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SHORT FORM ORDER

INDEX No. 08-36053
CAL No. 12-01499OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 12-18-12
ADJ. DATE 2-27-13
Mot. Seq. # 009 - MotD

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AL TIRANNO.

Plaintiff,

- against -

WARTHOG, INC., KIMCO REALTY CORPORATION, APPLEBEE'S and NATIONAL AMUSEMENTS MULTIPLEX, and FARMINGDALE THEATRES, INC.,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant's National Amusements, Inc. and Farmingdale Theatres, dated November 14, 2012, and supporting papers (including Memorandum of Law dated ___); (2) Affirmation in Opposition by the plaintiff, dated February 5, 2013, and supporting papers; (3) Reply Affirmation by the defendant's National Amusements, Inc. and Farmingdale Theatres, dated February 22, 2013, and supporting papers; (4) Other Defendant's National Amusements, Inc. and Farmingdale Theatres - memorandum of law ;(~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by defendant National Amusements, Inc. and Farmingdale Theatres, Inc. seeking summary judgment dismissing the complaint is decided as follows.

Plaintiff Al Tiranno commenced this action against defendants Warthog, Inc., Kimco Realty Corporation, Applebee's, and National Amusements, Inc., s/h/a National Amusements Multiplex, and Farmingdale Theatres, Inc., to recover damages for injuries he allegedly sustained as a result of an accident that occurred in the parking lot of Airport Plaza located at 1001 Broadhollow Road, Farmingdale, New York, on May 25, 2008. Plaintiff, by his bill of particulars, alleges, among other things, that he struck the curb of an island located in the subject premises' parking lot and fell from his motorcycle when he attempted to avoid colliding with a remote controlled vehicle, causing him to

sustain various personal injuries. The subject premises and parking lot are owned by defendant Farmingdale Theatres, Inc. ("Farmingdale Theatres"), which is a wholly-owned subsidiary of defendant National Amusements, Inc. ("NAI"). By stipulation dated October 31, 2011, the parties agreed to discontinue the action as against defendants Kimco Realty Corporation, Airport Plaza, LLC and Applebee's. The Court notes that defendant Warthog, Inc. has not made an appearance in the subject action.

Defendants NAI and Farmingdale Theatres, Inc. now move for summary judgment on the bases that there are no material triable issues of fact and that plaintiff's claim has no merit as against either NAI or Farmingdale Theatres. Specifically, defendants contend that NAI is not liable to plaintiff for his injuries, since NAI did not own, control or operate the subject premises and parking lot, and the fact that NAI is the parent company of Farmingdale Theatres is insufficient to impute liability upon it for Farmingdale Theatres' alleged negligent operation of the subject parking lot. Defendants further assert that Farmingdale Theatres, despite owning the subject premises, is not liable to plaintiff for his alleged injuries, because it cannot be held liable for the actions of third-parties on its premises, whose actions it did not control or whose presence it did not have knowledge of. In support of the motion, defendants submit copies of the pleadings, the affidavit of the vice president of NAI, Richard Sherman, and the parties' deposition transcripts. Plaintiff opposes the motion on the ground that there are material triable issues of fact as to whether Farmingdale Theatres had the knowledge of and the opportunity to control the conduct of the third-parties operating remote controlled vehicles on its premises. Plaintiff relies on the same evidence submitted by defendants in support of their motion for summary judgment.

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 demonstrate the absence of any material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing party's moving papers (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). Once the showing has been made the burden then will shift to the opposing party to raise an issue of fact by producing evidentiary proof in admissible form sufficient enough to require a trial on the merits (***Zuckerman v City of New York***, *supra*). A party will not sustain its burden by simply pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merits of its claim or defense (***Mennerich v Esposito***, 4 AD3d 399, 772 NYS2d 91 [2d Dept 2004]). In addition, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]).

To establish a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and that the breach of that duty was a proximate cause of the plaintiff's injury (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Kievman v Philip***, 84 AD3d 1031, 924 NYS2d 112 [2d Dept 2011]; ***Demshick v Community Hous. Mgt. Corp.***, 34 AD3d 518, 824 NYS2d 166 [2d Dept 2006]). A landowner has a duty to maintain his or her property in a reasonably safe condition in view of the existing circumstances (*see* ***Tagle v Jacob***, 97 NY2d 165, 737 NYS2d 331 [2001]; ***Demshick v Community Hous. Mgt. Corp.***, *supra*). The nature and scope of that duty and the persons to whom it is owed require consideration of the likelihood of injury to

another from a dangerous condition on the property, the seriousness of the potential injury, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property (***Galindo v Town of Clarkstown***, 2 NY3d 633, 636, 781 NYS2d 249 [2004] *quoting* ***Kush v City of Buffalo***, 59 NY2d 26, 29-30, 462 NYS2d 831 [1983]; *see* ***Peralta v Henriquez***, 100 NY2d 139, 144, 760 NYS2d 741 [2003]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]).

Additionally, to impose liability upon a defendant in a trip and fall action, there must be evidence that the defendant either created the condition or had actual or constructive notice of it (*see* ***Hayden v Waldbaum, Inc.***, 63 AD3d 679, 880 NYS2d 351 [2d Dept 2009]; ***Denker v Century 21 Dept. Stores, LLC***, 55 AD3d 527, 866 NYS2d 681 [2d Dept 2008]). A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident so that it could have been discovered and remedied (*see* ***Gordon v American Museum of Natural History***, 67 NYS2d 836, 501 NYS2d 646 [1986]). However, a landowner does not have a duty to warn or protect against a condition that is open and obvious, and that is not inherently dangerous (*see* ***Losciuto v City Univ. of N.Y.***, 80 AD3d 576, 914 NYS2d 296 [2d Dept 2011]; ***Weiss v Half Hollow Hills Cent. School Dist.***, 70 AD3d 932, 893 NYS2d 877 [2d Dept 2010]; ***Bretts v Lincoln Plaza Assoc., Inc.***, 67 AD3d 943, 890 NYS2d 87 [2d Dept 2009]; ***Murray v Dockside 500 Mar., Inc.***, 32 AD3d 832, 821 NYS2d 608 [2d Dept 2006]).

Based upon the adduced evidence, defendants established, prima facie, NAI's entitlement to judgment as a matter of law that it is not liable for plaintiff's accident, because it neither created nor had actual or constructive notice of the alleged defective condition that resulted in plaintiff's injury (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Campone v Pisciotta Servs., Inc.***, 87 AD3d 1104, 930 NYS2d 62 [2d Dept 2011]; ***Brown v Outback Steakhouse***, 39 AD3d 450, 833 NYS2d 222 [2d Dept 2007] ***Dugue v 1818 Mgt. Corp.***, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]). Additionally, defendants established that NAI did not own, occupy or control the subject premises and parking lot (*see e.g.* ***Quick v G.G.'s Pizza & Pasta, Inc.***, 53 AD3d 535, 861 NYS2d 762 [2d Dept 2008]). "The law imposes a duty to maintain property free and clear of dangerous and defective conditions only upon those who own, occupy, or control property, or who put the property to a special use or derive a special benefit from it" (***Segura v City of New York***, 70 AD3d 670, 670, 892 NYS2d 870 [2d Dept 2010] *quoting* ***Guzov v Manor Lodge Holding Corp.***, 13 AD3d 482, 483, 787 NYS2d 84 [2d Dept]; *see* ***Aversano v City of New York***, 265 AD2d 437, 696 NYS2d 233 [2d Dept 1999]; ***Turrisi v Ponderosa, Inc.***, 179 AD2d 956, 957, 578 NYS2d 724 [3d Dept 1992]), and "where none of these factors are present, a party cannot be held liable for injuries caused by [an] allegedly defective condition" (***Grover v Mastic Beach Prop. Owners Assn.***, 57 AD3d 729, 730, 869 NYS2d 593 [2d Dept 2008]; *see* ***Sanchez v 1710 Broadway, Inc.***, 79 AD3d 845, 915 NYS2d 272 [2d Dept 2010]). Moreover, a parent company may not be held liable for the torts of its subsidiary unless it can be shown that the parent exercised complete dominion and control over the subsidiary (*see* ***Billy v Consolidated Mach. Tool Corp.***, 51 NY2d 152, 432 NYS2d 879 [1980]; ***Serrano v N.Y. Times Co.***, 19 AD3d 577, 797 NYS2d 135 [2d Dept 2005]; ***Lipton v Unumprovident Corp.***, 10 AD3d 703, 783 NYS2d 601 [2d Dept 2004]; ***Potash v Port Auth. of N.Y. & N.J.***, 279 AD2d 562, 719 NYS2d 290 [2d Dept 2001]). Defendants submitted the affidavit of NAI's vice president, Richard Sherman, in which he attests that NAI is the parent company of Farmingdale Theatres, a wholly-owned subsidiary of NAI. Sherman states that Farmingdale Theatres owned and operated a multi-screen motion picture theater at the subject premises, and that it managed,

maintained and controlled the subject premises, including the parking lot. Sherman further states that NAI has never owned, operated, leased, maintained or managed Farmingdale Theatres, or the subject premises and parking lot. Moreover, the managing director, Kathleen Hanley, and the house manager, Allan Moore, for Farmingdale Theatres, each testified that Farmingdale Theatres owns the subject premises, including the parking lot, and that the theater hired independent contractors to clean and maintain the parking lot and provide security for the premises.

In opposition, plaintiff failed to adduce evidence sufficient to raise a triable issue of fact as to whether NAI owned, controlled or maintained the subject premises, including the parking lot, or whether it created the alleged defective condition that caused plaintiff's injury (*see* ***Zuckerman v City of New York***, *supra*; ***Chahales v Westchester Joint Water Works***, 47 AD3d 610, 850 NYS2d 145 [2d Dept 2008]; ***Fedrescordero v 2527 Boston Rd. Corp.***, 301 AD2d 401, 753 NYS2d 83 [2d Dept 2003]). Plaintiff also failed to raise a triable issue of fact as to whether NAI exercised complete domination and control over Farmingdale Theatres or as to whether Farmingdale Theatres existed solely to serve the business interest of NAI (*see* ***Fernbach, LLC v Calleo***, 92 AD3d 831, 939 NYS2d 501 [2d Dept 2012]; ***Nassau County v Richard Dattner Architect, P.C.***, 57 AD3d 494, 868 NYS2d 727 [2d Dept 2008]; ***Matter of Island Seafood Co. v Golub Corp.***, 303 AD2d 892, 759 NYS2d 768 [3d Dept 2003]; *cf.* ***Broxmeye v United Capital Corp.***, 79 AD3d 780, 914 NYS2d 181 [2d Dept 2010]). "Stock control, interlocking directors, interlocking officers are in and of themselves insufficient facts to justify the imposition of liability on [a] parent corporation" (***Pebble Cove Homeowners' Ass'n v Fidelity N.Y. FSB***, 153 AD2d 843, 843, 545 NYS2d 362 [2d Dept 1989], *quoting* ***Musman v Modern Deb***, 50 AD2d 761, 762, 377 NYS2d 17 [1st Dept 1975], *affd* 48 NY2d 941, 401 NYS2d 217 [1979]). Accordingly, the branch of the motion seeking summary judgment dismissing NAI from the action is granted.

However, defendants failed to demonstrate a prima facie case that Farmingdale Theatres neither created nor had actual or constructive notice of the alleged defective condition that resulted in plaintiff's injury (*see* ***Zhuo Zheng Chen v City of New York***, 106 AD3d 1081, __ NYS2d __ , 2013 NY Slip Op 03832 [2d Dept 2013]; ***Johnson v Culinary Inst. of Am.***, 95 AD3d 1077, 944 NYS2d 307 [2d Dept 2012]; ***Sarisohn v 341 Commack Rd., Inc.***, 89 AD3d 1007, 934 NYS2d 202 [2d Dept 20011]). "Owners of real property onto which members of the public are invited have a nondelegable duty to provide the public with a reasonably safe premises and a safe means of ingress and egress" (***Podlaski v Long Is. Paneling Ctr. of Centereach, Inc.***, 58 AD3d 825, 826, 873 NYS2d 109 [2d Dept 2009]). Here, defendants failed to eliminate all triable issues of fact as to whether Farmingdale Theatres had notice of the fact that radio controlled vehicle enthusiasts used its parking lot to race remote controlled vehicles, thereby creating a dangerous condition in its parking lot, which resulted in plaintiff's accident (*see* ***Franzese v Tanger Factory Outlet Ctrs., Inc.***, 88 AD3d 763, 930 NYS2d 900 [2d Dept 2011]; ***Kalland v Hungry Harbor Assoc., LLC.***, 84 AD3d 889, 922 NYS2d 550 [2d Dept 2011]; ***Kielty v AJS Constr. of L.I., Inc.***, 83 AD3d 1004, 922 NYS2d 467 [2d Dept 2011]). In fact, Kathleen Hanley and Alan Moore, employees of Farmingdale Theatres, each testified that they were aware of the subject premises' parking lot being used to race remote controlled vehicles, that the parking lot had been used for such purposes on several occasions, although Farmingdale Theatres did not rent out the parking lot to the radio controlled vehicle enthusiasts, and that its security personnel had been informed to remove the enthusiasts from the parking lot whenever they observed them using the parking lot for such purposes. Plaintiff testified that on the day of his accident, he observed a security guard in the parking lot near the

tent that had been erected by the remote controlled vehicle enthusiasts, and that said tent was located near the movie theater. Plaintiff further testified that there was at least one wooden barrier in the parking lot, approximately 100 to 150 feet, from the vicinity of the tent.

Moreover, although a property owner does not have a duty to control the conduct of a third-person to prevent him or her from causing injury to others (*see* ***Purdy v Public Adm'r of County of Westchester***, 72 NY2d 1, 530 NYS2d 513 [1988]; ***D'Amico v Christie***, 71 NY2d 76, 524 NYS2d 1 [1987]; ***Citera v County of Suffolk***, 95 AD3d 1255, 945 NYS2d 375 [2d Dept 2011]), a landowner does have the duty to act in a reasonable manner to prevent harm to those on their property from the conduct of third-persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control (*see* ***Martino v Stolzman***, 18 NY3d 905, 941 NYS2d 28 [2012]; ***D'Amico v Christie***, *supra*). Here, defendants failed to demonstrate, prima facie, that Farmingdale Theatres was unable to exercise the requisite control over the conduct of the radio controlled vehicle enthusiasts on its premises to protect plaintiff from injury (*see* ***Jayes v Storms***, 12 AD3d 1090, 784 NYS2d 471 [4th Dept 2004]; ***Panzera v Johnny's II***, 253 AD2d 864, 678 NYS2d 336 [2d Dept 1998]; *cf.* ***Daly v Finley***, 101 AD3d 931, 957 NYS2d 224 [2d Dept 2012]). As previously stated, Kathleen Henley, the managing director for Farmingdale Theatres testified that the theater did not generally rent out the parking lot for events, but that she was aware of the parking lot being used to race remote controlled vehicles, and that the security personnel hired by Farmingdale Theatres to patrol the premises were given explicit instructions to remove the remote control vehicle users whenever they were observed in the parking lot racing such vehicles. Likewise, Allan Moore, the house manager for Farmingdale Theatres, also testified that he had been informed about and had personally observed on several occasions, people racing remote controlled vehicles in the parking lot, and that the security personnel generally asked them to leave the premises whenever they witnessed such occurrences. Additionally, plaintiff testified that prior to his accident, he parked his motorcycle in a parking space for approximately 15 minutes while searching for his friends, and that while he was stopped, he observed a crowd of approximately 40 to 50 people near a tent, and about 15 to 20 people were racing remote controlled vehicles. Plaintiff further testified that he observed a security guard near the tent for a short period of time. Therefore, questions of fact exist as to whether Farmingdale Theatres had the opportunity to control the conduct of the remote control vehicle users on its premises and whether it had knowledge of the need to control such conduct (*see* ***DeCandia v Calamia***, 15 AD3d 436, 789 NYS2d 682 [2d Dept 2005]; ***Kern v Ray***, 283 AD2d 402, 724 NYS2d 457 [2d Dept 2001]). Accordingly, the branch of the motion for summary judgment seeking dismissal of the complaint as against Farmingdale Theatres is denied.

Accordingly, the motion by defendants National Amusement, Inc. and Farmingdale Theatres, Inc. seeking summary judgment dismissing the complaint against them is granted as to National Amusements, Inc., and is denied as to Farmingdale Theatres, Inc. The action is severed and continued as against the remaining defendants.

Dated: 8/22/13

PETER H. MAYER, J.S.C.