Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 51 NASSAU COUNTY

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

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MAE BOHIN, by LAUREN SYKES, as Executrix of the Estate of MAE BOHIN, and LAUREN SYKES, Individually,

Plaintiff(s),

-against-

310 WEST PARK AVENUE REALTY VENTURES, LLC and CVS PHARMACY INC. d/b/a CVS PHARMACY STORE NO. 0122,

Defendants.

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Index No. 010366/04

Motion Seq. No.: 004, 005 & 006
Motion Submitted: 5/25/07

The following papers read on this motion:

Notice of Cross-Motion (Motion Sequences No.'s 004, 005 & 006).....X
Affirmation in Opposition (2).....X
Reply Affirmation (2).....X

Both defendant, 310 West Park Avenue Realty Ventures, LLC., (hereinafter "West Park Avenue") and CVS West Park Avenue, LLC, (hereinafter "CVS"), each move (Sequence No.'s 004, 006) for an order pursuant to CPLR §3212 for summary judgment on liability dismissing plaintiff's complaint. "CVS" additionally moves for an order granting its request for defense and indemnification against "West Park Avenue" which "West Park Avenue" opposes. Plaintiff opposes each defendant's motion for

summary judgment and cross-moves (Sequences No. 005) for an order pursuant to CPLR §3126 striking defendant "CVS's" answer for failing to produce certain items of evidence, specifically photographs. Procedurally, this action was stayed by this Court [Alpert, J.] in a decision rendered June 29, 2006, upon the death of the plaintiff pending the appointment of a personal representative. On March 23, 2007, this Court granted the unopposed motion (Motion Sequence No. 003) of plaintiff's executrix to amend the caption to substitute the executrix in plaintiff's place and stead.

This is an action seeking damages for personal injuries as a result of a trip and fall accident which occurred on February 4, 2004 at approximately 1:00P.M. in the parking lot of the CVS Drug Store located at 310 West Park Avenue, Long Beach, New York. After leaving the CVS store on the date of the accident, plaintiff, accompanied by her son, began walking along the building facade toward her vehicle. In between the building and the parked cars were cement "parking blocks" on the parking lot asphalt surface which separated the vehicles from the outside of the CVS building. As the plaintiff, eighty-one years of age at time of the occurrence, approached her vehicle five parking stalls down, she tripped and fell over the concrete "parking block" that had become loose and was blocking her path.

In support of its motion for summary judgment on liability, "West Park Avenue," the owner of the premises where the accident occurred, offers the sworn deposition testimony of plaintiff Mae Bohin, "CVS" representative Alex Lettas, and "West Park Avenue's" representative Richard Cohen. Based on the sworn testimony,

West Park Avenue" argues the it was unaware of any problems with the car stops in the parking lot and that it did not have any notice of any defect concerning the particular parking stop that caused plaintiff to fall. Specifically, Richard Cohen, on behalf of "West Park Avenue," in a two year period prior to the accident date, received no complaints about the car stoppers in this parking lot nor did he notice any himself on those occasions he was physically present in the lot. While "CVS" representative Alex Lettas, the store manager, was aware for a number of months preceding the accident that a concrete parking block was out of line in the lot, he did not communicate that fact to the landlord, "West Park Avenue." In addition to these arguments regarding lack of notice, "West Park Avenue" further argues that the concrete parking block was open and obvious and not inherently dangerous (See, Exhibit K of "West Park Avenue's" Notice of Cross-Motion dated February 12, 2007). Plaintiff Mae Bohin had testified that she observed the concrete parking block initially when she entered the CVS and noticed that it was not moved or askew but had become so during the period of time she had entered the CVS and when she eventually exited the store. When she was walking toward her car, her son was walking in front of her and obscured her view of the area she walked until she tripped and fell.

"CVS" cross-motion for summary judgment is likewise based, in part, on the theory that the concrete parking stop was open and obvious and therefore not inherently dangerous. However, in addition, "CVS" claims it is entitled from co-defendant "West Park Avenue" both common law and contractual indemnification

based upon a lease agreement between "West Park Avenue" as landlord and "CVS" as tenant. The position of "CVS" is that the lease agreement required "West Park Avenue" to maintain the parking areas and curb where this accident occurred and further obligated "West Park Avenue" to indemnify "CVS" for claims arising out of "West Park Avenue's" contractual obligations. The lease agreement, entered into on June 14, 1994 provides, in part, that:

> "33.(a) Landlord agrees that, throughout the term of this lease and any extensions thereof, it will properly maintain and operate all parking areas and all other common facilities at the Shopping Center and shall keep same in good order and condition..."
>
> "The aforesaid obligation of landlord shall include, without limitation, the repairing, re-striping, resealing, of the parking areas,...the maintenance and repair of all curbing and directional marker..." (Defendant "CVS" Exhibit I, p. 25)
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> "47. Except to the extent that such liability is caused by Tenant's negligence or tortious act or omission, landlord shall defend, indemnify and save harmless tenant and its

agents and employees against and form all liabilities arising from the following:

(i) any negligence or tortious act or omission on the part of landlord or any of its agents, contractors, subcontractors, servant, employees....or

(ii) any failure on the part of landlord to perform or comply with any of the covenant, agreements, terms, provisions, conditions or limitations contained in this lease..." (Exhibit I, p. 33)

"CVS" further claims that co-defendant "West Park Avenue" was required under the lease to procure general liability insurance coverage and name "CVS" as an additional insured and has failed to do so.

In opposing the defendant's motion for summary judgment, plaintiff argues that the sworn testimony of "CVS" manager Alex Lettas demonstrated that he was aware prior to the date of the accident that the parking stop block which cause plaintiff's fall was not properly secured and that he notified "CVS's" home office of the condition. Mr. Lettas testified that the landlord, "West Park Avenue," maintained the parking lot including the removal of snow and ice. Mr. Lettas had noticed that parking blocks had been out of line in the parking lot a number or months prior to plaintiff's accident but that the parking block which had caused plaintiff's fall was put back in place after the

accident. He did not know who had put the block back in place. Mr. Cohen, "West Park Avenue's" representative, testified that "CVS" had no maintenance responsibilities as to the parking lot but that parking lot stoppers that were broken or defective would be replaced by "West Park Avenue" upon request or report by the cleaning maintenance person.

In addition to these arguments, plaintiff also relies upon the City of Long Beach Code, which requires, inter alia, bumper guards in all off-street parking areas and that "owners of premises" and any person in "actual possession of, have charge, care or control of any property within the City" regardless of any agreement between owners and operators occupants "shall assume responsibility to maintain the parking lot and provide "safe passage under normal use and weather conditions." (See, Long Beach Administrative Code Sections §9-1.3.2(c), 13-77(a)(b)). Plaintiff also claims defendants violated Section 303.1 and 302.3 of the New York State Property Maintenance Code which requires the exterior of a structure and, inter alia, parking spaces, to be maintained in good repair so as not to pose a threat to that public health, safety or welfare. Plaintiff claims that on the date of the accident plaintiff was forced to walk in the narrow pathway between the exterior of the CVS building and the parking block stops because the parking lot surface itself was slippery form an accumulation of ice in the parking lot. (Plaintiff's Exhibit F attached to Affirmation in Opposition, Accident Report dated February 5, 2004).

The law is well settled that liability for dangerous or defective condition on real

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 cause by a dangerous or defective condition of the property. (Usman v. Alexander's Rego Shopping Center, Inc., AD 3d 450 [2nd Dept. 2004]; Balsam v. Delma Eng's. Corp., 139 AD 2d 292 [1st Dept. 1988]; Turris v. Ponderosa, Inc. 179 AD 2d 956 [3rd Dept. 1992]). It is equally well settled that liability sustained by a shopping center patron due to defects in the surface of the shopping center's parking lot attaches to parties in possession or in control of the parking lot (Catsimatidis v. C-Town, 261 AD ~~262 AD 2d 351~~ 2d - 351 [2nd Dept. 1999]); Rosato v. Foodtown, 208 AD 2d 705 [2nd Dept. 1994]). The determinative question is one of possession or control. (Welwood v. Association for Children with Down Syndrome, 248 AD 2d 707 [2nd Dept. 1998]). Here, the testimony by both the "CVS" and "West Park Avenue" representatives - along with the lease - demonstrate that "CVS" was not in possession or in control of the parking lot at this location. Plaintiff has failed to show that "CVS" had an "exclusive right" to possession of the parking lot and therefore failed to demonstrate that "CVS" owed any duty of care to maintain or repair to the plaintiff (Millman v. Citibank, N. A., 216 AD 2d 278 [2nd Dept. 1995]). Further, plaintiff's attempt to impose liability upon defendant "CVS" through the City of Long Beach Administrative code for "owners or occupants" of property to maintain parking lots including bumper guards is unavailing as, while it may provide some proof of negligence if violated, the codes do not impose tort liability upon a party. Accordingly, the motion by "CVS" for summary judgment on liability is granted in all

respects.

As for "West Park Avenue's" motion for summary judgment, it is incumbent upon plaintiff to show that defendant either created or had actual or constructive notice of the defective condition. (Piacquadio v. Recine Realty Corp. 84 NY 2d 967 [1994]; Reddy v. 396 Lexington Avenue Co. L.P, 31 AD 3d 776 [2d Dept. 2006]). However, an out-of-possession landlord will be held liable for injuries that occur on the leased premises if it has retained control or is contractually obligated to repair or maintain the leased premises (Discini v. Richgold Associates, 272 AD 2d 366 [2nd Dept. 2000]). It is undisputed that "West Park Avenue," through the deposition testimony, but, more importantly, through its lease with "CVS" had contractually obligated to maintain and repair the parking area where plaintiff fell. The plaintiff, however, still must prove notice, either actual or constructive, in order to recover. To constitute notice, a defect must be visible and apparent and must exist for a sufficient length of time prior to the accident. (Gordan v. American Museum of Natural History, 67 NY 2d 836 [1986]; Morgan v. Chong Kwan Jun, 30 AD 3d 386 [2nd Dept. 2006]). Here, the testimony of the "CVS" manager, Alex Lettas, demonstrated that the concrete parking blocks had been out of line for a "few months" prior to plaintiff's fall. While Mr. Cohen, the "West Park Avenue" representative, testified that he had received no complaints about the parking blocks, he did state that he would visit the premises on occasion. In this Court's view, there is a question of fact as to whether "West Park Avenue" had constructive notice of this condition to defeat a motion for summary judgment. (Morgan v. Chong Kwan Jun,

supra.)

The contention by both defendants that the condition which cause plaintiff to fall was open and obvious and thus not inherently dangerous is unconvincing. First, the sworn testimony of the plaintiff showed that her vision of this parking block was obscured as a result of her son walking directly in front of her just prior to her fall thereby negating any interference that this condition was open and obvious. Second, the question of whether this condition was open and obvious is more relevant and probative as to plaintiff's comparative fault. (Cupo v. Karfunkel, 1 AD 3d 48 [2nd Dept. 2003]).

As for that branch of defendant's "CVS's" motion for defense and indemnification from co-defendant "West Park Avenue" including reasonable attorney's fees for defense cost incurred thus far, it is granted in all respects. The terms and conditions of the lease entered into between "CVS" and "West Park Avenue" are clear and unambiguous as to the issues of defense, indemnification and insurance procurement and should be interpreted in their plan, ordinary meaning. (219 Broadway Corp. V. Alexander's, Inc., 46 NY 2d 506 [1979]). In the instant matter, the relevant language of the lease is clear and unambiguous in that "CVS", as the lessee, did not have any obligation to maintain or repair the parking lot. It is apparent that "West Park Avenue" alone, as the landlord, had a duty to maintain and repair the parking lot where plaintiff fell. Accordingly, that branch of "CVS" motion is granted in all respects.

The remaining prayers for relief raised by both plaintiff and defendants, including plaintiff's application pursuant to CPLR §3126 to strike defendant "CVS" answer, is denied in all respects.

The foregoing constitutes the Decision and Order of this Court.

Dated: July 12, 2007
Mineola, N.Y.

Hon. James P. McCormack, A.J.S.C.