SUPREME COURT- STATE OF NEW YORK
DUTCHESS COUNTY

Present:
Hon. HAL B. GREENWALD
Justice.

SUPREME COURT: DUTCHESS COUNTY

PETER A. HEMENDINGER,

Plaintiff

-against-

BRANDYWINE PARK ASSOCIATES II, LLC.

Defendant.

DECISION AND ORDER
Index No. 2017/51028
Motion Seq. No. 2

The following papers were reviewed and considered by the Court in determining the within Decision and Order:

Notice of Motion and supporting papers	NYSCEF Doc. Nos.
	1,3,7,10,11-16,23-28, 31-41, 46, 48-60, 65-67

RELEVANT BACKGROUND

This matter arises out of a March 13, 2015 slip and fall on ice in the rear parking lot of property at 100 Bigelow Avenue, Schenectady, NY.(The Property). The relevant procedural history and claimed facts have been set forth in the Affirmation of David C. Blaxhill, Esq. Defendant's counsel (NYSCEF Doc. No. 32). Plaintiff PETER A. HEMENDINGER (HEMENDINGER) claims to be an employee of "SCAP' and works in the building at The Property. He was moving a school bus in the rear parking lot and slipped and fell when he was exiting the bus. Another employee of SCAP did maintenance work on The Property and would occasionally do snow removal on the parking lot. However, snow plowing of the parking lots was contracted to a third party. Defendant BRANDYWINE PARK ASSOCIATES II, LLC (BRANDYWINE) was the owner of The Property. SCAP was the tenant of the entire building under the lease (NYSCEF Doc. No. 34) and SCAP had all the responsibility for snow plowing. BRANDYWINE had no obligation to do maintenance at the building. BRANDYWNE neither performed any snow removal or plowing, nor hired any third party to do so at The Property. BRANDYWINE seeks dismissal of the complaint pursuant to CPLR 3212 summary judgment.

SUMMARY JUDGMENT

As set forth in *Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 (1957), summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of triable issues of fact. (see *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223 (s,

1978) *Di Menna & Sons v. City of New York*, 301 N. Y. 118 (1950); *Greenberg v. Bar Steel Constr. Corp.*, 22 N.Y.2d 210 (1968); *Barrett v. Jacobs*, 255 N. Y. 520 (1931).

When a court decides a motion for summary judgment: "...issue-finding not issue-determination is the key to the procedure. If and when the court reaches the conclusion that a genuine and substantial issue of fact is presented, such determination requires the denial of the application for summary judgment." *Esteve v. Abad*, 271 A.D. 725. (1st Dept, 1947).

Generally, the basis for determining summary judgment is that: "[T]he proponent of a summary judgment motion must make a prima facie case showing entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material fact." *Pullman v. Silverman*, 28 N.Y.3d 1060 (2016), *quoting* Alvarez v. Prospect Hosp. 68 N.Y.2d 320 (1986). Further as stated in *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985). "Bare conclusory assertions... " are insufficient to cause the court to grant summary judgment.

For a summary judgment motion to be denied, the one opposing the motion must demonstrate the existence of facts that have a probative value that indicates there is an unresolved material issue .See e.g. *Piedmont Hotel Co. v. A.E. Nettleton Co.*, 263 N.Y. 25, (1933); If the opposition can show there are questionable issues of fact that require a trial of the action, than summary judgment must be denied. In determining a motion for summary judgement, the court must look at the proof being offered in the light most favorable to the nonmoving party and then deny the motion when there is :....even arguably any doubt as to the existence of a triable issue'. *Baker v. Briarcliff School Dist.*, 205 A.D.2d 652 (2nd Dep't, 1994).

BRANDYWINE'S ARGUMENT FOR SUMMARY JUDGMENT

BRANDYWINE's basis for summary judgment is that it is an out-of-possession landlord and owes no duty of care to HEMENDINGER. As set forth in *Reynoso v Ahava 750, LLC* 185 A.D.3d 1074, a 2020, Second Department case where the complaint was dismissed:

> *"An out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a 'duty imposed by statute or assumed by contract or a course of conduct' " (Fox v. Patriot Saloon, 166 A.D.3d 950, 951, 88 N.Y.S.3d 483, quoting Alnashmi v. Certified Analytical Group, Inc., 89 A.D.3d 10, 18, 929 N.Y.S.2d 620). Since the pleadings did not allege a violation of any particular statute, Ahava 750 demonstrated its prima facie entitlement to judgment as a matter of law by establishing that it was an out-of-possession landlord which was not bound by contract or a course of conduct to maintain the premises (see Fox v. Patriot Saloon, 166 A.D.3d at 951, 88 N.Y.S.3d 483; Alnashmi v. Certified Analytical Group, Inc., 89 A.D.3d at 18–19, 929 N.Y.S.2d 620).*

BRANDYWINE's position is that the triple net lease it had with SCAP put the burden of snow removal and snow plowing squarely on the shoulders of the tenant, SCAP. BRANDYWINE had no employees at The Property and did not maintain an office at The Property. In the seminal case of *Palsgraf v Long Is. R.R. Co.*, 348 N.Y.339 (1928) it was determined that without a duty owed by the defendant to the plaintiff, the defendant cannot be held liable for negligence. Movant herein claims it has no duty to HEMENDINGER, and thus cannot be held liable for negligence.

Several cases were cited by BRANDYWINE that support its position that where the lease demonstrated that the tenant had the responsibility for snow and ice removal, and the owner was deemed an out of possession landlord, no liability would attach. *Scott v Bergstol*, 11 A.D.3d 525 (2nd Dep't, 2004); *Mendoza v City of New York*, 150 A.D.3d 519 (1st Dep't, 2017). It appears that BRANDYWINE may be entitled to summary judgment as an out of possession landlord with no duty to the Plaintiff. Accordingly, the burden shifts to the Plaintiff.

PLAINTIFF'S OPPOSITION

In opposition HEMENDINGER asserts that it was BRANDYWINE who designed and constructed the parking and lot and that its design and construction were defective, and this is the cause of the accident. BRANDYWINE admits at paragraph 28 of NYSCEF Doc. No. 32 that: " 28. BRANDYWINE hired reputable civil engineer (C.T.Male) and contractors (Matzen Construction Company) to construct the parking lot when the building was first built, from 1990-1992".

Defendant offers an unsworn letter dated September 9, 2019 issued by International Technomics Corp, allegedly, "...consultants in failure analysis", signed by two "Consultants", one identified as Alden P. Gandreau, EdD PE, whose CV was previously provided to the defendant as an expert. The letter indicates the documentation reviewed, including photos, building codes and climatological data. The letter opines that the construction of the parking lot was improper, that the grading was below the conventional 2% slope. The letter concludes:

> *Finally, it is our opinion to a reasonable degree of engineering certainty, that had the parking lot been properly constructed, low areas in the parking lot would not have formed. Without the low areas water would not pond and freeze. Absent the ice in the low areas, the condition that caused Mr. HEMENDINGER to slip would not be present and in all likelihood, he would not have fallen.*

THE REPLY

The Reply asserted by the moving Defendants concerned insufficient showings by experts that were unable to defeat summary judgment motions to dismiss. In *People of the State of New York v Robinson*, 174 A.D.2d 998 (4th Dep't, 1991) it was an expert opinion concerning the improper discharge of a damaged gun; in *Tedone v Success Homes, Inc.*, 31 A.D.3d 745 (2nd Dep't, 2005) it was an experts failure to view a crack in a foundation that led to the report being deemed speculative and not sufficient. Herein, although the experts did not visit the site, they reviewed photos, building codes, testimony, surveys, topological maps of the parking lot in rendering their opinion.

BRANDYWINE also asserted technical issues with the experts, claiming that the expert was not identified until after the Note of Issue was filed, violating CPLR 3101(d)(1) and cited in *Wartski v C.W. Post Campus*, 63 A.D.3d 916 (2nd Dep't, 2009) and *Dawson v Calfiero*, 292 A.D.2d 488 (2nd Dep't, 2002). Both cases were not probative. Moreover if the Court was to disallow the expert opinions proffered on a technicality, counsel should note that both the CPLR and this Court's Part Rules, specifically under MOTIONS (k) *"Summary Judgment or other dispositive motions must be made within 60 days after filing the Note of Issue.*, the instant Motion would be dismissed as untimely. (There was nothing found in the court's NYSEF file that would indicate that the Note of Issue was withdrawn.)

Consequently, it appears to this court that there are triable issues of fact as to whether Defendant BRANDYWINE is an out of possession landlord and as to whether said Defendant's actions in designing and constructing the parking lot were the cause of the accident

By reason of all the foregoing it is

ORDERED that the Motion for Summary Judgment by Defendant BRANDYWINE seeking to dismiss the Complaint by HEMENDINGER is **denied.**

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and Order of this Court.

Dated: January 5, 2021
Poughkeepsie, NY 12601

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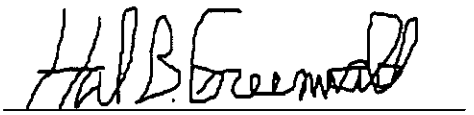

Hon. Hal B. Greenwald, J.S.C.

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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to Justice Greenwald's Chambers, please do not submit any copies. Submit only the original papers.