SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES G. CLYNES** **PART** **22M**

Justice

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ROSS DAISOMONT,

Plaintiff,

- v -

1345 GARAGE 1345 LEASEHOLD LLC, NYC PARKING WEST 54TH PARKING CORPORATION, FISHER BROTHERS MANAGEMENT CO. LLC, STANLEY RICHARDSON, SHEILA L FORD, CORE ZIEGFELD LLC D/B/A ZIEGFELD BALLROOM, GOTHAM HALL LLC,

Defendant.

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INDEX NO. 154015/2019

MOTION DATE 05/19/2020, 08/31/2020, 01/28/2021

MOTION SEQ. NO. 002 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 41, 42, 43, 44, 45, 46, 47, 48, 80, 86, 87, 88, 89, 90, 162

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

The following e-filed documents, listed by NYSCEF document number (Motion 004) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 158, 164

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 005) 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 165

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

Upon the foregoing documents and following oral argument, motion sequence numbers 002, 004 and 005 are consolidated herein for disposition and decided as follows:

In this personal injury action, defendant Gotham Hall, LLC (Gotham), moves, pursuant to CPLR 3212, for an order granting summary judgment in its favor and dismissing the complaint and any and all cross-claims against it (motion seq. no. 002); defendant Core Ziegfeld LLC d/b/a Ziegfeld Ballroom (Ziegfeld), moves pursuant to CPLR 3212, for an order granting summary judgment in its favor and dismissing the complaint and any and all cross-claims asserted against it (motion seq. no. 004); and defendants 1345 Leasehold LLC (1345 Leashold) and Fisher Brothers Management Co. LLC (Fisher Brothers), move pursuant to CPLR 3212, for an order granting

summary judgment in their favor and dismissing the complaint and any and all cross-claims as asserted against them (motion seq. no. 005).

For the reasons set forth more fully below, the motion by Gotham is granted, the motion by Ziegfeld is denied, and the motion by 1345 Leasehold and Fisher Brothers is likewise denied.

Background

Plaintiff, Ross Daisomont, was injured on October 27, 2018 at approximately 10:05 p.m. while in front of the Ziegfeld Ballroom located at 141 W 54th Street, New York, New York. Plaintiff alleges that a 2013 Honda, bearing license plate number FGR3335 (Honda) was owned by codefendant Sheila Ford (Ford), and operated by codefendant Stanley Richardson (Richardson), an alleged garage attendant. According to plaintiff, the Honda was going the wrong way by exiting the garage in the entry only lane, when it struck plaintiff on the sidewalk/driveway in front of the garage, while he was riding his skateboard, causing plaintiff to sustain serious personal injuries.

Procedural History

Plaintiff commenced this action on April 18, 2019. By stipulation dated December 5, 2019, plaintiff agreed to discontinue the action and any counterclaims as against individual defendants Ford and Richardson (NYSCEF Doc. No. 27). Plaintiff filed an amended complaint on January 24, 2020, and a second amended complaint dated June 12, 2020 (NYSCEF Doc. Nos. 32, 78).

On May 8, 2020, Hertz Corporation (Hertz) was joined as a defendant after the parties entered into a stipulation to amend the caption to do so (NYSCEF Doc. No. 40), and two weeks prior to Hertz's commencement of a Chapter 11 bankruptcy proceeding in the United States Bankruptcy Court of Delaware, entitled *In re The Hertz Corp., et al.*, Case No. 20-11218-MFW. A stay was entered by the bankruptcy court on May 27, 2020. Thereafter, on March 1, 2020, this court entered a stay, staying the motions at bar (NYSCEF Doc. No. 153). On September 28, 2023, the bankruptcy stay was lifted (NYSCEF Doc Nos. 162, 164, 165).

By decision and order dated February 22, 2024, the court found the matter settled between plaintiff and defendant NYC Parking West 54th Parking Corporation (NYC Parking) and therefore motion sequence no. 003, which sought summary judgment dismissing the complaint as against NYC Parking, was withdrawn (NYSCEF Doc. No. 166).

The court now addresses the remaining motions.

Discussion

In order to grant summary judgment, there must be no material or triable issues of fact presented. It is well established that "'[t]he proponent of a 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'" (*Wolff v New York City Tr. Auth.*, 21 AD3d 956, 956 [2d Dept 2005], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The party opposing the motion must then come forward with sufficient evidence to create an issue of fact for the consideration of the jury (*Pinto v Pinto*, 308 AD2d 571, 572 [2d Dept 2003]). "Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat such a motion (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party (*Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990] [internal citation omitted]).

Gotham

In order to prove that defendant was negligent, plaintiff must establish that: (1) defendant owed a duty to him; (2) the duty was breached; (3) the breach of the duty proximately caused plaintiff's injuries; and (4) plaintiff sustained damages as a consequence of defendant's negligence (*see Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept 2006]).

Gotham argues that the action must be dismissed as against it because it did not own, lease, manage, operate, maintain or control the subject premises or the subject motor vehicle, nor did it employ, supervise, control, retain or direct the operator of the subject vehicle as affirmed by its managing director, B. Allen Kurtz (NYSCEF Doc. No. 48). It argues, therefore, that it did not owe plaintiff a duty as a matter of law.

Whether such a duty exists is a legal question for the court (*Sanchez v State of New York*, 99 NY2d 247 [2002]). "In making such a determination, courts look to whether the relationship of the parties is such as to give rise to a duty of care, whether the plaintiff was within the zone of foreseeable harm, and whether the accident was reasonably foreseeable" (*Lynfatt v Escobar*, 71 AD3d 743, 744 [2d Dept 2010]). Gotham points out that it is an events services company that operates an event venue at 1356 Broadway, New York, New York approximately one mile from the subject parking lot. It argues that "[l]iability for a dangerous condition on property is predicated upon occupancy, ownership, control or special use of such premises" (citing *Gilbert Props. v City of New York*, 33 AD2d 175, 178 [1st Dept 1969], *affd* 27 NY2d 594 [1970]).

Plaintiff counters that the motion is premature as there are material witnesses who have not yet been deposed. However, plaintiff does not offer how Gotham is a relevant party to the instant action, save for the fact that Gotham and Ziegfeld, a tenant of 1345 Leasehold, may be "united in interest" as they have the same managing director, Kurtz.

"'A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant'" (*Tarasuik v Levoritz*, 216 AD3d 1031, 1035 [2d Dept 2023], quoting *Cajas–Romero v Ward*, 106 AD3d 850, 852 [2d Dept 2013]).'The mere hope that additional discovery may lead to sufficient evidence to defeat a summary judgment motion is insufficient to deny such a motion" (*Tarasuik*, 216 AD3d at 1035, quoting *Singh v New York City Hous. Auth.*, 177 AD3d 475, 476 [1st Dept 2019]). Rather,

> "[t]he summary judgment opponent must establish that the motion is premature because discovery may lead to relevant evidence, must specify the facts that are essential to justify their opposition, set forth some evidentiary basis to suggest that discovery may lead to relevant evidence, and demonstrate how further discovery may reveal material facts in the movant's exclusive knowledge" (*Rodriguez v Elpida Mgt., LLC*, 2021 WL 6619752, *1 [Sup Ct, Bronx County Oct. 6, 2021, No. 30464/2019E], citing CPLR 3212 [f]; *Vikram Constr., Inc. v Everest Natl. Ins. Co.*, 139 AD3d 720, 721 [2d Dept 2016]).

Further, "[u]nity in interest will not be found unless there is some 'relationship between the parties giving rise to vicarious liability of one for the conduct of the other'" (*Ciampi v Siviglia Bros. Holding Corp.*, 14 Misc 3d 140[A], 2007 NY Slip Op 50324[U] [App Term, 1st Dept 2007], quoting *Valmon v 4 M & M Corp.*, 291 AD2d 343, 344 [1st Dept 2002]). For example, "having common shareholders and officers is not dispositive on the issue of unity of interest" (*Valcom v 4 M & M Corp.*, 291 AD2d at 344).

Plaintiff has not sustained his burden. The only evidence plaintiff proffers is that Kurtz is the managing director for both Gotham and Ziegfeld. That, however, is not enough to "establish that the two entities are united in interest" (*Raymond v Melhon Props,. Inc.*, 47 AD3d 504, 505 [1st Dept 2008]).

Accordingly, the motion by Gotham is granted and the complaint and all cross-claims as against it are dismissed.

Ziegfeld

Ziegfeld argues that while it is a tenant of 1345 Leasehold, located at 141 West 54th Street, New York, New York; it is a catering and events venue, not a parking garage. Rather, Ziegfeld is a separate premises, adjacent to the 1345 Leasehold's 54th Street garage entrance/exit. Ziegfeld contends that at no time on or prior to the date of the accident did it own, lease, occupy, operate, control, supervise or manage the sub-terrain parking garage known as the "1345 Garage", nor did it own, lease, operate, control, supervise or manage the motor vehicle that is alleged to have struck plaintiff. Further, Ziegfeld notes that at all relevant times herein, Richardson was not in Ziegfeld's, employ, control or under its direction and/or management, nor were any other parking valets, parking attendants, or anyone else at the 1345 Garage.

