STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

KELLY KNAPP,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 7722-11
RJI NO. 01-11-105610

KMART FUNDING CORPORATION, SEARS HOLDING COMPANY, SEARS HOLDING MANAGEMENT CORPORATION, and KMART HOLDING CORPORATION,

Defendants.

Supreme Court Albany County All Purpose Term, February 17, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Hanson Law Firm, PC
Kristie Halloran Hanson, Esq.
Attorneys for Plaintiff
1801 Altamont Avenue
Schenectady, New York 12303

Carter, Conboy, Case, Blackmore, Maloney & Laird, P.C.
Stephen Groudine, Esq.
Attorneys for Defendants
20 Corporate Woods Boulevard
Albany, New York 12211

TERESI, J.:

On or about November 24, 2007, Plaintiff was allegedly struck by a falling box at the "Kmart Store in Glenmont, New York" (hereinafter "Glenmont Kmart"). Plaintiff commenced this action seeking to recover the damages she sustained. Issue was joined by all Defendants, who specifically denied Plaintiff's allegation that they "owned, operated and controlled the" Glenmont Kmart. Discovery is ongoing.

Defendants now move for summary judgment dismissing the complaint alleging that they do not "own, lease, operate, manage, control, or maintain" the Glenmont Kmart. Plaintiff opposes the motion and cross moves to amend her complaint to add Kmart Corporation as a named Defendant. Because Defendants demonstrated their entitlement to judgment as a matter of law, and Plaintiff raised no material issue of fact, their motion is granted. Plaintiff, however, failed to properly support her motion to amend.

"[S]ummary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v Finn, 229 AD2d 869, 870 [3d Dept 1996], quoting Moskowitz v. Garlock, 23 AD2d 943 [3d Dept 1965]).

"It is well settled that the proponent of a summary judgment motion bears the initial burden of establishing, by admissible evidence, entitlement to judgment as a matter of law." (Bores v Bolde, 88 AD3d 1243, 1243 [3d Dept 2011], Alvarez v Prospect Hospital, 68 NY2d 320 [1986]; CPLR §3212). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of fact. (Zuckerman v City of New York, 49 NY2d 557 [1980]).

As is applicable to Defendants' motion, "liability for an injury caused by a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property and where none is present, a party cannot be held liable." (Rackowski v Realty USA, 82 AD3d 1475, 1476 [3d Dept 2011], quoting Gadani v Dormitory Auth. of State of N.Y., 64 AD3d 1098 [3d Dept 2009][internal brackets omitted]; Battaglia v Town of Bethlehem, 46 AD3d 1151 [3d Dept 2007]; Turrisi v Ponderosa, Inc., 179 AD2d 956 [3d Dept 1992]; Long v Sage Estate Homeowners Assn., Inc., 16 AD3d 963 [3d Dept 2005]).

Here, Defendants sufficiently established their non- "ownership, occupancy, control or special use of the property." Defendants support their motion with an affidavit made by an Assistant Corporate Secretary for Sears Holdings Corporation, Sears Holdings Management Corporation and Kmart Holding Corporation. He alleges, upon his own personal knowledge of each Defendants' corporate organization, that the named Defendants did not "own, lease, operate, manage, control, or maintain the" Glenmont Kmart. Instead, he specified non-party Kmart Corporation as operating, managing, controlling and maintaining the Glenmont Kmart. He further disavowed any agreement that shifted negligence liability from Kmart Corporation to the named Defendants. With such allegations, Defendants duly established their entitlement to judgment as a matter of law.

With the burden shifted, Plaintiff failed to raise a triable issue of fact. Plaintiff offers no proof that any of the named Defendants own, occupy or control the Glenmont Kmart. She effectively conceded Defendants' proof. Instead, Plaintiff's counsel alleges that the Defendants should be equitably estopped from disavowing ownership, occupancy or control. However, she offered no evidentiary proof of "defendant's fraud, misrepresentation or other affirmative misconduct." (Kosowsky v Willard Mtn., Inc., 90 AD3d 1127, 1130 [3d Dept 2011]). Her "extensive research" allegations, which produced invalid results, speak not to Defendants' fraud or misrepresentation but instead to her own inadequate investigation. Her allegation that Defendants' "intentionally failed to list Kmart Corporation with the Secretary of State" is not only pure speculation but was definitively refuted by Defendants submitting a Secretary of State website printout listing "K MART CORPORATION [as] ACTIVE." Her web search and incident report telephone number allegations are similarly unavailing, because she alleged no

fraud, misrepresentation or other affirmative misconduct. Nor did she state that she relied on such information when commencing this action. Additionally, Plaintiff's attorney's characterizations of the Defendants' answer and demand to change venue are simply inaccurate. Defendants answer was not a general denial. (*see* Seigel, NY Prac §221, at 380 [5th ed]). It was a specific denial of Plaintiff's complaint's allegation of ownership, operation and control. This specific denial could not mislead. Also, contrary to Plaintiff's attorney's assertion, Defendants' change venue demand neither explicitly nor implicitly shows that Defendants believed Kmart Funding Corporation maintained and cared for the Glenville Kmart.

Accordingly, Defendants' motion for summary judgment is granted.

Turning next to Plaintiff's motion to amend her complaint, because it is improperly supported it is denied.

CPLR §3025(b) mandates that "[a]ny motion to amend... shall be accompanied by the proposed amended... pleading clearly showing the changes or additions to be made to the pleading." (emphasis added; *see also* Abbott v Herzfeld & Rubin, P.C., 202 AD2d 351 [1st Dept 1994]; Fernandez v HICO Corp., 24 AD3d 110, 111 [1st Dept 2005]).

Here, Plaintiff failed to submit a proposed amended complaint with her motion. Such prima facie defect requires denial. Moreover, Plaintiff's belated attempt to cure such defect in a sur-reply is rejected as unauthorized (CPLR §2214[b], *see* Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C2214:10) and is otherwise impermissible because it raises new arguments at a time when Defendants cannot respond. (Albany County Dept. of Social Services v Rossi, 62 AD3d 1049, 1050 [3d Dept 2009]; Ritt by Ritt v Lenox Hill Hosp., 182 AD2d 560 [1st Dept 1992]).

This Decision and Order is being returned to the attorneys for the Defendants. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: March 5, 2012
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated December 2, 2011, Affidavit of Stephen Groudine, dated December 2, 2011, with attached Exhibits A-F; Affidavit of David Halffield, dated October 24, 2011.
2. Notice of Cross-Motion, dated February 10, 2012, Affidavit of Kristie Hanson, dated February 10, 2012, with attached Exhibits A-F.
3. Affidavit of Stephen Groudine, dated February 14, 2012, with attached Exhibits A-B.
4. Affidavit of Kristie Hanson, dated February 16, 2012, with attached Exhibit G.