At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 15th day of August, 2018.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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COLLEEN C. USEVICH,

*Plaintiff,*

- against -

HARRY HOTELS CORP., PIERMONT PROPERTIES INC., BURGER KING, POPEYE'S, INC., POPEYE'S LOUISIANA KITCHEN, INC., and PETCO ANIMAL SUPPLIES STORES, INC.,

*Defendant.*

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Index No.: 512948/2017

**DECISION AND ORDER**

*Motions Sequence #2*

**Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:**

| | Papers Numbered |
|---|---|
| Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed..... | 1/2, |
| Opposing Affidavits (Affirmations)..... | 3, |
| Reply Affidavits (Affirmations)..... | 4, |

Upon the foregoing papers, and after oral argument, the Court finds as follows:

The instant action results from an alleged slip and fall incident that occurred on March 2, 2017. On that day the Plaintiff Colleen C. Usevich (hereinafter "the Plaintiff") allegedly injured herself at the premises located at 2343 Utica Avenue, Brooklyn, New York (hereinafter "the Premises"). In her Complaint, the plaintiff alleges that "the Plaintiff was lawfully and properly upon said premises as aforementioned, when plaintiff was caused to slip/trip and fall, as a result of the negligence of defendants, in the ownership, maintenance, management, operation, and control of the aforesaid premises, and more particularly a certain parking lot located thereat causing plaintiff to sustain severe and serious personal injuries."

Defendant Piermont Properties, Inc. (hereinafter "the Defendant") now moves (motion sequence #2) for an order pursuant to CPLR §3211 dismissing the complaint and any and all cross claims asserted against it.[1] The Defendant relies exclusively on the affidavit of Michael I. Grey, President of Piermont Properties, Inc. who contends that the Defendant "did not own, operate, maintain, manage or control the property and/or parking lot at 2343 Utica Avenue, Brooklyn, New York on March 2, 2017 or any date prior to this date or up to the present time." In opposition, the Plaintiff argues that the motion should be denied as "procedurally deficient and highly premature." Specifically, the Plaintiff contends that the motion is not clear as to which provision of CPLR §3211 the Defendant is moving under. Further, the Plaintiff avers that discovery is still outstanding. In addition, the Plaintiff contends that the moving Defendant was named as a Defendant in this action after a review of the October 20, 2016 deed in relation to the premises which names Defendant Harry Hotels Corp. as owner "with an address at c/o Piermont Properties, 865 Merrick Avenue, Suite 50N, Westbury, New York 11590." The Plaintiff argues that the Defendant has not sufficiently explained this issue and that the Plaintiff should be allowed to complete discovery in order to explore it further.[2]

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for summary judgment must make a *prima facie* showing of entitlement to

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[1] In the Defendant's Reply Affirmation, it clarifies that it is in fact moving for relief pursuant to CPLR §3212 and for an order seeking summary judgment. The motion will hereafter be treated as such.

[2] The remaining Defendants took no position on the subject motion.

judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v.* Plotnick, 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

Motions for summary judgement have been denied as premature when a party opposing summary judgment is entitled to further discovery and "when it appears that facts supporting the position of the opposing party exist but cannot be stated." *Family-Friendly Media, Inc. v. Recorder Television Network*, 74 A.D.3d 738, 739, 903 N.Y.S.2d 80, 81 [2nd Dept, 2010]; *see Aurora Loan Servs., LLC v. LaMattina & Assoc., Inc.,* 59 A.D.3d 578, 872 N.Y.S.2d 724 [2nd Dept, 2009]; *Juseinoski v. New York Hosp. Med. Ctr. of Queens,* 29 A.D.3d 636, 637, 815 N.Y.S.2d 183 [2nd Dept, 2006]. Moreover, "'where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied.... This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion.'" *Juseinoski v. New York Hosp. Med. Ctr. of Queens*, 29 A.D.3d 636, 637, 815 N.Y.S.2d 183, 184-85 [2nd Dept, 2006], citing *Baron v. Incorporated Vil. of Freeport,* 143 A.D.2d 792, 792–793, 533 N.Y.S.2d 143 [2nd Dept, 1988].

The Plaintiff has raised matters which justify the continuation of discovery, and has accordingly provided sufficient reason why a motion for summary judgment should be denied at this time. Also, examinations before trial of the Defendant movant should be conducted. While the Defendant movant argues that it had no ownership interest in or control over the subject premises at the time of the alleged incident, the fact that its name is reflected on the deed (Affirmation in Opposition, Exhibit "C") raises a question as to whether it may have had a role in relation to the Premises and prevents this Court from granting summary judgment at this time. Accordingly, the motion for summary judgment is denied as premature, without prejudice to renew after the deposition of the moving Defendant and Harry Hotels Corp. is complete.

Based on the foregoing, it is hereby ORDERED as follows:

The Defendant's motion is denied without prejudice to renew upon completion of the depositions of Defendants Piermont Properties, Inc. and Harry Hotels Corp. The parties are directed to appear in Courtroom 738 on September 26, 2018 at 9:30 a.m. to schedule the depositions of the afore-referenced Defendants.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.