SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ *Justice* **PART** 13

WILFREDO MARTINEZ FAMILIA,

Plaintiff,

-against-

133 DYCKMAN STREET LLC, SOLIL MANAGEMENT, NRP LLC II, MP44 LLC and LARDON WEST 66th LLC,

Defendants.

INDEX NO.	159323/12
MOTION DATE	02-03-2016
MOTION SEQ. NO.	002
MOTION CAL. NO.	

The following papers, numbered 1 to 12 were read on this motion to/for Summary Judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 6
Answering Affidavits — Exhibits ____ cross motion ____	7 - 10, 11
Replying Affidavits ____	12

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that MP44LLC and Lardon West 66th Street LLC's motion for summary judgment dismissing the claims asserted against them in the Second Amended Complaint and all cross-claims, is granted.

On December 10, 2012, at approximately 2:00 pm, Wilfredo Martinez Famila claims he sustained serious injuries after slipping and falling on a wet staircase outside a small kiosk/shanty that had four or five steps and no handrail, located in the middle of a parking lot at,141-149 Dyckman Street Street, New York, New York. Plaintiff was employed as a garage manager and was in the process of bringing keys to a customer. It is plaintiff's contention that the stairs were wet from rain water and before he fully exited the kiosk, his left foot slipped on the water on the top step causing him to fall.

MP44LLC and Lardon West 66th Street LLC's (hereinafter referred to as "Lardon") motion pursuant to CPLR §3212, seeks summary judgment dismissing all causes of action asserted against them in the Second Amended Complaint together with all cross-claims.

MP44LLC argues that it is not a proper party to this action because it had no connection at all to the premises and operates a parking garage at another location, specifically, 44th Street in Manhattan. MP44LLC also argues that the License Agreement identifies only Lardon as the entity that operated the parking lot. MP44LLC claims that it had no involvement in the daily operation and maintenance, rights, obligations, duties, or responsibilities with respect to the premises and plaintiff.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996] and Alvarez v. Prospect Hospital, 68 N.Y. 2d 320, 501 N.E. 2d 572, 508 N.Y.S. 2d 923 [1986]). Once the moving party has satisfied these standards, the burden shifts to the opponent to produce contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645, 569 N.Y.S. 2d 337 [1999]).

MP44LLC has established a prima facie showing of entitlement to summary judgment dismissing the claims asserted in the Second Amended Complaint and cross-claims asserted against it. The parking lot was operated on the premises in accordance with a License Agreement between Lardon and NRP LLC, II. MP44LLC is not named on the Licensing Agreement (Mot. Exh. V). There was no deposition testimony that MP44LLC had any connection to the premises. The conclusory arguments asserted in opposition by both plaintiff and NR Property 2 LLC s/h/i/a NRP LLC II (hereinafter referred to as "co-defendant") referring to both MP44LLC and Lardon together are insufficient to avoid summary judgment. Plaintiff and co- defendant, failed to provide contradictory evidence or raise any issues of fact to establish that MP44LLC has a relationship to the premises and could be found liable for negligence.

Lardon argues that it should be granted summary judgment because as plaintiff's employer it cannot be liable pursuant to Worker's Compensation Law §§10 and 11. Lardon provides copies of plaintiff's W2 forms and paycheck stubs as proof that it is his employer (Mot. Exh. U). Lardon also provides the affidavit of its personnel director, Claudia Santana, who states that plaintiff is not an employee of Manhattan Parking Group (hereinafter referred to as "MPG"), only Lardon (Mot. Exh. 1). It is Lardon's contention that having paid for plaintiff's Worker's Compensation benefits as his employer the exemption applies.

