SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 35EFM

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DOLORES RODRIGUES,

Plaintiff,

- v -

THE ANIMAL MEDICAL CENTER, QUIK PARK, FG, LLC,QUIK PARK

Defendant.

INDEX NO. 156994/2015

MOTION DATE 01/10/2020, 01/10/2020

MOTION SEQ. NO. 005 006

DECISION + ORDER ON MOTION

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HON. CAROL R. EDMEAD:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 83, 84, 101, 102, 103, 104, 107, 108, 109, 110, 111, 112, 120, 121
were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 105, 106, 113, 114, 115, 116, 117, 118, 119
were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

ORDERED that Defendant The Animal Medical Center's motion for dismissal (Motion Seq. 005) is denied; and it is further

ORDERED that Defendants Quick Park FG LLC and Quik Park's motion for dismissal (Motion Seq. 006) is granted; and it is further

ORDERED that the Clerk shall enter judgment accordingly and the action is severed and continues against the remaining defendant; and it is further

ORDERED that counsel for Plaintiff shall serve a copy of this decision, along with notice of entry, on all parties within 10 days of entry.

MEMORANDUM DECISION

In this negligence action, defendant The Animal Medical Center moves for summary judgment pursuant to CPLR 3212 dismissing the complaint as against it (Motion Seq. 005). Defendant Quick Park FG, LLC and Quik Park (collectively referred to as "Quik Park") also moves for dismissal pursuant to CPLR 3212 (Motion Seq. 006). The motions are consolidated for disposition.

BACKGROUND FACTS

This action arises from an accident that occurred on December 1, 2014, when Plaintiff allegedly fell and sustained various injuries while riding her motorized scooter on a ramp outside the Animal Medical Center in Manhattan. Plaintiff was using the ramp while visiting the center for an appointment for her pet dog. At the time of the accident, the parking area was maintained by Quik Park, a parking garage system company. The ramp involved in the incident, while located within the parking area, was owned, constructed and maintained by the Animal Medical Center (NYSCEF doc No. 99 at 1).

The Animal Medical Center moves for dismissal of the complaint, arguing that Plaintiff has not made out a *prima facie* case. The Animal Medical Center contends it has breached no duty to Plaintiff as there was no defect in the ramp, and Plaintiff's accident was caused by her scooter tipping over, which was completely within her control. Plaintiff opposes the motion and argues that the Animal Medical Center did not meet its initial burden of proof in demonstrating that it had no notice of the defect, and that there are issues of fact regarding the cause of Plaintiff's fall. Plaintiff also retained an expert engineer who determined that the ramp was

negligently designed due to its excessive slope and deviated from various standards for ramp safety.

Quik Park also moves for dismissal on the grounds that it did not own, operate, maintain or otherwise control the ramp. Quik Park argues it cannot be held liable as it owed no duty to Plaintiff, given that it never took action to maintain the ramp and thus had no safety obligation to anyone who may use the ramp for ingress into the Animal Medical Center. Plaintiff argues that Quik Park's motion is improper at this juncture as there are numerous questions of fact that exist as to the extent of control Quik Park exerted on the parking premises. Plaintiff contends that while Quik Park may not have built the ramp, it controlled the parking area and therefore was in the best position to warn Plaintiff of the defective ramp.

DISCUSSION

Summary judgment is granted when "the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also, DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). When the proponent fails to make a prima facie showing, the court must deny the

motion, *"'regardless of the sufficiency of the opposing papers'"* (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez,* 68 NY2d at 324).

A property owner seeking summary judgment in a negligence action is "required to establish that it maintained its [property] in a reasonably safe manner, and that it did not create a dangerous condition which posed a foreseeable risk of injury to individuals expected to be present on the property" (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 71 [1st Dept 2003]). In a trip and fall action, a defendant who moves for summary judgment must demonstrate "that it neither created the hazardous condition, nor had actual or constructive notice of its existence. Once a defendant establishes *prima facie* entitlement to relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008] [internal citations omitted]; *Manning v Americold Logistics, LLC*, 33 AD3d 427, 427 [1st Dept 2006]; *Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006]; *Zuk v Great Atl. & Pac. TeaCo., Inc.*, 21 AD3d 275, 275 [1st Dept 2005]).

Of course, for a defendant to be liable for a dangerous condition, one must exist on the property in the first place. The issue of "whether a dangerous or defective condition exists on the property of another so as to create liability … is generally a question of fact for the jury" (*Trincere v Cnty. of Suffolk,* 90 NY2d 976, 977 [1997]). When a defect exists, constructive notice to the defendant requires that the defect be "visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discovery and remedy it." (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

The Animal Medical Center

The Animal Medical Center argues that Plaintiff has established neither the existence of a defect nor any notice on its part regarding the defect. The existence of a potential hazard alone does not give rise to a negligence action; plaintiff must also demonstrate that the defendant had notice and a reasonable time to cure (*Mercer v City of New York*, 88 NY2d 955 [1996]). The Animal Medical Center contends that one of their representatives inspected the parking lot regularly and never took note of any defects (NYSECF doc No. 69, ¶ 14). Since there is no record of complaints regarding any sort of defect in the ramp, the Animal Medical Center argues it could not have had notice. However, this notion reverses the evidentiary burden in trip and fall cases. The burden is not on Plaintiff to show that Defendants had notice, but rather on Defendants to prove that they did not have notice. A lack of prior complaints or accidents alone is not sufficient (*Weingrad v NYU*, 65 NY2d 852 [1985).

Plaintiff also retained an expert witness, Dr. William Marletta, who performed an inspection of the ramp area a year after Plaintiff's accident. Dr. Marletta concluded that the ramp was negligently designed, as the slope of the ramp measured several inches in excess of the maximum recommended slope dimension (NYSCEF doc No. 107, ¶ 31). No warning sign was placed to mark the increased steepness of the ramp. Dr. Marletta also noted that the "side splay" was excessive, meaning that the ramp shot up steeply and then tilted abruptly (*id.*). Dr. Marletta reasoned that the excessive slope and side splay could theoretically lead to Plaintiff's scooter tipping over. He concluded that the ramp was not in compliance with the New York City Building Code, nor with various other standards and accepted safe practices for accessible ramps (*id.* at ¶ 96).

The Animal Medical Center disputes the veracity of Dr. Marletta's report, and its argument underscores the various factual disputes between the parties. The Animal Medical Center argues that the report must be disregarded, as it refers to the ramp as a handicapped accessible and/or pedestrian ramp, and the ramp is neither as there is no entrance to the public part of the facility from the ramp (NYSCEF doc No. 120, ¶ 6). According to the Animal Medical Center, the ramp leads to a separate service area where supplies were stored and could not even have been used by Plaintiff in the first place for entry to the center (*id.* at ¶ 11). Plaintiff disputes this characterization, testifying that at the time of the accident, she was driving her scooter toward the entrance of the center (NYSCEF doc No. 107, ¶ 77). The fact that the parties dispute the function of the subject ramp of the accident renders this Court unable to grant the relief sought by the Animal Medical Center, as it is not the Court's role to determine which party is correct regarding the characterization of the ramp. Even if the Court were to disregard the report provided, it remains unclear whether the ramp was indeed defective or whether Plaintiff's scooter caused her own accident. Where "credibility determinations are required, summary judgment must be denied" (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, [1st Dept 2012]).

As there are conflicting accounts from parties regarding the circumstances of the accident, the Court finds summary judgment for the Animal Medical Center premature at this stage.

Quik Park

Although questions of fact preclude the Animal Medical Center from dismissal at this juncture, Quik Park has established that it could not possibly have liability for Plaintiff's accident regardless of the function of the ramp. The evidentiary record reflects that the Animal Medical Center, by its own admission, was responsible for the construction, use, and

maintenance of the ramp at the time of the incident (NYSCEF doc No. 119, ¶ 7). No evidence introduced suggests that there was any sort of agreement between the parties stipulating that Quik Park was to take any responsibility for the ramp. The Animal Medical Center's facilities manager also testified that the ramp in its present form was created when the parking area was renovated in the 1990s, a project that was completely paid for and overseen by representatives for the center (*id.* at ¶ 12). Furthermore, Quik Park did not store equipment or otherwise make use of the space adjacent to the ramp, as it was only hired to maintain the parking area (*id.* at ¶ 14).

As Quik Park did not own, maintain, or otherwise make use of the ramp, it cannot owe any liability to Plaintiff regardless of whether the ramp is defective. Plaintiff's opposition to Quik Park's motion for dismissal relies mainly on speculation and asserts that as Quik Park "controlled" the parking area, it was in the best position to warn Plaintiff regarding the slope of the ramp (NYSCEF doc No. 113, ¶¶ 62-63). However, Quik Park is a contractor under an agreement with the Animal Medical Center and thus is not generally liable to a third party to the contract, especially given that Plaintiff does not allege that Quik Park created the defect or that Quik Park displaced the Animal Medical Center's duty to maintain the premises safely (*See Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 138 [2002]). Therefore, Quik Park owed no duty to Plaintiff and cannot be held liable even if the ramp was a defective condition.

As Quik Park has demonstrated that it had no duty to maintain the ramp and therefore had no duty to Plaintiff, it is entitled to dismissal from this action.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Defendant The Animal Medical Center's motion for dismissal (Motion Seq. 005) is denied; and it is further

ORDERED that Defendants Quick Park FG LLC and Quik Park's motion for dismissal (Motion Seq. 006) is granted; and it is further

ORDERED that the Clerk shall enter judgment accordingly and the action is severed and continues against the remaining defendant; and it is further

ORDERED that counsel for Plaintiff shall serve a copy of this decision, along with notice of entry, on all parties within 10 days of entry.

2/7/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[X]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE