SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

ANDRE MAURO,
Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF EDUCATION, PS 85 LLC, EAST HARLEM COUNCIL FOR HUMAN SERVICES, INC., KENNY MARAJ and KENNETH RAMESH MARAJ,
Defendants.

INDEX NO.	155085/2012
MOTION DATE	11/16/2016
MOTION SEQ. NO.	005
MOTION CAL. NO.	

The following papers, numbered 1 to 13 were read on this motion and cross-motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3; 4 - 6; 7 - 9; 10 - 12
Answering Affidavits — Exhibits	
Replying Affidavits	13

Cross-Motion: X Yes ☐ No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants The City of New York (herein "Defendant City"), The New York City Department of Education (herein "Dept. of Education"), and PS 85 LLC's (herein "Defendant PS 85") (collectively herein "Movants") motion for summary judgment dismissing the complaint and all cross-claims against them, is granted to the extent of dismissing the Complaint as against the Dept. Of Education, and dismissing the statutory violation claims of New York City Building Code §28-301.1, New York City Code §2904, and Administrative Code §19-152 asserted against PS 85, the remainder of the relief requested is denied.

Defendants Kenny Maraj and Kenneth Ramesh Maraj's (collectively herein "Defendant Maraj") cross-motion for summary judgment dismissing the complaint and all cross-claims, is denied. Defendant East Harlem Council for Human Service's (herein "Defendant East Harlem) motion under Motion Sequence No. 006 for summary judgment dismissing the Complaint and all cross-claims against it, is granted. Plaintiff's cross-motion under Motion Sequence No. 006 for an Order compelling the additional deposition of Defendant PS 85 is denied.

Plaintiff commenced this action for personal injuries he sustained on August 26, 2011, when he fell while on the vacant lot of 338 East 117th Street, New York, New York (herein "the premises"), that is owned by Defendant City, and leased to Defendant PS 85. Plaintiff asserts that the Defendants were negligent in the ownership, operation, maintenance, and repair of the property, yard, lot, walkway and/or roadway; in failing to maintain the property in a reasonably safe and fit condition; in failing to provide adequate fences and barricades surrounding the property; and in failing to warn of unsafe conditions on the property. Plaintiff also alleged that Defendant PS 85 violated New York City Building Code (herein "Building Code") §28-301.1, New York City Code (herein "City Code") §2904, and New York City Administrative Code (herein "Administrative Code") §19-152.

Movants now move for summary judgment dismissing the Complaint and all cross-claims against them.

Movants contend that the Complaint should be dismissed as against the Dept. of Education. In Plaintiff's cross-motion under Motion Sequence No. 006, and in opposition to the motions by Defendants, Plaintiff states that the action has been discontinued as against the Dept. of Education. Therefore, this renders the relief requested under Motion Sequence No. 005 moot, the Complaint as against the Dept. Of Education is dismissed.

Movants also contend that the Complaint should be dismissed as against Defendants City and PS 85 because Plaintiff's presence on the premises was unreasonable and unforeseeable. That at the time of Plaintiff's fall he trespassed upon the premises to rescue four stray cats, by exiting his apartment in the neighboring building through his back window, fully aware that the property was private and not open to the public. That the property was surrounded by a locked fence, in addition to having 18 hours of security a day, that there had not been any instances of anyone using the property or going onto the property for any purpose, and that there had been no complaints concerning the condition of the property. Moreover, Movants contend that the statutes Plaintiff asserts against PS 85 were not violated, that if they had been the violations are not the proximate cause of the accident, and further they are insufficient to establish liability for personal injury.

Movants argue that the Complaint must also be dismissed because the condition upon which Plaintiff claims he fell was open and obvious, and not inherently dangerous. That Plaintiff testified he fell because the ground was uneven terrain, he had poor footing, and that the area surrounding the place of his fall consisted of concrete, dirt, rocks and built-up earth. (Mot. Exh. I pp 18 and 45). That Plaintiff also testified he had walked through this same area two weeks prior to the accident, and that the day before the accident he observed the area to look the same way it did the day of his accident. (Id. at p 33, and Exh. J at pp 95-96). That there is no evidence to suggest there was a latent dangerous condition on the property, that the Plaintiff was

familiar with the property's condition because he lived next door, and had been on the property before.

Defendant Maraj cross-moves for summary judgment dismissing the complaint and all cross-claims against him arguing that he did not own, repair, or otherwise exercise control over the property which is next door to the building he owns at 336 East 117th Street, New York, New York (herein "Building 336"). That Plaintiff testified he entered the property through a hole in the fence after exiting his apartment through a window in Building 336, and that he did not have permission from the property's owner to enter. (Maraj Cross-Mot. Exh. E pp 13, 23-26, 30-35, 91, and 116). That Plaintiff had also testified that the accident occurred on the lot next to where he lived, and that the chimney replacement project for Building 336 did not have anything to do with the condition of the property. (Id. at Exh. H pp 15, 18, 34-35).

