SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 2

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Karam Malik and Basharat Begum,

Plaintiffs,

-against-

Style Management Co., Inc.,
I. Rosenberg Auto Repairs, Inc.,
AR Real Estate Management, Inc.,
514 West 44th Street, Inc.,
S & S Maintenance Corp. and
Terry Bear Cab Corp.,

Defendants.

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DECISION AND ORDER

Index Number: 152317/2014

Mot. Seq. Nos. 006, 007, and 008

Hon. Kathryn E. Freed, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THESE MOTIONS:

MOT. SEQ. NO. 006

NYSCEF Document Numbers 146-166, 202, 205, 230-233, 240-241

MOT. SEQ. NO. 007

NYSCEF Document Numbers 167-181, 199, 203, 207-217, and 234-238

MOT. SEQ. NO. 008

NYSCEF Document Numbers 182-197, 200, 204, 218-229, 239, 242-245

UPON THE FOREGOING PAPERS, THE DECISION/ORDER ON THE MOTIONS IS AS FOLLOWS:

In this personal injury action, plaintiffs Karam Malik and Basharat Begum move, pursuant to CPLR 3212 (motion sequence 006), for summary judgment on the issue of liability against all defendants. AR Real Estate Management, Inc. (AR Real Estate) moves, pursuant to CPLR 3212 (motion sequence 007), for summary judgment dismissing plaintiffs' complaint and any cross claims against it. 514 West 44th Street, Inc. (514) moves, pursuant to CPLR 3212 (motion sequence 008), for summary judgment dismissing plaintiffs' complaint and any cross claims against it. The motions are consolidated for disposition and decided as set forth below.

Underlying Allegations

Plaintiffs allege that, on March 6, 2014 at approximately 5:00 a.m., plaintiff Karam Malik (hereinafter plaintiff)[1] slipped and fell in the street (the accident location) in front of a building (the 514 Building) located at 514 West 44th Street, New York, New York (bill of particulars, items 2-5; plaintiff EBT at 18, 35, 38, 49). At the time of the alleged accident, plaintiff was a taxi driver working as an independent contractor for Style Management Co., Inc. (Style) (*id.* at 8, 16, 73-75).

Plaintiff alleged that he fell on ice at the accident location while walking to the taxi garage, and that he sustained a fractured left hip, requiring surgery (bill of particulars, item 14; plaintiff EBT at 35, 38, 49, 95). He claimed that the icy condition was caused by an individual named Byron Murillo (Murillo), who was using a hose to wash the taxis in the freezing weather (*id.* at 99-102, 156-157). Plaintiff further alleged that, while Murillo was employed by Style, all

[1]Plaintiff Basharat Begum, plaintiff's spouse, asserts a claim for loss of consortium. Complt. at pars. 2, 10.

of the defendants were controlled by Andrew Rosenberg (Rosenberg), that they operated as one entity, and that, consequently, they were all responsible for plaintiff's injury and that plaintiffs' motion for summary judgment on the issue of liability against all defendants should thus be granted (*id.* at 44-46, 166-168; Rosenberg EBT at 15).

Defendants contend that they are separate entities. They maintain that Style was a taxi cab company, which leased taxis to drivers, including plaintiff, who worked as independent contractors and whose only employees were Rosenberg, his son, Steven Rosenberg (Steven), who worked as a dispatcher, and Rosenberg's daughter, Stefanie Zygmont, who worked as bookkeeper (Rosenberg EBT at 8, 22-24, 35, 38). They further state that I. Rosenberg Auto Repairs, Inc. (IR Auto Repair) was a company that repaired and maintained the taxis that Style leased out to drivers and that it had 10-12 mechanics working as its employees (*id.* at 9, 42-46; Rosenberg EBT at 52-53). They also state that Terry Bear Cab Corp. (Terry Cab) was a cab company that leased out taxis to drivers and that it had no employees (Rosenberg EBT at 99-102). They further claim that AR Real Estate owned the building (the 518 Building) located at 518 West 44th Street, New York, New York and that it had no employees and no bank account (Rosenberg EBT at 14). They also maintain that 514 owned the 514 Building and that it had no employees and no bank account (*id.* at 17, 66). Additionally, they assert that S & S Maintenance Corp. (S&S) was a taxi meter repair company with one employee whom it shared with IR Auto Repair and that it repaired taxi meters for Style (*id.* at 11).

