SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 152038/2018

JOEL STANGER and LILY WONG,

Plaintiffs,

MOTION SEQ. NO. 003

- v -

SHOPRITE OF MONROE, NY, BRIXMOR PROPERTY GROUP, INC., UNISOURCE MANAGEMENT CORPORATION, CENTRO NP, LLC, and BRIXMOR MONROE PLAZA, LLC,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 160, 161

were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury action, defendant Shop-Rite Supermarkets Inc. s/h/a Shoprite of Monroe, NY ("Shop Rite") moves, pursuant to CPLR 3211 and 3212, to dismiss the complaint and all cross claims against it. Plaintiff Joel Stanger opposes the motion. After a review of the motion papers, as well as the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from an incident on March 7, 2015 in which plaintiff Joel Stanger was allegedly injured when he tripped and fell on ice in the parking lot of a Shop Rite supermarket located at 785 Route 17M, Monroe, New York ("the premises"). Plaintiff commenced this action by filing a summons with notice against defendants Shop Rite, Brixmor Property Group, Inc. ("BPG"), Unisource Management Corporation ("Unisource"), and Centro NP LLC ("Centro") on March 6, 2018. Doc. 1. On May 24, 2018, plaintiff and his wife, Lily Wong,

who asserted a claim for loss of consortium, filed a claim against said defendants.[1] Doc. 11. On June 22, 2018, plaintiffs filed an amended complaint adding Brixmor Monroe Plaza, LLC ("BMP") as an additional defendant and alleging, inter alia, that Shop Rite owned, leased, operated, and/or maintained the premises; that Shop Rite entered into a contract with BPG, Unisource, BMP, and/or Centro to provide snow removal, sanding and salting in the parking lot at the premises ("snow removal services"); that BPG owned, operated, and/or maintained the premises and hired Unisource, Centro, and/or BMP to provide snow removal services; that Unisource operated and/or maintained the premises and hired Centro, BPG, and/or BMP to provide snow removal services; and that Centro owned, operated, and/or maintained the premises and hired BMP to provide snow removal services. Doc. 60.

Shop Rite joined issue by its answer filed June 27, 2018, in which it denied all substantive allegations of wrongdoing, asserted several affirmative defenses, including that it did not own, operate, control or maintain the parking lot at the premises, and cross-claimed against Unisource and BPG for contribution and common law indemnification. Doc. 65.

BPG joined issue by its answer filed July 3, 2018, in which it denied all substantive allegations of wrongdoing, asserted numerous affirmative defenses, and asserted cross claims against Shop Rite for contractual and common law indemnification, contribution, and breach of contract to procure insurance. Doc. 66.[2]

Unisource joined issue by its answer filed July 3, 2018, in which it denied all substantive allegations of wrongdoing, asserted several affirmative defenses, and asserted cross claims against Shop Rite for contractual and common law indemnification, contribution, and breach of contract to procure insurance. Doc. 68.

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[1] Wong's claim was withdrawn by so-ordered stipulation dated September 4, 2019. Doc. 139.
[2] The answer was filed on behalf of BPG and Brixmor LLC ("Brixmor") i/s/h/a Centro NP LLC. Doc. 66.

On July 9 and 10, 2018, respectively, Shop Rite filed its reply to the cross claims asserted by Unisource (Doc. 70) and BPG and Brixmor (Doc. 71), denying all substantive allegations of wrongdoing.

On October 2, 2018, a preliminary conference was issued which, inter alia, scheduled the depositions of all parties. Doc. 117.

In his bill of particulars and supplemental bill of particulars filed January 3 and March 4, 2019, plaintiff alleged, inter alia, that he was injured when he slipped and fell on ice in the parking lot at the premises, which was owned, operated, controlled, and/or maintained by defendants. Docs. 118, 120, 134.

On February 19, 2019, a compliance conference order was issued which, inter alia, rescheduled the depositions of all parties. Doc. 123.

BMP joined issue by its answer filed February 27, 2019, in which it denied all substantive allegations of wrongdoing, asserted numerous affirmative defenses, and asserted cross claims against Shop Rite for contractual and common law indemnification, contribution, and breach of contract to procure insurance. Doc. 132.

On March 21, 2019, Shop Rite denied the allegations in the cross claims against it by BMP. Doc. 137.

On June 18, 2019, a status conference order was issued which, inter alia, rescheduled the depositions of all parties. Doc. 138.