Defendant Maraj contends that Defendant City's witness, Ms. Francis, testified that the property was owned by the City of New York, that the property was leased to Defendant PS 85 at the time of the accident (Id. at Exh. K), that according to the lease PS 85 would be responsible for maintaining the fences and upkeep of the lot, and that it did not appear that the City had granted authority to anyone from Building 336 to access the lot. (Id. at Exh. J pp 21, 23, 34-35, and 55). That Ms. Francis also testified regarding an inspection done three months before Plaintiff's accident by the Department of Health (which is authorized to conduct inspections of City properties), and that as a result of the inspection a violation was issued against the property for debris. (Id. at 41-43).

Defendant East Harlem also moves under Motion Sequence No. 006 for summary judgment dismissing the Complaint and all cross-claims against it arguing that it did not have any interest whatsoever in the property. That Defendant East Harlem did have an ownership interest in the property and the abutting building of 2269 First Avenue, New York, New York (the former site of P.S. 85), up until 1993 when the property was seized for unpaid taxes. After its seizure, the building was sold by quitclaim deed to another individual. (East Harlem Mot. Exhs. K and L).

Plaintiff cross-moves under Motion Sequence No. 006 seeking to compel a further deposition of Defendant PS 85 on the grounds that recently exchanged discovery demonstrates a substantial change in the condition of the property. That the newly received photographs dated June 2, 2011 show a substantial change in the property's condition compared to the pictures taken on August 27, 2011, the day after Plaintiff's accident. That a further deposition of PS 85 would determine who came in between the June 2, 2011 and August 27, 2011 pictures to clean the property, how the cleaning was done, and whether the clean-up caused the condition that caused the accident. Plaintiff also opposes the motions and cross-motions by the Defendants for summary judgment.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through

admissible evidence, eliminating all material issues of fact. (Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

"To subject a property owner to liability for a dangerous condition on its premises, a plaintiff must demonstrate that the owner created, or had actual or constructive notice of the dangerous condition that precipitated the injury. A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the dangerous condition (assuming that the condition existed), nor had actual or constructive notice of its existence (Ceron v. Yeshiva University, 126 A.D.3d 630, 7 N.Y.S.3d 66, 68 [1st Dept., 2015]). In the case of actual or constructive notice, plaintiff must also show that the owner had a sufficient opportunity, with the exercise of reasonable care, to remedy the situation" (Smith v. Costco Wholesale Corp., 50 A.D.3d 499, 856 N.Y.S.2d 573, 575 [1st Dept., 2008]). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to the plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (Ceron, Supra).

Defendant East Harlem makes a prima facie showing of entitlement to judgment as a matter of law, and Plaintiff fails to rebut this showing. Defendant East Harlem was not the owner of the building, nor was it a tenant, at the time of Plaintiff's accident as is evidenced by the lease between Defendants City and PS 85. Furthermore, Defendant City's witness testimony, and PS 85's witness testimony all attest to the City being the owner of the property, and PS 85 being the tenant. Further, the health code violation issued by the Dept. of Health expressly notes it as "health code violations on City property" (Plaintiff Cross-Mot. Exh. K), and the Quitclaim Deed from 1993 states that the property was seized from East Harlem due to unpaid taxes (East Harlem Mot. Exh. K). Therefore, the Complaint, and any cross-claims, as against Defendant East Harlem are dismissed.

Plaintiff argues that Defendant Maraj has not established a basis for summary judgment because the Bill of Particulars asserts that Maraj was negligent in the maintenance of the fence between Building 336 and the property, allowing Plaintiff access to the property that he otherwise would not have been able to gain. That Maraj did not address this argument at all, and instead argued that he was not liable to Plaintiff because he was not the owner of the property. Although Plaintiff's accident was caused by an alleged condition on the vacant lot, the hole in the fence alleged to be owned by Defendant Maraj allowed Plaintiff access to the property next door. Defendant Maraj does not address this argument at all, and only addresses the fact

that he was not the owner of the vacant lot. Therefore, Defendant Maraj has not established a basis for summary judgment.

As stated above, Plaintiff states in his cross-motion that he has discontinued the action as against the Dept. of Education. Therefore, the Complaint and any cross-claims against it are hereby dismissed.

Defendants City and PS 85 have not established a basis for summary judgment. Three months before the accident Defendant City received a violation for various conditions on the property from the Dept. of Health. (Plaintiff's Cross-Mot. Exh. K). The violation also noted that the property contained debris. (Id.). An issue remains as to whether Defendant PS 85 was made aware of this violation, whether the conditions on the property were cured, and whether these conditions contributed to Plaintiff's accident thereby putting Defendants City and PS 85 on notice of the condition.

As an out-of-possession landlord a defendant is entitled to summary judgment dismissing the complaint as against them when the lease specifically places responsibility for everyday maintenance and repairs on the tenant. (Thomas, et al., v. Fairfield Investors, et al., 273 A.D.2d 118, 709 N.Y.S.2d 180 (1st Dept. 2000). "Generally, an out-of-possession landlord is not responsible for correcting defective conditions unless they are significant structural failures or specific statutory violations." Id., citing Quinones v. 27 Third City King Rest., et al., 198 A.D.2d 23, 603 N.Y.S.2d 130 (1st Dept. 1993). "A landlord is not generally liable for negligence with respect to the condition of property after its transfer of possession and control to a tenant unless the landlord is either contractually obligated to make repairs or maintain the premises, or has a contractual right to reenter, inspect and make needed repairs..." Babich v. R.G.T. Restaurant Corp., 75 A.D.3d 439, 906 N.Y.S.2d 528 (1st Dept. 2010), citing Johnson v. Urena Serv. Ctr., 227 A.D.2d 325, 326, 642 N.Y.S.2d 897 (1st Dept. 1996).

Although the lease between Defendants City and PS 85 provides that Defendant PS 85 was responsible for maintenance of the property, the lease contained language that allowed for the Landlord to make repairs when the tenant failed to do so. If PS 85 failed to take care of the property, then as owner Defendant City had a duty to cure any defects. Further, any determinations such as whether it was foreseeable that Plaintiff would be on the property, or whether this condition containing debris was open and obvious, are questions of fact that cannot be determined on a motion for summary judgment.

Plaintiff fails to establish a need for a further deposition of PS 85's witness based on the differences between the June 2, 2011 photograph, and the August 27, 2011 photograph. The only difference in the photographs appears to be that some vegetation was removed, which would have been clearly within the confines of PS 85's duty under the lease. PS 85's witness testified that the maintenance of the property was the responsibility of PS 85, and that the security guards did basic clean-up and maintenance. There was no other testimony alluding to another individual or company being hired to clean up the property. A further deposition of PS 85's witness

Mr. Neumann is not warranted.

Plaintiff fails to address Movants' motion to dismiss the causes of action for statutory violations as against PS 85 LLC. Therefore, the action against PS 85 for violation of §§28-301.1, 2904, and 19-152, are hereby severed and dismissed.

This Court has considered Movants and Plaintiffs remaining arguments and finds them to be without merit.

Accordingly, it is hereby ORDERED that Defendants The City of New York, The New York City Department of Education, and PS 85 LLC's motion for summary judgment dismissing the complaint and all cross-claims against them, is granted to the extent of dismissing the Complaint as against the New York City Department of Education, and dismissing the statutory violation claims of New York City Building Code §28-301.1, New York City Code §2904, and Administrative Code §19-152 asserted against Defendant PS 85 LLC, and it is further,

ORDERED, that the Complaint and all cross-claims as against the New York City Department of Education are hereby severed and dismissed, and it is further,

ORDERED, that the statutory violations of New York City Building Code §28-301.1, New York City Code §2904, and Administrative Code §19-152 asserted against PS 85 LLC, are hereby severed and dismissed, and it is further,

ORDERED, that Defendants Kenny Maraj and Kenneth Ramesh Maraj's cross-motion for summary judgment dismissing the complaint and all cross-claims, is denied, and it is further,

ORDERED, that Defendant East Harlem Council for Human Service's motion under Motion Sequence No. 006 for summary judgment dismissing the Complaint and all cross-claims against it, is granted, and it is further,

ORDERED, that the Complaint and all cross-claims as against Defendant East Harlem Council for Human Service's are hereby severed and dismissed, and it is further,

ORDERED, that Plaintiff's cross-motion under Motion Sequence No. 006 for an Order compelling the additional deposition of Defendant PS 85, LLC, is denied, and it is further,

ORDERED, that the action shall continue as to the remaining Defendants, and it is further,

ORDERED, that the caption in this action is amended and shall read as follows:

ANDRE MAURO,

Plaintiff,

-against-

THE CITY OF NEW YORK,
PS 85 LLC, KENNY MARAJ, and
KENNETH RAMESH MARAJ.

Defendants.

and it is further,

ORDERED, that the moving parties within 20 days from the date of entry of this Order serve a copy of this Order with Notice of Entry on all parties, and it is further,

ORDERED, that the moving parties within 20 days from the date of entry of this Order serve a copy of this Order with Notice of Entry on the New York County Clerk's Office pursuant to e-filing protocol, and a separate copy of this Order with Notice of Entry pursuant to e-filing protocol on the Trial Support Clerk in the General Clerk's Office at genclerk-ords-non-mot@nycourts.gov, who shall amend their records and enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: January 9, 2017

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE