 2015]). The agreement need not be one that creates a leasehold in the property. (*Gronski*, 18 NY3d at 379).

a. CCDC

In their agreement, CCOC and Centerplate do not address CCDC's control over the property or its obligations to maintain it, and CCOC's vice-president's denial of a duty, to the extent she has any basis for such denial, is conclusory, unsupported, and not based on personal knowledge. (*See JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 385 [2005] [conclusory affidavit of principal, which simply relied on counsel's submissions, provided "no factual basis" in support of summary judgment]; *Almonte v 638 W. 160 LLC*, AD3d , 2016 NY Slip Op 03584 [1st Dept 2016] [court did not consider affidavit of defendant's managing member absent indication it was based on personal knowledge]). Consequently, absent any defense asserted that CCDC neither created the dangerous condition nor had actual or constructive notice of it, movants fail to satisfy their *prima facie* burden that CCDC owed plaintiff no duty.

b. CCOC

As Centerplate agreed to maintain and keep clean the food court area, and as CCOC reserved the right to enter and inspect it, CCOC may not be deemed to have relinquished complete control of the food court area so as to extinguish its duty to maintain it (*see Yehia v Marphil Realty Corp.*, 130 AD3d 615, 616-617 [2d Dept 2015] [lessor of premises failed to demonstrate *prima facie* that it relinquished complete control of premises, as lease gave it "right to reenter premises at all times during usual business hours" for inspection and repairs (internal quotation marks omitted)]; *Wagner v Waterman Estates, LLC*, 128 AD3d 1504, 1506 [4th Dept 2015] [defendants failed to establish that owner completely relinquished control of premises as lease provided that owner retained right to renter premises for purposes of inspecting and making repairs]), and again, absent the assertion of a defense based on an absence of actual or constructive notice, movants fail to establish, *prima facie*, that CCOC owed no duty to plaintiff to keep the food court area reasonably safe. Although it is undisputed that Centerplate's hours of operation were between 9 am and 4 pm, CCOC retained the right to enter the area for inspection at all times.

Whether CCOC and CCDC had actual or constructive notice of the alleged dangerous condition is an issue raised by them in their reply papers. Consequently, I do not address it, and reject their argument that the defenses of notice and duty are so intertwined that addressing one does not result in the waiver of the other, unmentioned defense.

Given the foregoing, I need not address plaintiff's opposition. In any event, the testimony on which plaintiff relies, that CCOC was responsible for the general safety of the premises, that it patrolled it, and that it cleaned the area in question at times when Centerplate was closed, is

sufficient to raise a triable issue as to whether CCOC retained control over the area.

III. MOTION FOR AN OPEN COMMISSION

A. Contentions

Movants argue that as plaintiff's out of state witness is a necessary and material witness, they are entitled to take his deposition via an open commission. Movants also claim that at oral argument I advised counsel that he could depose a nonparty notwithstanding plaintiff's filing a note of issue. (NYSCEF 66).

In response, plaintiff contends that absent a showing of unusual or unanticipated circumstances and substantial prejudice, movants may not engage in post-note discovery, and that as movants knew long ago of the witness's identity, they had ample time to depose the witness pre-note. (NYSCEF 84).

In reply, movants argue in the alternative that the witness's location outside the state constitutes an unusual circumstance, and maintain that they will be substantially prejudiced by the inability to depose him. They mention another potential nonparty witness for the first time in reply. (NYSCEF 92).

B. Analysis

Pursuant to CPLR 3108, the deposition of a nonparty may be taken upon issuance of a "commission . . . [which] may be issued where necessary or convenient for the taking of the deposition outside the state." The party seeking an open commission must make a "strong showing of necessity," namely, that the information sought is not available from other sources and that "the proposed out-of-state deponent would not cooperate with a notice of deposition or would not voluntarily come within this State." (*MBIA Ins. Corp. v Credit Suisse Sec. [USA*

LLC], 103 AD3d 486, 487-488 [1st Dept 2013], *quoting Reyes v Riverside Park Community [Stage I], Inc.*, 59 AD3d 219 [1st Dept 2009]).

Absent any indication that movants tried and failed to obtain the witness's voluntary participation, they are not entitled to the issuance of an open commission. (*See Sorrentino v Fedorczuk*, 85 AD3d 759, 760 [2d Dept 2012] [CPLR 3108 motion denied where defendant failed to demonstrate that nonparty witnesses would not cooperate with notice of deposition or voluntarily come within jurisdiction]; *Reyes*, 59 AD3d at 219 [same]). In any event, no special circumstances are advanced that would warrant a post-note deposition.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that movants' motion for an order dismissing the complaint as against them is denied; it is further

ORDERED, that movants' motion for an order issuing an open commission to obtain the deposition of a nonparty witness is denied; it is further

ORDERED, that New York Convention Center Operating Corporation be substituted as a defendant in the above-entitled action in the place and stead of defendant New York Convention Center Operating Authority without prejudice to any proceedings heretofore had herein; it is further

ORDERED, that all papers, pleadings, and proceedings in the above-entitled action be amended by substituting the name of New York Convention Center Operating Corporation, as a defendant in the place and stead of defendant New York Convention Center Operating Authority, without prejudice to the proceedings heretofore had herein; and it is further

ORDERED, that counsel for movants shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to amend their records to reflect such change in the caption herein.

ENTER:

Barbara Jaffe, JSC

DATED: June 8, 2016
New York, New York