Plaintiff appeared for his deposition in July 2019 and testified, inter alia, that he was injured when he slipped and fell on ice in the parking lot of the premises. Doc. 153 at 21-22. On September 4, 2019, a status conference order was issued which, inter alia, rescheduled the depositions of the defendants. Doc. 139.

Shop Rite now moves, pursuant to CPLR 3211 and 3212, to dismiss the complaint and all cross claims against it on the ground that it did not own, operate, control, or maintain the parking lot and did not have duty to perform snow removal services at that location. Docs. 140-141. It further asserts that it did not create, and had no notice of, any dangerous condition at the premises. In support of the motion, Shop Rite submits, inter alia, a lease between C/S Associates Limited Partnership and Big V Supermarkets, Inc., dated May 12, 1988 ("the C/S – Big V lease"), containing a clause requiring the landlord to maintain the common areas of the premises, including the parking lot. Doc. 157 at pars. 2, 9(A). The lease further required the tenant to pay additional rent to landlord for the cost of snow removal. Doc. 157 at par. 9(F). Additionally, the lease required the landlord to hold the tenant harmless for any acts or omissions of the landlord resulting in injury to persons in the common areas "unless proximately caused by the negligence or willful misconduct of [t]enant." Doc. 157 at par. 51(B).

In an affidavit in support of the motion, Clifford Brett Wing, president of Shop Rite, represents that Shop Rite had no duty to maintain the parking lot at the premises since it was a common area and, thus, the responsibility of the landlord, in accordance with the C/S – Big V lease. Doc. 158. Wing further asserts that Shop Rite is the successor-in-interest to Big V as tenant under the lease. Doc. 158.

LEGAL CONCLUSIONS:

Summary judgment, a drastic remedy and the procedural equivalent of trial, should not be granted where there is any doubt as to the existence of triable issues of fact. *See S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 (1974); *Sillman v Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 (1957). A party moving for summary judgment motion must

make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. *See Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). The movant must establish its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor and must do so by tender of evidentiary proof in admissible form. CPLR 3212(b); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 1067 (1979); *see also Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d at 853.

Shop Rite's motion must be denied since it failed to establish its prima facie entitlement to judgment as a matter of law. Although Wing represents that the C/S – Big V lease was assigned to Shop Rite as tenant, it fails to submit any proof of the assignment, including any documents containing the terms and/or conditions of the transaction. *See Sanatass v Consol. Inv. Co., Inc.*, 2008 NY Slip Op 32272(U), *10 (Sup Ct, NY County 2008). Additionally, although Wing avers that Shop Rite was the successor in interest to Big V under the lease, he does not conclusively establish that the 1988 C/S – Big V lease was assigned directly to Shop Rite. Thus, it is possible that the terms under which Shop Rite took possession of the premises differ from those in the C/S – Big V lease.

Even assuming, arguendo, that documentation of the assignment had been submitted, this Court cannot conclude as a matter of law that Shop Rite had no liability for the alleged incident since the C/S – Big V lease did not require the landlord to hold the tenant harmless for any injuries sustained in common areas if they were caused by the negligence of the tenant. Doc. 157 at par. 51 (B). Given that the depositions of the defendants remain outstanding, potential

issues of fact still exist regarding the responsibilities of the respective parties for snow removal services, including which party or parties contracted for such services and when. See CPLR 3212(f).

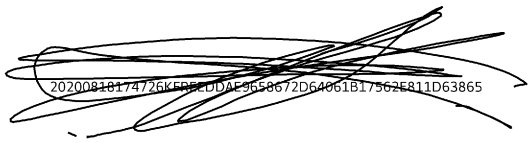
Similarly, Shop Rite's motion is denied under CPLR 3211 since the documentary evidence does not conclusively entitle it to dismissal and plaintiff has stated a viable cause of action.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by Shop-Rite Supermarkets Inc. s/h/a Shoprite of Monroe, NY is denied in all respects; and it is further

ORDERED that the parties are to submit a discovery stipulation to the court on or before October 5, 2020, leaving blanks for the compliance conference and note of issue filing dates, and, if they cannot so stipulate, they are to participate in a telephonic discovery conference on October 5, 2020 at 10:30 a.m. (the parties must provide a dial-in number and access code for the call or must have all parties on the line and then patch the court in at (646) 386-5655); and it is further

ORDERED that this constitutes the decision and order of the court.



8/18/2020
DATE

KATHRYN E. FREED, J.S.C.

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