SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 9

X

KENNETH LYNCH,

Plaintiff,

-against-

Index No.: 603518/16
Motion Sequence...02, 03
Motion Date...11/22/17

CITYWIDE SEWER & DRAIN SERVICE CORP., TRAP-ZAP ENVIRONMENTAL SYSTEMS, INC., PREMIER PLUMBING & HEATING, INC., PREMIER PLUMBING & HEATING SPECIALISTS, INC., and UNITED CESSPOOL SERVICE, INC.

Defendants.

X

Papers Submitted:
Notice of Motion (Mot. Seq. 02) x
Affidavit in Opposition.....x
Reply Affirmation.....x
Notice of Motion (Mot. Seq. 03).....x
Affidavit in Opposition.....x
Reply Affirmation.....x

Upon the foregoing papers, the motion (Mot. Seq. 02) by the Defendant, CITYWIDE SEWER & DRAIN SERVICE CORP., (hereinafter "CITYWIDE"), and the motion (Mot. Seq. 03) by the Defendant, PREMIER PLUMBING & HEATING SPECIALISTS, INC., (hereinafter "PREMIER PLUMBING"), seeking an Order, pursuant

to CPLR §§ 3211 and 3212, awarding summary judgment and dismissing the Plaintiff's complaint against them, is determined as hereinafter provided.

Initially, this Court notes that the Plaintiff discontinued his claims against the Defendants, PREMIER PLUMBING & HEATING, INC. and UNITED CESSPOOL SERVICE, INC., by way of stipulations of discontinuance, electronically filed on January 6, 2017 and February 15, 2017, respectively.

In this action, the Plaintiff seeks to recover damages for personal injuries that he sustained when he tripped and fell on an allegedly "uneven, raised, broken, dangerous and/or hazardous drain port not properly attached/closed" in the icebox (also referred to as "freezer") of the meat department at the Pathmark Supermarket (hereinafter the "supermarket") located at 1764 Grand Avenue, Baldwin, New York. The subject accident occurred on June 18, 2013 (*See* the Plaintiff's Verified Bill of Particulars attached to the Defendant, CITYWIDE's, Notice of Motion as Exhibit "C").

The Plaintiff, LYNCH, testified at an Examination Before Trial (hereinafter "EBT") on April 19, 2017 (*See* EBT transcript of the Plaintiff attached to the Defendant, CITYWIDE's, Notice of Motion as Exhibit "F"). The Plaintiff testified that, at the time of the subject accident, he worked as a manager of the meat department at the supermarket. He stated that, as part of his job duties, he would walk into the icebox of the supermarket on a daily basis. He indicated that the floor of the icebox is concrete and contains two (2) drains.

The Plaintiff testified that, immediately prior to the accident, he was moving a "U-Boat"[1] in the icebox. He testified that he was walking backwards, with both hands on the handle brackets of the U-Boat, while looking forward. The Plaintiff testified that, suddenly, his foot "just stopped" and he proceeded to fall (*Id.* at p. 188). He explained that his foot hit the drain port cover (hereinafter referred to as the "deck plate") located on the floor. He described the deck plate as a three to four (4) inch circle, raised less than an inch off of the ground. He testified that he observed the deck plate on the date of the accident, prior to falling. He did not recall seeing anything dangerous or defective about the deck plate prior to falling. However, after falling to the ground, the Plaintiff stated that something appeared to be "broken" on the side of the deck plate (*Id.* at pp. 181-192).

The Plaintiff testified that employees of the supermarket maintained the subject premises. He indicated that, if there was a maintenance related issue in the meat department, he would advise the supermarket manager of it (*Id.* at pp. 114-115). Prior to the subject accident, Mr. LYNCH never made complaints about the conditions of the lighting, floors, drains, or ports in the icebox or cutting room. Further, as manager of the meat department, he was never made aware of any safety issues, violations, or complaint regarding the conditions in either the icebox or cutting room by any other supermarket employee. The Plaintiff noted that, other than supermarket employees, he observed a plumber working on the subject drain port "years prior" to the accident (*Id.* at p. 193).

[1] The Plaintiff described the "U-Boat" as a device on wheels that was used by the supermarket employees to transport products. He testified that the "U-Boat" is approximately six (6) feet in height and has a handle bracket on the right and left side.

The Defendants, CITYWIDE and PREMIER PLUMBING, now move for summary judgment and dismissal or the Plaintiff's complaint, arguing that they cannot be liable for the subject accident, as no duty was owed to the Plaintiff. The moving Defendants contend that they neither created the allegedly dangerous condition, nor did they negligently repair any condition within the meat department of the supermarket prior to the subject accident. Lastly, the Defendants assert that they did not have actual or constructive knowledge of the dangerous condition that caused the Plaintiff to trip and fall.

CITYWIDE

Counsel for the Defendant highlights that CITYWIDE contracted with a company, USM, to perform services at the supermarket in the capacity as a subcontractor (*See* the Subcontractor Agreement attached to the Notice of Motion as Exhibit "K"). Moreover, counsel asserts that the Defendant, CITYWIDE, did not create the allegedly dangerous condition or have actual or constructive knowledge of its existence prior to the subject accident.

In support of its position, the Defendant, CITYWIDE, proffers, *inter alia*, the Affidavit of Sal Mangia, Sr., President of CITYWIDE (*See* the Affidavit of Sal Mangia attached to the Notice of Motion as Exhibit "H"). Mr. Mangia attests that, prior to the subject accident, CITYWIDE provided services in the supermarket pursuant to a limited, "on-call", contract. CITYWIDE did not have a full services maintenance agreement for the supermarket. He further attests that CITYWIDE never owned, operated, managed, or controlled the supermarket.

The Defendant also submits invoices, reflecting the work CITYWIDE performed at the supermarket. The invoices indicate that CITYWIDE performed work on the drain(s) in the "freezer" of the meat department on January 3, 2012, February 10, 2012, and September 18, 2012 (*See* the invoices attached to the Notice of Motion as Exhibit "J"). Counsel for the Defendant highlights that each invoice clearly indicates that CITYWIDE would not be responsible for any damage that may occur "during or after services provided..." Further, each invoice is signed by an employee of the supermarket wherein he/she confirmed that the work performed by CITYWIDE was inspected and completed to satisfaction (*Id.*). The invoices also contain a release and hold harmless provision against any property damage claims and third party claims.

PREMIER PLUMBING

In support of its position, the PREMIER PLUMBING submits, *inter alia*, the EBT testimony of John Dauito, a licensed master plumber and the President of PREMIER PLUMBING (*See* the EBT transcript of John Dauito attached to the Notice of Motion as Exhibit "G"). Mr. Dauito testified that PREMIER PLUMBING performed services at the supermarket as a subcontractor of USM. He testified that PREMIER PLUMBING has not performed any service at the supermarket since February 28, 2013. Importantly, Mr. Dauito testified that PREMIER PLUMBING never performed a service in the meat department of the supermarket (*Id.* at p. 41).

To further substantiate its position, the Defendant submits all invoices generated in connection with the services performed by PREMIER PLUMBING at the supermarket (*See* the invoices attached to the Notice of Motion as Exhibit "J").

LEGAL ANALYSIS

The burden on the party moving for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of material issue of fact (*See Ayotte v. Gervasio*, 81 N.Y.2d 1062 [1993]). Once the initial burden has been met by the movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form, sufficient to create material issues of fact requiring a trial. Mere conclusions and unsubstantiated allegations or assertions are insufficient (*See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]) even if alleged by an expert (*See Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 *supra*; *Aghabi v. Serbo*, 256 A.D.2d 287 [2d Dept. 1998]).

Before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff (*Palsgraf v. Long Is. R. R. Co.*, 248 N.Y. 339 [1928]). In the absence of duty, there is no breach and without a breach there is no liability (*See Pulka v. Edelman*, 40 N.Y.2d 781 [1976]).

It is well settled that a defendant who moves for summary judgment in a trip-and-fall case has the initial burden of making a *prima facie* showing that it did not create the hazardous condition that allegedly caused the fall, and did not have actual or constructive notice of that condition (*See Sloane v. Costco Wholesale Corp.*, 49 A.D.3d 522 [2d Dept. 2008]). To constitute such notice, a defect must be visible and apparent and

it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it (*See Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 [1986]; *Nelson v. Cunningham Associates, L.P.*, 77 A.D.3d 638 [2d Dept. 2008]).

As a general rule, liability for a dangerous condition on real property must be predicated upon a defendant's ownership, occupancy, control, or special use of that property (*See Micek v. Greek Orthodox Church of Our Savior, et. al.*, 139 A.D.3d 830 [2d Dept. 2016]; *Sanchez v. 1710 Broadway, Inc.*, 79 A.D.3d 845 [2d Dept. 2010]).

Further, a contractual obligation generally does not give rise to tort liability in favor of a third party. However, there are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm'; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136 [2002], quoting *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, [1928]; citing *Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*, 76 N.Y.2d 220, 226–227 [1990]; *Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 585–586 [1994]).

Here, the Defendants, CITYWIDE and PREMIER PLUMBING, sufficiently established their *prima facie* burden of entitlement to summary judgment as a matter of law. First, the evidence presented demonstrates that neither of the Defendants had ownership or control over the subject supermarket nor did they have an exclusive right to

maintain the area where the accident took place. Additionally, the record is devoid of any indication the Defendants created the allegedly dangerous condition or had actual or constructive knowledge of the condition.

With respect to the Defendant, CITYWIDE, those services that were performed by CITYWIDE in the area where the accident took place were done so nine (9) months prior to the Plaintiff's accident. Nothing in the record indicates that any complaints were made with respect to the services performed by CITYWIDE or that any defective conditions arose as a result thereof. The Plaintiff's conclusory and unsubstantiated assertion that the attenuated work performed by CITYWIDE created a defective condition in the drain plate, lacks merit. Admittedly, not even the Plaintiff noticed any defective or dangerous condition prior to the date of the accident.

With respect to the Defendant, PREMIER PLUMBING, the evidence supports the assertion that PREMIER PLUMBING never even performed services in the area where the accident occurred.

There is nothing in the record to suggests that the performance of CITYWIDE and PREMIER PLUMBING, acting as subcontractors, fell within the exceptions which give rise to tort liability in favor of the Plaintiff, a third-party.

Accordingly, it is hereby

ORDERED, that the motion (Mot. Seq. 02) by the Defendant, CITYWIDE SEWER & DRAIN SERVICE CORP., seeking an Order of this Court, pursuant to CPLR §§ 3211 and 3212, awarding it summary judgment and dismissing the Plaintiff's complaint against it, is **GRANTED**.

ORDERED, that the motion (Mot. Seq. 03) by the Defendant, PREMIER PLUMBING & HEATING SPECIALISTS, INC., seeking an Order of this Court, pursuant to CPLR §§ 3211 and 3212, awarding it summary judgment and dismissing the Plaintiff's complaint against it, is **GRANTED**.

This constitutes the decision and Order of the Court.

DATED: Mineola, New York
January 29, 2018

Hon. Randy Sue Marber, J.S.C.

HON. RANDY SUE MARBER

ENTERED
JAN 30 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE