SUPREME COURT- STATE OF NEW YORK

Honorable Thomas Rademaker,
Justice

_____x

RAYMONDE POLYCARPE,

Plaintiff(s),

-against-

JQ II ASSOCIATES, LLC and ACCOLADE BUILDING MAINTENANCE CORP,

Defendant(s).

_____x

Trial IAS Part 21
Nassau County

Index No.: 614911/2018

Motion Seq. No.: 001
Motion Submitted: 10/22/2021

DECISION AND ORDER

The following papers read on this motion:

Notice of Motion/Supporting Exhibits. 1
Affirmations in Opposition.....2
Reply Affirmation.....3

The Defendant, **JQ II ASSOCIATES, LLC ("JQ II")**, moves pursuant to CPLR §3212, for an Order granting summary judgment against the Plaintiff and dismissing the plaintiff's complaint. This motion is opposed by the Plaintiff.

The case at bar is a negligence action in which the Plaintiff slipped and fell on July 19, 2017, in the basement of a premises located at 200 Jericho Quadrangle, Jericho , New

York. The Plaintiff contends thathe was caused to slip due to an oily substance on the floor. The Building was owned by JQII, which leased the premises to a non-party tenant, CSC Holdings LLC. CSS Holdings, LLC, in turn, hired the Defendant Accolade Building Maintenance Corp ("Accolade") to perform services at the subject premises.

The Plaintiff filed his Summons and Complaint with the Court on November 15, 2018, and issue was joined when the Defendant JQII filed its Answer on February 18, 2018. The Court's "Consolidation Order" dated June 7, 2021, added the Defendant Accolade as a party.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v. City of New York*, 49 NY2d 5557 [1980]). The primary purpose of a summary judgment motion is issue finding not issue determination (*Garcia v. J.C. Duggan,*

Inc., 180 AD2d 570 [1st Dept. 1992]), and it should only be granted when there are no triable issues of fact (see also *Andre v. Pomeroy*, 35 N2d 361 [1974]).

A motion for summary judgment is premature when the nonmoving party has not been given a reasonable time and opportunity to conduct disclosure relative to pertinent evidence, more speculation will not suffice. (See *Bevens v. Tarrant Mfg., Co*, Inc. 48 AD3d 939 [3rd Dept 2008]) "A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment." (*Elliot v. County of Nassau*, 53 AD3d 561, 563 [2nd Dept 2008] quoting *Amico v Melville Volunteer Fire Co., Inc.* 39 AD3d 784, 785 [2nd Dept 2007], citing *Urcan v. Cocarelli*, 234 AD2d 537 [2nd Dept 1996])

The Defendant JQII contends that it is entitled to summary judgment because it was an absent landlord that did not maintain the premises or hire maintenance providers, such as Accolade. A defense deposition of Defendant JQII has not been conducted, and in lieu of providing a defendant's transcript, JQII submits an affidavit of "an auhorized signatory of Defendant, JQ II," and said afidavit provides that JQII had no obligation pro provide "any work labor or services" for the tenant at the accident site, and the Defendant JQII denies creating the alleged oily substance on the basement floor at the accident site.

An out of possession landlord with no direction or control over the layout of a commercial premises would be entitled to summary dismissal of a complaint. (Wrubel v. Rose Boutique II, Inc. 13 AD3d 264 [1st Dept 2004])

In contrast, the Plaintiff contends that Summary Judgment must be denied as premature since JQ II associates had, under its lease with CSS Holdings, LLC the right to make repairs and replacements at the subject premises, the right to enter and inspect the premises, and the right to

make repairs which the tenant neglected or refused to make. The Plaintiff has not had the opportunity to depose Accolade regarding the presence or creation of the alleged oily substance on the basement floor which caused the Plaintiff to fall, and that such testimony would be relevant to determine if JQII had any involvement with the creation of the oily condition on the basement floor, or if the oil condition arouse out of a "structural defect" on the premises for which the landlord may indeed be responsible for.

It is axiomatic that an out-of-possession landlord who has actual or constructive notice of a hazardous condition and retains the right to inspect and to make repairs in the leased premises may be held liable for failure to maintain the property in a safe condition. (Beach v. C.H. Wing Company, Inc. 2008 NY Misc. Lexis 7812 [Sup. Ct. New York County 2008])

CPLR 3212[F] provides that "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just."

Upon review of a careful review of the affidavits in support of the defendants' motion, and the annexed exhibits thereto, and in the exercise of its discretion, the Court finds that granting summary judgment in favor of the Defendant prior to the completion of the discovery process, including but not necessarily limited to depositions, is premature and accordingly it is hereby.

ORDERED that motion sequences 001 is **DENIED** in their entirety, but without prejudice

to the filing of summary judgment motion by any party at the conclusion of the discovery process and the certification of this matter as ready for trial.

This constitutes the Decision and Order of the Court.

Dated: December 15, 2021
Mineola, N.Y.

Hon. Thomas Rademaker, J. S. C.