Documentary evidence in the form of W-2 statements, paychecks and financial records are prima facie evidence of employment. The Worker's Compensation Board records alone are not sufficient to raise an issue of fact, unless the identity of the plaintiff's employer was directly involved in the dispute. Plaintiff can raise an issue of fact by establishing that his daily activities were supervised by a different entity (Sorrentino v. Ronbet Co., 244 A.D. 2d 262, 664 N.Y.S. 2d 290 [1st Dept. 1997]). Correspondence asserting that plaintiff was employed by another entity and testimony of his supervisor can raise an issue of fact as to control of his work (Singh v. Metropolitan Const. Corp., 244 A.D. 2d 262, 663 N.Y.S. 2d 870 [2nd Dept. ,1997] and Samuel v. Fourth Avenue Associates, 75 A.D. 3d 594, 906 N.Y.S. 2d 67 [2nd Dept., 2010]). Self-serving affidavits are not sufficient proof that an employer is free of liability under the Workers' Compensation Law (Boateng v. Four Plus Corp., 22 A.D. 3d 323, 802 N.Y.S. 2d 418 [1st Dept., 2005]).

Plaintiff in opposition provides a copy of the accident report which bears only the MPG logo (Opp. Exh. E). Plaintiff relies on his own deposition testimony that MPG hired him to work for Lardon, and that his uniform had the MPG Logo (Aff. In Opp. Exh. F, p. 74-77). He also relies on the deposition testimony of General Manager and part owner of MPG, Rafael Maldonado, who states that 141-149 Dyckman Street is referred to as "Lardon 66" (Aff. In Opp. Exh. G, p. 9-12, 27-30). Plaintiff provides the deposition transcript of his Supervisor, Francisco Luis Villegas' that stated he is employed by MPG (Aff In Opp. Exh. H, p. 8). Plaintiff also provides the Workers' Compensation Board "Notice of Decision" listing MPG as his employer, as proof that his employer is MPG (Aff. In Opp., Exh. I).

Lardon has not established a prima facie claim that it is plaintiff's employer pursuant to Worker's Compensation Law §§10 and 11. That combined with deposition and the documentary evidence presented by plaintiff raises an issue of fact as to whether Lardon or MPG controlled his work. The self-serving and conclusory Affidavit of Claudia Santana is not sufficient to establish prima facie entitlement to summary judgment. Lardon does not provide proof that it paid for plaintiff's Workers Compensation benefits or is named as his employer on the policy. Lardon fails to establish it is not an "alter ego" of MPG, or that plaintiff was a "special employee" assigned to work for Lardon by MPG.

Alternatively, Lardon argues that it cannot be found liable because of a storm in progress and the lack of actual or constructive notice removing any liability for negligence. A claim of storm in progress applies to an ongoing storm and avoids any obligation or liability for notice of the dangerous condition, until after the storm has ceased. The storm in progress rule typically addresses conditions occurring inside an

entrance caused by winter weather, including snow, sleet and freezing rain, but not where the only precipitation is rain (Hilsman v. Sarwil Associates, L.P., 13 A.D.3d 692, 786 N.Y.S. 2d 225 [3rd Dept., 2004]). The mere wetness of exterior walking surfaces due to rain is insufficient and does not constitute a dangerous condition (Cavorti v. Winston, 307 A.D. 2d 1018, 763 N.Y.S. 2d 777 [2nd Dept., 2003] and McGuire v. 3901 Independence Owners, Inc., 74 A.D. 3d 434, 902 N.Y.S. 2d 69 [1st Dept., 2010]). Lardon is not liable because mere wetness on the exterior staircase due to rain, does not by itself constitute a dangerous condition.

Lardon argues it is entitled to summary judgment because it did not have notice of any dangerous condition. Lardon also argues that it should be granted summary judgment on plaintiff's claims of building code violations because these do not apply to the Kiosk and facts of this case.

In a slip and fall case the defendant has the burden of proving that the condition was not visible and apparent for a sufficient length of time prior to the accident to permit its employees to discover and remedy it, and that it did not create the condition (Healy v. ARP Cable, Inc., 299 A.D. 2d 152, 753 N.Y.S. 2d 38 [1st Dept., 2002] and Gordon v. American Museum of Natural History, 67 N.Y. 2d 836, 501 N.Y.S. 2d 646, 492 N.E. 2d 774 [1986]). Whether the defendant created or was aware of the condition is a material issue of fact (Andino v. NSPD Associates, LLC, 89 A.D. 3d 414, 931 N.Y.S. 2d 856 [1st Dept., 2011]). Defendant can establish that there is a lack of constructive notice by, "producing evidence of its maintenance activities on the day of the accident and specifically that the dangerous condition did not exist when the area was last inspected or cleaned before plaintiff fell" (Ross v. Betty G. Reader Revocable Trust, 86 A.D. 3d 419, 927 N.Y.S. 2d 49 [1st Dept., 2011] and Santana v. 3410 Kingsbridge LLC, 110 A.D. 3d 435, 973 N.Y.S. 2d 23 [1st Dept., 2013]).

In opposition plaintiff and co-defendant argue that the dangerous condition was not just the rain water on the staircase, but a combination of defects. They argue that the issue is not storm in progress or whether Lardon noticed the combination of potentially dangerous conditions, but whether Lardon created the conditions that caused plaintiff to fall.

Plaintiff and co-defendant have failed to raise an issue of fact as to whether there was a pre-existing dangerous condition on the premises noticed by Lardon. Lardon has established it is entitled to summary judgment related to maintenance of the kiosk prior to the accident and that it did not create any dangerous condition.

Lardon argues that New York City Building Code §27-375 applies to interior stairs and has a limited application pursuant to New York City Building Code §27-376 to exterior stairs, which would not apply to those attached to the kiosk. Lardon claims that New York City Administrative Code §28.301.1 does not apply because it only imposes a general duty on owners to maintain the property and does not address any structural issues. Lardon also argues that as a tenant, New York City Administrative Code §28.301.1 would not apply because it specifically refers to owners.

New York City Administrative Code §28.301.1, imposes a general duty on owners of premises to maintain the property, because it does not address any specific structural defect, it is not a basis to impose liability (Stubbs v. 350 E. Fordham Rd., LLC, 117 A.D. 3d 642, 988 N.Y.S. 2d 579 [1st Dept., 2014]).

The application of New York City Building Code §27-375 requirements as stated in New York City Building Code §27-376, has been interpreted as referring to, "metal staircases that are frequently connected to, and run along, the exterior walls..." similar to those that serve near emergency exits to or from upper portions theaters and not merely exterior exits to buildings (Gaston v. New York City Housing Authority, 258 A.D. 2d 220, 695 N.Y.S. 2d 83 [1st Dept., 1999], Cepeda v. 3604-3610 Realty Corp., 298 A.D. 2d 175, 748 N.Y.S. 2d 130 [1st Dept. 2002] and Camarda v. Sputnik Restaurant Corp., 65 A.D. 3d 561, 882 N.Y.S. 2d 715 [2nd Dept., 2009]).

Lardon has established entitlement to summary judgment on plaintiff's claims of New York City Building Code and New York City Administrative Code violations. Plaintiff and co-defendant failed to raise an issue of fact as to Lardon's liability under New York City Building Code §375, §27-232, §27-375, §27-376 and New York City Administrative Code §28.301.1. Their arguments that New York City Building Code §27-232, §27-375, §27-376, when read together apply the building code to an outdoor kiosk and result in potential liability, cannot be sustained. The remainder of plaintiff and co-defendants arguments as to Lardon's creation of a dangerous condition are unavailing.

Accordingly, it is ORDERED that MP44LLC and Lardon West 66th Street LLC's (hereinafter referred to as "Lardon"), motion for summary judgment dismissing the claims asserted against them in the Second Amended Complaint and all cross-claims, is granted, and it is further,

ORDERED that the causes of action in the Second Amended Complaint and cross-claims for indemnification asserted against MP44 LLC, are severed and dismissed, and it is further,

ORDERED that that the causes of action in the Second Amended Complaint and cross-claims for indemnification asserted against Lardon West 66th Street, are severed and dismissed, and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly, and it is further,

ORDERED that the action shall continue to trial with the remaining defendant.

ENTER:

MANUEL J. MENDEZ,
J.S.C.

Dated: April 4, 2016

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE