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SHORT FORM ORDER

INDEX No. 10-18232

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 10-5-11
ADJ. DATE 10-18-12
Mot. Seq. # 002 - MD
003 - XMotD

NIMIA GARCIA,

Plaintiff,

- against -

THE TOWN OF BABYLON INDUSTRIAL DEVELOPMENT AGENCY, THE TOWN OF BABYLON, GAZZILLA CORP., and CREATIVE JUICES PRINTING & GRAPHICS, INC.,

Defendants.

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Upon the following papers numbered 1 to 42 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers 13 - 30; Answering Affidavits and supporting papers 31 - 38; Replying Affidavits and supporting papers 39 - 40; 41 - 42; Other _ _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Creative Juices Printing & Graphics, Inc. for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing plaintiff's complaint and all cross claims is denied; and it is further

ORDERED that that this cross motion by defendants The Town of Babylon Industrial Development Agency and Gazzilla Corp. for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing plaintiff's complaint is determined herein.

This is an action to recover damages for injuries allegedly sustained by plaintiff on January 25, 2008 at approximately 10 a.m. when she tripped and fell on an extension cord attached to a portable heater in the warehouse at her place of employment located at 90 Gazza Boulevard, Farmingdale, New York. Plaintiff alleges that defendants were negligent in, among other things, failing to provide a safe place to work; creating or allowing a dangerous condition to exist in the work area by installing and maintaining extension cords in the area, having inadequate or improperly placed electrical outlets in the warehouse area, and failing to inspect the work area or to take precautions or to warn to prevent injury to persons traversing the work area. At the time of the incident, plaintiff was a sandblaster for non-party American Visual Display (American Visual), and both American Visual and defendant Creative Juices Printing & Graphics, Inc. (Creative) occupied the building. Gazzilla Corp. had been formed to acquire the premises from the Town of Babylon Industrial Development Agency (Babylon IDA).

Defendant Creative now moves for summary judgment on the grounds that the accident did not occur in the area occupied by Creative, and that it did not have actual or constructive notice of the alleged defective condition. The submissions in support of the motion include the pleadings, the bill of particulars, the deposition transcripts of plaintiff and of Michael Karmatz on behalf of defendant Creative, and color photographs of the area of the accident.

Defendants Babylon IDA and Gazzilla Corp. cross-move for summary judgment on the ground that no one controlled the area where the accident occurred nor caused or created the transient condition that allegedly caused plaintiff's fall. The submissions in support of the cross motion include the pleadings, the stipulation of discontinuance dated December 6, 2010 between plaintiff and the Town defendants discontinuing with prejudice the action against The Town of Babylon, the deposition transcript of Robert Stricoff on behalf of defendant Babylon IDA, and the commercial lease effective April 1, 2007 to April 1, 2008 between Gazzilla and American Visual.

In opposition to the motion and cross motion, plaintiff contends that it is unclear which of the defendants owned, occupied or controlled the area where plaintiff's accident occurred; that defendants retained sufficient control over the premises for maintenance and repair; that defendants failed to demonstrate that the defect was not structural in nature; that the lack of electrical outlets on the walls rendered the premises unsafe; that the structural electrical system of the premises created a foreseeable tripping hazard based on the insufficient number of electrical outlets prompting the constant need for extension cords; and that there are questions of fact as to whether defendants had actual and/or constructive notice of the alleged dangerous condition. Plaintiff submits her own as well as her sister's affidavit dated January 10, 2012, the affidavit and attached report of her architectural expert, David Hunter, the lease agreement dated October 27, 2005 between Babylon IDA and Gazzilla Corp. and the October 2005 sublease agreement between Gazzilla Corp. and Creative Juices, and the lease agreement between Gazzilla and American Visual.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals, Inc. v Associated Fur Mfrs., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima

facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, citing to ***Zuckerman v City of New York***, 49 NY2d 557, 562, 427 NYS2d 595).

As a general rule, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of that property (*see* ***Forbes v Aaron***, 81 AD3d 876, 918 NYS2d 118 [2d Dept 2011]). "An out-of-possession landlord generally will not be responsible for injuries occurring on its premises unless the landlord 'has a duty imposed by statute or assumed by contract or a course of conduct'" (***Healy v Bartolomei***, 87 AD3d 1112, 1113, 929 NYS2d 866 [2d Dept 2011], *quoting* ***Alnashmi v Certified Analytical Group, Inc.***, 89 AD3d 10, 18, 929 NYS2d 620 [2d Dept 2011]). A tenant may be held liable for a dangerous or defective condition on the premises it occupies, even where the landlord has explicitly agreed in the lease to maintain the premises and keep it in good repair (*see* ***McNelis v Doubleday Sports***, 191 AD2d 619, 595 NYS2d 118 [2d Dept 1993]; ***Chadis v Grand Union Co.***, 158 AD2d 443, 550 NYS2d 908 [2d Dept 1990]).

"To impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it" (***Denker v Century 21 Dept. Stores, LLC***, 55 AD3d 527, 528, 866 NYS2d 681 [2d Dept 2008]; *see*, ***Starling v Suffolk County Water Auth.***, 63 AD3d 822, 823, 881 NYS2d 149 [2d Dept 2009]). A defendant moving for summary judgment in a personal injury action has the burden of establishing that it did not create the defective condition or have actual or constructive notice of its existence (*see*, ***Starling v Suffolk County Water Auth.***, *supra*).

At her continuing deposition on April 7, 2011, plaintiff testified that she was walking with a part in her hand and that her feet got tangled in the black cord of a portable heater and that while attempting to extricate one foot, she slipped and fell backwards. In addition, plaintiff testified that the heater was not operating at the time and that the extension cord that it was plugged into was not plugged into the ceiling outlet. She described that the heater was simply plugged into the red extension cord and that the extension cord was merely thrown onto the floor.

Michael Karmatz testified on April 20, 2011 on behalf of defendant Creative stating that he is the owner of Creative as well as Gazzilla Corp. and that Gazzilla Corp. was formed to purchase 90 Gazza Boulevard, which consists of a cement building zoned light industrial. Mr. Karmatz stated that he currently owns the property and that the property was purchased in 2004 or 2005 from the owner of American Visual through Babylon IDA. According to Mr. Karmatz, in January 2008 Creative occupied about 10 percent of the rear of the building for storage of supplies and boxes and that the rest of the building was occupied by American Visual pursuant to a lease agreement with Gazzilla Corp. He described the premises as having a front office of approximately 1500 square feet, a middle section where most of the production occurred of approximately 4000 square feet, then a cement wall with a door leading to two other sections of approximately 2500 square feet. In addition, Mr. Karmatz stated that American Visual occupied the front office, middle production area, and most of the rear area and

that his company used only about 800 square feet in the rear. He explained that upon entering the building there are two offices and a bathroom in the middle and then a hallway that leads to the central production area. Mr. Karmatz testified that there were outlets on the walls and outlets on the ceiling rafters spaced every 10 feet, remnants from a lighting store once on the premises. In addition, he testified that in January 2008 he would visit the owner of American Visual once or twice a month. He could not remember the terms of the lease between Gazzilla Corp. and defendant Creative.

Robert Stricoff testified at his deposition on September 23, 2011 that he is chief executive officer of Babylon IDA, which he described as a public benefit corporation authorized to provide tax incentives to businesses and groups to bring businesses and jobs to Babylon. He explained that in 2006 Babylon IDA entered into a PILOT (Payment In Lieu Of Taxes) agreement with Creative which provided a tax incentive plan for Creative to invest, own and operate 90 Gazza Boulevard in Farmingdale. Mr. Stricoff believed that the property was purchased by Gazzilla Corp., the company that was formed for the purpose of purchasing the property, and that the building was not leased back to another entity after the purchase. According to Mr. Stricoff, the property could be sublet and alterations could be made to its interior but only with the approval of Babylon IDA. He had never heard of American Visual and during 2006 to 2008, Babylon IDA did not receive a request to sublet the subject premises to American Visual. Mr. Stricoff testified that between 2006 and 2008 Babylon had no knowledge and received no complaints concerning the outlets on the ceiling of the premises. He also testified that he had no notice of any prior accidents or code violations or electrical work regarding the interior of the subject premises and that he had never visited the building.

The lease agreement dated October 27, 2005 between Babylon IDA and Gazzilla Corp. indicates that Babylon IDA would acquire fee simple title to the land and 8000 square foot building contained thereon and would lease its interest to Gazzilla Corp. with an option for Gazzilla Corp. to purchase the land and 8000 square foot building and terminate the agreement by paying all the rental payments due and payable. The lease agreement was signed by Mr. Stricoff in his capacity as executive director of Babylon IDA and by Mr. Karmatz as member of Gazzilla Corp. Said agreement contemplated a sublease of the premises to Creative. Based on section 9.3 of Article IX of the lease, Gazzilla Corp. could not sublet the whole or any part of the premises, except pursuant to the sublease agreement, without the prior written consent of Babylon IDA. The sublease dated October 2005, signed by Mr. Karmatz in his capacity as president of Gazzilla Corp. and president of Creative, sublet 100 percent of the land and the building to Creative subject to the terms of the lease agreement between Babylon IDA and Gazzilla Corp. Pursuant to section 4.1 of Article IV of the lease, Gazzilla Corp. agreed to keep the premises in good and safe operating order and condition. Pursuant to section 6 of the sublease, Creative agreed to keep the premises in good and clean order and condition and to promptly make all necessary and appropriate repairs, whether structural or non-structural.

The commercial lease between Gazzilla Corp. and American Visual indicates that it was made and effective April 1, 2007 and that Gazzilla Corp. was the owner of the land and improvements thereon and that the lease term ended on April 1, 2008.

Here, the adduced evidence reveals that defendant Creative, pursuant to the sublease contemplated by the Babylon IDA lease, leased 100 percent of the building. Contrary to the assertions of

defendant Creative in its reply, defendant Creative has failed to clearly demonstrate through the testimony of Mr. Karmatz that the Babylon IDA lease and Creative sublease were no longer in effect at the time that Gazzilla Corp. entered into a lease with American Visual. No deed has been submitted showing that Babylon IDA conveyed the subject premises to Gazzilla Corp. Thus, it is unclear which entity, defendant Babylon IDA or defendant Gazzilla Corp., was the owner and/or out of possession landlord, of the subject premises at the time of plaintiff's accident. Thus, there is the possibility that the lease between Gazzilla Corp. and American Visual was void under the terms of the Babylon IDA lease requiring approval by Babylon IDA, and that defendant Creative, as sublessee, would have been responsible for the maintenance and repair of the entire building at the time of plaintiff's incident. Under those circumstances, defendant Creative has failed to meet its burden of demonstrating that it lacked actual or constructive notice of the alleged defective condition of a strewn cord/extension cord attached to a portable heater or that it had no control over the use of the portable heater. There is no statement, by deposition or affidavit, from Mr. Karmatz expressly indicating that he had no actual or constructive notice of the particular alleged condition during his visits to the portion of the building occupied by American Visual (*compare* ***Nunez v Bell Atlantic Corp.***, 41 AD3d 803, 840 NYS2d 370 [2d Dept 2007]; ***Cynar v U.S. Trust Corp.***, 7 AD3d 749, 776 NYS2d 900 [2d Dept 2004]). Therefore, the motion by defendant Creative for summary judgment is denied. To the extent that defendant Gazzilla Corp. was still a lessee at the time of the incident pursuant to the lease with Babylon IDA in which Gazzilla Corp. agreed to keep the building in good and safe operating order, defendant Gazzilla Corp. similarly failed to demonstrate that it lacked actual or constructive notice of the alleged defective condition of the strewn cord on the floor or that it had no control over the use of the portable heater (*compare* ***Nunez v Bell Atlantic Corp.***, 41 AD3d 803, 840 NYS2d 370; ***Cynar v U.S. Trust Corp.***, 7 AD3d 749, 776 NYS2d 900). It so follows that the portion of the cross motion for summary judgment dismissing the complaint as against Gazzilla Corp. is denied.

The proffered proof does indicate that at the time of this incident, Babylon IDA was either the out-of-possession landlord of the building pursuant to its lease with Gazzilla Corp. or had deeded the premises to Gazzilla Corp. and thus had no interest in the property. There is no evidence that Babylon IDA owned, installed, maintained, or repaired the subject portable heater or its cord and/or extension cord that plaintiff allegedly tripped over, and there is no evidence that it created the alleged defective condition of a strewn cord or had actual or constructive notice of it or had any control over the use of the portable heater (*see* ***Nunez v Bell Atlantic Corp.***, 41 AD3d 803, 840 NYS2d 370; ***Cynar v U.S. Trust Corp.***, 7 AD3d 749, 776 NYS2d 900; *see also* ***Guzman v CSC Holdings, Inc.***, 85 AD3d 1113, 926 NYS2d 613 [2d Dept 2011]; ***Romano v Browne***, 180 AD2d 515, 579 NYS2d 400 [1st Dept 1992]). Even when viewed as a structural or design defect due to the presence solely of ceiling electrical outlets, there is no evidence that Babylon IDA owed a duty to plaintiff as the out-of-possession landlord (*see* ***Alnashmi v Certified Analytical Group, Inc.***, 89 AD3d 10, 929 NYS2d 620 [2d Dept 2011]). There is no proof that Babylon IDA retained any control over the building, that it was contractually obligated to maintain and repair the building, or that it owed a duty to plaintiff by virtue of any statute (*see* ***Goggins v Nidoj Realty Corp.***, 93 AD3d 757, 940 NYS2d 674 [2d Dept 2012]). Babylon IDA demonstrated that its failure to install wall outlets did not constitute a breach of any duty imposed by statute or regulation, contract, or course of conduct (*see* ***Mercer v Hellas Glass Works Corp.***, 87 AD3d 987, 930 NYS2d 18 [2d Dept 2011]). When there is no duty toward plaintiff, the foreseeability of plaintiff's trip and fall accident is rendered irrelevant (*see* ***Arango v Vasquez***, 89 AD3d 875, 933 NYS2d 82 [2d Dept 2011]).

In opposition, plaintiff has failed to raise a triable issue of fact with respect to Babylon IDA (*see* ***Goggins v Nidoj Realty Corp.***, 93 AD3d 757, 940 NYS2d 674; ***Moltisanti v Virgin Entertainment Group, Inc.***, 91 AD3d 838, 937 NYS2d 285 [2d Dept 2012]). Plaintiff's architectural expert fails to cite violations of specific, relevant and applicable building codes (*compare* ***Madry v Heritage Holding Corp.***, 96 AD3d 1022, 947 NYS2d 588 [2d Dept 2012]). Therefore, that portion of the cross motion for summary judgment dismissing the complaint as against Babylon IDA is granted.

Accordingly the motion is denied and the cross motion is granted solely as to defendant Babylon IDA. The action is severed and continued as against the remaining defendants.

Dated: OCTOBER 22, 2012

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**