SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 35
NASSAU COUNTY

MI YOUNG HONG,

Plaintiff,

Index No.: 607735/16
Motion Seq. No.: 01
Motion Date: 02/28/17

- against -

ASSI EXPRESS ENTERPRISE INC., KOREA PLAZA, INC. and RHEE BROS., INC.,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant Rhee Bros., Inc. ("Rhee") moves, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint as against it, as well as any and all cross claims and counterclaims as against it. Plaintiff opposes the motion.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff on October 11, 2013, at the premises known as 131–01 39th Avenue, Flushing, County of Queens, State of New York. At the time of the accident, plaintiff claims that she was lawfully in the subject premises grocery shopping. While shopping, she was attempting to lift a box of cabbage with both hands inside holes in the sides of the box which were intended to be used for lifting said box. Plaintiff contends that the box was not strong enough to support the weight of

the contents when said box was being lifted. When plaintiff was attempting to lift said box the holes on the side tore apart, causing plaintiff to fall backwards. Plaintiff further alleges that the slippery condition of the floor also caused her to slip, causing her body to be thrown to the floor and sustaining serious injuries. Plaintiff asserts that all of the named defendants owned the subject premise on the date of accident. Plaintiff commenced the action, on or about October 6, 2016, with the filing of a Summons and Verified Complaint. *See* Defendant Rhee's Affirmation in Support Exhibit A. Issue was joined by defendant Korea Plaza, Inc. on or about December 7, 2016. *See* Defendant Rhee's Affirmation in Support Exhibit B. Issue was joined by defendant Rhee on or about December 16, 2016. *See* Defendant Rhee's Affirmation in Support Exhibit C.

Counsel for defendant Rhee submits that "[a]s the admissible evidence herein establishes that RHEE BROS. did not owe plaintiff any duty which they may have allegedly violated and which may have caused the subject accident, pursuant to the relevant and controlling case law, RHEE BROS. is entitled to summary judgment and dismissal of plaintiff's Complaint and any and all cross-claims/counter-claims against them as a matter of law. In this regard, RHEE BROS. never owned or leased the subject premises, never made any repairs or performed any maintenance to the subject premises at the time of plaintiff's alleged accident."

In support of the motion, defendant Rhee submits the Affidavit of Robert Rhee, the managing agent/principal of defendant Rhee. *See* Defendant Rhee's Affirmation in Support Exhibit D. Robert Rhee states, in pertinent part, that "I have been advised by my counsel that on October 11, 2013, plaintiff was involved in an incident wherein she slipped/tripped and fell at the subject premises located at 131-01 39th Avenue, Flushing, New York. RHEE BROS. INC. is not the current owner of this property, nor was it the owner of the property at the time of the subject

occurrence. In fact, RHEE BROS. INC. was **never** the owner of the subject premises. A true, certified and accurate copy of the Deed for the subject premises at the time of the accident is annexed hereto as **Exhibit A**. A review of the Deed confirms that RHEE BROS. INC. is not the current owner of the subject premises, nor was it the owner or occupier at the time of the subject occurrence. Furthermore, RHEE BROS. INC. is not the current tenant of the subject premises, nor was it a tenant of the property at the time of the subject accident. As such, at the time of the alleged incident herein, October 11, 2013, RHEE BROS. INC. did not own, lease, occupy, manage, supervise, maintain any control over, make repairs or perform any maintenance to the subject premises. RHEE BROS. INC. first became aware of the subject incident on November 11, 2016, upon receipt of plaintiff's Summons and Complaint. At and prior to the time of the alleged incident, RHEE BROS. INC. did not hear about, nor was it involved in any prior claim, regarding a similar incident where a customer fell at the subject premises, as again, it was not the owner, tenant or occupant of the property. At and prior to the time of the alleged incident, RHEE BROS. INC. did not receive any notice of any similar prior incidents taking place at the subject premises. At and prior to the time of the alleged incident, RHEE BROS. INC. did not make any changes, alterations or repairs to the subject premises where the alleged incident took place." *See* Defendant Rhee's Affidavit in Support Exhibit A.

Counsel for defendant Rhee further contends that, "[i]n the event that this Court finds that RHEE BROS. somehow did owe a potential duty to the plaintiff, which RHEE BROS. did not, it is also respectfully submitted that RHEE BROS. nevertheless bears no liability because plaintiff cannot establish that RHEE BROS. created any alleged defective condition in relation to the subject premises nor that it was on actual or constructive notice of any such defective condition.

Therefore, summary judgment should still be granted in RHEE BROS.'s favor. As previously stated, at the time of the subject accident, RHEE BROS. did not own, occupy, maintain or control the subject premises wherein plaintiff slipped/tripped and fell.... As such, RHEE BROS. had no reason to be on actual or constructive of (*sic*) notice of any defect.... Clearly, nothing in the record before the Court even suggests that RHEE BROS. could have known that the subject premises was somehow defective, as it had no involvement in the subject premises at the time of the subject accident and never received any prior reports of any complaints or injuries. Moreover, nothing suggests that RHEE BROS. took any action whatsoever with respect to the subject premises at the time of the accident, let alone any type of action that could cause a defect."

In opposition to the motion, counsel for plaintiff argues that "[i]t is important to note that as the moving defendant noted, this action is in the pre-discovery phase where no other discovery has been exchanged. As such, the evidence submitted in support of (*sic*) Defendant, RHEE BROS., INC., is ***significantly insufficient*** for the Court to grant the instant motion at this time. Moreover, Plaintiff HONG is entitled to discovery from Defendant, RHEE BROS., INC. In this respect, Defendant, RHEE BROS., INC.'s instant motion is premature. Defendant, RHEE BROS., INC., alleges that it did not own, lease, operate, maintain, manage or control the subject premises where this accident occurred. Plaintiff HONG strongly disputes Defendant, RHEE BROS., INC.'s claim that it did not own, lease, operate, maintain, manage or control the subject premises. Defendant, RHEE BROS., INC., is an Asian food distributor. It is important to note that ***even if Defendant, RHEE BROS., INC., was not the owner of the building of Assi Plaza at the time of the accident, as alleged, Defendant, RHEE BROS., INC., was the owner of Assi Plaza, as Asian supermarket, as well as its own 'Assi' brand that was sold at the Assi Plaza, the subject premises where the accident occurred.*** Defendant, RHEE BROS., INC.'s website

show (*sic*) that they created the brand named 'Assi'.... In fact, Defendant, RHEE BROS., INC., is also the trademark owner of Assi Plaza. On December 18, 2003, Defendant, RHEE BROS., INC., filed a U.S. federal trademark registration for Assi Plaza, ... In this respect, Defendant, RHEE BROS., INC., clearly operated, maintained, managed and controlled the subject premises. Or at the very least, there are material issues of fact as to whether Defendant, RHEE BROS., INC., operated, maintained, managed and controlled the subject premises at the time of the accident. Moreover, Defendant, RHEE BROS., INC., has the ownership and control of what was sold in Assi Plaza as their Assi brand products were sold at the Assi Plaza. In this respect, there are material issues of fact as to whether Defendant, RHEE BROS., INC., had actual notice of (*sic*) defective and dangerous condition of the box as well as improper weight of the box and the unsafe and slippery condition of (*sic*) floor by directly creating such conditions. Or alternatively, there are material issues of fact as to whether Defendant, RHEE BROS., INC., had constructive notice of said condition." *See* Plaintiff's Affirmation in Opposition Exhibits A and B.

Counsel for plaintiff adds that, "[d]espite the fact that Defendant, RHEE BROS., INC., submitted a deeds (*sic*) for the property of 131-01 39th Avenue ..., there is a material issue of fact as to whether Defendant, RHEE BROS., INC., was the owner of the subject property, through the doctrine of piercing the corporate veil. The deeds (*sic*) for the property of 131-03 39th Avenue indicates that the grantor/seller is SYNG MAN RHEE, located at 7461 Coca Cola Driver (*sic*), Hanover, MD 21076 and the buyer of (*sic*) the grantee/buyer of the subject property is RHEES FLUSHING, LLC, located at 7461 Coca Cola Drive, Hanover, MD 21076. However, it is widely known in the Queens community that Defendant, RHEE BROS., INC., was the owner of Assi Plaza at the time of the accident. ***Numerous*** media sources have published articles which specifically report that Defendant, RHEE BROS., INC., the owner of Assi Plaza sold the

supermarket for $54.6 million in 2014.... This (*sic*) evidence that Defendant, RHEE BROS., INC., acted as the owner of (*sic*) building of Assi Plaza, located at the subject premises. In this respect, the doctrine of piercing the corporate veil applies in this case. The corporate veil will be pierced to achieve equity, even absent fraud, [w]hen a corporation has been so dominated by an individual ***or another corporation*** and its separate entity so ignored that its primarily transacts the dominator's business instead of its own and can be called the other's alter ego (*emphasis added*) [citation omitted]. It is respectfully submitted that Defendant, RHEE BROS., INC., exercised complete domination of RHEES FLUSHING, LLC, which was used to commit wrong against Plaintiff HONG. It should be noted that Plaintiff HONG is entitled to discovery from Defendant, RHEE BROS., INC., of its corporate records and bank accounts. Importantly, an individual named SYNG MAN LEE is the chief executive officer of RHEE BROS., INC. and RHEES FLUSHING, LLC. Plaintiff HONG intends to depose him in order to find out the relationship between Defendant, RHEE BROS., INC., and RHEES FLUSHING, LLC.... At the very least, there is a material issue of fact as to whether Defendant, RHEE BROS., INC. is the owner of the subject premises. Further, the alter ego doctrine, or alternatively, the doctrine of apparent authority or agency by estoppel applies in this case. It is respectfully submitted that Defendant, RHEE BROS., INC., is the alter ego of RHEES FLUSHING, LLC, where both corporations do not have separate assets, employees and business. As stated above, the chief executive officer (*sic*) of RHEES FLUSHING, LLC and Defendant, RHEE BROS., INC., are both SYNG MAN RHEE. Moreover, (*sic*) address to which Department of State will mail process if accepted on behalf of the entity for Defendant, RHEE BROS., INC., is 131-01 39th Avenue, Flushing, New York, allegedly owned by RHEES FLUSHING, LLC. Defendant, RHEE BROS., INC., further owned Assi Plaza supermarket, which was located at the said premises.

This strongly indicates that Defendant, RHEE BROS., INC., is not the 'independent business' from RHEES FLUSHING, LLC [citation omitted]. In this respect, it is respectfully submitted that Defendant, RHEE BROS., INC., controls RHEES FLUSHING, LLC, and the two operate as a single integrated entity [citations omitted]." *See* Plaintiff's Affirmation in Opposition Exhibit C.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film*

Corp., *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

Issue finding, rather than issue determination, is the key to summary judgment. *See In re Cuttitto Family Trust*, 10 A.D.3d 656, 781 N.Y.S.2d 696 (2d Dept. 2004); *Greco v. Posillico*, 290 A.D.2d 532, 736 N.Y.S.2d 418 (2d Dept. 2002); *Gniewek v. Consolidated Edison Co.*, 271 A.D.2d 643, 707 N.Y.S.2d 871 (2d Dept. 2000); *Judice v. DeAngelo*, 272 A.D.2d 583, 709 N.Y.S.2d 427 (2d Dept. 2000). The court should refrain from making credibility determinations (*see S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 357 N.Y.S.2d 478 (1974); *Surdo v. Albany Collision Supply, Inc.*, 8 A.D.3d 655, 779 N.Y.S.2d 544 (2d Dept. 2004); *Greco v. Posillico, supra*; *Petri v. Half Off Cards, Inc.*, 284 A.D.2d 444, 727 N.Y.S.2d 455 (2d Dept. 2001)), and the papers should be scrutinized carefully in the light most favorable to the party opposing the motion. *See Glover v. City of New York*, 298 A.D.2d 428, 748 N.Y.S.2d 393 (2d Dept. 2002); *Perez v. Exel Logistics, Inc.*, 278 A.D.2d 213, 717 N.Y.S.2d 278 (2d Dept. 2000). Where causation is disputed, summary judgment is not appropriate unless only one conclusion may be drawn from the established facts. *See Kritz v. Schum*, 75 N.Y.2d 25, 550 N.Y.S.2d 584 (1989).

Summary judgment is a drastic remedy which should not be granted when there is any doubt about the existence of a triable issue of fact. *See Sillman v. Twentieth Century-Fox Film*

Corp., *supra*. It is nevertheless an appropriate tool to weed out meritless claims. *See Lewis v. Desmond*, 187 A.D.2d 797, 589 N.Y.S.2d 678 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N.A.*, 82 A.D.2d 168, 442 N.Y.S.2d 610 (3d Dept. 1981).

In order for plaintiff to make a *prima facie* case of negligence, he or she must establish the existence of a dangerous or defective condition in the first instance. *See Pillato v. Diamond*, 209 A.D.2d 393, 618 N.Y.S.2d 446 (2d Dept. 1994). Plaintiff must also demonstrate that the defendant's negligence was a substantial cause of the incident. *See Howard v. Poseidon Pools, Inc.*, 72 N.Y.2d 972, 534 N.Y.S.2d 360 (1988).

Under New York law, a landowner must exercise reasonable care to maintain its premises in a safe condition in view of the circumstances, accounting for the possibility of injury to others, the seriousness of such injury and the burden of avoiding such risk. *See Witherspoon v. Columbia University*, 7 A.D.3d 702, 777 N.Y.S.2d 507 (2d Dept. 2004).

"To impose liability upon a defendant in a trip-and-fall action, there must be evidence that a dangerous or defective condition existed, and that the defendant either created the condition or had actual or constructive notice of it." *See Leary v. Leisure Glen Home Owners Ass'n, Inc.*, 82 A.D.3d 1169, 920 N.Y.S.2d 193 (2d Dept. 2011); *Williams v. SNS Realty of Long Island, Inc.*, 70 A.D.3d 1034, 895 N.Y.S.2d 528 (2d Dept. 2010); *Dennehy-Murphy v. Nor-Topia Serv. Center, Inc.*, 61 A.D.3d 629, 876 N.Y.S.2d 512 (2d Dept. 2009). *See also Denker v. Century 21 Dept. Stores, LLC*, 55 A.D.3d 527, 866 N.Y.S.2d 681 (2d Dept. 2008); *Rubin v. Cryder House*, 39 A.D.3d 840, 834 N.Y.S.2d 316 (2d Dept. 2007). "A defendant has constructive notice of a defect when the defect is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected." *Dennehy-Murphy v. Nor-Topia Serv. Center, Inc., supra; Gordon v. American Museum of Natural History*, 67

N.Y.2d 836, 501 N.Y.S.2d 646 (1986); *Nelson v. Cunningham Associates, L.P.*, 77 A.D.3d 638, 908 N.Y.S.2d 713 (2d Dept. 2010); *Cusack v. Peter Luger, Inc.*, 77 A.D.3d 785, 909 N.Y.S.2d 532 (2d Dept. 2010).

Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the circumstances of each case and is generally a question of fact for the jury." *See Perez v. 655 Montauk, LLC*, 81 A.D.3d 619, 916 N.Y.S.2d 137 (2d Dept. 2011); *Sabino v. 745 64th Realty Associates, LLC*, 77 A.D.3d 722, 909 N.Y.S.2d 482 (2d Dept. 2010); *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 665 N.Y.S.2d 615 (1997).

Viewing the evidence in the light most favorable to plaintiff (*see Taylor v. Rochdale Village Inc.*, 60 A.D.3d 930, 875 N.Y.S.2d 561 (2d Dept. 2009); *Judice v. DeAngelo*, 272 A.D.2d 583, 709 N.Y.S.2d 427 (2d Dept. 2000); *Robinson v. Strong Memorial Hosp.*, 98 A.D.2d 976, 470 N.Y.S.2d 2398 (4th Dept. 1983)), the Court finds that there are material triable issues of fact with respect to defendant Rhee's liability.

Additionally, it is apparent that little, if any, discovery had been completed prior to the making of defendant Rhee's motion. It is settled that "[a] party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment." *See Valdivia v. Consolidated Resistance Co. of America, Inc.*, 54 A.D.3d 753, 863 N.Y.S.2d 720 (2d Dept. 2008); *Venables v. Sagona,* 46 A.D.3d 672, 848 N.Y.S.2d 238 (2d Dept. 2007). *See generally Gruenfeld v. City of New Rochelle*, 72 A.D.3d 1025, 2010 WL 1716148 (2d Dept. 2010); *Gonzalez v. Nutech Auto Sales,* 69 A.D.3d 792, 891 N.Y.S.2d 910 (2d Dept. 2010); *Elliot v. County of Nassau*, 53 A.D.3d 561, 862 N.Y.S.2d 90 (2d Dept. 2008); *Fazio v. Brandywine Realty Trust*, 29 A.D.3d 939, 815 N.Y.S.2d 470 (2d Dept. 2006).

Accordingly, defendant Rhee's motion, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint as against it as well as any and all cross claims and counterclaims as against it, is hereby **DENIED**.

It is further ordered that the parties shall appear for a Preliminary Conference on July 17, 2017, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
May 31, 2017

ENTERED

JUN 01 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE