SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK - QUEENS COUNTY

Present: HONORABLE LOURDES M. VENTURA, J.S.C. IAS Part 37

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DOMINQUE BENJAMIN, Index

Plaintiff, Number: 705399/2018

-against- Motion

Date: September 13, 2021

WILLIE DILLARD, JESSEL THOMPSON d/b/a
ZAINABU HAIR SALON-N-DAY SPA, Motion

Defendants. Seq. No.: 3

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The following electronically filed (EF) papers read on this Motion by the defendant Jessel Thompson d/b/a Zainabu Hair Salon-N-Day Spa for an Order: pursuant to CPLR 3212, granting summary judgment to the defendant, Jessel Thompson d/b/a Zainabu Hair Salon-N-Day Spa, on the grounds that no triable issues of fact exist and/or dismissing plaintiff's complaint and any and all crossclaims, pursuant to CPLR 3211(a)(7) in that such fails to state a cause of action against defendant Jessel Thompson d/b/a Zainabu Hair Salon-N-Day Spa and, an Order pursuant to CPLR 3126(3) striking the Answer of Defendant Willie Dillard based on Defendant Dillard's failure and refusal to obey the directives of the Preliminary Conference Order dated February 20, 2019 as well as the Compliance Conference Order dated August 1, 2019, by failing to appear for a court-ordered deposition as well as precluding him from testifying or submitting an affidavit in his defense of this matter; and, for such other and further relief as this Court deems just and proper.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits…..……...…….....	EF 40-49
Affirmation in Opposition -Exhibits……...	EF 50-53, EF57-59
Affirmation in Reply to Motion – Exhibits……	EF 55-56, EF 60-61

Upon the foregoing papers, it is Ordered that defendant Jessel Thompson d/b/a Zainabu Hair Salon-N-Day Spa's motion is determined as follows:

This is an action to recover money damages for personal injuries allegedly sustained by the plaintiff Dominique Benjamin when she claims to have stepped into a hole in the cellar door

located in front of the premises located at 74 Ralph Avenue, County of Kings, ("subject premises") on May 24, 2016. Plaintiff alleges that defendants were negligent in the ownership, operation, management, maintenance, inspection, control and repair of the accident location. The subject premises were owned by defendant Willie Dillard ("defendant Dillard") however, subject premises were occupied by defendant Jessel Thompson d/b/a Zainabu Hair Salon-N-Day Spa ("defendant Thompson"). It is further alleged that defendant Thompson occupied and operated the subject premises as a retail beauty salon on the date of the accident in question.

Defendant Thompson filed this summary judgment motion and avers that the motion should be granted in its entirety as there are no triable issues of fact and plaintiff failed to make a prima facie case against defendant Thompson. Defendant Thompson further avers that all of the testimony indicates that the cellar door where plaintiff's accident occurred was owned, maintained and controlled by defendant Dillard and there was no duty between the plaintiff and Thompson in this case concerning the co-defendant's cellar door where plaintiff's accident allegedly occurred.

Defendant Dillard submits opposition to defendant Thompson's motion and avers that co-defendant Thompson's motion should be denied in all respects as co-defendant Thompson has failed to establish entitlement to judgment as a matter of law through evidence in admissible form.

Plaintiff also opposes defendant Thompson's motion and avers defendant Thompson's motion for summary judgment and dismissal of the Complaint should be denied in its entirety. Specifically, plaintiff avers that defendant Thompson fails to establish that she did not control the cellar door, and that she did not have notice of the defective condition which proximately caused Plaintiff's fall.

In order to succeed on a motion for summary judgment "it is necessary that the movant establish [its] cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in [its] favor [CPLR 3212, subd. (b)], and [it] must do so by tender of evidentiary proof in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557 (1980]).

"Only if the movant succeeds in meeting its burden will the burden shift to the opponent to demonstrate through legally sufficient evidence that there exists a triable issue of fact" [cite omitted] (see *Richardson v County of Nassau,* 156 AD3d 924 [2d Dept 2017]). Consequently, where the movant fails to meet this initial burden, summary judgment must be denied regardless of the sufficiency of the opposing papers (see *Voss v Netherlands Ins. Co.,* 22 NY3d 728 [2014]). A court deciding a motion for summary judgment is required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and proof submitted by the parties in favor of the opponent to the motion" (*Myers v Fir Cab Corp.*, 64 NY2d 806 [1985]).

"Generally, a landowner owes a duty of care to maintain his or her property in a reasonably safe condition" [citations omitted](*Yehia v Marphil Realty Corp.,* 130 AD3d 615, 616 [2d Dept 2015]). "That duty is premised on the landowner's exercise of control over the property, as 'the

person in possession and control of property is best able to identify and prevent any harm to others' " (*Gronski v. County of Monroe*, 18 N.Y.3d at 379, 940 N.Y.S.2d 518, 963 N.E.2d 1219, quoting *Butler v. Rafferty*, 100 N.Y.2d 265, 270, 762 N.Y.S.2d 567, 792 N.E.2d 1055). Indeed, "[i]t has been held uniformly that control is the test which measures generally the responsibility in tort of the owner of real property" (*Ritto v. Goldberg*, 27 N.Y.2d 887, 889, 317 N.Y.S.2d 361, 265 N.E.2d 772 [1970]). "Thus, a landowner who has transferred possession and control is generally not liable for injuries caused by dangerous conditions on the property" [citations omitted] (*Gronski v County of Monroe*, 18 NY3d 374, 379 [2011]). "Control is both a question of law and of fact" (*Id.)*

However, this rule is not exclusive as an out-of-possession landlord may be liable for injuries occurring on the premises if "it has retained control of the premises, is contractually obligated to perform maintenance and repairs, or is obligated by statute to perform such maintenance and repairs" (*Denermark v. 2857 W. 8th St. Assoc.*, 111 A.D.3d 660, 661, 974 N.Y.S.2d 533; *see Rivera v Nelson Realty, LLC*, 7 NY3d 530 [2006]; *Guzman v Haven Plaza Hous. Dev. Fund Co., Inc.*, 69 NY2d 559 [1987]).

Here, plaintiff alleges as she was walking towards the subject premises, her right foot got stuck inside a hole located in the cellar door adjacent to the subject premises causing her to trip and fall. In support of defendant Thompson's motion, it submits *inter alia* a copy of the plaintiff and defendant Thompson's examination before trial ("EBT") testimony.

Here, during defendant Thompson's EBT she admitted that the hole in cellar door was there two to three months before the date of the accident, and that she observed it every day when she raised and lowered the gate. Defendant Thompson also testified that the gate for the salon covered a portion of the sidewalk cellar door. Defendant Thompson additionally testified that the sidewalk cellar door could not be accessed when the salon gate was closed, and that defendant Thompson supplied the lock for the gate and defendant Thompson was the only person to have a key to said lock.

The court finds that defendant Thompson failed to demonstrate its prima facie entitlement to judgment as a matter of law. Here, defendant's Thompson's EBT testimony raises a triable issue regarding whether or not defendant Thompson controlled the cellar doors (see *Gronski v County of Monroe*, 18 NY3d 374, 380 [2011]). In addition, in defendant Thompson's EBT testimony she denies being responsible for the maintenance of the sidewalk cellar door under the terms of a lease agreement. However, defendant Thompson fails to provide a copy of the alleged lease agreement or provide the lease terms demonstrating she was not responsible for the maintenance of the sidewalk cellar door. Defendant Thompson similarly failed to establish that it "relinquished complete control" over the property such that its duty to maintain the premises in a reasonably safe condition was extinguished as a matter of law(see *Yehia v Marphil Realty Corp.*, 130 AD3d 615, 617 [2d Dept 2015]).

Since defendant Thompson failed to sustain its initial burden of demonstrating its prima facie entitlement to judgment as a matter of law, its motion was properly denied without regard

to the sufficiency of the papers submitted in opposition (*see Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642).

Defendant Thompson also seeks dismissal of this action pursuant to CPLR 3211(a)(7) and avers that the pleadings fail to state a cause of action against defendant Thompson.

CPLR 3211 governs motions to dismiss, and CPLR 3211 in relevant part states:

"(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
7. the pleading fails to state a cause of action; or…".

The branch of defendant Thompson's motion seeking dismissal of the action pursuant to CPLR 3211(a)(7) is denied.

It is well settled that a "motion to dismiss pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" [citation omitted] (*see Leon v Martinez*, 84 NY2d 83 [1994]). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre discovery CPLR 3211motion to dismiss" (see *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34 [2d Dept 2006]).

Here, accepting the facts alleged in the complaint as true and according plaintiff the benefit of every possible favorable inference, this court finds that the complaint sufficiently alleges a cause of action based on negligence against defendant Thompson.

Defendant Thompson also seeks an Order pursuant to CPLR 3126(3) striking the Answer of defendant Dillard based on defendant Dillard's failure and refusal to obey the directives of the Preliminary Conference Order dated February 20, 2019 as well as the Compliance Conference Order dated August 1, 2019, by failing to appear for a court-ordered deposition as well as precluding him from testifying or submitting an affidavit in his defense of this matter; and, for such other and further relief as this Court deems just and proper.

Pursuant to New York Code Rules and Regulations ("NYCRR") 202.7(a) "no motion shall be filed with the court unless there have been served and filed with the motion papers (1) a notice of motion, and (2) with respect to a motion relating to disclosure or to a bill of particulars, an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion."

Here, defendant Thompson's moving papers fail to affix an affirmation of good faith as prescribed pursuant to NYCRR 202.7(a). Notwithstanding defendant's defective papers regarding the disclosure, the court finds in the interest of justice, and upon this Court's strong desire to have

matters litigated on the merits, the Court shall permit co-defendant Dillard to be produced for An EBT.

Accordingly, it is hereby

ORDERED that the branch of defendant Thompson's motion seeking summary judgment pursuant to CPLR 3212 is denied; and it is further

ORDERED that the branch of defendant Thompson's motion seeking dismissal of the action pursuant to CPLR 3211(a)(7) is denied; and it is further

ORDERED that the parties are to confer with one another and set a firm date within 45 days from the entry of this Order for the co-defendant Dillard to be produced for an EBT. Once the parties have confirmed a date for the production and EBT of co-defendant Dillard, defendant Dillard shall send this court an email to jivalle@nycourts.gov providing the agreed upon date for defendant Dillard to be produced for an EBT; and it is further

ORDERED that any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied.

This shall constitute the Decision and Order of the Court.

Dated: November 24, 2021

LOURDES M. VENTURA, J.S.C.