SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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KEITH STONE, Jr. as the Administrator of the Goods Chattels and Credits which were of KEITH STONE, SR., Deceased,

Plaintiff(s),

-against-

RAUL AVILA INC.,[1] P.M.O JAMAICA, LTD., ORTMAYER MATERIALS HANDLING INC., And JAMAICA HOSPITAL MEDICAL CENTER

Defendant(s).

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DECISION and ORDER
Index No. 801992/2021E

Doris M. Gonzalez, J.

Defendant PMO Jamaica's (hereinafter, "PMO") moves to dismiss the complaint and all cross-claims pursuant to CPLR 3211.

On June 1, 2020, Keith Stone Sr. was seriously injured when glass panels fell onto him at 159-19 107th Avenue in Jamaica, Queens. The complaint also alleges medical malpractice in relation to the treatment he received after his injuries. He later died of the injuries and related complications.

The premises where the accident occurred are a commercial warehouse. On or about October 15, 2015, PMO, by its president Anna Marie Oppedisano ("Oppedisano"), entered into a lease agreement for the premises. The lease provides that "the tenant shall repair and maintain the Leased Premises in good order and condition, except for reasonable wear and tear, the repairs required of the Landlord pursuant hereto, and maintenance or replacement necessitated as the

[1] The action has been discontinued as to Raul Rivera, Inc.

result of the act or omission or negligence of the Landlord." The lease further provides, "The agreement further notes that "Landlord shall only be liable for structural repairs and roof, so long as the repairs are not the result of the act or omission or negligence of the Tenant, its employees, agents or contractors." Lastly, PMO had a right to reenter but only for the purpose of inspection or making repairs, additions or alterations necessary for the purpose of preserving the structural integrity of the premises.

The cause of the accident is allegedly the condition of the surface of the concrete floor in the warehouse, which is asserted in the complaint to be cracked, pitted, not level, and otherwise defective and dangerous. PMO contends that as an out-of-possession owner, it did not cause or create the defect (if any), and had no notice of it. Pursuant to the affidavit of Oppedisano, she alleges that neither she nor PMO had not entered the building to make any repairs, had made no other repairs and had no other control over the building, and had been an out-of-possession landlord since the lease agreement was signed in 2015.

In opposition, defendant Ortmayer Materials Handling, Inc. ("Ortmayer") argues that the motion is premature, as no discovery has been held. Ortmayer argues that exceptions exist as to the liability of out-of-possession owners where (1) the landlord has a non-delegable duty to provide the public with a reasonably safe premises and a safe means of ingress and egress; (2) the out-of-possession landlord affirmatively created the condition; or, (3) the landlord retained a right to reenter the premises for inspection or repairs and the injury arises from a structural defect or specific statutory violation.

Similarly, in opposition, plaintiff argues that plaintiff is "entitled to explore whether the Landlord had actual notice of the defective and inherently dangerous condition on its premises..."

In the context of a motion to dismiss the complaint, the Court must "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]). "It is well established that affidavits and other evidentiary materials are admissible to support a motion to dismiss pursuant to CPLR 3211 (a) (7) . . . , and it is equally well established that such affidavits and materials will warrant dismissal under that provision if they establish conclusively that [the] plaintiff has no cause of action" (*Jeanty v State of New York*, 175 AD3d 1073, 1074, 107 N.Y.S.3d 799 [4th Dept 2019], *lv denied* 34 NY3d 912 [2020] [internal quotation marks omitted]).

Defendant PMO may ultimately prevail in its argument that it is an out-of-possession owner which did not effectuate any repairs, did not undertake voluntarily to effectuate repairs, had no actual notice of a dangerous condition, and had no constructive notice of a dangerous condition with respect to the floor. Moreover, defendant PMO may ultimately succeed in demonstrating that constructive notice was lacking despite the right to re-enter, as the condition of the floor was not due to a structural defect. However, whether PMO had actual knowledge of a dangerous condition, and whether it effectuated any floor repairs or undertook to do so, requires knowledge facts essential to opposing the motion that are at the present time exclusively within the defendant PMO's knowledge or control. (*See* CPLR 3211 [d] ["Facts Unavailable to Opposing Party. Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be

obtained or disclosure to be had and may make such other order as may be just.]") The opposing parties should have an opportunity to rebut the statements contained in the moving defendant's affidavit by engaging in discovery before dismissal is granted.

Accordingly, it is

ORDERED that the motion is denied with leave to renew upon the completion of discovery as to the issues raised herein.

This is the Decision and Order of the Court.

Dated: 11-15-2021

Doris M. Gonzalez, J.S.C.