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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

MADELEINE PETRARA,

Plaintiff(s),

- against -

ELMONT ESTATES INC., 601 OLD COUNTRY ROAD CORP. d/b/a JOHN'S FARMS and 110 MAINTENANCE CORP.,

Defendant(s).

ELMONT ESTATES INC.,

Third-Party Plaintiff,

- against -

110 MAINTENANCE CORP.,

Third-Party Defendant.

TRIAL/IAS PART 3

INDEX NO. 572/16

MOTION SEQUENCE NO. 4 & 5

MOTION SUBMISSION DATE: August 8, 2018

The following papers read on this motion:

| | |
|---|---|
| Notice of Motion | XX |
| Affirmation in Opposition | XX |
| Affidavit in Opposition | X |
| Reply Affirmation | XXX |

Motion (seq. no. 4) by the attorney for 601 Old Country Road d/b/a John's Farms (John's Farms) for an order pursuant to CPLR 3212 granting John's Farms summary judgment dismissing plaintiff's complaint against John's Farms and dismissing all cross-claims against John's Farms is granted. Motion (seq. no. 5) by the attorney for 110 Maintenance Corp. for an order pursuant to CPLR 3212 granting 110 Maintenance Corp. (110) summary judgment dismissing plaintiff's complaint against 110 Maintenance Corp. and dismissing all cross-claims and third-party claims against 110 Maintenance Corp., is **granted**.

This is a trip and fall action. On May 8, 2015, plaintiff alleges she tripped and fell caused by a hole

in the parking lot at 601 Old Country Road, Plainview, New York. At the time of the accident, plaintiff had finished grocery shopping at defendant 601 Old Country Road d/b/a John's Farms and was pushing a shopping cart as she walked to her car. The parking lot and shopping center/strip mall is owned by defendant Elmont Estates, Inc. (Elmont). Defendant 110 Maintenance Corp. (110) performs parking lot maintenance that includes cleaning and repairs pursuant to an oral agreement with Elmont.

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it (*Sillman v* (*Twentieth Century Fox Films Corp.*, 3 NY2d 395, 404). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant (*Alvarez v Prospect Hospital*, 66 NY2d 320; *Winegrad v New York University Medical Center*, 64 NY2d 851; *Fox v Wyeth Laboratories, Inc.*, 129 AD2d 611; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133). John's Farms and 110 Maintenance Corp. have made an adequate *prima facie* show of entitlement to summary judgment.

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form (*Friends of Animals, Inc. v Associated Fur Mfgrs., Inc.*, 46 NY2d 1065). Conclusory statements are insufficient (*Sofsky v Rosenberg*, 163 AD2d 240, *aff'd* 76 NY2d 927; *Zuckerman v City of New York*, 49 NY2d 557; *see Indig v Finkelstein*, 23 NY2 728; *Werner v Nelkin*, 206 AD2d 422; *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v Petrides*, 80 AD2d 781, *app dism.* 53 NY2d 1028; *Jim-Mar Corp. v Aquatic Construction, Ltd.*, 195 AD2d 868, *lv app den.* 82 NY2d 660).

John's Farms' motion for summary judgment is based on the argument that it had no duty to the plaintiff in regards to the maintenance of the parking lot; nor did it breach a contractual duty with Elmont to maintain the parking lot.

John's Farms had no duty to inspect, maintain or repair the subject parking lot. This fact was admitted on numerous occasions at the depositions of Elmont's representative. Elmont's owner and general manager admit that the lease does not require John's Farms to make repairs to that part of the parking lot where plaintiff's alleged accident occurred.

Elmont's lease with John's Farms states that:

> The tenant agrees that at all times during the terms of this lease it will, at tenant's own cost and expense, comply with the following:
> (m) Keep the sidewalks and twenty (20) feet into the parking area and twenty (20) feet into the rear and to include the ramp and sidewalk free of snow and ice, dirt and debris with due promptness and diligence.

Snow, ice, and debris removal within 20 feet of a curb line is very different than repair, maintenance and upkeep of a non-exclusive parking lot.

Paragraph 37 of the lease provides that:

> The tenant agrees to provide at his own expenses an employee to walk the parking lot area in order to keep the parking lot free of dirt and debris created by the operation of his business during operating hours of the tenant's business ("A" at ¶ 37).

Having someone present to ensure the parking lot is free of dirt and debris secondary to the operation of a grocery store cannot be read to impose a duty to maintain and repair. Elmont failed to rebut John's Farms *prima facie* showing that John's Farms was not responsible for the physical condition of the parking lot where the alleged accident occurred.

Plaintiff's opposition to John's Farms based on the assertion that John's Farms made special use of a parking lot over which it had no control is not based on the facts or supported by the law. Plaintiff claims she tripped in the middle of a regular parking spot as a result of a pot hole. Plaintiff further alleges that John's Farms operated a store adjacent to the parking lot, that its customers used the parking lot and consequently, John's Farms made special use of the parking lot. Plaintiff's understanding of the special use doctrine is incorrect and plaintiff's theory of liability is flawed. The fact that customers of a store might occasionally, or even regularly, use a parking lot adjacent to the store does not transfer title of the parking lot from the landowner to the store nor does it transfer the legal responsibility to inspect, maintain or repair the parking lot from the landowner to the store. A store owner/operator cannot be held liable for injuries resulting from an allegedly dangerous property it does not own or control and for which it has no legal responsibility to maintain or repair (*Casale v Brookdale Med. Assoc.*, 43 AD3d 418). Plaintiff did not fall on an area of the parking lot that could possibly be considered to have been under the exclusive control of John's Farms. Plaintiff has failed to raise an issue of fact to demonstrate that John's Farms made special use of the parking lot that was open and available to the public, and other stores exclusive of John's Farms.

In support of its motion for summary judgment, 110 submits the following facts: 110 conducted asphalt repairs nine days before plaintiff's accident; there is no showing that 110 conducted its work in a negligent manner or failed to repair any and all potholes in the parking lot; there is no showing that 110 had actual or constructive notice of the claimed condition; was not permitted to unilaterally enter the parking lot located at 601 Old Country Road, Plainview, New York to perform asphalt work without permission from Elmont; Elmont never marked, flagged, cordoned off, or prevented public access to the area 110 was to perform asphalt repair; there were no oral or written complaints issued by Elmont concerning the asphalt repair work performed in the parking lot; and there were no complaints leveled against 110. Plaintiff has failed to raise an issue of fact to rebut 110's *prima facie* showing.

Elmont has failed to raise a question of fact to counter the testimony concerning the proper manner in which the work was performed. Elmont has failed to raise a question of fact that 110 had actual or constructive notice or created an unsafe condition (*see Welles v New York City Housing Authority*, 284 AD2d 327). Angela Campo by her own admission was not actively involved in the office activities of Elmont at the time of the incident. The proponent of hearsay evidence must establish the applicability of an exception to the hearsay rule before that evidence may be submitted (*Tyrell v Wal-Mart Stores, Inc.*, 97 NY2d 650, 652) (hearsay statement by unidentified employee should not have been admitted into evidence because declarant was not under stress of excitement); (*People v Nieves*, 67 NY2d 125, 131) (victim's out-of-court statements, identifying defendant as the person who stabbed her, should not have been admitted as dying declarations). It is error to require the opponent of hearsay evidence to prove that an exception does not apply (*see Tyrell, supra; Berzpm v D'Agostino Supermarkets, Inc.*, 15 AD3d 600). Courts have generally held such testimony as objectionable because of its lack of reliability (*see Flyn v Manhattan and Bronx Surface Transit Operating Authority*, 61 NY2d 769) (holding that trial court erred when it permitted police officer to testify as to what bus driver told him a witness told the bus driver about witnessing the bus strike a person, because such testimony is double hearsay); (*Quinn v 1649 Restaurant Corp.*, 18 AD3d 281) (holding that plaintiff's testimony regarding what defendant's owner told her defendant's manager had told him about her husband's condition was properly excluded as hearsay). Out-of-court statements offered to prove the truth of the matter asserted are inadmissible hearsay, and must not be admitted into evidence unless the proponent of the hearsay evidence can establish the applicability of a hearsay-rule exception. Plaintiff and Elmont have failed to rebut 110's *prima facie* showing of 110's entitlement to summary

judgment.

110's motion for an order granting it summary judgment and dismissing all claims, cross and counterclaims and third-party claims against it, is **granted**.

The court has considered Elmont's remaining arguments and finds them to be baseless.

601 Old Country Road Corp. d/b/a John's Farms and 110 Maintenance Corp. shall be deleted as parties and the caption should be:

MADELINE PETRARA,

Plaintiff,

v

ELMONT ESTATES, INC.,

Defendant.

This decision is the Order of the Court.

DATED: 10/25/2018

Ray S. Mallon
J.S.C.

ENTERED

OCT 29 2018

NASSAU COUNTY
COUNTY CLERK'S OFFICE