DOCKET NO. UWY-CV-21-6060676-S

JAN ALMONTE	:	SUPERIOR COURT
v.	:	JUDICIAL DISTRICT OF WATERBURY AT WATERBURY
BRIXMOR GA WATERBURY, LLC, ET AL.	:	
	:	MAY 9, 2024

MEMORANDUM OF DECISION
RE: MOTION FOR SUMMARY JUDGMENT (#195)

FACTS

The present action, filed by the plaintiff, Jan Almonte, stems from an alleged trip and fall that occurred on July 9, 2020. The location of the accident is 152 Chase Avenue in Waterbury. Said property is alleged to be owned, possessed, controlled and maintained by the defendant, Brixmor GA Waterbury, LLC (Brixmor). The plaintiff alleges that the property in question is also possessed, controlled, and maintained by the remaining defendants, Unisource Management Corporation (Unisource), Fortune Center of Chase Avenue Waterbury, LLC (Fortune),[1] Subway of Chase Avenue, LLC (Subway) and NYM Group of CT., Inc. (NYM). The plaintiff claims to have tripped and fallen on uneven plywood decking over the sidewalk on the property. The instant motion for summary judgment was filed on behalf of Subway. The plaintiff submitted a written objection, and counsel was heard for oral argument on April 22, 2024.

STANDARD OF LAW

[1] Defendant Fortune moved for summary judgment (docket no. 182.15), which was granted on March 19, 2024.

"Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party . . . ." (Internal quotation marks omitted.) *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 414–15, 195 A.3d 664 (2018).

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle[s] him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact . . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent . . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue . . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue . . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § 380 [now § 17-45] . . . ." (Internal quotation marks omitted.) *Fiano* v. *Old Saybrook Fire Co. No. 1, Inc.*, 332 Conn. 93, 101, 209 A.3d 629 (2019).

"Issues of negligence are ordinarily not susceptible of summary adjudication but should be resolved by trial in the ordinary manner." (Internal quotation marks omitted.) *Fogarty* v. *Rashaw*, 193 Conn. 442, 446, 476 A.2d 582 (1984). However, "[t]he issue of whether a defendant owes a duty of care is an appropriate matter for summary judgment because the question is one of law." (Internal quotation marks omitted.) *Streifel* v. *Bulkley*, 195 Conn. App. 294, 304, 224 A.3d 539, cert. denied, 335 Conn. 911, 228 A.3d 375 (2020). "The existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the defendant violated that duty in the particular situation at hand . . . ." (Internal quotation marks omitted.) *Sic* v. *Nunan*, 307 Conn. 399, 407, 54 A.3d 553 (2012).

DISCUSSION

The defendant Subway has moved for summary judgment arguing that it did not own, possess, control, or maintain the property where the plaintiff fell. Specifically, Subway argues that the plaintiff claims that he fell on a temporary plywood walkway constructed during a construction project. Subway argues that it did not own, possess, control or maintain the plywood walkway and, therefore, no duty can be found against Subway in favor of the plaintiff.

In support of its motion, Subway attached an affidavit from Merwais Rashid, a member of Subway, who attests that Subway was a tenant in the building and that Subway has since dissolved as of December 14, 2021. The affidavit further attests that the area where the plaintiff claims to have fallen was never maintained, possessed, or controlled by Subway and that Subway had no obligation to maintain the area of the property where the plaintiff fell. Subway did not attach any lease agreement regarding the subject property.

In his objection, the plaintiff argues that the absence of the lease is dispositive of the motion for summary judgment. Specifically, the plaintiff relies heavily on the following language from

Supreme Court in *LaFlamme* v. *Dallessio*, 261 Conn. 247, 257, 802 A.2d 63 (2002): "[U]nless it is definitely expressed in the lease, the circumstances of the particular case determine whether the lessor has reserved control of the premises or whether they were under the exclusive dominion of the tenant, and it becomes a question of fact and is a matter of intention in the light of all the significant and attendant facts which bear on the issue." (Citations omitted; internal quotation marks omitted.) Id.

The plaintiff argues that due to the absence of the lease between the landlord and Subway defining who had control over the subject area, summary judgment should be denied. Although Subway did not submit a reply brief, at oral argument counsel argued that the language cited in *LaFlamme* does not support the plaintiff's argument. The court disagrees.

"In other words, if the terms of control are not express between the parties, the question of who retains control over a specific part of the property is an issue of fact and a matter of intent that can be determined only in light of all the relevant circumstances." (Internal quotation marks omitted.) Id.

In this case, there is a genuine issue of material fact as to the control of the area where the plaintiff fell. Subway admits it was a tenant in the shopping plaza where the plaintiff fell but failed to attach a copy of the lease agreement to its motion for summary judgment. Such omission is fatal to the motion because "[l]iability for injuries caused by defective premises . . . does not depend on who holds legal title, but rather on who has possession and control of the property." Id., 251. Because "the circumstances of the particular case determine whether the lessor has reserved control of the premises or whether they were under the exclusive dominion of the tenant . . . it becomes a question of fact and is a matter of intention in the light of all the significant and attendant facts which bear on the issue . . . . [I]f the terms of control are not express between the parties, the

question of who retains control over a specific part of the property is an issue of fact and a matter of intent that can be determined only in light of all the relevant circumstances." (Internal quotation marks omitted.) *Maker* v. *DiMarino,* Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-01-0186427-S (March 22, 2004, *Lewis, J.T.R.*), citing *LaFlamme* v. *Dallessio*, supra, 261 Conn. 256-57.

Here, the affidavit and motion do not attach or refer to the lease agreement between the landlord and the tenant Subway, therefore, there remains a question of fact as to the terms of the lease as to who had reserved possession and control of the area where the plaintiff fell. See *Palker* v. *Estate of Jackman*, Superior Court, judicial district of Litchfield, Docket No. CV-05-5000051-S, (January 27, 2006, *Pickard, J.*);[2] see also *Brennan* v. *Culligan Water Services,* Superior Court, judicial district of Waterbury, Docket No. CV-00-0160170-S (June 11, 2002, *Wolven, J.*) (stating that because there was no lease or written agreement, the issue of who had control of the premises is a question of fact).

Whether the landlord or another party is liable to the plaintiff for their injuries remains an issue to be addressed pending determination of who maintains, possesses or controls the area where the plaintiff was injured. See *Stokes* v. *Lyddy*, 75 Conn. App. 252, 260, 815 A.2d 263 (2003) ("[t]he general rule is that a landlord has a duty reasonably to maintain property over which he exercises control."); see also *Panaroni* v. *Johnson*, 158 Conn. 92, 97-99, 256 A.2d 246 (1969) (analyzing instances where a landlord may reserve control and thus be responsible for proper care of the

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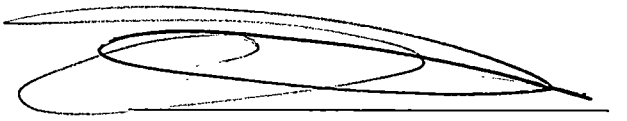
[2] "Therefore, because the terms of who had reserved possession and control of the gutters on the premises rented by the defendant to the apportionment defendant do not appear to have been express between the parties, but, instead, appear to be a question of fact, there exists a genuine issue of material fact as to whether the defendant owed a duty to the plaintiff to maintain the gutters in a reasonably safe condition and whether the leaking gutters were the proximate cause of the plaintiff's injuries. As a result of the existence of this question of fact, summary judgment is denied." *Palker* v. *Estate of Jackman*, supra, Superior Court, Docket No. CV-05-5000051-S.

premises). Based on the evidence provided by Subway, however, it has failed to sustain its burden that there is no genuine issue of material fact that the plaintiff's alleged fall occurred on the plywood decking in an area that area was not owned, controlled or maintained by Subway. As such, it is not entitled to summary judgment.

CONCLUSION

Based on the foregoing analysis, the defendant Subway of Chase Avenue, LLC's motion for summary is DENIED in its entirety.

SO ORDERED.



PARKINSON, J.

- Notice sent to all parties of record.
- Copy sent to Reporter of Judicial Decisions

Sabrina Ahmad, AC[6]
5/9/2024