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SHORT FORM ORDER

COPY

INDEX No. 15-8727
CAL. No. 19-00085OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 5-30-19 (001)
MOTION DATE 6-11-19 (002)
ADJ. DATE 7-19-19
Mot. Seq. # 001 - MotD
002 - MD

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OSCAR GUERRA,

Plaintiff,

- against -

HALSEY REALTY CORP., NORTHERN COLLINS CORP, and BLACKMAN PLUMPING SUPPLY COMPANY, INC.,

Defendants.

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Upon the following papers numbered 1 to 56 read on these motions for summary judgment: Notice of Motion and supporting papers 1 - 17; 18 - 31; Answering Affidavits and supporting papers 32 - 33; 34 - 35; 36 - 48; Replying Affidavits and supporting papers 49 - 51; 52 - 56; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. 001) by defendants Halsey Realty Corp. and Blackman Plumbing Supply Company, Inc., and the motion (seq. 002) by defendant Northern Collins Corp. are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendants Halsey Realty Corp. and Blackman Plumbing Supply Company, Inc., for summary judgment dismissing the complaint and cross claims against them is granted to the extent provided herein, and is otherwise denied; and it is further

ORDERED that the motion by defendant Northern Collins Corp. for summary judgment dismissing the complaint against it is denied.

RST

This action was commenced by plaintiff Oscar Guerra to recover damages for injuries he allegedly sustained on February 7, 2015, when he slipped and fell on ice at a location owned by defendant Northern Collins Corp. (Northern), known as 2700 Route 112, Medford, New York. Said location is allegedly a portion of property leased to defendant Blackman Plumbing Supply Company, Inc. (Blackman). However, in its counsel's affirmation in support of its motion, Northern admits that it "leased the subject premises to plaintiff's employer, Cars Unlimited of Suffolk, LLC for use as an overflow lot for their vehicles, for the period of January 26, 2015 through July 25, 2015, at least." Defendant Northern asserts a cross claim against defendants Halsey Realty Corp. (Halsey) and Blackman for contribution and indemnification.

Halsey and Blackman now move for summary judgment in their favor, arguing, first, that the action should be discontinued against Halsey, as it has not done business in New York since October 25, 1996, when it merged into defendant Northern. Further, they argue that they did not create, have notice of, or have a duty to protect plaintiff from the alleged dangerous condition. In addition, Halsey and Blackman argue that Northern granted exclusive use of the subject property to Cars Unlimited of Suffolk, LLC (Cars Unlimited), and, thus, they can not be liable for any accidents occurring thereupon. In support of their motion, Halsey and Blackman submit, among other things, transcripts of the parties' deposition testimony, a copy of a notice to admit, a copy of a license agreement between Northern and Cars Unlimited, a copy of a lease agreement between Northern and Blackman, a copy of a certificate of merger, and multiple photographs.

Northern also moves for summary judgment in its favor, arguing that it was an out-of-possession owner of the subject property, which it had leased for the occupation and control of others during the period in question. In support of its motion, Northern submits, among other things, transcripts of the parties' deposition testimony, a copy of a license agreement between Northern and Cars Unlimited, and a copy of a lease agreement between Northern and Blackman.

Plaintiff testified that on the date in question he was employed as a sales manager for Cars Unlimited, also known as Chevrolet 112, located at 2096 Route 112 in Medford. He stated that, at approximately 4:30 p.m., he and a number of other employees entered the site of his alleged incident, a fenced-in parking lot adjacent to a Blackman Plumbing Supply building. Plaintiff indicated that approximately two weeks earlier, he had alerted his employer of the opportunity to rent the lot, having seen a real estate sign affixed to its fence. He testified that he called the telephone number on the sign and spoke to a real estate agent, Mark DiMarsico, who then "referred [him] to the manager at the Blackman facility." Plaintiff stated that he later met such manager, "who provided [him] with the keys to the property to take a look at it." He indicated that the lot had a chain-link fence on all sides, with access to its interior through a single, locked, chain-link sliding gate. Following his inspection of the lot, he spoke to his "bosses" at Cars Unlimited, who then signed an agreement with Northern. Immediately following the signing of such agreement, Cars Unlimited, which was located approximately three-quarters of a mile south, began moving cars into the lot for storage. Questioned regarding who possessed keys to the lot, he stated that Cars Unlimited had "several" keys, which were duplicates made from Blackman's key. He stated that "[i]t was [Blackman's] property, their key."

Plaintiff testified that shortly after Cars Unlimited began using the storage lot in question, a major storm depositing "close to a foot" of snow occurred. He stated that Cars Unlimited did not plow the snow

after the storm but, instead, employed "lot personnel" who used "rubber rake[s]" to clear snow off the cars, individually, as they were needed by the dealership. Plaintiff indicated that "sometimes [Cars Unlimited] sales personnel" also performed such snow clearing. However, he testified that no one cleared the snow from around the vehicles, and denied having knowledge of anyone spreading salt or sand. Questioned regarding the dimensions of the storage lot, plaintiff was unable to provide an answer, but indicated that there "had to be at least 100, 120" vehicles parked therein, and that its maximum capacity was approximately 140.

Plaintiff testified that he could recall visiting the storage lot on one occasion between the time of the major snowfall and the date of his accident. He stated that at such time he observed a truck plowing snow from Blackman's driveway, but that the fenced storage lot "was not touched, [and] completely filled with snow." Turning to the date of his alleged accident, plaintiff stated that he asked "four or five salespeople" to accompany him to the subject storage lot. Plaintiff indicated that when they arrived at the lot, its gate was open, because "[w]hen it would snow, it was very hard to move it back and forth, so it would stay open." He testified that they walked approximately 50 yards, or about half way, into the lot, and that he began giving the salespeople the keys to some of the vehicles, intending that they be driven to Chevrolet 112. Plaintiff stated that the vehicles in the storage lot still had some snow on them, and that there were patches of snow remaining on the pavement. He indicated that while walking in an open portion of the storage lot both of his feet slipped and he fell to the ground. Plaintiff testified that while on the ground, he observed that he was on top of a circular "puddle" of half-inch-thick clear ice, measuring "a yard wide."

Louis Peppe testified that he has been employed by Blackman for nearly 20 years, and that he was a branch manager at its Medford location on the date in question. He stated that his job duties include managing sales, the business's daily operations, and maintenance of "[e]verything to do with the property," including snow removal. Mr. Peppe indicated that the parking lot in question, located adjacent to the south wall of Blackman's building, is owned by Northern, a "subsidiary" of Blackman, and was leased to Cars Unlimited at the time of plaintiff's accident. He testified that the lot had been previously leased to a different, unknown, entity for the period of approximately one year in 2013. He further testified that prior to the "licensing agreement" between Northern and Cars Unlimited, he possessed a key to the gate of the storage lot. Upon questioning, Mr. Peppe denied having any interaction with the realtor hired to list the storage lot for rent, but stated that plaintiff "came in inquiring about the lot [in January 2015], and [said] he tried contacting the number [on the real estate sign] and he could not get through." He indicated that he then used his key to open the gate of the storage lot and gave plaintiff a 10 to 15 minute tour thereof. Mr. Peppe testified that plaintiff returned some days later on behalf of Cars Unlimited and handed him a check for what he recalls was $9,000.00, which represented "the first month's rent." He stated that he accepted the check and that at some time in late January 2015, after Cars Unlimited began storing vehicles in the subject lot, "somebody" removed the gate's prior lock and installed a new one. Mr. Peppe denied receiving a copy of the key to the new lock. He stated that soon after Cars Unlimited took possession of the storage lot, there was a large snowfall, depositing "probably 16" inches of snow. Mr. Peppe indicated that neither he, nor the snow removal contractor hired by Blackman to remove snow in Blackman's parking lots, plowed any snow in the storage lot. However, he testified that he has observed "a red Chevy truck with a plow on it" clearing snow from the subject lot. He denied having any knowledge of who was operating the truck, or if the truck

had been present prior to plaintiff's accident, but indicated that it had a "112 Chevy" license plate cover.

Diane C. Nardone, Esq., testified that she is the secretary and chief legal officer of Northern, as well as the secretary and chief legal officer of Blackman, and that she has held those positions since August 2013. She indicated that Robert Manheimer is the president of Northern, and one of its owners. The estate of Richard Blackman, which is administered by Mr. Manheimer and Robert Tepedino, also holds an ownership interest in Northern. Ms. Nardone stated that it is "possible" that the chief financial officer or the vice-president of finance for Blackman "would have also been handling anything to do with the finances of Northern." She further stated that Northern is in the business of owning real estate, but has no employees. Questioned as to her knowledge of Halsey, she testified that Richard Blackman was its president, but that it had merged into Northern and was not doing business in New York at the time of plaintiff's accident.

Ms. Nardone testified that Northern owned the property known as 2700 Route 112 in Medford, New York. However, when asked if the storage lot in question was a part of such property, she stated that she has never been to the premises, and that she does not know, but that "it looks like it is" based on a photograph. As to Cars Unlimited, Ms. Nardone indicated that "[t]he only thing [she] know[s] is that they were licensing a parking lot that was near the [Medford Blackman] branch," and does not know if the licensed property is the storage lot in question. Furthermore, Ms. Nardone stated that she did not draft the aforementioned license agreement, that she did not have any role in its negotiation, and that Lou Peppe "would not have had any authority to negotiate anything with Cars Unlimited."

In a copy of a notice to admit dated August 13, 2018, Northern admitted that it owned the storage lot where plaintiff's accident allegedly occurred, which it "had leased out to co-defendant Blackman Plumbing prior to plaintiff's accident, pursuant to a written lease which obligated Blackman Plumbing to maintain [such lot] and to clear said parking lot of snow and ice." Northern also admitted that plaintiff "fell on property licensed by [Northern] to [Cars Unlimited] for use by [Cars Unlimited]." In addition, in response to question 7, Northern admits that "[o]n February 7, 2015, the property licensed by [Northern] to [Cars Unlimited] was not part of property leased to [Blackman] by [Northern]."

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157, 159 [2011]).

Liability for a dangerous or defective condition on property is generally "predicated upon ownership, occupancy, control, or special use of the property" (***Tilford v Greenburgh Hous. Auth.***, 170 AD3d 1233, 1235, 97 NYS3d 278 [2d Dept 2019] [internal quotations and citations omitted]). The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]). The duty "is premised on the landowner's exercise of control over the property, because the person in possession and control of property is best able to identify and prevent any harm to others, [but a] landowner who has transferred possession and control . . . is generally not liable for injuries caused by dangerous conditions on the property" (***Henry v Hamilton Equities, Inc.***, 34 NY3d 136, 2019 NY Slip Op 07642 [2019] [internal citations and quotations omitted]). A real property owner "will be held liable for a slip-and-fall accident involving snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice of its existence" (***Lauture v Board of Mgrs. at Vista at Kingsgate, Section II***, 172 AD3d 1351, 1352, 99 NYS3d 662 [2d Dept 2019], quoting ***Cuillo v Fairfield Prop. Servs., L.P.***, 112 AD3d 777, 778, 977 NYS2d 353 [2d Dept 2013]). A defendant has constructive notice of a hazardous condition on property "when it is visible and apparent, and has existed for a sufficient length of time before the accident such that it could have been discovered and corrected (***Kyte v Mid-Hudson Wendico***, 131 AD3d 452, 453, 15 NYS3d 147 [2d Dept 2015]). To meet the prima facie burden on the issue of lack of constructive notice, a defendant "must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (***Rong Wen Wu v Arniotes***, 149 AD3d 786, 787, 50 NYS3d 563 [2d Dept 2017]). However, "[a]n out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct" (***Michaele v Steph-Leigh Assoc., LLC***, 178 AD3d 820, 111 NYS3d 882 [2d Dept 2019] [citations omitted]).

Initially, the Court notes that Halsey established its prima facie case of entitlement to summary judgment in its favor by adducing evidence that it had merged into Northern prior to the date of plaintiff's accident (*see generally* ***Ward v Cross County Multiplex Cinemas, Inc.***, 62 AD3d 466, 878 NYS2d 334 [1st Dept 2009]; *cf.* ***Saldivar v I.J. White Corp.***, 9 AD3d 357, 780 NYS2d 28 [2d Dept 2004]). None of the parties submit opposition to Halsey's motion. Accordingly, the application for summary judgment dismissing the complaint and the cross claims against Halsey is granted.

