SHORT FORM ORDER

INDEX No. 623920/2023
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 07/11/2024
SUBMIT DATE 09/12/2024
Mot. Seq. # 01 - MG

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JENNIFER MAZZA,

Plaintiff,

- against -

SOUTH SEA HOLDINGS, L.P., and BLUMENFELD DEVELOPMENT GROUP, LTD.,

Defendants.

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Upon the following papers numbered 13 to 33; 36; 39 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 13 - 33 ; ~~Notice of Cross Motion and supporting papers~~ __; Answering Affidavits and supporting papers 36 ; Replying Affidavits and supporting papers 39 ; ~~Other~~ __; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

Defendants, South Sea Holdings, L.P. and Blumenfeld Development Group, Ltd. move for an order pursuant to CPLR 3212 granting summary judgment and dismissing the plaintiff's claims. The plaintiff opposes this application.

The plaintiff commenced this action to recover damages for personal injuries allegedly sustained on March 25, 2023, when she purportedly tripped and fell on an uneven, broken pothole in the parking lot of the premises located at 260 Pond Path, Centereach, New York. The premises was subleased by non-party Stop & Shop Supermarket Company (hereinafter "Stop & Shop"), the plaintiff's employer, and leased by South Sea Holdings, L.P. (hereinafter "South Sea"), one of the defendants. Defendant Blumenfeld Development Group, Ltd. (hereinafter "Blumenfeld") is the property manager for the subject location. The plaintiff claims that during the course of her employment with Stop & Shop and while delivering bottled water to a customers vehicle, she rolled her ankle on a pothole in the parking lot resulting in, among other injuries, a full thickness tear of the anterior talofibular ligament, tearing of the calcaneal fibular ligament, and a subchondral left ankle fracture. The defendants argue that under the lease agreement, the tenant, Stop & Shop, was responsible for maintenance of all common facilities, including the parking areas, driveways and sidewalks. The defendant South Sea claims that it is an out-of-possession landlord/lessor with no responsibilities to control, operate, or maintain the premises, including the subject parking lot. The defendant

Blumenfeld argues it is not a named party in the lease agreements and is merely the property manager responsible for lease administration.

CPLR §3212(b) states that a motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (***Olan v. Farrell Lines, Inc.***, 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); ***Spearman v. Times Square Stores Corp.***, 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, ***New York Civil Practice*** Sec. 3212.09)).

The 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 from the case (***Friends of Animals v. Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v. Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR3212 [b]; ***Gilbert Frank Corp. v. Federal Insurance Co.,*** 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988]; ***Zuckerman v. City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v. Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (***Robinson v. Strong Memorial Hospital,*** 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (*see* ***S.J. Capelin Associates v. Globe Mfg. Corp.,*** 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (***Prunty v. Keltie's Bum Steer,*** 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (***Prunty v. Keltie's Bum Steer,*** *supra*, citing ***Glick & Dolleck v. Tri-Pac Export Corp.,*** 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; ***Columbus Trust Co. v. Campolo,*** 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

In ***Scott v Bergstol***, 11 AD3d 525, 525-526 [2d Dept 2004], the Court held that

> Generally, an out-of-possession owner or lessor is not liable for injuries that occur on its premises unless it has retained control over the premises or is contractually obligated to repair unsafe conditions (see ***Vijayan v Bally's Total Fitness***, 289 A.D.2d 224, 733 N.Y.S.2d 703 [2001]; ***Berado v City of Mount Vernon***, 262 A.D.2d 513, 694

> N.Y.S.2d 403 [1999]). Here, Bergstol established her entitlement to judgment as a matter of law by demonstrating that she was an out-of-possession landlord with no duty to remove snow and ice from the premises (see ***Jackson v United States Tennis Assn.***, 294 A.D.2d 470, 742 N.Y.S.2d 374 [2002]; ***Shrenkel v New York State Dormitory Auth.***, 266 A.D.2d 369, 698 N.Y.S.2d 299 [1999]; ***Carvano v Morgan***, 270 A.D.2d 222, 703 N.Y.S.2d 534 [2000]). In opposition, the plaintiff failed to submit evidence sufficient to raise a triable issue of fact. The plaintiff's contention that the roof of the building was improperly designed, constructed, and maintained was purely speculative. Accordingly, the Supreme Court properly granted Bergstol's motion for summary judgment dismissing the complaint insofar as asserted against her.

In ***Yadegar v Intl. Food Mkt.***, 37 AD3d 595, 596-597 [2d Dept 2007], the Court held that

> Stein satisfied his burden on his motion for summary judgment dismissing the complaint insofar as asserted against him by demonstrating that he was an out-of-possession landlord who was not obligated to maintain or repair the parking lot (see ***Salgado v Ring***, 21 AD3d 362, 363, 798 NYS2d 920 [2005]; ***Knipfing v V & J, Inc.***, 8 AD3d 628, 629, 779 NYS2d 244 [2004]; ***Ahmad v City of New York***, 298 AD2d 473, 474, 748 NYS2d 777 [2002])... In opposition, the plaintiffs failed to raise a triable issue of fact. "Reservation of a right of entry may constitute sufficient retention of control to impose liability upon an out-of-possession owner or lessor for injuries caused by a dangerous condition, but only when 'a specific statutory violation exists and there is a significant structural or design defect'" (***Lowe-Barrett v City of New York***, 28 AD3d 721, 722, 815 NYS2d 630 [2006], quoting ***Stark v Port Auth. of N.Y. & N.J.***, 224 AD2d 681, 682, 639 NYS2d 57 [1996]). Here, however, although Stein retained a right to re-enter the premises, the plaintiffs did not allege the violation of a statutory provision and presented no evidence demonstrating that the raised and broken asphalt in the parking lot constituted a significant structural or design defect (see ***Schwegler v City of Niagara Falls***, 21 AD3d 1268, 801 NYS2d 873 [2005]; ***Salgado v Ring***, *supra* 21 AD3d at 363 [2005]; ***Seney v Kee Assoc.***, 15 AD3d 383, 384-385, 790 NYS2d 170 [2005]; ***Sangiorgio v Ace Towing & Recovery***, 13 AD3d 433, 787 NYS2d 51 [2004]). Accordingly, Stein's cross motion should have been granted.

Defendants argue that they were not responsible for maintenance, repair, or inspections of the parking lot where the plaintiff fell. Pursuant to an agreement dated January 13, 1995, and extended through January

31, 2026, defendant South Sea leased to Stop & Shop the land on which Stop & Shop constructed a supermarket and parking area. The original lease contained a provision that required Stop & Shop to "maintain or cause the Common Facilities to be maintained" and defined Common Facilities as "all those portions of the Shopping Center which are not from time to time occupied by buildings permitted by this Lease. The general term "Common Facilities" includes all parking areas, aisles, driveways, entrances, exists, sidewalks," etc. Further, the lease directed the tenant, Stop & Shop, to "maintain all of the Common Facilities in good order, repair and condition, free of snow, ice and refuse, and free of obstructions, and "[s]uch maintenance shall include, without limitation, the restriping of the paved parking areas." Additionally, Stop & Shop was required to procure liability insurance as part of the common facilities maintenance naming defendant South Sea as an additional insured. The defendant South Sea thus claims that it is an out-of-possession landlord with no responsibilities to maintain the parking lot and that Stop & Shop enjoyed complete and exclusive possession of the premises. The defendant Blumenfeld likewise argues as a property manager it was only responsible for lease administration, and had no involvement with maintenance, repair, or inspections of the parking lot and has never had involvement with the daily operations of the premises.

In opposition, the plaintiff, through an affirmation by her attorney only, claims the defendants have not shown a lack of control over the premises and delegation of its entire property ownership safety duties since depositions have not yet been held. Notably, plaintiff's affirmation states, "[y]our affirmant does not dispute the procedural history as provided by the movant," and "[y]our affirmant does not dispute the direct citations to the Lease in effect on the premises on the date of incident." Finally, plaintiff argues that dismissal of plaintiff's claims before further discovery and examination of the evidence is premature.

In order to establish tort liability the plaintiff must demonstrate the existence and breach of a duty owed to her by the defendant (***Pulka v. Edelman***, 40 NY2d 781, 390 NYS2d 393 (1976); ***Palsgraf v. LIRR Co.***, 248 NY 339 (1928); Prosser, "***Torts***" 4th Edition §30, 41-42 and 53)). She must further demonstrate that defendant's acts or omissions which constituted such breach were a proximate cause of plaintiff's injuries (***Sheehan v. City of New York***, 40 NY2d 496, 387 NYS2d 92 (1976)).

In ***Colombini v Westchester County Healthcare Corp.***, 24 AD3d 712, 715 [2d Dept 2005], the Court held that

> Summary judgment should be denied as premature where, as here, the party opposing the motion has not had an adequate opportunity to conduct discovery into issues within the knowledge of the moving party (see CPLR 3212 [f]; ***Ross v Curtis-Palmer Hydro-Elec. Co.***, 81 NY2d 494, 506, 618 NE2d 82, 601 NYS2d 49 [1993]; ***OK Petroleum Distrib. Corp. v Nassau/Suffolk Fuel Oil Corp.***, 17 AD3d 551, 793 NYS2d 152 [2005]; ***Mazzola v Kelly***, 291 AD2d 535, 738 NYS2d 246 [2002]).

In support of their motion, defendants established, prima facie, that they were not responsible for the maintenance of the parking lot at issue. Viewing the evidence in the light most favorable to the plaintiff

(***Robinson v. Strong Memorial Hospital***, 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]), it is the conclusion of this Court that she failed to raise a triable issue of fact as to whether the defendants were responsible for the maintenance of the parking lot or the area where the plaintiff allegedly fell.

The Court concludes that the defendants have made a prima facie showing of their entitlement to judgment as a matter of law. As the plaintiff has failed to raise a triable issue of fact, summary judgment is warranted and the complaint is hereby dismissed (see ***Borra v. Walden Books, Inc.***, 298 AD2d 542, 748 NYS2d 670 [2d Dept 2002]).

The foregoing constitutes the decision and Order of this Court.

Dated: September 17, 2024

HON. JOSEPH A. SANTORELLI
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION