SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

DAVID SOLEMIMANI,

Plaintiff,

- against -

VW CREDIT, INC. and VOLKSWAGEN GROUP OF AMERICA, INC.,

Defendants.

TRIAL/IAS PART 35
NASSAU COUNTY

Index No.: 603335/15
Motion Seq. No.: 01
Motion Date: 05/22/17
XXX

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	**1**
Affirmation in Opposition	**2**
Reply Affirmation	**3**

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants move, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint. Plaintiff opposes the motion.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, on April 5, 2014, at approximately 9:30 a.m., at the Open Road Manhattan dealership located at 802 11th Avenue, New York, New York. Plaintiff, in the course of his employment at said dealership, was in the process of unlocking the dealership's glass front entrance doors when the

deadbolt of the front doors malfunctioned and caused him to rupture tendons in his right arm. *See* Defendants' Affirmation in Support Exhibit C. Defendant VW Credit, Inc. owned the subject premises and leased same to defendant Volkswagen of America, Inc. Defendant Volkswagen of America, Inc. subleased one half of the premises to Open Road Audi Manhattan and the other half of the premises to Open Road Volkswagen.

Plaintiff commenced the action with the filing of a Summons and Verified Complaint on or about June 2, 2015. *See* Defendants' Affirmation in Support Exhibit A. Issue was joined on or about July 30, 2015. *See* Defendants' Affirmation in Support Exhibit B.

Counsel for defendants contends that, "[n]either VW Credit, Inc. nor Volkswagen of America, Inc. retained any obligations in and to the premises. Nor did either Defendant have any interest in either of the two dealerships operating out of the premises. Based on this, there can be no finding of negligence against either defendant and this Court should dismiss the Complaint."

In support of the instant motion, defendants submit the transcript from plaintiff's Examination Before Trial ("EBT"). *See* Defendants' Affirmation in Support Exhibit D. Counsel for defendants asserts that plaintiff testified, in pertinent part, that, "[p]laintiff was involved in an accident on April 5, 2014 at Open Road Volkswagen and Audi of Manhattan.... Plaintiff was the General Manager of that dealership.... Plaintiff arrived at work at approximately 8:30a.m.... At approximately 8:45a.m. one of the dealers informed Plaintiff that the dead bolt on the front door was jammed.... Plaintiff attempted to loosen up the deadbolt and in the process injured his bicep.... According to Plaintiff, the subject doors did jam on prior occasions and when they did Plaintiff would report the condition to employees of the dealership, George Capella, Steven Park and Mike Morias.... Of significance, Plaintiff also confirmed that on prior occasions the owner of

the dealership hired repairmen and paid repairmen to fix the subject doors.... Plaintiff also reported the issues with the subject doors to Michael Rueckert, the regional representative of the dealership." *See id.*

Richard Vassar ("Vassar"), Director of Risk and Insurance with defendant VW Credit, Inc., testified on behalf of defendants at an EBT on December 19, 2016. *See* Defendants' Affirmation in Support Exhibit E. Counsel for defendants submits that Vassar testified, in pertinent part, that, "Mr. Vassar confirmed that VW Credit, Inc., owned the subject property in April 2014.... Mr. Vassar also confirmed that as of April 2014 VW Credit, Inc. had leased the subject property to Volkswagen Group of America.... Finally, Mr. Vassar confirmed that Volkswagen Group of America, in turn, subleased the property to two separate entities: Open Road of New York City, LLC and Open Road of Manhattan, LLC.... Mr. Vassar confirmed that the Open Road entities operated car dealerships out of the subject premises.... Mr. Vassar confirmed that neither VW Credit, Inc. nor Volkswagen Group of America had a presence at the property during the lease terms with the Open Road entities.... Mr. Vassar also confirmed that the Open Road entities were solely responsible for maintaining the premises.... Mr. Vassar testified that neither VW Credit nor Volkswagen ever received any complaints about he (*sic*) conditions of the premises prior to the date of the accident.... Mr. Vassar specifically denied knowledge of prior accidents involving the subject door at the premises.... Mr. Vassar testified clearly that neither VW Credit, Inc. nor Volkswagen Group of America had any responsibility in and to the door that was involved in the subject accident.... Nor did either VW Credit Inc. or Volkswagen Group of America receive any complaints about the subject doorway prior to the date of the accident." *See id.*

Counsel for defendants further submits that, "[r]elevant portions of the Lease Agreement entered into between VW Credit, Inc. as Landlord and Volkswagen Group of America, Inc. as Tenant are annexed hereto.... On the date of the incident VW Credit, Inc. was the owner of the premises. In 2009 VW Credit leased the premises to Volkswagen Group of America, Inc. Under the Lease Agreement Volkswagen Group of America is responsible to maintain the premises and to defend and indemnify VW Credit Inc.... A copy of the Sublease entered into between Volkswagen Group of America, Inc. as Landlord and Open Road of New York City as Subtenant is annexed hereto.... A copy of the Sublease entered into between Volkswagen Group of America, Inc. as Landlord and Open Road of Manhattan as subtenant is annexed hereto.... Pursuant to these two Sub-Lease Agreements, Volkswagen Group of America sub-leased one half of the premises to Open Road New York City and the other half of the premises to Open Road of Manhattan. Under the sublease agreements, both sub-tenants are responsible to maintain their leased spaces and to indemnify and defend Volkswagen Group of America, Inc. for 'any injury or death of any person in or about the Premises Common Areas or Dealership Complex by or from any cause whatsoever'. It is respectfully submitted to the Court that the moving defendants are out-of-possession lessors of the aforementioned property and do not owe a duty of care to plaintiff. Accordingly, all claims against them must be dismissed.... Based on the evidence set forth above, VW CREDIT, INC. was an out of possession owner and VOLKSWAGEN GROUP OF AMERICA, INC. was an out of possession lessor of the Dealership Premises where Plaintiff's accident occurred. Moreover, neither defendant retained any control over the Dealership Premises nor was either defendant contractually obligated to repair or maintain the Dealership Premises. To the contrary, under the Sub-Lease Agreements in effect the date of Plaintiff's accident, both dealerships of the Dealership Premises were

responsible to maintain, clean and repair the Dealership Premises including the location where Plaintiff's accident happened. Significantly, Plaintiff testified that he was caused to sustain an injury when trying to loosen a jam in the front door of the Dealership Premises. In light of this it is clear that Plaintiff's accident was not caused by a structural or design defect in the Premises. In fact, Plaintiff has not provided any evidence to support a finding that there was either a structural or design defect at the Dealership Premises or that a structural or design defect caused his accident. Rather, Plaintiff clearly testified that his accident happened solely as a result of a jam in the lock of the front door of the Premises. Even if this Court finds that the subject door was defective and that the defect in the door caused Plaintiff's accident, both Defendants are still entitled to summary judgment. As is set forth above, neither Defendant participated in installing the subject door and locking system nor did either Defendant have any knowledge of the functionality of the locking system for the subject door. Finally, and most significantly, the Dealership, and not the defendants, repaired the subject door on multiple occasions prior to the happening of this accident. Finally, Plaintiff has failed to allege and/or to provide any evidence to support a finding that either the Defendant violated a specific statutory safety provision as is required in order to hold an out-of-possession owner liable under a theory of constructive notice." *See* Defendants' Affirmation in Support Exhibits G-I.

In opposition to the motion, counsel for plaintiff submits, in pertinent part, that, "[w]hile attempting to open the front door of the premises, which consisted of two dead bolts, the lower dead bold would not disengage, and Plaintiff found himself needing to go down to the bottom of the door and open the lower bolt, which would have then released pressure on the upper bolt and allow that to also disengage and the door to open.... As Mr. Solemiani (*sic*) tried to turn the lock and open the door, it was 'dead stuck, like frozen.' He then put his right arm out to try and pull

