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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

PETER A. MARTIN,

Plaintiff,

-against-

I BLDG CO. INC., et al.,

Defendants.

I BLDG CO. INC. and SURFSIDE INVESTMENT COMPANY,

Third-Party Plaintiffs,

-against-

VERTICAL MAINTENANCE & REPAIR, INC.,

Third-Party Defendant.

Index No. 6097/07

Motion Date January 4, 2013

Motion Cal. No. 61

Motion Sequence No. 6

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Upon the foregoing papers it is ordered that the motion by defendants, I Bldg Co. Inc. ("I Bldg"), Surfside Investment Company ("Surfside") and Mallah Management, LLC ("Mallah") for summary judgment pursuant to CPLR 3212 and dismissing all claims and cross claims as against them is hereby denied.

This action by plaintiff, Peter A. Martin arises out of an accident occurring on February 15, 2006. Plaintiff alleges his Verified Complaint that he was caused to be seriously injured upon the premises known as 205 East 38th Street, in the County, City, and State of New York due to the negligence of the defendants. Plaintiff maintains that on the date of the accident, he was working for his employer, third-party defendant, Vertical Maintenance & Repair Inc ("Vertical"), when his right

leg plummeted through a roof upon the premises at 205 East 38th Street due to the fact that defendants negligently maintained the roof.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (Andre v. Pomeroy, 32 NY2d 361 [1974]; Kwong On Bank, Ltd. v. Montrose Knitwear Corp., 74 AD2d 768 [2d Dept 1980]; Crowley Milk Co. v. Klein, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (Newin Corp. v. Hartford Acc & Indem. Co., 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (Bennicasa v. Garrubo, 141 AD2d 636 [2d Dept 1988]; Weiss v. Gaifield, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc., 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (Gervasio v. DiNapoli, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (Knepka v. Tallman, 278 AD2d 811 [4th Dept 2000]).

For defendants to be liable, plaintiff must prove that defendants either created or had actual or constructive notice of a dangerous condition (Gordon v. American Museum of Natural History, 67 NY2d 836 [1986]; Ligon v. Waldbaum, Inc., 234 AD2d 347 [2d Dept 1996]). To constitute constructive notice, a defect must be visible and apparent and exist for a sufficient period of time prior to the accident to permit defendants to discover and remedy it (see id.).

Moving defendants, I Bldg and Surfside established a prima facie case that plaintiff's claims against them should be dismissed because they were out-of-possession landlords who did retain control of the premises and were not contractually obligated to perform maintenance and repairs. It is well-established law that an out-of-possession landowner is generally not liable for injuries occurring on its premises unless the

landlord retains control of the premises or is contractually obligated to perform maintenance and repairs (see, Brewster v. Five Towns Health Care Realty Corp., 59 AD3d 483 [2d Dept 2009]; Chapman v. Silber, 97 NY2d 9 [2001]; Putnam v. Stout, 38 NY2d 607 [1976]). The determinative factor in premises liability cases is control (see, Siegel v. Hofstra University, 154 AD2d 449 [2d Dept 1989]). In support of the motion, moving defendants, I Bldg and Surfside, present inter alia: the examination before trial transcript testimony of plaintiff himself, an affidavit of Robert Rapuano, vice president of commercial leasing at BLDG Management Co. Inc., who held such office on the date of the accident and who avers, inter alia, that: on the date of the accident, BLDG management Co. was an affiliate of, and under common ownership with I Bldg and Surfside, the property in question where the plaintiff claims to have been injured was jointly owned by defendants I Bldg and Surfside, on the date of accident, the property at 205 East 38th Street, New York, New York, was leased to defendant 205 EAST 38TH STREET PARKING LLC ("205") pursuant to a long standing lease and an addendum dated as of August 13, 1986, defendant 205 operated the parking garage at the premises and was required to completely maintain the property and to make all structural and non-structural repairs, on the date of the accident, I Bldg. and Surfside were out of possession landlords and did not use, occupy, operate, maintain, repair and/or control the premises at 205 East 38th Street, I Bldg and Surfside did not maintain any offices or presence at 205 East 38th Street, and I Bldg and Surfside did not receive any complaints regarding the condition of the roof of the building prior to the incident or contract to perform any work on the roof prior to the incident.

Moving defendant, Mallah Management established a prima facie case that plaintiff's claims against them should be dismissed because they had no notice of any defect to the roof of the garage. In support of the motion, moving defendant, Mallah Management submits, inter alia: plaintiff's own examination before trial transcript testimony and the examination before trial transcript testimony of defendant, Roberto Godoy of Mallah Management, who testified that: he is employed by Mallah as vice president of operations and facilities and held such position on the date of the accident, Mallah never received any complaints about defects or water leaks from the roof and did not know of any problem before the accident, Mallah would make inspections of the garage at least once a month and would respond to problems or complaints made by 205 East 38th Street Parking LLC, and no prior complaints of problems or leaks to the roof were ever brought to the attention of Mallah.

In opposition, plaintiff raises a triable issue of fact. In opposition, plaintiff submits: the examination before trial

transcript testimony of plaintiff himself, wherein he testified inter alia that: a month before the accident he mentioned the leaking of the roof to the manager of the garage, Ricky, on at least one prior visit, he told Roberto Godoy, vice-president of operations and facilities for Mallah, about the leaking of water from the roof; and the examination before trial transcript testimony of Roberto Godoy who testified that: Ricky served as manager at the time of the accident.

In opposition, defendant 205 and third-party defendant Vertical, establish that there is a triable issue of fact as to whether defendants I Blg and Surfside had constructive notice of structural defects that existed on the roof. Via submission of inter alia, a copy of the Lease Agreement entered into by I Bldg, Surfside, and 205, defendant 205 and third-party defendant Vertical establish that defendants I Bldg and Surfside reserved the right to reenter the premises to conduct inspections and repairs and a structural defect existed in that a defect in the roof of a building is a structural defect. It is well-established law that an out-of-possession landlord may be held liable for a third-party's injuries on the premises based on the theory of constructive notice where the landlord reserved the right to enter the premises pursuant to the terms of a lease for the purposes of inspection, maintenance, and repair and where a specific statutory violation exists (Briggs v. County Wide Realty Equities, Ltd., 276 Ad2d 456 [2d Dept 2000]; Spencer v. Schwarzman, LLC, 309 Ad2d 852 [2d Dept 2003]).

In opposition, defendant 205 and third-party defendant, Vertical established that there is a triable issue of fact as to whether Mallah was negligent in the maintenance of the roof. In opposition, Vertical submits, inter alia, the examination before trial transcript testimony of Roberto Godoy who testified that: Mallah is solely responsible for maintaining the premises and roof at 205 East 38th Street, Mallah was responsible for the monthly inspection of the roof at the premises, an employee of Mallah was responsible for inspecting the roof of the property located at 205 East 38th Street about once a month; and the examination before trial transcript testimony of plaintiff himself, wherein he testified that: two weeks prior to the accident he was called to the premises in order to inspect water leaking through the roof of the elevator motor room and on that visit, he observed water leaking through the main roof into the top floor of the premises and notified the garage manager, Ricky, of the defect in the roof.

Accordingly, there are triable issues of fact in connection with, inter alia, whether a defective condition existed, whether

defendants had either actual or constructive notice of a defective condition, and whether defendants acted reasonably under the circumstances. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, moving defendants' motion for summary judgment is denied.

This constitutes the decision and order of the Court.

Dated: March 8, 2013

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Howard G. Lane, J.S.C.