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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS IA Part 11
Justice

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FLORENCE CAMPBELL,

Plaintiff,

-against-

I.R. PARKING, INC., 112-118 WEST 25TH LLC, STEVE & AL'S GARAGE, INC. THE GARAGE, INC., EXTELL DEVELOPMENT COMPANY and LMG REALTY, LLC,

Defendants.

Index Number 5578 2009

Motion Date April 13, 2011

Motion Cal. Number 4

Motion Seq. No. 3

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112-118 WEST 25TH LLC.,

Third-Party Plaintiff,

-against-

STEVE & AL'S GARAGE, INC.,

Third-Party Defendant.

Third-Party Index No.: 350297/09

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112-118 WEST 25TH LLC and EXTELL DEVELOPMENT COMPANY,

Second Third-Party Plaintiffs,

-against-

112 W. 25th ST. PARKING CORP.,

Second Third-Party Defendant.

Second Third-Party Index No.:

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The following papers numbered 1 to 24 read on this motion by defendant/third-party plaintiff/second third-party plaintiff 112-118 West 25th LLC (112-118) and defendant/second third-party plaintiff Extell Development Company (Extell) for summary judgment in their favor dismissing plaintiff's complaint and any and all cross claims against them or, in the alternative, for summary judgment on their third-party action and cross claims against defendant Steve & Al's Garage, Inc. (Steve & Al) and defendant/third-party defendant The Garage, Inc. s/h/a Steve & Al's Garage, Inc. (The Garage) on the issues of contractual and common-law indemnification, and breach of contract, with the reimbursement of all costs, fees and expenses, and on this cross motion by defendant I.R. Parking, Inc.(IR Parking) for summary judgment in its favor dismissing plaintiff's complaint and all cross claims as against it and for summary judgment in its favor on its cross claims against defendant Steve & Al and defendant/third-party defendant The Garage for contribution and common-law and contractual indemnification.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits	5-8
Answering Affidavits - Exhibits	9-14
Reply Affidavits	15-24

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This is an action by plaintiff seeking damages for personal injuries allegedly sustained on October 11, 2008, when she tripped and fell on an uneven pavement in a multistory parking garage located at 112-118 West 25th Street, New York, New York, owned by defendant/third-party plaintiff/second third-party plaintiff 112-118 and managed by defendant/second third-party plaintiff Extell. Pursuant to a lease dated May 1, 1995, 112 West 25 Company, a New York General Partnership, leased the subject premises to defendant LMG Realty, LLC (LMG)[1] for a period of 15 years. On or about May 11, 1995, defendant LMG entered into a sublease agreement with defendant Steve & Al for the premises. On or about June 20, 2007, defendant LMG entered into an assignment and assumption of that sublease agreement with owner, defendant/third-party plaintiff/second third-party plaintiff 112-118. Pursuant thereto, defendant/third-party plaintiff/second

[1]The action has been discontinued against defendant LMG.

third-party plaintiff 112-118 assumed all rights, title and interest as sublandlord under the sublease agreement with subtenant, defendant Steve & Al.

The sublease agreement was for a term of ten years commencing on December 1, 1998, and expiring on November 30, 2008. Pursuant to the terms thereof, the subtenant, defendant Steve & Al was to maintain the premises, which included, among other things, all necessary repairs to the premises, interior and exterior, structural and nonstructural. The sublease also contains an indemnification provision whereby defendant Steve & Al agreed to defend and indemnify defendant/third-party plaintiff/second third-party plaintiff 112-118 from and against all liabilities, obligations, damages, penalties, claims, costs and expenses, including reasonable attorneys' fees, as a result of any breach of defendant Steve & Al or the agents, contractors, employees, invitees or licensees of defendant Steve & Al, of any covenant or condition of the sublease, or the carelessness, negligence or improper conduct of defendant Steve & Al or the agents, contractors, employees, invitees or licensees of defendant Steve & Al. The sublease further contains an insurance clause requiring defendant Steve & Al to provide and keep in force general public liability insurance and to name defendant/third-party plaintiff/second third-party plaintiff 112-118 as an additional insured.

In the sublease agreement, an existing sublease with second third-party defendant 112 West 25th Street Parking Corp. is acknowledged, as is the fact that the principals thereof are the same as subtenant defendant Steve & Al's principals. The date of expiration of that existing sublease was November 30, 1998. Defendant IR Parking managed the parking garage pursuant to a December 2004 Parking Management Agreement (Parking Agreement) with second third-party defendant 112 West 25th Street Parking Corp. In that Parking Agreement, it is acknowledged that Alan Boss and The Estate of Stavros Pavlounis each own 50% of 112 West 25th Street Parking Corp. The Parking Agreement was for a term of one year, and was to be renewed each year unless otherwise terminated. Pursuant to the terms of the Parking Agreement, second third-party defendant 112 West 25th Street Parking Corp. was responsible for all repairs of a structural nature, including pavement repair, and not defendant IR Parking.

Defendant/third-party defendant The Garage operated a flea market, on Saturdays and on Sundays, which was located on all, but the top floor of the parking garage. The top floor was still used for parking on the weekends. Alan Boss, who is president of both defendant/third-party defendant The Garage and defendant Steve & Al, testified that he did not know if there was a formal signed agreement between defendant Steve & Al and defendant/third-party defendant The Garage for the operation of the flea market. He also testified that defendant/third-party defendant The Garage was a sub-lessee to defendant Steve & Al, but paid rent directly to owner, defendant/third-party plaintiff/second third-party plaintiff 112-118. Alan Boss further testified that he thought that there may have been a

formal agreement between defendant Steve & Al and defendant IR Parking for the latter party's operation of the parking garage.[2]

Plaintiff, who was a vendor at that flea market, testified that on the date of the accident, she tripped and fell due to an approximately five-inches round hole on the ground level of the parking garage located in the aisle outside of booth 21 at the flea market. She also testified that she had seen the hole prior to that date, but had not made any complaints about it.

It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (*See Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980].) Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers. (*See Winegrad v New York Univ. Med. Ctr.*, *supra*.) Once this showing has been made, however, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a triable issue of fact. (*See Alvarez v Prospect Hosp.*, *supra*.)

It is also well settled that a property owner or lessee has a duty to maintain the property in a reasonably safe condition and may be held liable for injuries arising from a dangerous or defective condition on the property if such owner or lessee either created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it. (*See Basso v Miller*, 40 NY2d 233 [1976]; *see also Sowa v S.J.N.H. Realty Corp.*, 21 AD3d 893 [2005]; *Freidah v Hamlet Golf and Country Club*, 272 AD2d 572 [2000].)

In general, an out-of-possession owner or lessor is not liable for injuries that occur on its premises unless it has retained control over the premises or is contractually obligated to repair unsafe conditions. (*See Lindquist v C & C Landscape Contractors, Inc.*, 38 AD3d 616 [2007]; *see also Scott v Bergstol*, 11 AD3d 525 [2004]; *Knipfing v V&J, Inc.*, 8 AD3d 628 [2004].) Reservation of the right of entry for inspection and repair may constitute sufficient retention of control to impose liability upon an out-of-possession owner or lessor for injuries caused by a dangerous condition, but only where the condition violates a specific statutory

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[2]The only parking agreement produced for the subject premises was the December of 2004 Parking Agreement between second third-party defendant 112 West 25th Street Parking Corp., the principals of which, as noted herein, were the same as defendant Steve & Al's principals, and defendant IR Parking.

provision and there is a significant structural or design defect. (*See Knipfing v V&J, Inc.*, *supra*; *see also Ingargiola v Waheguru Management, Inc.*, 5 AD3d 732 [2004]; *Thompson v Port Authority of New York and New Jersey*, 305 AD2d 581 [2003].)

In this case, defendant/third-party plaintiff/second third-party plaintiff 112-118 and defendant/second third-party plaintiff Extell presented competent evidence demonstrating their entitlement to summary judgment as a matter of law. This evidence established that defendant/third-party plaintiff/second third-party plaintiff 112-118 did not exercise control over the subject premises or assume any contractual responsibility to maintain and repair the premises. Defendant Steve & Al, rather, was contractually obligated under the terms of the May 11, 1995 sublease agreement to repair and maintain the subject premises. Thus, the burden shifts to those parties opposing the motion to demonstrate the existence of a triable issue of fact. (*See Alvarez v Prospect Hosp.*, *supra*.)

