**SUPREME COURT STATE OF NEW YORK**
**COUNTY OF BRONX TRIAL TERM - PART 15**

**PRESENT:** Honorable Mary Ann Brigantti-Hughes

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FRANK PEREZ JR.,

Plaintiff,

-against-

**DECISION / ORDER**
Index No.309887/2011

1200 ZEREGA REALTY LLC.,

Defendant.

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The following papers numbered 1 to 6 read on the below motion noticed on January 15, 2014 and duly submitted on the Part IA15 Motion calendar of **February 19, 2014:**

| Papers Submitted | Numbered |
|---|---|
| Def. Notice of Motion, Exhibits | 1,2 |
| Pl. Aff. In Opp.,, Exhibits | 3,4 |
| Def. Aff. In Reply, Exh. | 5,6 |

In an action seeking damages for injures arising out of an alleged trip and fall accident, the defendant 1200 Zerega Realty LLC ("Defendant") moves for summary judgment, dismissing the complaint of the plaintiff Frank Perez, Jr. ("Plaintiff"), pursuant to CPLR 3212. Plaintiff opposes the motion.

I. Background

Plaintiff asserts that he slipped and fell inside of an industrial building at 1200 Zerega Avenue, Bronx, New York, on December 1, 2010. He asserts that a puddle of water was allowed to accumulate inside of the warehouse as a result of improper grading of the property. Plaintiff claims that rain water flowed under a loading door, entering the warehouse as a result of the defendant's negligence in failing to pitch the adjoining parking area in a proper manner to shed water away from the building. The moving Defendant asserts that while it owns the accident location, it did not maintain or control the loss location, which is within the demised space of a tenant, Crescent Electric. Plaintiff was an employee of Crescent at the subject location of 1200 Zerega Avenue, working as a truck driver.

On the date of the accident, it had rained all day. He allegedly fell inside of the warehouse

near the "garage door" where trucks back up to unload. In that area, there is no loading dock - rather, the garage door is at the same level as the parking lot. Plaintiff had seen water in the area on rainy days before this accident. He had no first - hand knowledge concerning the source of the water. He knew only that his employer would remedy the condition by brushing water out of the building. Plaintiff testified that on the date of the incident, it had rained all day. He arrived at work at approximately 11:00AM. Plaintiff testified that he noticed whenever it rained, water originating from the garage and receiving area would flood into the warehouse.

Eric Ildefonso, who worked for the building's property manager, testified that he was responsible for maintaining the roof and responding to any structural problems, and that the "tenants are responsible for their own spaces." He testified that he visited the property once every three months. He recognized the accident location and noted the the parking lot is graded upward from the street towards the two entrances. The grading of the parking area has not been changed during Crescent's tenancy. He knew of no previous complaints about a water condition in that area.

According to the lease, Article 6, the tenant assumed the "full and sole responsibility" for all repairs and maintenance and management of the interior and exterior portions of the premises, including "grading, paving, fencing, maintaining, repairing, and lighting the parking area included in the premises."

Plaintiff confirmed that he had no actual knowledge concerning the manner in which rainwater may have entered the building. His theory of an improper pitch of the surface of the parking lot was derived merely from hearsay statements of his former co-workers.

Plaintiff opposes the motion and initially argues that the subject lease (Section 6.2[a]) obligates Defendant to maintain, repair, and replace the parking lot on the subject premises. According to an affidavit from Plaintiff, submitted with the opposition papers, the garage door near his accident location was connected to the outside parking lot, "which was on a slant that allowed the water to flow into the warehouse." He further states that "[c]ontrary to Mr. Illdefono's testimony, the parking lot is graded downward near the garage door." Plaintiff also argues that Defendant failed to satisfy its initial burden of demonstrating that they lacked constructive notice of the water condition. Plaintiff testified, in his affidavit, that he first saw the

water was present for "over three hours" on the day of his accident. Accordingly, Plaintiff argues that there is an issue of fact as to whether Defendant had constructive notice of this condition. Plaintiff states in his affidavit that he was personally aware of the hazardous condition of water flowing into the warehouse from under the garage door on at least a dozen occasions during the four or five months before the accident.

In reply, Defendant argues that contrary to Plaintiff's assertions, the subject lease does not require that they maintain or repair the gradation of the parking lot in question. Moreover, Plaintiff's affidavit submitted in opposition must be disregarded since it contradicts his deposition testimony and was otherwise tailored to create an issue of fact.

## II. Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "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 from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738,[1993]).

III. Applicable Law and Analysis

Generally, a landowner owes a duty of care to maintain his or her property in a reasonably safe condition (*see Peralta v. Henriquez*, 100 N.Y.2d 139 [2003]). This duty, however, is premised on the landowner's exercise of control over the property, since the entity in control of the property is in the best position to identify and prevent harm to other (*Butler v. Rafferty*, 100 N.Y.2d 265 [2003]). Therefore, a landowner who transfers possession and control is generally not liable for injuries caused by dangerous conditions on the property (*Chapman v. Silber*, 97 N.Y.2d 9 [2001]). Exceptions to this general rule apply when the landlord is either contractually obligated to maintain the premises or has a contractual right to re-enter, inspect, and make repairs at the tenants expense, and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision (*see Johnson v. Urena Service Center*, 227 A.D.2d 325 [1st Dept. 1996]; *Heim v. Trustees of Columbia Univ.*, 81 A.D.3d 507 [1st Dept. 2011]). When determining out-of-possession status, the court looks not only to the terms of the agreement but to the parties' course of conduct, including, but not limited to, the landowner's ability to access the premises, to determine whether the landowner surrendered control over the property such that the landowner's duty of care is extinguished as a matter of law (*Gronski v. County of Monroe*, 18 N.Y.3d 374 [2011]).

In this case, Defendant has satisfied its initial burden of demonstrating entitlement to judgment as a matter of law (*see Reyes v. Morton William Assoc. Supermarkets, Inc.*, 50 A.D.3d 496 [1st Dept. 2008]). Defendant established that, pursuant to a written lease, it transferred ownership and control of the property to tenant Crescent. The written lease provided that Crescent was responsible for maintenance and control of the interior and exterior of the premises. Although the lease provides that Defendant was responsible for repairing and replacing, among other things, the building foundation and parking lot, it further states that the tenant was responsible for the "grading, paving, fencing, maintaining, repairing, and lighting the parking area included in the Premises." Accordingly, there is no indication that Defendant "consented to be responsible for the maintenance and repair" of the gradation of the parking lot (*see Velazquez v. Tyler Graphics Ltd.*, 214 A.D.2d 489 [1st Dept. 1995]).

In any event, the Plaintiff has not claimed that the alleged improper grading constituted a

significant structural or design defect that violated a specific statutory safety provision, as required to impose liability against the out-of-possession landlord (*Johnson v. Urena, supra; Qiu v. J&J Grocery & Deli Corp.*, 115 A.D.3d 627 [1st Dept. 2014]; *Uhlich v. Canada Dry Bottling Co. of New York*, 305 A.D.2d 107 [1st Dept. 2003]). Moreover, Plaintiff's theory that the parking lot's improper grading caused the puddle of water to form is entirely based on hearsay conversations with co-workers (*see Rugova v. Davis*, 112 A.D.3d 404 [1st Dept. 2013]), his affidavit submitted in opposition to the motion was clearly tailored to create an issue of fact and avoid the consequences of this earlier testimony (see *Telfeyan v. City of New York*, 40 A.D.3d 372 [1st Dept. 2007]), and Plaintiff provided no other competent evidence regarding the actual gradation of the parking lot in question (*see Khan v. Bangala Motor and Body Shop, Inc.*, 27 A.D.3d 526, 528 [2nd Dept. 2006]).

On the issue of notice, it may only be found under these circumstances where the out of possession landlord both expressly reserves a right to re-enter the premises, *and* there is a specific statutory violation (*Lopez v. 1372 Shakespeare Ave. Housing Dev. Fund Corp.*, 299 A.D.2d 230 [1st Dept. 2002][emphasis supplied]). Since Plaintiff has not alleged or submitted evidence that the defective condition constituted such a violation, Defendant cannot be liable under a theory of constructive notice (*see Nieves v. Burnside Assoc., LLC.*, 59 A.D.3d 290 [1st Dept. 2009]).

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Defendant's motion for summary judgment is granted, and the complaint is dismissed with prejudice.

This constitutes the Decision and Order of this Court.

Dated: 5/9/14

Hon. Mary Ann Brigantti-Hughes, J.S.C.