However, Blackman and Northern failed to establish a prima facie case of entitlement to summary judgment in their favor (*see generally* ***Alvarez v Prospect Hosp.***, *supra*). As liability for alleged injuries sustained at a premises is predicated upon ownership or control of such premises, it is essential that the ownership or control of the area of a plaintiff's incident be conclusively ascertained. In this instance, the two moving defendants deny having a duty to maintain the area of plaintiff's fall and, thus, it is incumbent upon them to demonstrate a freedom from such a duty. A review of the initial lease agreement between Northern and Blackman, in effect from January 15, 2006 until December 31, 2010, reveals that, among other things, the use, occupancy, control, and maintenance duties of three parcels was transferred thereby. The lease agreement describes the three parcels as:

–Medford Avenue, Medford, New York – Section 735, Block 1, Lot 4

–2644 Medford Avenue, Medford, New York – Section 734, Block 3, Lot 9

–2700 Route 112, Medford, New York – Section 735, Block 1, Lot 9.3

The terms of such lease were extended to January 1, 2016 by a "lease extension agreement" dated January 1, 2011. In the lease extension agreement, Blackman relinquishes one of the three lots comprising the original leased premises, namely that parcel described as "2644 Medford Avenue, Medford, New York – Section 734, Block 3, Lot 9," leaving the descriptions of the remaining two parcels unaltered.

A copy of a "license agreement" dated January 26, 2015, between Northern as "licensor" and Cars Unlimited as "licensee," states, in relevant part, that "[t]he Licensor hereby grants to Licensee, the privilege to use the Premises described in Exhibit A attached hereto, and for no other purpose . . . for a period of (6) six months." Despite language to the contrary, no Exhibit A is attached to the license agreement.

The Court notes that neither Blackman nor Northern has submitted a metes and bounds description of the leased property, the licensed property, or the subject storage lot. Further, those defendants submit neither a the copy of a Suffolk County Tax Map by which the Court could compare the relevant real property to the section/block/lot descriptions thereof in the lease agreement, nor an expert affidavit of a licensed surveyor opining that the subject storage lot was within the premises leased to Blackman. In addition, the license agreement, purporting to allow Cars Unlimited use of the subject storage lot, contains no property description. Yet, in the main, the parties agree that the storage lot is where plaintiff's accident allegedly occurred, that such lot is owned by Northern, and that the lot was licensed to Cars Unlimited for the purpose of storing its vehicles. Where conflict remains, evidenced by Northern's responses in its notice to admit, is which entity controlled the storage lot, or was responsible for its maintenance, at the time of plaintiff's alleged fall. The "degree of control retained over the property by the landlord remains an important consideration" (***Henry v Hamilton Equities, Inc.***, *supra*). Northern contradictorily admitted both that the subject lot "was not part of property leased to" Blackman, and that

> the extra parking lot in which plaintiff alleges he slipped and fell was licensed to [Cars Unlimited] . . . but that all of the obligations under the lease of the entire real property leased to [Blackman], which included that portion of the real property licensed for use by [Cars Unlimited] . . . were still in full effect as of the time of the accident, and were due and owing from [Blackman] to [Northern].

Even assuming, arguendo, that the subject storage lot is bound by the terms of one, or both, of the aforementioned documents, various triable issues exist, including whether Northern breached the terms of its lease agreement with Blackman, and retained control of the subject lot by licensing it to Cars Unlimited; whether Blackman's contractual obligation to clear snow extended to the subject storage lot; whether Blackman's obligations obligation to maintain the storage lots, if any, had been assumed by Northern or Cars Unlimited after the execution of the license agreement; and whether Northern or Cars Unlimited blocked

Blackman's access the storage lot after Cars Unlimited took possession thereof. Regarding Northern's claim that it was an out-of-possession landlord, it failed to demonstrate how, if it had the authority to license the subject property to Cars Unlimited, it did not wrest ownership and/or control thereof from Blackman prior to such licensing. Further, the licensing of a premises for another entity's use does not afford the licensor the protections of the out-of-possession landlord standard (*see* ***Agbosasa v City of New York***, 168 AD3d 794, 92 NYS3d 100 [2d Dept 2019]). To determine the statuses of the defendants at this juncture would require the Court to adjudge the credibility of the witnesses, which is impermissible on a motion for summary judgment (*see generally* ***114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC***, ___AD3d___, 2019 NY Slip Op 08813 [2d Dept 2019]). Accordingly, the branch of the motion by Halsey and Blackman for summary judgment dismissing the complaint and cross claims against Blackman is denied, as is the motion by Northern for summary judgment dismissing the complaint against it.

Dated: 1-28-20

Hon. Denise F. Molia
A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION