Kolman v Gallina
2019 NY Slip Op 33807(U)
December 31, 2019
Supreme Court, Kings County
Docket Number: 501043/17
Judge: Pamela L. Fisher

At an IAS Term, Part 94 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 31st day of December, 2019.

PRESENT:

HON. PAMELA L. FISHER,
Justice.

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RAIZY KOLMAN AND DAVID KOLMAN,

Plaintiffs,

- against -

PATRICIA GALLINA,[1] LAZER MARBLE & GRANITE CORP., GRANITE REALTY CORP., STONE & TILE INC., LAZER MECHLOVITZ AND NACHMAN MECHLOVITZ,

Defendants.

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DECISION AND ORDER

Index No. 501043/17

Mot. Seq. No. 6-8

The following e-filed papers read herein:	NYSCEF No.
Motion/Order to Show Cause/Petition/Cross Motion and Affidavits (Affirmations) Annexed	92-94, 107, 112, 114-116
Opposing Affidavits (Affirmations)	130, 133, 136, 139-141
Reply Affidavits (Affirmations)	142, 144-146

Upon the foregoing papers, defendant Granite Realty Corp. (Granite) moves, in motion (mot.) sequence (seq.) six, for an order, pursuant to CPLR 3212, granting it summary judgment (1) dismissing plaintiffs' complaint and all cross claims against it and (2) on its cross claim for contractual indemnity against defendant Stone & Tile Inc. (Stone & Tile). Defendants Lazer Marble & Granite Corp. (Lazer Marble) and Nachman Mechlovitz

[1]A stipulation of discontinuance filed January 28, 2019 discontinued this action as to Pareicia Gallina.

(Nachman) move, in mot. seq. seven, for an order (1), pursuant to CPLR 3212, granting them summary judgment dismissing plaintiffs' complaint and all cross claims against them, and (2), pursuant to CPLR 8303-a, awarding them reasonable attorney's fees. Defendant Lazer Mechlovitz (Lazer) moves, in mot. seq. eight, for an order, pursuant to CPLR 3212, granting him summary judgment and dismissing plaintiffs' claims as well as all cross claims against him.

Background and Procedural History

Plaintiffs, Raizy Kolman (Raizy or plaintiff) and David Kolman bring this action against corporate defendants Granite, Stone & Tile, Lazer Marble, and individual defendants Lazer and Nachman (collectively, defendants)[2] for injuries sustained on November 16, 2016 resulting from Raizy's trip and fall inside the premises at 1061-1065 61st Street in Brooklyn (amended compl. ¶¶ 32, 40, 48, 56, 66). Raizy testified that she first went to "Lazer Marble[,] the store . . . on 53rd and McDonald and 20th" to buy a vessel sink counter top, and that "they" sent her to their 61st street location (Raizy Kolman tr. 37, lines 2-6; at 35, lines 16-19, annexed as exhibit B to Granite's motion papers). Raizy did not recall the exact location of the premises where the accident occurred, but testified that it was "Lazer Marble" located at "10-something 61st Street" (*id.* at 34, line13). Upon being shown a photograph of

[2] The claims against defendant Patricia Gallina have been voluntarily discontinued, but the caption has not been amended to reflect this dismissal (*see* NYSCEF No. 106). In addition, Lazer Marble and Nachman's reply supporting their summary judgment motion asserts that the case has been voluntarily dismissed against Nachman (*see* NYSCEF No. 145, ¶ 4), but no stipulation of discontinuance has yet been filed, which thus necessitates considering Nachman's portion of mot. seq. seven.

the location, she testified that there was a sign over where she entered identifying the location as "1061" (*id.* at 62, lin 6). The 61st street location was a "tremendous" tile warehouse with "tiles on the wall and tiles all over on the floor and stands of tiles" (*id.* at 38, lines 21-23).

Granite submits a lease (Lease) between it as lessor and Stone & Tile as lessee, beginning January 1, 2014 and terminating December 31, 2019, for three premises located at 1051 61st Street, 1069 61st Street and 1073 61st Street in Brooklyn. Stone & Tile, pursuant to the Lease, was responsible for maintaining, repairing and cleaning the premises at its expense (Lease, § 6 [a] and 21). Granite retained the right to enter the premises to inspect and make repairs and improvements (*id.* at § 6 [c]). Stone & Tile also agreed to indemnify Granite for personal injury suits it faced regarding the premises that resulted from Stone & Tile's failure to perform its obligations under the Lease (*id.* at § 6 [j]).

Notably, Lazer is the sole shareholder and officer of both Granite and Stone & Tile (Lazer Affs., NYSCEF No. 94, ¶ 1; NYSCEF No. 116, ¶ 5). The Lease indicates that both Granite and Stone & Tile's place of business is 1053 Dahill Road in Brooklyn. Nachman is president of Lazer Marble, whose principal place of business is also 1053 Dahill Road (Nachman Aff., NYSCEF No. 112, ¶ 1).

Defendants interposed answers, and on August 6, 2018, plaintiffs filed a note of issue before discovery was completed. Significantly, none of the defendants had been deposed. Granite, Stone & Tile, Lazer Marble and Nachman moved, in mot. seqs. 2-4, to vacate the note of issue or, alternatively, to extend discovery and defendants' time to make dispositive

motions. The motions were resolved by a September 5, 2018 order which directed the parties to appear for depositions and extended the time for them to move for summary judgment until January 31, 2019. Raizy was deposed on October 19, 2018. However, her deposition was not completed and no other depositions had taken place. Lazer Marble and Nachman moved on December 27, 2018 in mot. seq. 5, pursuant to CPLR 3126, for an order dismissing the action for Raizy's failure to appear for her continued deposition, or, alternatively, for an order compelling her deposition. Movants timely filed their summary judgment motions. Lazer Marble and Nachman's dismissal motion was resolved by March 27, 2019 and May 20, 2019 orders which directed the parties' depositions and Raizy's independent medical examination. No notice has been received whether the ordered depositions took place, but the parties, since filing their initial papers, have not supplemented their submissions for or against summary judgment with any additional deposition testimony.

The Parties' Contentions

Granite argues, in support of it motion, mot. seq. 6, that Raizy plaintiff tripped and fell "inside one of Stone & Tile's bays, located at 1069-1073, 61st Street, Brooklyn" (NYSCEF No. 93, ¶ 4). Granite alleges that it was an absentee landlord when the accident occurred, and that since the Lease took effect, it has not entered the premises or performed work or repair in that location. Nachman asserts in support of his and Lazer Marble's motion, mot. seq. 7, that neither he nor Lazer Marble had any ownership interest in 1069-1073 61st Street in Brooklyn and did not operate, manage, control or maintain the subject premises. Lazer

argues, in support of his motion, mot. seq. 8, that he was merely a shareholder in Granite and Stone & Tile and cannot be held liable because he did not own, lease, manage, control, maintain or perform repairs on the premises in his individual capacity. Lazer avers that while the accident occurred at 1061 61st street, "this location is technically 1069 61st street" (NYSCEF No. 116, ¶ 2). Lazer also alleges that he never entered into any contract in which he agreed to indemnify the codefendants.

Stone & Tile argues in opposition to Granite's motion, mot. seq. 6, that while "Granite" may not have entered the premises, it still had actual or constructive notice of the premises' condition since Lazer was presumably on premises every day in his capacity as Stone & Tile's sole principal. Stone & Tile argues that the hazardous condition on the floor was visible from outside the premises and that Granite's contractual rights to make repairs establishes a basis for Granite's liability. Stone & Tile argues that the signatures for Granite and Stone & Tile on the lease are similar and that Raizy would seek discovery from Lazer as to whether he signed the lease on both parties' behalf. Stone & Tile argues regarding Granite's motion for contractual indemnity that the contractual indemnification provision is unenforceable under General Obligations Law (GOL) § 5-321 because Granite is attempting to escape liability for its own negligent acts.

Plaintiffs' argue in opposition to movants' motions, mot. seqs. 6-8, that the motions are premature, as discovery may lead to relevant evidence exclusively within movants' knowledge or control that is essential to oppose the motions. In particular, plaintiffs

highlight an inconsistency in Lazer's two affidavits that creates a factual issue as to indemnification. More specifically, Lazer alleges, in support of Granite's motion, that Stone & Tile agreed to indemnify Granite, while Lazer denies, in an affidavit supporting his own motion, entering into a contract under which he agreed to indemnify any of the codefendants. Plaintiffs further argue that Lazer's affidavits are self-serving and that there a factual question exists whether Granite's reservation of rights to enter the premises to make repairs subjects Granite to liability in spite of being an out-of-possession landlord. Plaintiffs also argue that GOL § 5-321 renders the contractual indemnification provision unenforceable because Granite may be attempting to escape liability for its own negligent acts. Finally, plaintiffs argues that questions of fact exist as to whether Granite had actual or constructive notice of the allegedly dangerous condition.

Granite argues in reply, in further support of its motion, Granite argues that plaintiffs should be estopped from arguing that summary judgment is premature, as depositions had not been completed as of 10 months after the note of issue filing date.

Discussion

A. Summary Judgment Standard

A party moving for summary judgment bears the burden of making a prima facie showing of entitlement to judgment as a matter of law and must tender sufficient evidence in admissible form to demonstrate the absence of any material factual issues (*see* CPLR 3212 [b]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*,

49 NY2d 557, 562 [1980]). Failure to make this prima facie showing requires denying the motion (*see Alvarez*, 68 NY2d at 324; *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidence in admissible form sufficient to establish a material factual issue requiring a trial (*see* CPLR 3212; *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). "[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment" (*Banco Popular North America v Victory Taxi Management, Inc.*, 1 NY3d 381, 383 [2004] [internal quotations omitted]). "[T]he shadowy semblance of an issue or bald conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment" (*Spodek v Park Property Dev. Assocs.*, 263 AD2d 478, 478 [2d Dept 1999]). Courts must view the totality of evidence presented in the light most favorable to opposing parties and afford them the benefit of every favorable inference (*see Fortune v Raritan Building Services Corp.*, 175 AD3d 469, 470 [2d Dept 2019]; *Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2d Dept 2019]).

Summary judgment is a "drastic remedy" that "should not be granted where there is any doubt as to the existence of such issues or where the issue is 'arguable'; issue-finding, rather than issue-determination, is the key to the procedure" (*Sillman v Twentieth Century-Fox Film Corp*, 3 NY2d 395, 404, *rearg denied* 3 NY2d 941 [1957] [internal citations omitted]). "The court's function on a motion for summary judgment is 'to determine whether material factual issues exist, not resolve such issues'" (*Ruiz v Griffin,* 71 AD3d 1112, 1115 [2d Dept 2010] *quoting Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]).

B. Granite's Motion (Mot. Seq. 6)

A landowner moving for summary judgment in a premises liability case bears the initial burden of establishing that it did not create the defective condition or have actual or constructive notice of its existence for sufficient time to discover and remedy it (*see Ramirez v Saka*, 76 AD3d 673, 674-675 [2d Dept 2010]; *Rosas v 397 Broadway Corp*, 19 AD3d 574, 574 [2d Dept 2005]). An out-of-possession owner or lessor is not liable in negligence for injuries occurring on premises unless the owner or lessor has retained control over the premises or is contractually obligated to repair unsafe conditions (*see Henry v Hamilton Equities, Inc.*, 34 NY3d 136, 141 [2019]; *Putnam v Stout*, 38 NY2d 607, 618 [1976]; *Valenti v 400 Carlls Path Realty Corp.*, 52 AD3d 696, 696 [2d Dept 2008]). Control of the premises may be established by proof of the landlord's promise to repair or by a course of conduct demonstrating that the landlord has assumed responsibility to maintain the premises (*see Winby v Cestas*, 7 AD3d 615, 615 [2d Dept 2004]). However, in absence of a duty imposed by statute, a lessor's mere reservation of right to enter a leased premises to make repairs does not give rise to liability for a subsequently arising dangerous condition (*see Ortiz v RVC Realty Co.*, 253 AD2d 802, 802 [2d Dept 1998]).

Here, the Lease submitted by Granite states that Stone & Tile, as lessee, was responsible for maintaining, repairing and cleaning the premises and that Granite retained the right to enter the premises to make repairs, a reservation that, in and of itself, does not impose liability (*see Ortiz*, 253 AD3d at 802). Lazer's affidavit, submitted on Granite's behalf, states that Granite was an absentee landlord, did not operate or work on the premises

and never received any complaints about the premises before the accident. However, Granite has failed to meet its burden of establishing, prima face, that it was it was an out-of-possession landlord without actual or constructive notice of any dangerous condition on the premises. The Lease notes that Granite and Stone & Tile have the same principal place of business. The same individual apparently signed the Lease on behalf of both entities, as the signatures appear identical. The statement, contained in Lazer's self-serving affidavit, that Granite did not control the premises, in absence of other evidence, fails to compel a no notice finding (*see Simmons v City of New York*, 146 AD2d 624, 624 [2d Dept 1989] [excerpts from plaintiff's vague deposition transcript neither convincing nor compelling enough to render an inference that defendants were negligent]).

In any event, plaintiffs and Stone & Tile have submitted evidence that has raised a factual question sufficient to defeat Granite's motion. Specifically, plaintiffs and Stone & Tile highlight Lazer's affidavit supporting his own summary judgment motion where he avers that he is the sole shareholder and officer of both Granite and Stone & Tile. A factual question exists whether Lazer, in his capacity as Stone & Tile's principal, was on the subject premises and whether he had actual or constructive notice of the alleged defective condition. Another factual question exists, given Lazer's ownership interest in both corporations, whether Granite retained control of the premises (*see Rosas*, 19 AD3d at 574 [triable issue of fact as to whether appellant was out-of-possession landlord or had notice of the alleged defect, where evidence showed that the same individual was president of both the landlord and corporate tenant and was present at the premises every day]; *Brasby v Barra*, 156 AD2d

530, 531 [2d Dept 1989] [individual defendant, who leased property to third-party defendant corporation in which he was also the sole stockholder and president, was not entitled to summary judgment, as record revealed that defendant had actual notice of the defective condition and there was no dispute that defendant frequented premises before accident, undermining his argument that he was an out-of-possession landlord]; *Mikolajczyk v M.C. Morgan Contractors, Inc.*, 273 AD2d 864 [4th Dept 2000] [summary judgment denied where record demonstrated that owner of lessor corporation was frequently on premises and would occasionally remove salt or use snow on premises]; *Jenkins v Ehmer*, 272 AD2d 976, 977 [4th Dept 2000] [individual defendant and owner of defendant landlord corporation did not establish entitlement to summary judgment where he did not affirmatively show that he did not retain control over the premises or lacked notice of the allegedly dangerous condition, as the record demonstrated that he was at the motel on a frequent basis]). Notably, Lazer does not allege in either of his affidavits that he was not personally on the premises every day or that he was unaware of the allegedly dangerous condition in question.

Plaintiffs also contend that summary judgment is premature, as discovery has not yet been completed. No notice has been received, as previously mentioned, whether court-ordered depositions occurred, and, as also mentioned, the parties, since filing their initial papers, have not supplemented their submissions for or against summary judgment with any additional deposition testimony. "A motion for summary judgment may be denied as premature where it appears that the facts essential to oppose the motion exist but cannot then be stated" (*Bonilla v Bangert's Flowers*, 132 AD3d 618, 619 [2d Dept 2015]; *see also*

Guzman v City of New York, 171 AD3d 653 [1st Dept 2019]). "A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (*id.*). "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*Cajas-Romero v Ward*, 106 AD3d 850, 852 [2d Dept 2013] [internal quotations and citation omitted]).

Here, plaintiffs are correct that discovery from the defendants would flesh out the relationship between Lazer and the other corporate defendants and would reveal whether Granite, through Lazer, had actual or constructive notice of the alleged dangerous condition. Discovery from defendants would also shed light on the issue of whether the indemnification provision of the contract is enforceable. Moreover, this information lies exclusively within defendants' knowledge and control. Granting summary judgment under the particular circumstances here would be inappropriate, even if Granite had sustained its burden to make a prima facie showing, as the evidence necessary for plaintiffs to raise a material factual issue is solely in defendants' possession and considering that both parties share responsibility for not completing discovery (*id.*; *Guzman*, 171 AD3d at 653; *Rodriguez v Architron Envtl. Servs., Inc.*, 166 AD3d 505, 506 [1st Dept 2018]).

C. Lazer Marble and Nachman's Motion (Mot. Seq. 7)

Lazer Marble and Nachman have also failed to demonstrate their entitlement to summary judgment as a matter of law. Lazer Marble and Nachman are not parties to the lease between Granite and Stone & Tile, but Lazer Marble shares Granite and Stone & Tile's principal place of business at 1053 Dahill Road in Brooklyn. Lazer and Nachman appear to be related, as they share the same last name. Nachman's company, Lazer Marble, apparently has Lazer's name as part of its corporate name. In addition, Raizy testified that she first went to Lazer Marble's storefront on the day of her accident, at which time she was directed to "Lazer Marble's" warehouse on 61st Street. Given these facts, Lazer Marble and Nachman have not established, prima facie, that they did not operate, manage, control or maintain the subject premises or have actual or constructive notice of the allegedly dangerous condition. Moreover, even if Lazer Marble and Nachman had established their entitlement to summary judgment, plaintiffs would not be able to properly oppose the motion by producing evidence sufficient to establish an issue of material fact because such information is in defendants' exclusive control and defendants have not yet been deposed (*see* Section B, *supra*).

Lazar Marble and Nachman's summary judgment motion warrants denial, and therefore, they have not shown entitlement to attorneys' fees pursuant to CPLR 8303-a.

D. Lazer's Motion (Mot. Seq. 8)

Lazer moves for summary judgment on the ground that he did not commit any independently tortuous act and cannot be liable for Granite or Stone & Tile's negligence as

a mere shareholder and officer of those corporations. "[A] corporate officer is not held liable for the negligence of a corporation merely because of his official relationship to it" (*Felder v R & K Realty,* 295 AD2d 560, 561 [2d Dept 2002], quoting *Clark v Pine Hill Homes*, 112 AD2d 755 [4th Dept 1985]). An individual defendant is entitled to summary judgment if "he did not act in his individual capacity or commit any tort outside the scope of his corporate capacity (*Bernstein v Starrett City*, 303 AD2d 530, 532 [2d Dept 2003]; *Meyer v Martin*, 16 AD3d 632, 634 [2d Dept 2005]).

However, Lazer's summary judgment motion is premature. Discovery from Lazer would flesh out the relationship between him and the other corporate defendants and would reveal whether Lazer, in his individual capacity, committed any tort outside the scope of his corporate capacity (*Bonilla*, 132 AD3d at 619). This information is exclusively within his knowledge and control, and granting summary judgment under these circumstances is inappropriate (*id.*; *Guzman*, 171 AD3d at 653; *Rodriguez*, 166 AD3d at 506). Accordingly, it is

ORDERED that Granite's motion, mot. seq. 6, for an order granting it summary judgment and dismissing plaintiffs' complaint and all cross claims against it is denied; and it is further

ORDERED that Granite's motion, mot. seq. 6, for an order granting it summary judgment on its cross claim for contractual indemnity against Stone & Tile is denied; and it is further

ORDERED that Lazer Marble and Nachman's motion, mot. seq. 7, for an order, granting them summary judgment dismissing plaintiffs' complaint and all cross claims against them is denied; and it is further

ORDERED that Lazer Marble and Nachman's motion, mot. seq. 7, for an order awarding them reasonable attorney's fees pursuant to CPLR 8303-a, is denied; and it is further

ORDERED that Lazer's motion, mot. seq. 8, for an order granting him summary judgment and dismissing plaintiffs' claims against him as well as dismissing all cross claims against him is denied.

This constitutes the decision and order of the court.

ENTER,

J.S.C.

Hon. Pamela L. Fisher, J.S.C.

KINGS COUNTY CLERK
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