SHORT FORM ORDER

INDEX No. 10-1894

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 9-19-12
ADJ. DATE 4-3-12
Mot. Seq. # 002 - MG; CASEDISP

STEPHEN ADLER-THEUNE,	:	THOMAS J. STOCK & ASSOCIATES
	:	Attorneys for Plaintiff
Plaintiff,	:	88 Second Street
	:	Mineola, New York 11501
- against -	:	
	:	WILSON, ELSER, MOSKOWITZ, EDELMAN &
	:	DICKER, LLP
BLUE POINT ROAD, LLC	:	Attorneys for Defendants
	:	3 Gannett Drive
Defendants.	:	White Plains, New York 10604

Upon the following papers numbered 1 to 22 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1-15; Notice of Cross Motion and supporting papers__; Answering Affidavits and supporting papers 16-20; Replying Affidavits and supporting papers 21-22; Other__; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by the defendant, Blue Point Road LLC, pursuant to CPLR 3212 for summary judgment dismissing the complaint is granted and the complaint is dismissed.

On or about January 5, 2009, at approximately 9 a.m., the plaintiff, Stephen Adler-Theune, was at the premises of Blue Point Road LLC, located at 664 Blue Point Road, Holtsville, New York, when he allegedly slipped and fell on snow and ice in the parking lot, causing him to sustain injury.

Blue Point Road, LLC (Blue Point) seeks summary judgment dismissing the complaint on the basis that it was an out-of-possession landlord with no control over the subject premises; it owed no duty to the plaintiff; that non-party Life Star Response Corp., pursuant to a lease agreement, was responsible for maintaining the parking lot; (Blue Point) did not cause or create the allegedly dangerous condition; and it did not have actual or constructive notice of the condition.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.

To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014 [2d Dept 1981]).

In support of this application, the defendant has submitted, inter alia, a copy of the summons and complaint, defendant's answer, and plaintiff's verified bill of particulars; the transcripts of the examinations before trial of the plaintiff dated August 30, 2011, and the defendant by Richard Burden dated January 11, 2012; affidavit of Richard Burden; copy of a lease agreement between RPR Realty Associates, LLC and STAT Equipment Corp. d/b/a Life Star; second amendment to lease; and the affidavit of Brian Beauchesne.

Stephen Adler-Theune testified to the extent that on January 5, 2009, he was employed by Life Star Response at 664 Blue Point Road, Holtsville, as an EMT (emergency medical technician), and went to the site to start his shift at 9 a.m. He drove his vehicle into the parking lot and parked on the edge of the hilly, unpaved dirt portion of the L-shaped lot which was partially paved. The unpaved portion of the parking lot was adjacent to the building where he worked. He did not remember when it had last snowed, but stated that the parking lot had some kind of snow cover over it. After he parked his car, he got out and walked about a car length toward the door closest to the parking lot, looking down, using the same route he took many times before. He was about twenty feet from the door, when suddenly, his legs slid out and he fell on his lower back, tail bone-lumbar region. He continued that the ice and snow had no dirt or salt thrown on it, and the parking lot was not plowed. An ambulette driver, Mr. Hall, saw him fall and came to assist him.

Richard Burden testified to the extent that he started Blue Point Road LLC in February 2005, and purchased the property at 664 Blue Point Road in early 2005 from RPR Realty Associates. He runs the LLC and is the only officer. When he purchased the property, there was an asphalt paved parking lot alongside the north and west side of the building. The area southwest of the building on the property was a dirt field, which was also used for parking. He stated that there was a tenant, Stat Equipment Corp. d/b/a Life Star Ambulance, who was the lessee of the property when he purchased it, and that Robinson's Oxygen was also operated at the premises by Stat Equipment. Robinson's Oxygen used approximately 20% of the premises, and Stat Equipment/Life Star, used the remainder. Burden testified that Richard Gabriel owned RPR Realty Associates and ran Life Star and Stat Equipment, and owned one-fifth of Robinson's. When Burden purchased the property, both Robinson's and Life Star were using the dirt field in the rear of the building for parking, as well as the asphalt lots on the north and west sides. When he purchased the property in 2005, there was a preexisting lease between RPR Realty and Stat Equipment. Robinson's Oxygen is no longer at the premises.

Burden continued that he entered into a lease agreement with Stat Equipment on July 17, 2007, identified as the second amendment to the lease, and that there had been no first amendment to the lease entered

into between the parties. Thus, he continued, the second amendment to the lease was in effect in 2009. Burden testified that after he purchased the property, he visited it quarterly through 2009 as he had a vending business at the site with a candy machine which he filled every two to three months. When he went to the site, he parked on the north side and sometimes at the back of the building in the vehicle service driveway. He also looked around a little bit to take note of the condition of the property. Sometimes his visits were at night and he could not see anything. Burden stated that pursuant to the lease, the tenant was responsible for snow removal and all matters in that area. He had seen a pickup truck with a plow on the front owned by the tenant, so he took it for granted that they were doing some work with it. He never checked the premises during a snowstorm or winter weather, but then stated that through January 2009, he saw that they plowed so that their vehicles could leave the parking areas and so that employees could park. He also saw the premises with snow on it.

In his affidavit, Burden averred that RPR Realty, as landlord, entered into a lease agreement with Stat Equipment Corp., as tenant, on August 22, 1997, to lease the premises at 664 Blue Point Road, Holtsville, and that lease agreement was subsequently renewed by amendment dated May 1, 2002. It was his understanding that Stat Equipment was doing business as Life Star Response, Corp. After he purchased the property, Blue Point Road replaced RPR Realty Associates as landlord. On or about August 1, 2007, the original lease was renewed and amended by the Second Amendment dated August 1, 2007, containing payment provisions and the new time frame for the lease going forward, and was in effect at the time of the plaintiff's accident. He continued that at all times, the Second Amendment to the Lease was in effect, that Life Star Response was the tenant and was responsible for snow and ice removal on the property, including the parking lot for the building located on the premises. He concluded that at no time did Blue Point Road assume any responsibility for snow or ice removal from the parking lot, and it did not instruct the tenant to remove any snow or ice from the parking lot of the property or arrange for it removal.

In opposing this motion, non-party Kelly Evans averred that she is a disinterested party to this action and is presently employed by LifeStar. It is noted, however, that the plaintiff testified during his deposition that Kelly Evans is his girlfriend. Evans continued that she was present at the premises on the date of the accident and heard Life Star supervisor George Colbert say that snow plowing of the parking lot is not the responsibility of Life Star, and that it is the landlord's responsibility. It is determined that this statement is hearsay and an affidavit from George Colbert is conspicuously absent.

Article 7, Section 7.01 (a) of the lease provides that the tenant shall, at all times, keep the premises, including "sidewalks, areas" free from dirt, snow, ice, rubbish and other obstructions or encumbrances. While the plaintiff, by counsel, argues that the lease agreement is silent as to the parking area, "areas" is specifically mentioned in the section. Further, at Section (b), the lease agreement provides that the landlord shall not be required to furnish to tenant any facilities or services of any kind whatsoever during the term of the lease, such as, but not limited to ... lawn and driveway maintenance, and tenant covenants to provide and pay for the same. Counsel further argues that the defendant is in violation of Section 49-1 of the Town of Brookhaven Administrative Code. It is noted that the lease, at Section (c), provides that the landlord shall in no event be required to make any alterations, rebuilding, replacements, changes, additions, improvements or repairs during the terms of the lease. At Article 8, Section 8.01, the agreement provides in pertinent part that "during the term of this lease, tenant, at its sole cost and expense, shall promptly comply with all present and future laws, environmental statutes, ordinances, orders, rules and requirements of all federal state and municipal governments, courts departments, ...even though such law, ordinance, rule, order, regulation or requirement

shall necessitate structural changes, repairs or improvements...." Thus, counsel's argument fails as the lease provides for the tenant to comply with applicable ordinances and further provides that the defendant is not required to provide services for lawn and driveway maintenance.

Generally, 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 unsafe conditions (***Lindquist v C & C Landscape Contrs.***, 38 AD3d 616, 831 NYS2d 523 [2d Dept 2007]; ***Gibson v Bally Total Fitness Corp.***, 1 AD3d 477, 767 NYS2d 135 [2d Dept 2003]). Control of the premises may be established by proof of a promise by the owner or lessor to keep the premises in repair or by a course of conduct demonstrating that the owner or lessor has assumed responsibility to maintain a particular portion of the premises (***Gelardo v ASTHMA Realty Corp.***, 137 AD2d 787, 525 NYS2d 334 [2d Dept 1988]). Reservation of the right to enter the premises for the purpose of inspection and repair may constitute sufficient retention of control to permit a finding that the owner or lessor had constructive notice of a defective condition only if a specific statutory violation exists and there is a significant structural or design defect (***Bouima v Dacomi, Inc.***, 36 AD3d 739, 829 NYS2d 572 [2d Dept 2007]; ***Thompson v Port Auth. of N.Y. & N.J.***, 305 AD2d 581, 761 NYS2d 75 [2d Dept 2003]). Here, the evidentiary proof does not show that the landlord retained control of the premises or had constructive notice of the alleged defective condition. No right of re-entry has been set forth in the lease agreement, and the record does not demonstrate that there were any promises by the owner to keep the premises in repair. Nor has a course of conduct by the defendant owner been demonstrated to establish that it assumed responsibility to maintain a particular portion of the premises, including snow and ice removal or maintenance of the parking lot or field. Burden's testimony that Life Star had a pickup truck with a plow on the front which they use to clear the premises of snow so they can move their ambulance equipment has not been refuted by the plaintiff.

Brain Beauchesne set forth in his affidavit that he is employed by Life Star Response Corp as the corporate director of fleet services. Life Star maintains an office at 664 Blue Point Road, Holtsville. Based upon his review of the files maintained by Lifestar, the plaintiff was an employee of Life Star at the time of the alleged occurrence. Stat Equipment Corp. was doing business as Life Star. He continued that pursuant to the terms of the lease, the tenant was responsible for snow and ice removal on the premises, including the parking lot for the building in which Life Star maintains its office, and that he was the Life Star employee responsible for the maintenance of the parking lot with respect to snow and ice removal. At no time did the landlord assume any responsibility for snow or ice removal from the premises, and did not instruct Life Star to remove snow and ice or coordinate or arrange for its removal.

A landowner has a duty to exercise reasonable care in maintaining his property in a safe condition under all circumstances, including the likelihood of injury to others, the seriousness of the potential injuries, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property (*see* ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***Fellis v Old Oaks Country Club***, 163 AD2d 509, 558 NYS2d 183 [2d Dept 1990]). Encompassed in this duty is a duty to warn of potentially dangerous conditions (*see* ***Basso v Miller***, *supra*, at 241; ***Thornhill v Toys "R" Us NYTEX***, 183 AD2d 1071, 583 NYS2d 644 [3d Dept 1992]). To prove a prima facie case of negligence in a slip/trip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (***Stumacher v Waldbaum***, 274 AD2d 572, 716 NYS2d 573 [2d Dept 2000]. To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to

the accident to permit the defendant or it's employees to discover and remedy it (***Stumacher v Waldbaum,*** *supra*; *see also* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Bykofsky v Waldbaum's Supermarkets, Inc.***, 210 AD2d 280, 619 NYS2d 760 [2d Dept 1994]). Liability can be predicated only on failure of the defendant to remedy the danger after actual or constructive notice of the condition (***Piacquadio v Recine Realty Corp.***, 84 NY2d 967, 622 NYS2d 493 [2d Dept 1994]).

The plaintiff's adduced testimony establishes that he used the parking field on a regular basis and was aware of its condition. The plaintiff was unaware of when the last snowfall occurred or how long the condition complained of existed. There has been no testimony or evidentiary proof submitted to establish that the defendant Blue Point Road LLC was at any time apprised of the alleged defective or dangerous condition present on the date of the accident. Thus, actual and constructive notice has not been established. It is further determined that pursuant to the terms of the lease agreement, the plaintiff's employer, Life Star, was responsible for maintaining the premises and providing for snow and ice removal. The plaintiff has failed to raise a triable issue of fact to preclude summary judgment.

Accordingly, motion (002) is granted and the complaint is dismissed.

Dated: May 1, 2013

J.S.C.
JEFFREY ARLEN SPINNER

__X__ FINAL DISPOSITION ___ NON-FINAL DISPOSITION