the door and unlock it, and 'stretched [his] arm so far that it sounded like a rubber band snapping in my arm. Excruciating pain.'... Mr. Solemiani (*sic*) testiified (*sic*) this was 'not the first time that this had occurred.'... Notwithstanding the morass of leases and subleases behind which the property owner seeks to hide, none of those documents serve as a complete shield, nor do they completely divest the owner of the property from any presence (*sic*) threat. In fact, with regard to the initial lease between VW Credit, Inc. and Volkswagen Group of America, Inc., same allows VW Credit, Inc. To (*sic*) 'enter upon **and examine** any of the Leased Premises at reasonable times after reasonable notice.'... Further, with regard to the subsequent leases between Volkswagen Group of America, Inc., and the 'Open Road' entities referenced in Defendants' moving papers, the primary lease between VW Credit, Inc. and Volkswagen Group of America, Inc., states that 'no such sublease shall release the Tenant from any of its obligations or liabilities under this Lease.... Similarly, the sub-leases between Volkswagen Group of America and the 'Open Road' entities provides (*sic*) that Volkswagen Group of America 'shall have the right at all reasonable times **to enter and inspect** the Premises and Common Areas, and to bring others to inspectthe (*sic*) Premises and Common Areas, whether for purposes of selling, mortgaging or appraising the Premises, Common Areas and or Dealership **or for any other purpose**.'... Despite the foregoing, and in the face of detailed, clearly delineated rights of entry, inspection and control, Defendants move for Summary Judgment claiming there are no issues of fact with regard to their potential liability. As detailed above this assertion is refuted by the lease provisions contained in the master and subleases, which as opposed to 'triple net' or other leases, allow the owner of the property and the lessor of the property to not just enter but to examine and inspect the premises, for any reason, at any time provided they give notice. Further, the master lease bars Volkswagen Group of America, Inc. from transferring any of its obligations to any sublessee. It is

therefore undeniable that despite Defendants (*sic*) contentions, at the very least real triable issues of fact exist in the issue (*sic*) at hand, as there is sufficient evidence from which a jury could find Defendants liable for the condition on the property that caused Plaintiff's accident.... In the case at bar, it is clear that despite significant efforts to create a shield for the property owner and primary lessee/sublessor, the leases between the various entities do just the opposite. Both Defendant VW Credit, Inc. and Defendant Volkswagen Group of America Inc. retained not just a right of re-entry in the event of a default, as is standard, but also the right to re-enter the premises, for any reason, at any time as long as notice is provided to the tenant. As such, not only the potential for constructive notice exists, based upon their presence at the site, but also actual notice as Mr. Solemiani (*sic*) testified that this was not the first time this issue had arisen. As such, questions of fact, at the very least, exist as to notice and the potential negligence of the defendants herein, and their motion for summary judgment should be denied in its entirety." *See* Defendants' Affirmation in Support Exhibits G-I.

In reply to the opposition, counsel for defendants submits that "[a]gain, Plaintiff does not dispute that VW CREDIT, INC. was an out of possession owner and VOLKSWAGEN GROUP OF AMERICA, INC. was an out of possession lessor of the Dealership Premises where Plaintiff's accident occurred. Plaintiff's opposition hinges solely on the terms of the lease which allows Defendants a broad right of reentry to the subject premises. Again, it is well settled that an out-of-possession owner or lessor is not liable for injuries that occur on the premises unless the owner or lessor has retained control over the premises or is contractually obligated to repair or maintain the premises. Here neither VW CREDIT, INC. nor VOLKSWAGEN GROUP OF AMERICA, INC. had control over the subject premises nor was contractually obligated to repair or maintain the premises. Therefore, Plaintiff's argument that Defendants owed a duty to Plaintiff

because of the sublease agreements' allowance of a broad right of reentry, is incorrect.... In addition to the terms of the sublease, this lack of control was confirmed by Defendants' witness, who confirmed that the Open Road entities operated car dealerships out of the subject premises.... Mr. Vassar confirmed that neither VW Credit, Inc. nor Volkswagen Group of America had a presence at the property during the lease terms with the Open Road entities.... Mr. Vassar also confirmed that the Open Road entities were solely responsible for maintaining the premises.... Most importantly, at no point did Defendants enter, inspect, or repair any portion of the premises. As such, neither defendant retained any control over the Dealership Premises nor was either defendant contractually obligated to repair or maintain the Dealership Premises. Again, under the Sub-Lease Agreements in effect on the date of the Plaintiff's accident, both dealerships, Open Road Audi Manhattan and Open Road Volkswagen Manhattan, were responsible to maintain, clean and repair the Dealership Premises including the location where Plaintiff's accident happened. In addition to being out-of-possession with no control over the subject premises and no contractual obligations to repair or maintain the subject premises, Defendants were never placed on notice of any allegedly defective condition.... Contrary to Plaintiff's argument, Defendants were never placed on notice of the alleged condition and no complaints were ever voiced to them. Mr. Vassar testified that neither VW Credit nor Volkswagen ever received any complaints about the conditions of the premises prior to the date of the accident.... Mr. Vassar specifically denied knowledge of prior accidents involving the subject door at the premises.... Mr. Vassar testified clearly that neither VW Credit, Inc. nor Volkswagen Group of America had any responsibility in and to the door that was involved in the subject accident.... Nor did either VW Credit Inc. or Volkswagen Group of America receive any complaints about the subject doorway prior to the date of the accident.... Furthermore, Plaintiff

confirmed that all alleged complaints were made to the Dealership.... Furthermore, the Dealership, and not the defendants, repaired the subject door on multiple occasions prior to the happening of this accident." *See* Defendants' Affirmation in Support Exhibits D and E.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp., supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Issue finding, rather than issue determination, is the key to summary judgment. *See In re Cuttitto Family Trust*, 10 A.D.3d 656, 781 N.Y.S.2d 696 (2d Dept. 2004); *Greco v. Posillico*, 290 A.D.2d 532, 736 N.Y.S.2d 418 (2d Dept. 2002); *Gniewek v. Consolidated Edison Co.*, 271 A.D.2d 643, 707 N.Y.S.2d 871 (2d Dept. 2000); *Judice v. DeAngelo*, 272 A.D.2d 583, 709 N.Y.S.2d 427 (2d Dept. 2000). The court should refrain from making credibility determinations (*see S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 357 N.Y.S.2d 478 (1974); *Surdo v. Albany Collision Supply, Inc.*, 8 A.D.3d 655, 779 N.Y.S.2d 544 (2d Dept. 2004); *Greco v. Posillico, supra*; *Petri v. Half Off Cards, Inc.*, 284 A.D.2d 444, 727 N.Y.S.2d 455 (2d Dept. 2001)), and the papers should be scrutinized carefully in the light most favorable to the party opposing the motion. *See Glover v. City of New York*, 298 A.D.2d 428, 748 N.Y.S.2d 393 (2d Dept. 2002); *Perez v. Exel Logistics, Inc.*, 278 A.D.2d 213, 717 N.Y.S.2d 278 (2d Dept. 2000).

Summary judgment is a drastic remedy which should not be granted when there is any doubt about the existence of a triable issue of fact. *See Sillman v. Twentieth Century-Fox Film Corp., supra*. It is nevertheless an appropriate tool to weed out meritless claims. *See Lewis v. Desmond*, 187 A.D.2d 797, 589 N.Y.S.2d 678 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N.A.*, 82 A.D.2d 168, 442 N.Y.S.2d 610 (3d Dept. 1981).

In order for plaintiff to make a *prima facie* case of negligence, he or she must establish the existence of a dangerous or defective condition in the first instance. *See Pillato v. Diamond*,

209 A.D.2d 393, 618 N.Y.S.2d 446 (2d Dept. 1994). Plaintiff must also demonstrate that the defendant's negligence was a substantial cause of the incident. *See Howard v. Poseidon Pools, Inc.*, 72 N.Y.2d 972, 534 N.Y.S.2d 360 (1988).

Under New York law, a landowner must exercise reasonable care to maintain its premises in a safe condition in view of the circumstances, accounting for the possibility of injury to others, the seriousness of such injury and the burden of avoiding such risk. *See Witherspoon v. Columbia University*, 7 A.D.3d 702, 777 N.Y.S.2d 507 (2d Dept. 2004).

An owner of property has a duty to maintain the property in a reasonably safe condition. *See Kellman v. 45 Tieman Assoc.*, 87 N.Y.2d 871, 638 N.Y.S.2d 937 (1995); *Basso v. Miller*, 40 N.Y.2d 233, 386 N.Y.S.2d 564 (1976); *Kruger v. Donzelli Realty Corp.*, 111 A.D.3d 897, 975 N.Y.S.2d 689 (2d Dept. 2013). In order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence. *See Lezama v. 34-15 Parsons Blvd., LLC*, 16 A.D.3d 560, 792 N.Y.S.2d 123 (2d Dept. 2005).

Premises liability, as with liability for negligence, generally begins with a duty. It is axiomatic that, before a defendant may be held liable for negligence, it must be shown that the defendant owes a duty to the plaintiff. In the absence of a duty of care, there is no breach, and, without a breach there, is no liability. *See Pulka v. Edelman*, 40 N.Y.2d 781, 390 N.Y.S.2d 393 (1976); *Izzo v. Proto Constr. & Dev. Corp.*, 81 A.D.3d 898, 917 N.Y.S.2d 287 (2d Dept. 2011). The existence and extent of duty is a question of law. Although a jury determines whether, and to what extent, a particular duty was breached, the Court must first to determine whether any duty exists. *See Alnashmi v. Certified Analytical Group, Inc.*, 89 A.D.3d 10, 929 N.Y.S.2d 620 (2d

Dept. 2011); *Lexington Vil. Condominium v. Scottsdale Ins. Co.*, 136 A.D.3d 645, 25 N.Y.S.3d 259 (2d Dept. 2016); *Darby v. Compagnie Natl. Air France*, 96 N.Y.2d 343, 728 N.Y.S.2d 731 (2001).

It is well settled that liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property. Where none of the factors are present, a party cannot be held liable for injuries caused by a dangerous or defective condition on said property. *See O'Toole v. Vollmer*, 130 A.D.3d 597, 13 N.Y.S.3d 213 (2d Dept. 2015); *Suero-Sosa v. Cardona*, 112 A.D.3d 706, 977 N.Y.S.2d 61 (2d Dept. 2013); *Sanchez v. 1710 Broadway Inc.*, 79 A.D.3d 845, 915 N.Y.S.2d 272 (2d Dept. 2010).

As a general matter, an out-of-possession landlord may not be liable for negligence with respect to the condition of property after the transfer of possession and control to a tenant, unless the landlord is either contractually obligated to make repairs and/or maintain the premises, or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense, and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision. *See Hawkins v. Stewart & Clinton Co., LLC*, 133 A.D.3d 567, 568, 18 N.Y.S.3d 450 (2d Dept. 2015). Although reservation of a right of reentry may constitute sufficient retention of control to impose liability on an out-of-possession landlord for injuries caused by a dangerous condition which constitutes a violation of a duty imposed by statute, this exception only applies where a specific statutory violation exists and there is a significant structural or design defect. *See Couluris v. Harbor Boat Realty, Inc.*, 31 A.D.3d 686, 820 N.Y.S.2d 282 (2d Dept. 2006). In the instant matter, plaintiff does not allege the existence of specific statutory safety violation or the existence of a significant structural or design defect. *See Ingargiola v. Waheguru Mgt.*, 5 A.D.3d 732, 774 N.Y.S.2d 557 (2d Dept. 2004).

In the absence of a duty of care, premised on ownership by an out-of-possession owner/lessor who made no special use of the premises, defendants cannot be held liable in negligence for plaintiff's injury. Furthermore, defendants had no constructive notice of the alleged defect since plaintiff testified that all alleged complaints concerning the subject door were made to the dealership and that it was the dealership, not the defendants, who repaired the subject door on multiple occasions prior to the happening of this accident.

Accordingly, defendants' motion, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint, is hereby **GRANTED**.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
October 17, 2017

ENTERED
OCT 18 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE