

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS
J.S.C.
Justice

PART 46

Index Number : 101854/2012
HEDGES, MICHAEL
vs
EAST RIVER PLAZA, LLC.
Sequence Number : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 13, were read on this motion to/for Dismiss claims

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 3
Answering Affidavits — Exhibits _____ | No(s). 2, 5-7, 9-10, 12
Replying Affidavits _____ | No(s). 4, 8, 11, 13

Upon the foregoing papers, it is ordered that ~~this motion is~~ ;

The court denies the motion by defendant Bob's Discount Furniture of NY, LLC, to dismiss the claims against it and denies the cross-motion by defendant Costco Wholesale Corporation for summary judgment dismissing the claims against this defendant, pursuant to the accompanying decision. C.P.L.R. §§ 3211(a)(1) and (7), 3212(b) and (f).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

JUL 31 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/23/13

Lucy Billings, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

-----x

MICHAEL HEDGES as Guardian ad Litem of
MARION HEDGES, an Incapacitated Person,
MICHAEL HEDGES Individually, and
DAYTON HEDGES, an Infant by His Father
and Natural Guardian MICHAEL HEDGES,

Index No. 101854/2012

Plaintiffs

- against -

DECISION AND ORDER

EAST RIVER PLAZA, LLC, TIAGO HOLDING,
LLC, BLUMENFELD DEVELOPMENT GROUP,
LTD., FOREST CITY ENTERPRISE, INC.,
FOREST CITY RATNER COMPANIES, INC.,
ERP MANAGEMENT LLC, PLANNED SECURITY
SERVICE INC., TARGET CORPORATION,
COSTCO WHOLESALE CORPORATION, and BOB'S
DISCOUNT FURNITURE OF NY, LLC,

Defendants

-----x

APPEARANCES:

For Plaintiffs

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For Defendant Planned Security Service Inc.

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For Defendant Costco Wholesale Corporation

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For Defendant Bob's Discount Furniture of NY, LLC

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Smith Mazure Director Wilkins Young & Yagerman, P.C.
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LUCY BILLINGS, J.S.C.:

FILED

JUL 31 2013

COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff mother, Marion Hedges, her son Dayton Hedges who accompanied her, and her husband Michael Hedges, suing derivatively and as her guardian ad litem, seek damages for her life changing injuries when two minor customers of the East River Plaza shopping center in New York County threw a shopping cart from the fourth level of the center onto her at the ground level. Plaintiffs sue the shopping center's owners, management, and tenant stores that plaintiffs claim were responsible for security in the area of the injury, for controlling the rowdy customers who became the assailants, and for controlling the stray shopping carts from which those customers selected their instrumentality.

I. THE MOTION TO DISMISS CLAIMS AGAINST BOB'S DISCOUNT FURNITURE

Defendant Bob's Discount Furniture of NY, LLC, one of several large retail stores in the shopping center, moves to dismiss the complaint and cross-claims against this defendant based on documentary evidence, C.P.L.R. § 3211(a)(1), and failure to state a claim. C.P.L.R. § 3211(a)(7). Bob's Discount Furniture rented part of center's fourth level, from which an elevated pedestrian bridge crossed to the parking garage attached to the center. Bob's Discount Furniture claims that, under its lease with the East River Plaza owner, co-defendant Tiago Holding, LLC, this elevated walkway, from which two boys threw the shopping cart, was a common area of the complex for which the tenant bore no maintenance or security responsibilities, including a duty to remove any stray shopping carts.

Insofar as Bob's Discount Furniture relies on its lease,

however, no witness attests to the signatures on the lease or to circumstantial authentication. IRB-Brasil Resseguros S.A. v. Portobello Intl. Ltd., 84 A.D.3d 637 (1st Dep't 2011); Babikian v. Nikki Midtown, LLC, 60 A.D.3d 470, 471 (1st Dep't 2009); Bank of New York v. Dell-Webster, 23 Misc. 3d 1107 (Sup. Ct. Bronx Co. 2008). See Singer Asset Fin. Co., LLC v. Melvin, 33 A.D.3d 355, 357-58 (1st Dep't 2006); Acevedo v. Audubon Mgt., 280 A.D.2d 91, 95 (1st Dep't 2001); Fields v. S & W Realty Assoc., 301 A.D.2d 625 (2d Dep't 2003). Therefore the lease is not admissible documentary evidence that the court may consider to support a motion to dismiss claims pursuant to C.P.L.R. § 3211(a)(1). Greenapple v. Capital One, N.A., 92 A.D.3d 548, 550 (1st Dep't 2012); Advanced Global Tech., LLC v. Sirius Satellite Radio, Inc., 44 A.D.3d 317, 318 (1st Dep't 2007); 1911 Richmond Ave. Assoc., LLC v. G.L.G. Capital, LLC, 60 A.D.3d 1021, 1022 (2d Dep't 2009). See Muhlhahn v. Goldman, 93 A.D.3d 418, 419 (1st Dep't 2012).

To establish this tenant's nonliability, Bob's Discount Furniture relies not just on its lease, but also on non-documentary evidence outside the complaint's allegations, that this store did not own, possess, control, or use any shopping carts or allow them into the store, and the cart thrown onto Marion Hedges belonged to co-defendant Target Corporation. Target was another large retail store in the shopping center.

Part of this evidence is a Bob's Discount Furniture store security camera recording of the boys who dropped the shopping

cart leaving this store without a shopping cart. According to Bob's Discount Furniture employee Joseph Klein, the video recording then shows the boys pushing a cart from the common area at a distance from the front of the store. Even if Klein authenticates the video recording, this evidence, along with the remainder of his affidavit and the affidavit of the store manager concerning the absence of responsibility for shopping carts or maintenance, may not be considered to support a motion to dismiss claims pursuant to C.P.L.R. § 3211(a)(1) and (7). Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Solomons v. Douglas Elliman LLC, 94 A.D.3d 468, 469 (1st Dep't 2012); Tsimerman v. Janoff, 40 A.D.3d 242 (1st Dep't 2007). See Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002); Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); Correa v. Orient-Express Hotels, Inc., 84 A.D.3d 651 (1st Dep't 2011).

II. THE CLAIMS AGAINST BOB'S DISCOUNT FURNITURE

A. Factual Allegations

The complaint's allegations against Bob's Discount Furniture are exceedingly broad and vague to the effect that the store negligently failed to keep its premises safe and failed to provide adequate security for its customers. The only specific allegation applicable to this defendant, among other defendants, is that it failed to respond adequately to prior complaints or reports of persons throwing objects off the elevated walkway outside its store.

Plaintiffs in opposing a motion to dismiss the complaint, unlike defendants supporting the motion, may supplement their pleading with admissible evidence. Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Cron v. Hargro Fabrics, 91 N.Y.2d 362, 366 & n. (1998); Ray v. Ray, ___ A.D.3d ___, 2013 WL 3387988, at *2 (1st Dep't July 9, 2103); Thomas v. Thomas, 70 A.D.3d 588, 591 (1st Dep't 2010). While plaintiffs only belatedly supplemented their complaint with three affidavits, from a current and a former employee of Bob's Discount Furniture and from a superintendent of a neighboring building, defendants were provided an opportunity to reply further, did so, and did not request more time.

Bob's Discount Furniture objects particularly to its current employee's affidavit on the ground that plaintiffs' attorney obtained it in violation of Rule 4.2 of the Rules of Professional Conduct. 22 N.Y.C.R.R. pt. 1200. The employee, however, is neither a defendant, nor a defendant's managerial employee with the authority to bind a defendant or the responsibility to carry out the advice of a defendant's attorney, nor a defendant's principal with a stake in the corporate entity. As the employee makes clear in his affidavit, he was and is part of the Bob's Discount Furniture "sales staff" and not part of the "management team." Aff. of Nelson Ramirez, Jr. (Oct. 7, 2012). Therefore no rule restricted plaintiffs' attorney in obtaining sworn statements from this employee. Muriel Siebert & Co., Inc. v. Intuit Inc., 8 N.Y.3d 506, 511 (2007); Niesig v. Team I, 76

N.Y.2d 363, 374 (1990). See Arons v. Jutkowitz, 9 N.Y.3d 393, 407 (2007); Flores v. Willard J. Price Assoc., LLC, 20 A.D.3d 343, 344 (1st Dep't 2005).

Plaintiffs' affidavits opposing the motion by Bob's Discount Furniture attest that, for approximately two years leading up to plaintiffs' injury, the store had been attracting unsupervised minors inside with free beverages, candy, and cookies, where the minors often became disruptive. After the store expelled the minors from inside the store, its employees had observed these minors throwing candy and other objects off the fourth level walkway. Security personnel for the shopping center had complained about this misbehavior to store employees, who had reported these complaints to the store management.

The store's video recording as authenticated by its witness, on which plaintiffs may rely, corroborates that, on the day of plaintiffs' injury, the store and the boys involved acted consistently with this pattern. The store was offering free beverages and food and attracted the boys inside. They became disruptive, so the store expelled them into the mall, but never notified security personnel or anyone else that the boys posed a risk.

Thus, according to the complaint, Bob's Discount Furniture was aware of a situation that frequently posed a risk to the shopping center's other tenants and customers, whether customers of Bob's Discount Furniture or of other tenants, and other persons in the center. At minimum, the complaint raises a

question whether it was reasonably foreseeable to Bob's Discount Furniture that expelling the troublesome boys from the store to cause disruption outside the store, without any further action to address their misbehavior, would result in injury to persons or property outside.

B. Legal Duty

A business proprietor in possession and control of premises owes a duty to control persons on the business' premises when the business is aware of the need for such control and is in a position to take precautionary measures to protect members of the public from the misconduct of those uncontrolled misbehaving persons. E.g., Nunez v. Recreation Rooms & Settlement, 229 A.D.2d 359, 360 (1st Dep't 1996); Banayan v. F.W. Woolworth Co., 211 A.D.2d 591, 592 (1st Dep't 1995); Rivera v. 21st Century Rest., 199 A.D.2d 14, 15 (1st Dep't 1993); Murphy v. Turian House, 232 A.D.2d 535 (2d Dep't 1996). See Martino v. Stolzman, 18 N.Y.3d 905, 908 (2012); Di Ponzio v. Riordan, 89 N.Y.2d 578, 582-83 (1997); D'Amico v. Christie, 71 N.Y.2d 76, 85 (1987); Garrett v. Twin Parks Northeast Site 2 Houses, 256 A.D.2d 224, 225-26 (1st Dep't 1998). A duty of supervision adequate to guard against reasonably foreseeable injury is particularly warranted when, as alleged here, the business invited unescorted minors into its premises. Aquino v. Higgins, 15 N.Y.3d 903, 905 (2010); Mirand v. City of New York, 84 N.Y.2d 44, 49 (1994); Nicholson v. Board of Educ. of City of N.Y., 36 N.Y.2d 798, 802-803 (1975); Phelps v. Boy Scouts of Am., 305 A.D.2d 335, 336 (1st Dep't

2003). Under these circumstances, Bob's Discount Furniture may be liable for reasonably foreseeable injuries proximately related to its inadequate supervision of its minor invitees. Aquino v. Higgins, 15 N.Y.3d at 905; Mirand v. City of New York, 84 N.Y.2d at 50-51; Nicholson v. Board of Educ. of City of N.Y., 36 N.Y.2d at 803; Phelps v. Boy Scouts of Am., 305 A.D.2d at 335-36. See Singh v. Persaud, 269 A.D.2d 381, 382 (2d Dep't 2002).

Consequently, even were the court to consider Bob's Discount Furniture's evidence regarding its lack of responsibility for shopping carts or for maintenance of the shopping center's common areas, plaintiffs' claims against this defendant are premised on negligent supervision of the store's invitees, not negligent maintenance of carts or of premises beyond its leasehold. Therefore the court denies Bob's Discount Furniture's motion to dismiss the complaint against this defendant for its negligence. C.P.L.R. § 3211(a)(1) and (7).

Bob's Discount Furniture presents no evidence, documentary or otherwise, or even any other defendant's answer, to establish any cross-claims' lack of merit. Only in reply does Bob's Discount Furniture's attorney insist that, even if plaintiffs raise factual questions regarding the store's negligence that would support implied indemnification and contribution cross-claims, defendant Planned Security Service Inc.'s contractual indemnification cross-claim must fail because there was no contract between these two defendants. Were the court to consider this basis for Bob's Discount Furniture's motion

impermissibly presented for the first time in reply, Sylla v. Brickyard Inc., 104 A.D.3d 605, 606 (1st Dep't 2013); Calcano v. Rodriguez, 103 A.D.3d 490, 491 (1st Dep't 2013); Martinez v. Nguyen, 102 A.D.3d 555, 556 (1st Dep't 2013); JPMorgan Chase Bank, N.A. v. Luxor Capital, LLC, 101 A.D.3d 575, 576 (1st Dep't 2012), its attorney's declaration remains unsupported by any evidence or by Planned Security Service's answer, to ascertain whether it fails to plead the elements of contractual indemnification. Therefore the court also denies the motion by Bob's Discount Furniture to dismiss any cross-claims against it. C.P.L.R. § 3211(a)(1) and (7).

III. THE CROSS-MOTION FOR SUMMARY JUDGMENT DISMISSING CLAIMS AGAINST COSTCO WHOLESALE

Defendant Costco Wholesale Corporation, another large retail store in the shopping center, cross-moves for summary judgment dismissing the complaint and cross-claims against this defendant based on failure to state a claim. C.P.L.R. §§ 3211(a)(7), 3212(b). Costco Wholesale rented part of center's ground level for the store's retail space across from a parking garage pay-box kiosk where the shopping cart hit Marion Hedges.

Like co-defendant Bob's Discount Furniture, Costco Wholesale claims that, under its lease with Tiago Holding, the elevated walkways connecting the shopping center and parking garage were common areas that remained in the owner's possession and control and for which the owner provided security personnel. Again, however, no witness authenticates the lease, so Costco Wholesale may not rely on its lease either, as admissible evidence

supporting its motion for summary judgment. E.g., IRB-Brasil Resseguros S.A. v. Portobello Intl. Ltd., 84 A.D.3d 637; Babikian v. Nikki Midtown, LLC, 60 A.D.3d at 471. See Muhlhahn v. Goldman, 93 A.D.3d at 419; Greenapple v. Capital One, N.A., 92 A.D.3d at 550; Singer Asset Fin. Co., LLC v. Melvin, 33 A.D.3d at 357-58; Acevedo v. Audubon Mgt., 280 A.D.2d at 95.

IV. THE CLAIMS AGAINST COSTCO WHOLESALE

Nonetheless, Costco Wholesale points to the absence of allegations in the complaint that this defendant owned, possessed, maintained, or controlled any shopping carts or the area where plaintiffs were injured: either the pedestrian walkway from which the shopping cart was thrown or the walkway in which plaintiffs were standing when the shopping cart hit Marion Hedges. The complaint does allege that Costco Wholesale was negligent in failing to provide security for customers and to collect shopping carts from areas where they were abandoned. Without any connection to the area where plaintiffs allege security was required or to the instrumentality that caused the injury, however, plaintiffs fail to lay any premise for a duty of care toward the area or instrumentality. Haymon v. Pettit, 9 N.Y.3d 324, 328-29 (2007); Darby v. Compagnie Air France, 96 N.Y.2d 343, 347-48 (2001); Kobre v. United Jewish Appeal-Fedn. of Jewish Philanthropies of N.Y., Inc., 32 A.D.3d 218, 223 (1st Dep't 2006); Hoberman v. Kids "R" Us, 187 A.D.2d 187, 190-91 (1st Dep't 1993). See Espinal v. Melville Snow Contrs., 98 N.Y.2d 136, 138, 141-42 (2002); Kaplan v. New York Mercantile Exch., 55

A.D.3d 406 (1st Dep't 2008); Gibbs v. Port Auth. of N.Y., 17 A.D.3d 252, 254 (1st Dep't 2005).

Again, however, plaintiffs claim Costco Wholesale, as a business proprietor in possession and control of premises, owed a duty to take precautionary measures to protect the store's customers or other members of the public from a danger that store personnel were aware of and in a position to prevent. E.g., Nunez v. Recreation Rooms & Settlement, 229 A.D.2d at 360; Banayan v. F.W. Woolworth Co., 211 A.D.2d at 592; Rivera v. 21st Century Rest., 199 A.D.2d at 15; Murphy v. Turian House, 232 A.D.2d 535. The only admissible evidence plaintiffs rely on are the affidavits of two persons who came to plaintiffs' aid immediately after the injury.

Susan Mahoney attests to a Costco Wholesale employee's hearsay account "that earlier some boys were on the Target pedestrian bridge throwing slurpees down on Costco customers," and the employee "had called Target security 30 minutes before to report the boys." Aff. in Opp'n of Carmine A. Rubino Ex. F ¶ 3. This account, even were it admissible, shows only that the Costco Wholesale employee took precautionary measures by notifying security personnel that the boys throwing objects off the pedestrian bridge posed a risk.

Susan Mahoney's husband Gaurav Patel in his affidavit adds the Costco employee's further account that "eventually she sent one of her security guards up there to investigate." Id. Ex. G ¶ 6. This further account, were it admissible, again shows Costco

Wholesale employees' responsive action. Without a showing of what the investigating security guard found and how the guard then responded, this evidence, too, falls short of indicating any negligence by Costco Wholesale personnel. This evidence does suggest, however, that further evidence of this defendant's action or inaction to address the risk that caused plaintiffs' injury may be available through the Costco Wholesale security guard, if plaintiffs are given the opportunity to depose this witness. See Maldonado v. Townsend Ave. Enters., Ltd.

Partnership, 294 A.D.2d 207, 208 (1st Dep't 2002); Stankowski v. Kim, 286 A.D.2d 282, 283 (1st Dep't 2001); Levbarg v. City of New York, 282 A.D.2d 239, 241 (1st Dep't 2001).

The complaint and admissible evidence still provide little support for Costco Wholesale's duty toward the area of the danger, to control the assailants, or to protect the victims. No allegations in the complaint or admissible evidence outside the complaint indicate that the assailants were leaving or entering Costco Wholesale's business premises or had been its customers at all. Dayton Hedges's affidavit, however, does establish that Dayton Hedges and his mother had been shopping at Costco Wholesale, were leaving its premises and heading to the parking garage when the shopping cart hit his mother, and were provided no visual or auditory warning of any potential danger upon leaving the store.

The inconclusive evidence at this stage leaves open the question of whether plaintiffs were injured in an area necessary

for egress from or ingress to Costco Wholesale and where store employees and management were aware of imminent danger from overhead. The business proprietor's duty to provide a safe environment for members of the public whom the business invites into its store extends to customers' means of egress and ingress. Peralta v. Henriquez, 100 N.Y.2d 139, 143 (2003); Edwards v. BP/CG Ctr. I. Inc., 102 A.D.3d 413 (1st Dep't 2013); Reyes v. Dunning, 216 A.D.2d 449, 450 (2d Dep't 1995). See Bingham v. New York Tr. Auth., 8 N.Y.3d 176, 180-81 (2007); Angulo v. Concourse One Co., LLC, 84 A.D.3d 504 (1st Dep't 2011); Masillo v. On Stage, Ltd., 83 A.D.3d 74, 79 (1st Dep't 2011). Thus, if plaintiffs were injured in an area necessary for egress or ingress where it was reasonably foreseeable that customers exiting or entering would be exposed to danger, such facts would raise the further question regarding the extent of Costco Wholesale's duty to those customers, including plaintiffs, even if that duty is only to warn them. See Bingham v. New York Tr. Auth., 8 N.Y.3d at 181; Peralta v. Henriquez, 100 N.Y.2d at 144-45.

Disclosure undoubtedly will pinpoint where plaintiffs' injuries occurred in relation to Costco Wholesale, as well as where the assailants launched their instrumentality in relation to Bob's Discount Furniture. Through disclosure from these defendants plaintiffs reasonably may expect to obtain information also about complaints by customers or employees to management personnel that customers, when entering or exiting the store

premises, were being assaulted by objects thrown from overhead or even about store managers observing such conduct themselves. Insofar as plaintiffs may have failed to rebut Costco Wholesale's defenses at this stage, such disclosure carries the potential to defeat summary judgment more soundly and is warranted before granting Costco Wholesale summary judgment. C.P.L.R. § 3212(f); Mason v. U.E.S.S. Leasing Corp., 96 N.Y.2d 875, 878 (2001); Cooke v. City of New York, 95 A.D.3d 537, 538 (1st Dep't 2012); Arbor Leasing, LLC v. BTMU Capital Corp., 68 A.D.3d 580 (1st Dep't 2009); Slemish Corp., S.A. v. Morgenthau, 63 A.D.3d 418, 419 (1st Dep't 2009). See Maldonado v. Townsend Ave. Enters., Ltd. Partnership, 294 A.D.2d at 208; Stankowski v. Kim, 286 A.D.2d at 283; Levbarq v. City of New York, 282 A.D.2d at 241.

V. CONCLUSION

Consequently, the court denies defendant Costco Wholesale Corporation's cross-motion for summary judgment on the ground that evidence beyond plaintiffs' possession and control, but within defendants' possession or control, may defeat the motion. C.P.L.R. § 3212(f). For the reasons explained above, the court also denies both the motion by Bob's Discount Furniture of NY, LLC, to dismiss the complaint and cross-claims against this defendant and Costco Wholesale's cross-motion. C.P.L.R. §§ 3211(a)(1) and (7), 3212(b). In sum, were the court to consider the evidence presented by both these defendants regarding their lack of responsibility for the shopping cart wielded against Marion Hedges or for maintenance or security in the shopping

center's common areas, plaintiffs' claims against these defendants are not premised on negligent maintenance of the premises or carts. Plaintiffs allege that Bob's Discount Furniture negligently supervised its invitees and that both defendants negligently failed to warn or take other precautions to protect shopping center customers from a danger that the stores were aware of and in a position to prevent.

DATED: July 23, 2013

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

FILED

JUL 31 2013

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