Plaintiff argues that the motion is premature as the motion was filed before depositions and before all parties responded to the preliminary conference order. Plaintiff argues that the affidavit offered by Kurtz, Ziegfeld's managing director, is self-serving and unverifiable as plaintiff has not had a chance to cross-examine Kurtz, and the affidavit alleges facts that are within Kurtz's exclusive possession. Further, plaintiff argues that 1345 Leasehold and Ziegfeld leased space at the physical location of the accident and ownership cannot be conclusively established.

According to the lease entered into between Ziegfeld and 1345 Leasehold, the premises leased to Ziegfeld include: (1) a portion of the ground floor (Ground Floor Premises); and (2) the entire rentable areas of the second and third floors (Upper Level Space), of the building, which collectively are referred to as the "Demised Premises" (Ziegfeld exhibit M, NYSCEF Doc. No. 120). The lease states that the building is a multistoried office building, with a subterrain garage, located on both the street level and beneath the street level (Subterrain Garage) (*id.* at 1). Ziegfeld points out that pursuant to the lease, the leased space "shall be used solely as and for the operation of a first-class, high-quality catering facility and event space for private parties, weddings and other first-class social, corporate and not-for-profit functions" (*id.*, article 2, 2.1 [a]). Ziegfeld also notes that the schematics show that the subterrain garage is clearly not included in the Ziegfeld Demised Premises, and also that 1345 Leasehold reserved the right to install, remove or maintain any signage existing on the exterior of the building for the tenant of the Subterrain Garage or for Hertz (*id.*, exhibit A-1, at 155-157, section 37.2 [b]).

However, article 2.6 (f) provides, "Tenant shall be responsible, at its sole expense, for keeping the pedestrian access to and from Fisher Park, the Building, the 1345 Building and the

Sub-Terrain Garage free and clear from obstruction at all times during Tenant's use of Fisher Park as determined by Landlord and pursuant to applicable Legal Requirements." Further, article 5.2 (i) provides that Ziegfeld agreed to "use commercially reasonable efforts to minimize . . . lines or crowds in front of or adjacent to the Building, the 1345 Building, Fisher Park or the Sub-Terrain Garage, including any sidewalks and pedestrian walkways, and shall advise all vehicles to not park or loiter outside of the Demised Premises (except on a temporary basis)." Article 5.2 (r) further states that

> "Tenant shall, at its sole cost and expense, take all reasonable security measures necessary to protect the Demised Premises and the Building and its employees, customers and property therein (and the 1345 Building, the Sub-Terrain Garage, Fisher Park and the employees, customers and property therein) to the extent that Tenant conducts and/or permits an event in or about the Demised Premises that reasonably may impact such 1345 Building, the Sub-Terrain Garage and/or Fisher Park)."

As noted above, to sustain a cause of action for negligence, plaintiff must establish that defendant owed plaintiff a duty, defendant breached that duty, which caused plaintiff harm (*Kenney v City of New York*, 30 AD3d 261). Here, the court finds that given the provisions in the lease, there are questions of fact as to whether Ziegfeld owed a duty of care based on its tenancy with 1345 Leasehold. Given that it agreed to "keep[] the pedestrian access to and from . . . the Sub-Terrain Garage free and clear from obstruction" and "take all reasonable security measure to protect . . . the Sub-Terrain Garage [in] the event [Ziegfeld] conducts and/or permits an event," particularly given that the accident occurred on a Saturday night before Halloween (Lease, article 5.2 [i], [r]) and plaintiff alleges that the accident occurred on the sidewalk in front of the garage (Bill of Particulars, NYSCEF Doc. No. 116), questions of fact remain. Further, as there has been no testimony by either defendant, the court finds the motion premature, and the motion is, therefore, denied (*241 Fifth Ave. Hotel, LLC v GSY Corp.*, 110 AD3d 470, 471 [1st Dept 2013]).

1345 Leasehold & Fisher Brothers

Defendants 1345 Leasehold and Fisher Brothers, likewise, move for summary judgment asserting that they did not owe plaintiff a duty of care. They argue that parking garages do not owe a duty of care to pedestrians outside of the garage, as a parking garage does not have a duty to control conduct of its patrons for the protection of off-premises pedestrians (citing *Pulka v Edelman*, 40 NY2d 781 [1976]). They submit a photograph and the police report of the accident in support of their argument that the accident actually occurred in the street and not on the

sidewalk. To the extent plaintiff alleges that Richardson was a garage attendant and not a patron, defendants offer the affidavit of Anna Pavlo, payroll manager of Fisher Brothers, who affirms that as payroll manager, she has access to the employment records for all personnel who have worked for Fisher Brothers and 1345 Leasehold as they are maintained in the ordinary course of business; and after conducting a thorough search of the employment and personnel files and records for the period of January 1, 2016 through October 27, 2018, maintained by Fisher Brothers, she has determined that Richardson was never employed by either Fisher Brothers or 1345 Leasehold (Pavlo aff dated December 8, 2020, ¶¶ 2, 4, 5-8, NYSCEF Doc. No. 137).

