SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE L. LOVE** **PART** **IAS MOTION 63M**

Justice

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INDEX NO. 150259/2012

MANUEL GOMEZ,

Plaintiff,

MOTION DATE 01/04/2021, 01/04/2021

- v -

MOTION SEQ. NO. 005 006

1539 ST. NICHOLAS HARDWARE INC., WEST 187TH ST. PROPERTIES INC. KOZOT REALTY CORP. and ABC CORP., A FICTITIOUS NAME,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 165, 167, 170, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 210, 212, 214

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 166, 168, 169, 171, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 211, 213, 215

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motions are decided as follows:

The case arises from a fire which occurred on March 14, 2011, at the building located at 1539 St. Nicholas Avenue. At the time, said building was owned by West 187th Street Properties, Inc ("West") The fire occurred above the ceiling of the premises occupied by the defendant 1539 St. Nicholas Hardware, Inc ("St. Nicholas Hardware"). Kozot Realty Corp. ("Kozot") is the owner of the adjoining building on at 1533 St. Nicholas Avenue. Plaintiff, Manuel Gomez ("Gomez") commenced the instant action by e-filing a summons and complaint on February 21, 2012, seeking to recover for injuries allegedly sustained in said fire. On April 9, 2012, St. Nicholas Hardware interposed an answer with cross-claims. On July 30, 2012, West interposed an answer. On April 29, 2014, this action was consolidated with a related action (Index No. 152333/2013), adding

Kozot as a party defendant. St. Nicholas Hardware now moves under motion sequence 002 for summary judgment, dismissing this action as asserted against St. Nicholas Hardware; and West and Kozot move under motion sequence 003 for summary judgment, dismissing this action and any cross claims asserted against them.

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d331, 479 N.Y.S.2d 35 (1st Dept., 1984) *aff'd* 65 N.Y.2d 732, 429 N.Y.S.2d 29 (1985). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

In support of its motion, St. Nicholas Hardware submits the deposition transcripts of plaintiff, Gomez, Ishmael Nunez ("Nunez") owner of St. Nicholas Hardware, and New York City Fire Marshall George Aguirre. It is undisputed that plaintiff was within the building at 1533 St. Nicholas Avenue at the time of the fire, and that he was injured using the fire escape of that

building and jumping from that fire escape to the ground. St. Nicholas Hardware argues that "there would be no duty on the part of the defendant St. Nicholas Hardware to an individual who allegedly was residing in the adjoining property and was allegedly injured in exiting from that property. Clearly, the defendant St. Nicholas Hardware has no duty to maintain, control, and certainly, does not own the adjoining building wherein the plaintiff was allegedly injured." This argument is utterly without merit as it is well established that there is a duty to exercise reasonable care in the maintenance of its property to prevent foreseeable injury that might occur on the adjoining property (see *Brown v Long Is. R.R. Co*. 32 A.D.3d 813 [2d Dept. 2006] *citing Scurti v City of New York*, 40 NY2d 433, 445 [1976]; *Leone v City of Utica*, 66 AD2d 463, 466 [1979]). As such, St. Nicholas Hardware's motion must be denied.

In support of Kozot and West's motion for summary judgment, as it relates to Kozot, defendants submit the deposition testimony of plaintiff, and the deposition testimony of Alexandra Zotos-Bermio, a 50% owner of Kozot. Additionally, Zotos-Bermio is employed as the building manager and lives in the building in apartment 31, which is located immediately next to Apartment 32, where plaintiff resided. Kozot was previously granted summary judgment. In reversing said Order as premature, the Appellate Division summarized plaintiff's argument as follows:

> "Plaintiff, who did not hear any smoke or fire alarm sounding on the night of the fire, posits that Kozot may have failed to provide the building with a properly working smoke or fire alarm, and that, if so, the lack of an adequate device of this nature delayed plaintiff's evacuation on the fire escape until there was so much smoke surrounding the building that he panicked when he reached the second-story platform, failed to see the ladder, and jumped."

Based upon same, the Appellate Division continued:

> There having been no discovery before Kozot moved for summary judgment, the existing record does not negate plaintiff's theory, nor does plaintiff's deposition testimony in the related action establish, as a matter of law, whether or not there was sufficient smoke in the

> building to have triggered an adequate and functional smoke or fire alarm soon enough for plaintiff to have avoided the extremely smoky condition he allegedly encountered when he finally did evacuate. Drawing all reasonable inferences in favor of plaintiff, the non-movant, it cannot be said, as a matter of law, that plaintiff's jump from the fireescape platform, allegedly when he was in a state of fear and shock due to the smoke and nearby flames, was not "a foreseeable consequence of an emergency situation" (Humbach v Goldstein, 255 AD2d 420, 421 [2d Dept 1998]), assuming that plaintiff proves that his escape was delayed by Kozot's failure to provide adequate fire safety devices.

Discovery on said issues having been completed, this issue is ripe for determination. Ms. Zotos-Bermio testified that the building was inspected by their insurance company on a yearly basis (page 27, line 3; page 36, line 14; page 68, line 2; page 70, line 20), that the smoke/fire alarms in each of the tenant's apartments were inspected on a yearly basis (page 54, line 25; page 55, line 10; page 60, line 10), and that the building was inspected three to six months prior to the March, 2010 fire (page 118, line 2). The last insurance company inspection before the March, 2010 incident was between October and December 2009 and that inspection found no fire safety issues (page 118, line 2). At no time before or after the fire did Ms. Zotos-Bermio ever receive notification from anyone of any violation for a fire code issue in her building (page 117, line 7). There were smoke detectors both in the apartments and in the landings for at least the past 30 years (page 45, line 5). In 2010 there were battery-operated fire alarms in the apartments and every floor landing had a fire alarm that was both battery operated and hardwired into the buildings electrical system (page 48, line 6). The battery operated smoke alarms in the apartments are inspected annually and would be replaced as needed by the building (page 54, line 15). Every year, in the beginning of the winter, the handyman or the super would inspect each apartment. This has been a procedure that she had put in place for the past 25 years (page 55, line 6). As such, Kozot has established that there was a working fire alarm both in plaintiff's apartment and on the landing immediately outside

the apartment. Kozot further established that the front door of Mr. Gomez's apartment was an iron, fire safety door (page 65, line 20), that there are fire exit signs that light up within the building which light when the electricity goes out (page 77, line 23), and that fire escapes were attached to the building page 69, line 10), which were inspected by the insurance company, and Ms. Zotos-Bermio went with them when they conducted their inspection (page 69, line 24).

Plaintiff's deposition fails to raise an issue of fact as to Kozot's negligence. In the early morning of March 14, 2010 Gomez was sleeping in his room when Tobias (another resident of the apartment) knocked on his door (Gomez 2013 deposition page 141, line 18) and advised him that the building was burning (page 142, line 9). Gomez does not remember smelling any smoke at that time (page 142, line 3) or seeing any fire at that time (page 32, line 24; page 78 line 25). After being told that the building was burning, Mr. Gomez got dressed (page 143, line 7) packed a bag, and took his wallet and his cell phone with him before he left his room. (page 144, line 21). It took him "perhaps five minutes" to dress (page 28, line 2). 24. After leaving his room, Mr. Gomez did not attempt to leave the apartment by the door to the hallway, but instead went immediately toward the living room where the fire escape was. (page 146, line 13). Tobias and Armida went down the fire escape before Mr. Gomez left the apartment. (page 40, line 10). When he was in the living room, where the window that led to the fire escape was, he did not smell any smoke or hear any fire alarms from his building (page 42, line 16) and he did not recall whether there was any smoke in the living room (page 43, line 3). It was only when he got outside onto the fire escape that he saw that there were flames coming from the hardware store (page 44, line 6). The flames did not reach the fire escape that he was using. (page 46, line 10). When he arrived at the first level above the ground, the "bottom platform" of the fire escape, (page 149, line 8) Gomez never tried to take the ladder down to the street before he jumped because he failed to see it (page 72, line 15, page

70, line 17). As such, Kozot has established that all of the fire safety devices were in working order, which plaintiff has failed to rebut and the motion must be granted as to Kozot.

As it relates to West, defendants argue 1) that no duty is owed to plaintiff by virtue of his occupancy of an adjacent building and the manner of his injury, an argument which this Court has rejected *supra*, 2) that West is an out of possession landlord not responsible for inspecting and repairing the wires in the ceiling, 3) that the fire was caused by a latent defect which could not have been discovered in the course of a reasonable inspection and 4) that plaintiff cannot demonstrate that there was a fault in the wiring.

In support, West submits a copy of the relevant lease. Paragraph 73 of the lease states that the Tenant accepts the premises "as is" and will be responsible for all repairs within the demised premises, including structural repairs. Paragraph 74(a) requires that "Tenant shall put and keep in good repair the premises, and all outlets, risers, wiring, . . . electrical work . . . electric meters, connections and appurtenances . . ." Generally, "an out-of-possession landlord is not responsible for dangerous conditions existing upon leased premises after possession of the premises has been transferred to the tenant" (*Davison v. Wiggand*, 247 A.D.2d 700. 701, 668 N.Y.S.2d 748 [1998], lv. denied 94 N.Y.2d 751, [1999]) While the testimony of West alleges that same is an out of possession landlord, same is contested by the testimony of St. Nicholas Hardware. Additionally, an owner's responsibility under Multiple Dwelling Law § 78 is non-delegable, See *Bonifacio v. 910-930 Southern Blvd. LLC*, 295 A.D.2d 86 (1st Dep't 2002) (an owner's liability under the statute requiring a landlord to keep a property in good repair is non-delegable, although the owner may in turn look to a party with whom it contracted for the maintenance of the premises); *Wagner v. Grinnell Hous. Development Fund Corp*., 260 A.D.2d 265 (1st Dep't 1999), lv to app denied, 99 N.Y.2d 502 (building owner's duty to maintain its premises remains nondelegable as between

the owner and the injured party despite any contractual delegation of maintenance obligations by the owner to another party).

West argues that it had no constructive or actual notice of any dangerous or defective condition in the building and therefore cannot be found to have been negligent in contributing to the fire. To constitute constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time before the accident to permit the defendant an opportunity to discover and remedy it (see *Gordon v. American Museum of Natural History*, supra; *Lee v. Bethel First Pentecostal Church of Am.*, 304 A.D.2d 798, 799). Moreover, constructive notice will not be imputed where a defect is latent and would not be discoverable upon reasonable inspection (see *Rapino v. City of New York*, 299 A.D.2d 470; Ferris v. County of Suffolk, 174 A.D.2d 70, 76). West's argument is premised on the deposition testimony of Fire Marshall Cristadoro, Fire Marshall Aguirre and a Fire Inspection Report. The Fire Marshalls came to the conclusion that the most likely cause of the fire was electrical based upon the lack of other combustible materials in the area of the fire's origin ("at a point approximately 25 feet south of the building north exterior wall, one foot west of the roll-down gates at receiving level. So basically that means the north side of the building if you come down 25 feet approximately and then you go in approximately a foot, that's the spot of where the fire originated, so it would be basically just inside the roll-down gates when you entered the store"). As described by Aguirre, the wiring in the area that this fire started was in the ceiling, accessible only if you opened the ceiling and looked inside. (page 31, line 19). Since the wiring is hidden by the ceiling, he would not expect the landlord or the owner of the building to replace the wiring or inspect it. (page 29, line 18). Based upon same, West argues that there was a lack of constructive or actual notice.

While it is clear that the electrical wires were in the ceiling of St. Nicholas Hardware and not open to inspection, the deposition testimony of Ismael Nunez on behalf of St. Nicholas Hardware establishes issues of fact as to whether West knew or should have known that a hazardous condition existed. Specifically, there were numerous leaks in the ceiling and that the building's superintendent was notified of said leaks (Nunez deposition, page 60, line 18 through page 61, line 5). Nunez further testified "There is a section in the front that you would see leaks come in. But you really can't tell if you don't break the ceiling, you know. Because a leak could be here, and you see water coming down here, but I would report it to the super, and that was it. (page 64, lines 6-13). While defendants were certainly not on notice of any electrical issues on the premises, there is an issue of fact as to whether West should have known of the potential of an electrical fire based upon water leaks in the area of the electrical wiring. As such, West is not entitled to summary judgment.

ORDERED that defendant, 1539 St. Nicholas Hardware, Inc's motion is DENIED in its entirety; and it is further

ORDERED that as it relates to West 187th Street Properties, Inc, the motion for summary judgment is DENIED; and it is further

ORDERED that defendant, Kozot Realty Corp's is granted is granted summary judgment and the complaint is dismissed with costs and disbursements to Kozot Realty Corp. as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

3/10/2021
DATE

LAURENCE L. LOVE, J.S.C.

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
[ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER

APPLICATION:	☐	SETTLE ORDER	☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN	☐	FIDUCIARY APPOINTMENT	☐ REFERENCE