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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES J. GOLIA IA Part 33
Justice

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x

JONG HWA WANG,

Plaintiff,

- against -

JACOB PEARLSTEIN LLC., JARA ENTERPRISES, INC., and 190 STREET AUTO REPAIR, INC.,

Defendants.

x

Index Number 7710 2008

Motion Dates April 8, 2010

Motion Cal. Numbers 28 & 29

Motion Seq. Nos. 2 & 3

JACOB PEARLSTEIN, LLC,

Third-Party Plaintiff,

- against -

B. REITMAN BLACTOP, INC.,

Third-Party Defendant.

x

The following papers numbered 1 to 24 read on these separate motions by defendant/third-party plaintiff Jacob Pearlstein LLC (Jacob) pursuant to CPLR 3212 for summary judgment in its favor dismissing plaintiff's complaint as against it and for summary judgment in its favor and against defendant 190 Street Auto Repair, Inc. (Auto) on its cross claims over defendant Auto and by third-party defendant B. Reitman Blacktop, Inc. (B. Reitman) pursuant to CPLR 3212 for summary judgment in its favor dismissing the third-party complaint and any cross claims asserted against it, and on this cross motion by

defendant Jara Enterprises, Inc. (Jara) pursuant to CPLR 3212 for summary judgment in its favor dismissing plaintiff's complaint and all cross claims against it.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits.....	1-8
Notice of Cross Motion - Affidavits - Exhibits.....	9-12
Answering Affidavits - Exhibits.....	13-20
Reply Affidavits.....	21-24

Upon the foregoing papers it is ordered that the motions and cross motion are consolidated and decided as follows:

In this action, plaintiff seeks damages for personal injuries allegedly sustained on December 18, 2007, when she slipped and fell on ice in the parking lot located at the rear of premises known as 190-08 and 190-10 Northern Boulevard in Queens, New York owned by defendant/third-party plaintiff Jacob. Defendant Jara leases 190-10 Northern Boulevard from defendant/third-party plaintiff Jacob. Defendant Auto leases 190-08 Northern Boulevard from defendant/third-party plaintiff Jacob. Pursuant to the terms of those leases, defendant/third-party plaintiff Jacob is responsible for the maintenance and repair of the parking lot, including snow removal, and defendants Jara and Auto are to pay their pro rata share of such expenses.

Defendant/third-party plaintiff Jacob's witness, Alan Pearlstein, its principal and the property manager of the subject premises, testified that, in fact, defendant Auto maintains the parking lot and performs the snow and ice removal. He also testified that if it was a heavy storm, defendant Auto's owner, Young C. Lee, would call him and he would tell him to hire someone and send him the bill. Young C. Lee testified that he maintained the parking lot and performed all snow and ice removal. He also testified that prior to December of 2007, he never paid anyone to perform snow and ice removal from the parking lot. He further testified that an inch of snow had fallen the week before the accident and that although he noticed snow accumulations on the edge of the parking lot on the date of the accident, he did not see any snow or ice in the area where plaintiff fell. Defendant Jara's witness, Theresa Turetzky, its office manger, testified that Jara's office personnel use four parking spaces near the rear entrance to its store and that she shoveled snow one time to create a path from the first spot to the rear entrance. She also testified that she might have thrown salt on the area/strip outside that door, but could not say what day that was done. Plaintiff testified that the day of the accident the weather was clear and very cold. She also testified that it had last snowed

before the day of the accident on December 13, 2007, and that as she entered the subject parking lot, she saw snow at the edge of the parking lot along the fence. According to plaintiff, she parked her car in the first stall facing defendant Jara's store and to the right of its rear entrance. Plaintiff further testified that she slipped and fell while returning to her car and that prior to her fall, she did not see the ice patch upon which she fell which was located by a sewer drain near her parked car.

According to Alan Pearlstein, in 2006, defendant/third-party plaintiff Jacob had an additional drain added to the parking lot to alleviate any flooding. Alan Pearlstein testified that defendant/third-party plaintiff Jacob also retained third-party defendant B. Reitman to repave the driveway and parking lot in 2006 because it was in disrepair with potholes and B. Reitman's work was completed on May 26, 2006. He also testified that defendant/third-party plaintiff Jacob never made any complaints to third-party defendant B. Reitman about its repaving work, nor did Jacob ever call B. Reitman for any additional or follow-up work. According to Alan Pearlstein, in 2007, after defendant Jara became a tenant at the location, flooding occurred because water was not draining fast enough from the drain added in 2006. Alan Pearlstein testified that the flooding and water pooling around the drain was not caused by third-party defendant B. Reitman's work or the pitch of the lot. According to him, the flood was caused by water collecting around the drain because the sewer system could not handle the volume of water that was entering the drainage system and was not draining quickly enough. Alan Pearlstein also testified that in 2007, defendant/third-party plaintiff Jacob retained nonparty Protech Plumbing (Protech) and Lock Contracting (Lock) to excavate a portion of the lot, to install an additional underground pipe to drain water from the drain, to backfill the excavated portion and to repave that portion. He further testified that the accident location identified by plaintiff is the area of the work performed by Protech and Lock.

It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (*See Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980].) Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers. (*See Winegrad v New York Univ. Med. Ctr., supra*.) Once this showing has been made, however, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a triable issue of fact. (*See Alvarez v Prospect Hosp.*, *supra.*)

A property owner or possessor is not liable in negligence unless it created the allegedly dangerous condition or had actual or constructive notice of its existence. (*See*

Rosas v 397 Broadway Corp., 19 AD3d 574 [2005]; *see also Winby v Kustas*, 7 AD3d 615 [2004]; *Voss v D&C Parking*, 299 AD2d 346 [2002].) While an out-of-possession owner or lessor is generally not liable for injuries that occur on its premises, one who retains control of the premises, or contracts to repair or maintain the property, may be liable for defects. (*See Ever Win, Inc. v 1-10 Industry Assocs., LLC*, 33 AD3d 845 [2006]; *see also Winby v Kustas, supra*; *Eckers v Suede*, 294 AD2d 533 [2002].) Control may be evidenced by lease provisions making the owner or landlord responsible for repairs or by a course of conduct demonstrating that the owner or landlord has assumed responsibility to maintain a particular portion of the premises. (*See Winby v Kustas, supra*.)

In this case, in light of the provisions contained in the subject leases whereby defendant/third-party plaintiff Jacob agreed to maintain and repair the public portions of the buildings, both exterior and interior, including the subject parking lot, defendant/third-party plaintiff Jacob failed to meet its burden of establishing as a matter of law that it was an out-of-possession landlord with no control over the subject premises or that it was not obligated by the leases to remedy the allegedly hazardous condition on the adjacent parking lot. (*See Lalicata v 39-15 Skillman Realty Co., LLC*, 63 AD3d 889 [2009]; *see also Dunitz v J.L.M. Consulting Corp*., 22 AD3d 455 [2005]; *Winby v Kustas, supra*.)

Moreover, a defendant will be held liable for a slip and fall accident involving snow and ice on its property when the defendant created the dangerous condition which caused the accident or had actual or constructive notice of its existence. (*See Salvanti v Sunset Industrial Park Assocs.*, 27 AD3d 546 [2006]; *see also Cody v DiLorenzo*, 304 AD2d 705 [2003]; *Voss v D&C Parking*, 299 AD2d 346 [2002].) Although a defendant has no duty to remove snow and ice during an ongoing storm, a defendant may be held liable where that party's snow removal efforts create a hazardous condition or exacerbate a natural hazard created by the storm. *(See Salvanti v Sunset Industrial Park Assocs., supra*; *see also Cody v DiLorenzo, supra; Grillo v Brooklyn Hosp.,* 280 AD2d 452 [2001].)

In this case, defendant/third-party plaintiff Jacob also failed to establish that the allegedly dangerous ice condition existed for an insufficient length of time for it to have discovered and remedied it. (*See Wheaton v East End Commons Assocs., LLC*, 50 AD3d 675 [2008]; *see also Pearson v Parkside Limited Liability Co.*, 27 AD3d 539 [2006]; *Strange v Colgate Design Corp.*, 6 AD3d 422 [2004]; *cf. Corsaro v Stop and Shop, Inc.*, 287 AD2d 678 [2001].) The evidence submitted by defendant/third-party Jacob also failed to establish what, if any, snow removal efforts were employed by defendant Auto on its behalf prior to the accident and that defendant Auto did not cause, create or exacerbate the allegedly hazardous condition upon which plaintiff fell. (*See Petrocelli v Marrelli Development Corp*., 31 AD3d 623 [2006]; *see also Salvanti v Sunset Industrial Park Assocs.*, *supra*; *Knee v Trump Village Construction Corp*., 15 AD3d 545 [2005].)

Since defendant/third-party plaintiff Jacob failed to meet its burden on this branch of its motion, it is not necessary to consider whether the papers submitted in opposition are sufficient to raise a triable issue of fact. (*See Alvarez v Prospect Hosp., supra*; *see also Vasta v Home Depot*, 25 AD3d 690 [2006]; *Karalic v City of New York,* 307 AD2d 254 [2003].)

Accordingly, the branch of the motion of defendant/third-party plaintiff Jacob for summary judgment in its favor dismissing plaintiff's complaint as against it is denied.

The branch of the motion of defendant/third-party plaintiff Jacob for summary judgment in its favor and against defendant Auto on its cross claims for contractual and common-law indemnification is denied without prejudice to renew as it is premature.

"It is well established that 'liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property . . . Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition' " (*Hennessy v Palmer Video*, 237 AD2d 571 [1997], quoting *Minott v City of New York*, 230 AD2d 719, 720 [1996].)

In this case, although defendant Jara established, as a matter of law, that it did not own, occupy, control, or put to a special use the subject parking lot, or have any right or obligation to maintain that area *(see Ellers v Horwitz Family Ltd. Partnership*, 36 AD3d 849 [2007]; *see also Morgan v Chong Kwan Jun*, 30 AD3d 386 [2006]; *Welwood v Association for Children With* Down *Syndrome, Inc.*, 248 AD2d 707 [1998]), in light of the testimony of defendant Jara's witness, Theresa Turetzky, that she shoveled snow once in the parking lot to create a path from the first parking stall to the rear entrance of Jara's store and also may have thrown salt in that area of the subject accident, defendant Jara failed to establish its prima facie entitlement to judgment as a matter of law. Defendant Jara submitted no evidence indicating that this shoveling and salt throwing did not take place immediately before the date of the subject accident. Moreover, while occasional snow removal measures are insufficient to establish control over a common area (*see Figueroa v Tso*, 251 AD2d 959 [1998]), where there is a question whether such measures either created or increased a dangerous condition, summary judgment is inappropriate. (*See Petrocelli v Marrelli Development Corp., supra; see also Salvanti v Sunset Industrial Park Assocs., supra; Suntken v 226 West 75th St.* Inc., 258 AD2d 314 [1999].)

Accordingly, defendant Jara's cross motion for summary judgment is denied.

Third-party defendant B. Reitman established its entitlement to dismissal of the contribution claim asserted by defendant/third-party plaintiff Jacob by demonstrating prima facie that it did not owe a duty of reasonable care to defendant/third-party plaintiff Jacob

independent of its contractual obligations or that a duty was owed to the injured plaintiff, a breach of which contributed to her injuries. (*See Torchio v New York City Housing Auth.*, 40 AD3d 970 [2007]; *see also Hites v Toys "R" Us, Inc*., 33 AD3d 759 [2006]; *Baratta v Home Depot USA*, 303 AD2d 434[2003]; *Mitchell v Fiorini Landscape*, Inc., 284 AD2d 313[2001].) Third-party defendant B. Reitman also made a prima facie showing entitling it to dismissal of the indemnification claim asserted by defendant/third-party plaintiff Jacob by demonstrating that the injured plaintiff's accident was not due solely to its negligent performance or nonperformance of an act solely within its province. (*See Roach v AVR Realty Co., LLC, 41 Ad3d 821 [2007]; see also Corley v Country Squire Apts., Inc*., 32 AD3d 978 [2006].); *Murphy v M.B. Real Estate Dev. Corp.*, 280 AD2d 457 [2001].) Third-party defendant B. Reitman's repaving work in the parking lot was completed one year and seven months prior to the date of plaintiff's accident and defendant/third-party plaintiff Jacob did not make any complaints about that work or contact B. Reitman for any additional work. In addition, a subsequent unrelated project in the parking lot, which included repaving, was performed by nonparties Protech and Lock. In opposition, defendant/third-party plaintiff Jacob failed to demonstrate the existence of a triable issue of fact. Its claim that a triable issue of fact exists concerning whether third-party defendant B. Reitman's work caused or contributed to the alleged hazardous ice condition is unsupported and without merit.

Accordingly, third-party defendant B. Reitman's motion for summary judgment is granted and the third-party complaint and any and all cross claims against it are dismissed.

This constitutes the Order of the Court.

Dated: August 25, 2010

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J.S.C.