Plaintiff opposes and counters that the motion is premature as Richardson, as well as Fisher Brothers and 1345 Leasehold's representatives can testify to movants' "longstanding practice to raise the gate" permitting attendants, including Richardson, to drive the wrong way out of the parking garage into New York City traffic. Further, plaintiff asserts that the photograph submitted by movants is not only unverifiable and unauthenticated, but it is also unclear; and that the police report submitted is uncertified and therefore, inadmissible.

Plaintiff submits a sworn statement of Richardson, who avers, that at that time of the accident he was employed by Hertz as a garage attendant (Richardson statement dated May 1, 2020, NYSCEF Doc. No. 145). He attests that at the time of the accident, he "drove out of the garage through the inbond [sic] enter only lane on the far left and exited through the W 54th Street exit." He also admits that his car was parked in the "inbound lane" which was a common occurrence (*id.*). Richardson claims that parking attendants frequently parked in and exited from the inbound lane, and if the car was parked behind the gate, another parking attendant would have to manually lift the gate (*id.*). On the day in question, Richardson was parked in front of the gate (*id.*). He avers "When I exited the garage, I struck a male that was riding a skateboard" (*id.*).

On reply, defendants submit a hard copy of video surveillance taken as further clarification of the accident (reply at ¶¶ 9, 10). However, a moving party cannot meet its burden by submitting evidence for the first time in its reply (*American Trans. Ins. Co. v Longevity Med. Supply, Inc.*, 131 AD3d 841, 842 [1st Dept 2015] ["(a)ny belated attempt by plaintiff to cure . . . its prima facie showing by submitting evidence for the first time in reply [is] improper"]). The court, therefore, will not consider this evidence for purposes of this motion.

"It is well established that before a defendant may be held liable for its negligence[,] it must be shown that the defendant owes a duty to the plaintiff" (*Pulka v Edelman*, 40 NY2d at 782). Further, if there is no duty, then there is no breach and it follows then that there is no liability (*id.*).

Movants argue parking garages do not owe a duty of care to pedestrians on the sidewalk outside a garage (citing *Pulka v Edelman*, 40 NY2d at 782). In *Pulka*, the Court of Appeals found that while there is a clear duty of the driver of a vehicle to any pedestrian, there, the question is whether the garage has "a duty to control the conduct of its patrons for the protection of off-premises pedestrians" (*id.* at 783). The court, however, goes on to state:

> "[t]he garage obviously owes a duty to protect pedestrians from the acts of its own employees when driving a patron's vehicle across the path of pedestrians. On the other hand, it would be most unfair to impose that duty on the garage with respect to acts of its patrons. A duty to prevent such negligence should not be imposed on one who does not control the tort-feasor" (*id.* at 784).

Here, Richardson admits that he was employed by Hertz, a lessee of 1345 Leasehold, as a garage attendant. It is unclear whether he was moving the vehicle in that capacity or that of a patron. Further, plaintiff contends that movants' negligence is predicated not on their employment of Richardson but on their alleged negligent ownership and management of the parking garage in permitting cars to exit the garage out of the enter-only lane, as well as in their employment of the attendant who opened the gate. It is not clear what Richardson meant when he states that he was "parked in front of the gate" and whether a garage attendant needed to manually lift the gate for him to exit the garage. Even if the court were to consider the police report, it would be of no consequence here; and the court finds the photograph submitted by defendants is indecipherable.

As plaintiff argues there can be more than one proximate cause of an accident, the movants burden is to show that they are free from comparative negligence as a matter of law (*Spadaro v Parking Sys. Plus, Inc.*, 113 AD3d 833, 835 [2d Dept 2014]). Here, movants have not met their burden as questions of fact remain concerning whether they were, in fact, free from comparative fault (*id.*). There is no dispute that defendants 1345 Leashold and Fisher Brothers own and manage the building, however, there is no evidence to establish what their management obligations are with respect to the parking garage. As many questions of fact remain, the motion is denied.

Conclusion

Accordingly, it is

ORDERED that the motion by defendant Gotham Hall, LLC is granted, and the case is hereby severed and dismissed as against it (motion seq. no. 002); and it is further

ORDERED that the motion by defendant Ziegfeld Ballroom is denied (motion seq. no. 004); and it is further

ORDERED that the motion by defendants 1345 Leasehold LLC and Fisher Brothers Management Co. LLC is likewise denied (motion seq. no 005).

This constitutes the Decision and Order of the Court.

3/20/2024
DATE

JAMES G. CLYNES, U.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