Plaintiff, defendant/third-party defendant The Garage and defendant Steve & Al have not met this burden. Their contention that an issue of fact exists concerning whether defendant/third-party plaintiff/second third-party plaintiff 112-118 was an out-of-possession owner is unsupported and without merit. In addition, although defendant/third-party plaintiff/second third-party plaintiff 112-118 retained the right to enter the premises for inspection and repair, such a reservation of right will demonstrate sufficient control to impose liability upon an out-of-possession owner for injuries caused by a dangerous condition on premises only where the injuries are proximately caused by a significant structural or design defect which violates a specific statutory provision. (*See Nikolaidis v La Terna Restaurant*, 40 AD3d 827 [2007]; *see also Lowe-Barrett v City of New York*, 28 AD3d 721 [2006]; *Thompson v Port Authority of New York and New Jersey*, *supra*.) Plaintiff, defendant/third-party defendant The Garage and defendant Steve & Al, here, failed to allege any specific statutory violation. (*See Ingargiola v Waheguru Management, Inc.*, *supra*.) Said parties also failed to offer evidence establishing the existence of a significant structural or design defect. (*See Chery v Exotic Realty, Inc.*, 34 AD3d 412 [2006]; *see also Deebs v Rich-Mar Realty Associates*, 248 AD2d 185 [1998]; *Aprea v Carol Management Corp.*, 190 AD2d 838 [1993].)

Plaintiff further contends that additional discovery is necessary. This contention is no more than a mere hope that disclosure will reveal something helpful to defeat the motion, and insufficient to forestall summary judgment. (*See Commissioners of the State Insurance Fund v Concord Messenger Service, Inc.*, 34 AD3d 355 [2006]; *see also Fulton v Allstate Ins. Co.*, 14 AD3d 380 [2005]; *Kennerly v Campbell Chain Co.*, 133 AD2d 669 [1987].)

Accordingly, the motion of defendant/third-party plaintiff/second third-party plaintiff 112-118 and its managing agent, defendant/second third-party plaintiff Extell, for summary

judgment in their favor is granted and plaintiff's complaint and all cross claims against them are dismissed.

Defendant IR Parking cross-moves for summary judgment. While a cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party (*see* CPLR 2215; *see also Mango v Long Is. Jewish-Hillside Med. Center*, 123 AD2d 843 [1986]; *Kleeberg v City of New York*, 305 AD2d 549 [2003]), a technical defect of this nature may be disregarded where, as in this case, there is no prejudice, and the opposing parties had ample opportunity to be heard on the merits of the relief sought. (*See* CPLR 2001; *see also Daramboukas v Samlidis*, _AD3d_, 2011 NY Slip Op 3796 [2d Dept 2011]; *Sheehan v Marshall*, 9 AD3d 403 [2004].)

Defendant IR Parking presented competent evidence demonstrating its entitlement to summary judgment as a matter of law. This evidence, which included, among other things, the parties' examinations before trial testimony, established that defendant IR Parking was not responsible for the alleged defective condition and also did not create or have actual or constructive notice of it. Pursuant to the terms of the 2004 Parking Agreement, second third-party defendant 112 West 25th Street Parking Corp. was responsible for all repairs of a structural nature, not defendant IR Parking. Moreover, pursuant to the terms of the subject sublease agreement, subtenant, defendant Steve & Al, was to maintain the subject premises, which included, among other things, all necessary repairs to the premises, interior and exterior, structural and nonstructural. In addition, Alan Boss testified that sub-lessee defendant Steve & Al and defendant/third-party defendant The Garage, which operated the flea market, would be responsible for the alleged defective condition. Thus, the burden shifts to those parties opposing the motion to demonstrate the existence of a triable issue of fact. (*See Alvarez v Prospect Hosp.*, *supra*.)

Plaintiff, defendant/third-party defendant The Garage and defendant Steve & Al failed to meet this burden. Their contention that a triable issue of fact exists concerning whether the operator of the parking garage, defendant IR Parking, owed plaintiff a duty of care is unsupported and without merit. Plaintiff, defendant/third-party defendant The Garage and defendant Steve & Al also contend that a triable issue exists concerning whether defendant IR Parking had constructive notice of the alleged defective condition. Where, as here, defendant IR Parking owes no duty to plaintiff, the issue of notice to defendant IR Parking is rendered academic. Finally, plaintiff asserts that further disclosure is necessary. Mere hope that somehow plaintiff will uncover evidence that will prove her case provides no basis, pursuant to CPLR 3212(f), for postponing the decision on this summary judgment cross motion. (*See Kennerly v Campbell Chain Co.*, *supra*.)

Accordingly, defendant IR Parking's cross motion for summary judgment is granted and plaintiff's complaint and all cross claims against it are dismissed.

Dated: July 26, 2011

SIDNEY F. STRAUSS, J.S.C.