Defendants assert that Style paid rent for the use of the 514 and 518 Buildings by paying for the expenses of those entities (*id.* at 62-63). They allege that all of the defendants were owned by Rosenberg and had their offices located in the 518 Building, but that they each had

separate corporate books and records (*id.* at 12, 15, 22). Additionally, they contend that the allegedly negligent conduct of creating the icy condition was attributable to Murillo, a car washer who was working as either an employee or independent contractor of Style, that there were no prior complaints regarding this allegedly dangerous condition, and that plaintiff was able to observe and avoid the allegedly dangerous condition (Murillo EBT at 10-11. 17, 31, 39, 44; Steven EBT at 27-28). Thus, they contend that plaintiffs' motion for summary judgment on the issue of liability should be denied and that AR Real Estate's and 514's motion for summary judgment dismissing plaintiffs' complaint and any cross claims against these entities should be granted.

Summary Judgment Standard

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*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 and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). "Where different conclusions can

reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]). "[I]ssues as to witness credibility are not appropriately resolved on a motion for summary judgment" (*Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002]; *see also Santana v 3410 Kingsbridge LLC*, 110 AD3d 435, 435 [1st Dept 2013]).

Premises Liability

Generally, a landowner must act as a reasonably prudent person in maintaining its property in a reasonably safe condition under all the circumstances, including the likelihood of injury, the potential seriousness of injury and the burden of avoiding the risk (*Peralta v Henriquez*, 100 NY2d 139, 144 [2003]). Additionally, in order to be held liable, a party must be aware of the alleged defective or dangerous condition, either through having created it, actual knowledge of the condition, or constructive notice of it through the defect's visibility for a sufficient amount of time prior to the accident to enable a defendant to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Moreover, "[a] defendant moving for summary judgment in a slip-and-fall action has the initial burden of showing that it neither created, nor had actual or constructive notice of the dangerous condition that caused plaintiff's injury" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]; *Amendola v City of New York*, 89 AD3d 775, 775 [2d Dept 2011]; *Schiano v Mijul, Inc.*, 79 AD3d 726, 726 [2d Dept 2010]).

A party may be responsible for a dangerous condition of ice when it "created the icy condition on which the plaintiff slipped" (*Sescila v Great S. Bay Estates Homeowner's Assn.*, 69

AD3d 604, 605 [2d Dept 2010]; *see also Cuillo v Fairfield Prop. Servs., L.P.*, 112 AD3d 777, 778 [2d Dept 2013]).

However, "[n]egligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination. Only if it can be concluded as a matter of law that defendant was negligent, may summary judgment be granted in a negligence action" (*Ugarizza v Schmeider*, 46 NY2d 471, 474 [1979]; *see also McCummings v New York City Tr. Auth.*, 81 NY2d 923, 926 [1993], *cert denied* 510 US 991 [1993]).

Alter Ego Liability

"Since, by definition, a corporation acts through its officers and directors, to hold a shareholder/officer ... personally liable, a plaintiff must do more than merely allege that the individual engaged in improper acts or acted in 'bad faith' while representing the corporation .... [Rather, he must allege] acts amounting to an abuse or perversion of the corporate form" (*East Hampton Union Free School Dist. v Sandpebble Bldrs.*, Inc., 16 NY3d 775, 776 [2011]).

Common ownership and common control does not meet the threshold of complete domination and abuse of the corporate form for the purpose of wrongdoing in the transaction at issue (*East Hampton*, 16 NY3d at 776; *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141-142 [1993]; *Nuevo El Barrio Rehabilitacion de Vivienda y Economia, Inc. v Moreight Realty Corp.*, 87 AD3d 465 [1st Dept 2011]; *Itamari v Giordan Dev. Corp.*, 298 AD2d 559, 560 [2d Dept 2002]).

Discussion

Plaintiffs have presented evidence that Murillo was washing taxis at the accident location on the morning of March 6, 2014, that the water froze, and that, due to this conduct, plaintiff slipped and fell. They assert that, since Murillo was working for Style and Rosenberg stated that "[e]verything goes through Style," all defendants are responsible for the icy condition at the Accident Location (Rosenberg EBT at 15).

Since plaintiffs are seeking summary judgment, this Court must accept the nonmoving parties' version of contested facts and accord them all reasonable inferences for the purpose of resolving the motion (*see Vega*, 18 NY3d at 503; *Branham*, 8 NY3d at 932).

While all defendants are owned and controlled by Rosenberg, common ownership and control are insufficient to pierce separate identities (*see East Hampton*, 16 NY3d at 776; *Morris*, 82 NY2d at 142). Defendants have presented evidence that they each have separate corporate books and records and that they are organized differently for distinct purposes. They assert that IR Auto Repair had between 10 and 12 mechanics, who are employees, while AR Real Estate, 514, and Terry Cab have no employees, S & S had one employee that it shared with IR Auto Repair, and Style had only Rosenberg and his children as employees and that the drivers who used its taxis were independent contractors. To pierce the corporate veil, plaintiffs must show that defendants "abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice" (*East Hampton*, 16 NY3d at 776, quoting *Morris*, 82 NY2d at 142; *see also Johnson v Law Off. of Kenneth B. Schwartz*, 145 AD3d 608, 610 [1st Dept 2016]). Plaintiffs have not made such a showing and, consequently, the portion of their motion that seeks summary judgment on the issue of liability against defendants based upon alter ego liability must be

denied.

Plaintiffs' motion for summary judgment against Style is based upon Murillo's alleged creation of the allegedly dangerous icy condition at the accident location as a result of his washing taxis. Defendants have presented evidence that plaintiff was in a position to observe and, thereby, to avoid, the icy condition at the accident location. As noted above, "[n]egligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination. Only if it can be concluded as a matter of law that defendant was negligent, may summary judgment be granted in a negligence action" (*Ugarizza*, 46 NY2d at 474). This Court finds that the reasonableness of the actions of Murillo and plaintiff, and the extent to which each may have been responsible for the accident, is an issue more appropriately evaluated by a finder of fact and, accordingly, the portion of plaintiffs' motion which seeks summary judgment on the issue of liability against Style is denied.

514 has presented evidence that it owned the 514 Building and that it had no employees and AR Real Estate has presented evidence that it owned the 518 Building and that it had no employees. These defendants have also presented evidence that there were no prior complaints regarding the purportedly dangerous icy condition at the accident location and that the said condition was created by Murillo, an employee of Style. Plaintiffs have not presented any evidence that these landowners had any actual or constructive notice of the icy condition or that they created it. Therefore, AR Real Estate's motion for summary judgment dismissing the complaint and any cross claims against it and 514's motion for summary judgment dismissing the complaint and any cross claims against it are granted.

Order

In light of the foregoing, it is hereby:

ORDERED that plaintiffs' motion for summary judgment on the issue of liability (motion sequence 006) is denied; and it is further

ORDERED that defendant AR Real Estate Management, Inc.'s motion for summary judgment dismissing plaintiffs' complaint and any cross claims against it (motion sequence 007) is granted and the complaint is dismissed against said defendant in its entirety, with costs and disbursements as taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant 514 West 44th Street Inc.'s motion for summary judgment dismissing plaintiffs' complaint and any cross claims against it (motion sequence 008) is granted and the complaint is dismissed against said defendant in its entirety, with costs and disbursements as taxed by the Clerk of the Court upon submission of an appropriate bill of costs and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: July 10, 2017

ENTER:

HON. KATHRYN E. FREED, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT