

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HELENE and DANIEL J. KOSTAR : CIVIL ACTION
 : :
 : :
 : :
 : :
PEPSI-COLA METROPOLITAN : :
BOTTLING COMPANY, INC., : :
PEPSICO, INC., and : :
SERAVALLI, INC. : NO. 96-7130

MEMORANDUM AND ORDER

HUTTON, J.

October 22, 1998

Presently before the Court are Defendant Pepsi-Cola Metropolitan Bottling Company, Inc.'s Motion for Summary Judgment (Docket No. 57), Plaintiffs' response thereto (Docket No. 63), Defendant's Reply Brief (Docket No. 67), Plaintiffs' Sur-Reply Brief (Docket No. 75), Plaintiffs' Supplemental Response Based on Newly Discovered Evidence (Docket No. 76), and Defendant's reply thereto (Docket No. 80). Also before the Court are Defendant PepsiCo, Inc.'s Motion for Summary Judgment (Docket No. 66), Plaintiffs' response thereto (Docket No. 69), and Defendant's Reply Brief (Docket No. 78). For the reasons stated below, the Defendant's motions are **GRANTED IN PART AND DENIED IN PART**.

I. BACKGROUND

Taken in the light most favorable to the nonmoving party, the facts are as follows. During 1996, Plaintiff Helene Kostar

("Kostar" or Plaintiff) was an employee of Pepsi-Cola Laurel Bottling Company ("Pepsi-Laurel"). Plaintiff worked at a manufacturing plant located on 11701 Roosevelt Boulevard in Philadelphia, Pennsylvania. On February 16, 1996, Plaintiff exited the manufacturing building on crutches using a handicapped-access ramp. As Plaintiff proceeded down the ramp, she fell and suffered physical injuries. Plaintiff alleges that she fell due to ice and snow on the ramp and/or the existence of a defective condition in the ramp.

Plaintiff and her husband subsequently filed a complaint against Defendant Pepsi-Cola Metropolitan Bottling Company, Inc. ("Pepsi-Metro"). In her complaint, Plaintiff alleges that Defendant Pepsi-Metro owns the premises upon which the ramp is located. In asserting this allegation of ownership, Plaintiff relied on a deed dated September 5, 1990 which conveyed the property from the Philadelphia Authority for Industrial Development to Defendant Pepsi-Metro. This deed is filed with the Philadelphia Recorder of Deeds.

After several months of discovery, Plaintiff moved this Court for permission to file an amended complaint to join PepsiCo, Inc. ("PepsiCo") as a defendant. Plaintiff based this motion on deposition testimony that suggested PepsiCo employed personnel potentially responsible for the maintenance of the property, particularly ice and snow removal. On December 23, 1997, this

Court granted Plaintiff's motion and Plaintiff filed an amended complaint naming PepsiCo as an additional defendant.

Defendant Pepsi-Metro now moves for summary judgment. Defendant Pepsi-Metro asserts that summary judgment should be granted because: (1) Pepsi-Metro does not own the property in dispute or (2) Pepsi-Metro cannot be held liable for Plaintiff's injuries as a landlord out of possession under Pennsylvania law even if it did own the property. Defendant PepsiCo also moves for summary judgment on two grounds. First, PepsiCo joins Defendant Pepsi-Metro's motion and asserts similar grounds for summary judgment. Second, PepsiCo argues that there is no evidence that any PepsiCo employee was responsible for maintenance of any sort, much less ice and snow removal, at the property where Plaintiff fell. The Court considers these motions together.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to

go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

III. DISCUSSION

A. Defendant Pepsi-Metro

Defendant Pepsi-Metro essentially argues that summary judgment is proper because it does not own the property upon which Plaintiff fell and, thus, owed no duty to the Plaintiff. Plaintiff responds with numerous exhibits, deposition testimony and affidavits in an attempt to show that the Defendant Pepsi-Metro owned the property during the injury in question. Plaintiff thus

counter argues that the Defendant did in fact own the property upon which Plaintiff fell and, therefore, owed a duty to the Plaintiff.

In order to sustain a cause of action in negligence, a plaintiff must show that: (1) defendant owed them a duty of care; (2) defendant breached that duty; (3) a causal link existed between the breach of duty and plaintiff's injury and harm; and (4) damages. See Markovich v. Bell Helicopter Textron, Inc., 805 F. Supp. 1231, 1236 (E.D. Pa.), aff'd, 977 F.2d 568 (3d Cir. 1992) (unpublished table decision). Pennsylvania courts hold that the existence of a duty "is predicated on the relationship existing between the parties at the relevant time." Zanine v. Gallagher, 345 Pa. Super. 119, 497 A.2d 1332, 1334 (1985) (quoting Morena v. South Hills Health Sys., 501 Pa. 634, 462 A.2d 680, 684 (1983)).

Under Pennsylvania law, where liability is premised on the duty of a "possessor" to maintain premises, the duty does not always lie with the holder of legal title. See Whitaker v. Hills, 430 F. Supp. 1389, 1391-92 (E.D. Pa. 1977). Rather, the duty follows the "possessor of land" or the person in possession and control of the land at the time of injury. See id. Restatement (Second) of Torts § 328E¹ defines a possessor of land as follows:

- (a) a person who is in occupation of the land with intent to control it;

¹ This Court notes that the Supreme Court of Pennsylvania has never expressly adopted this Section of the Restatement. Nevertheless, because numerous other Pennsylvania courts used this Section as guidance in determining who is a possessor of land, this Court will use it in the same manner.

(b) a person who has been in occupation of land with intent to control it, if no other person has, subsequently occupied it with intent to control it, or

(c) a person who is entitled to immediate occupation of the land, if no other person is in possession under clauses (a) or (b).

Restatement (Second) of Torts § 328E (1965).

Thus, title ownership is not determinative of whether a defendant is a possessor of land owing a duty of maintenance. See Nacke v. Super Fresh Food Mkts., Inc., No. CIV.A.95-1542, 1997 WL 117022, at *6 n.4 (E.D. Pa. Mar. 12, 1997) ("Title ownership is not a sufficient basis for liability."); Bloom v. Waste Management, Inc., 615 F. Supp. 1002, 1015 (E.D. Pa. 1985) ("Pennsylvania law makes clear, however, that title ownership is not a sufficient basis for liability; it is the possessor of land that bears responsibility for dangerous conditions that arise on the premises."), aff'd, 800 F.2d 1142 (3d Cir. 1986) (unpublished table decision); Blackman v. Federal Realty Inv. Trust, 444 Pa. Super. 411, 416, 664 A.2d 139, 142 (1995) (holding that trial court incorrectly granted summary judgment in reliance of title ownership and finding that unanswered question of whether defendant was a possessor of land must be made by jury); Rodriguez v. City of Phila., 657 A.2d 105, 110 (Pa. Commw. Ct. 1995) ("[L]iability is premised upon possession and control of the land, not merely ownership."); see also Del Collo v. MMC Corp., No. 84C-JA-84, 1986 WL 5869, at *3 (Del. Super. Ct. 1986) (finding tenant possessed and

controlled land under Section 328E where tenant assumed responsibility of snow removal). Instead, “[l]iability for maintenance follows possession and control, regardless of title.” Bagley v. City of Phila., 148 Pa. Super. 318, 326, 25 A.2d 579, 582 (1942). Finally, whether a defendant is a possessor of land is a question for the fact-finder. See Leichter v. Eastern Realty Co., 358 Pa. Super. 189, 193, 516 A.2d 1247, 1249 (1986).

In this case, while both parties spill much ink over the issue of whether Defendant Pepsi-Metro owns the property in question, neither party recognizes that ownership is only a piece of the much larger puzzle of whether Defendant is a possessor of land. In her complaint, Plaintiff alleges that the Defendant owed her a duty because Defendant is “the titled owner, operator and/or manager” of the property in question. See Pls.’ Compl. at ¶ 8. Moreover, Plaintiff alleges that Defendant Pepsi-Metro “had control of the handicap ramp” and that “[s]aid ramp is a part of the property owned, managed, maintained and controlled” by Defendant Pepsi-Metro. See id. at ¶ 9, 10. Thus, Plaintiff’s allegations do not rest exclusively on Defendant’s ownership of the ramp and/or property. Instead, Plaintiff alleges that Defendant controlled the property upon which the ramp was located and, as an invitee or licensee, owed her a duty as a possessor of land. See id. at ¶ 11. The critical question under Pennsylvania law, therefore, is not whether Defendant Pepsi-Metro owned the property at the time of

Plaintiff's injury. Rather, the critical question is whether Defendant Pepsi-Metro was a possessor of land, or in other words, was "in occupation of the land with intent to control it" at the time of Plaintiff's injury. See Restatement (Second) of Torts § 328E (defining possessor of land). The Court now turns to this issue.

Defendant Pepsi-Metro contends that Plaintiff offers no evidence demonstrating that it owns or controls the property where the ramp is located. Plaintiff counters that there is sufficient evidence that Defendant Pepsi-Metro was in possession and control of the property during the time in question. Because possession and control are the relevant inquiries, not simply title ownership, this Court agrees with the Plaintiff and concludes that whether Defendant Pepsi-Metro was the possessor of land at the time of injury is a genuine issue of material fact for trial.

1. Deeds

Plaintiff offers a deed dated September 5, 1990 indicating that Pepsi-Metro was the record owner on the date of Plaintiff's injury. Plaintiff supports this documentation with an expert report indicating that a title search also suggests that Pepsi-Metro was the record owner on the date of injury.

Defendant submits that it transferred ownership of the property to Pepsi-Laurel, Plaintiff's employer, on January 1, 1992. In support, Defendant offers the deposition testimony of Charles

Mueller, a former officer of Pepsi-Metro, who stated "[a]ll of the real and tangible personal property previously owned by Pepsi-Metro was intended to be transferred to its wholly owned subsidiary, Laurel Group Limited [who later became Pepsi-Laurel]." Mueller Dep. at 32. Defendant also offers the deposition testimony of Fraeger Sanders, Pepsi-Laurel's facility plant manager, who stated that Pepsi-Laurel employees handled all matters involving the physical facility including snow removal. See Sanders Dep. at 56. Finally, Defendant also offers a deed dated January 1, 1992 which transferred ownership of the property from Pepsi-Metro to Pepsi-Laurel and was recorded on April 30, 1998. Plaintiff objects to the January 1, 1992 deed and questions its veracity because Defendant did not disclose the existence of the deed after numerous discovery requests and a request for an admission. Indeed, the first copy of the deed provided to this Court was not in Defendant's original motion for summary judgment, but in Defendant's Reply Brief. While the Court agrees that it is not easily understood why the Defendant's first disclosure of this deed occurred after many requests by Plaintiff and in Defendant's Reply Brief, the Court will nonetheless consider the deed for the purposes of this motion.

Predictably, the parties disagree concerning the weight of each of these deeds and the importance of Pepsi-Metro's status as record owner on the date of injury. While both parties cite

case law concerning the importance of Pepsi-Metro as record owner, the Court does not find the case law or the respective arguments made by the parties particularly helpful or relevant. Even if this Court could conclusively determine-- which it cannot-- who was the title owner on the day of injury, this fact would not be determinative of whether Pepsi-Metro was the possessor of land on that day. See Bagley, 148 Pa. Super. at 326, 25 A.2d at 582 ("Liability for maintenance follows possession and control, regardless of title."). On the one hand, the September 5, 1990 deed and the fact that Pepsi-Metro was the record owner on the date of injury are relevant evidence for a fact-finder to determine whether Pepsi-Metro was "a person who is in occupation of the land with intent to control it" on the date of injury. See Restatement (Second) of Torts § 328E (defining possessor of land). On the other hand, the January 1, 1992 deed and authenticity thereof are also matters for the jury to consider in determining whether Pepsi-Metro was "a person who is in occupation of the land with intent to control it" when Plaintiff injured herself on the property. See id.

2. Deposition Testimony and Affidavits

Plaintiff also offers testimony and affidavits which suggest that Pepsi-Metro was in possession and control of the property in 1996. For example, Plaintiff attached the affidavit of William Hamilton, a former employee at the manufacturing plant from

1994 to 1996, in which he states that Defendant Pepsi-Metro would hold its annual employee picnic on the property upon which Plaintiff injured herself. In addition, Plaintiff points to the deposition testimony of Mueller which indicates that numerous Pepsi-Laurel employees who work at the manufacturing plant are also Pepsi-Metro employees. See Mueller Dep. at 14-15, 39-40. Mueller also testified in his deposition about the existence of telephone conference calls between Pepsi-Laurel and Pepsi-Metro employees concerning operation of the manufacturing plant. See id. Finally, Plaintiff submits her own affidavit which lists tasks that she performed as an administrative assistant in the manufacturing plant for Pepsi-Metro. She also describes various Pepsi-Metro activities that took place in the manufacturing plant even after the alleged transfer of ownership to Pepsi-Laurel.

In sum, this evidence at the very least raises an issue of whether Pepsi-Metro exerted possession and control of the premises in February of 1996 when Plaintiff was injured. Under Restatement 328E, a reasonable jury could conclude that Pepsi-Metro, while not the title owner of the property, was in occupation of the property with the intent to control it. While Defendant argues that this evidence is not strong enough to raise an issue of ownership, it is not ownership that is the main subject of dispute in this case. The crux of Plaintiff's complaint revolves around the status of Pepsi-Metro as possessor of land. That is the source

of the duty allegedly owed to Plaintiff and this Court finds that the affidavits, deposition testimony, and admissions submitted by Plaintiff create an issue of fact concerning such a duty.

3. Other Evidence of Possession and Control

Finally, Plaintiff also points to numerous other indicia of Defendant Pepsi-Metro's possession and control of the property. Among other things, Plaintiff attaches the following: (1) tax information listing Pepsi-Metro as owner; (2) deposition testimony of officers employed by Pepsi-Laurel and Pepsi-Metro who worked on the property in question; (3) copies of the registrations of over 50 trucks that work out of the property in question who list Pepsi-Metro as the owner; (4) copies of water and sewer bills directed to Pepsi-Metro as the owner of the property; and (5) deposition testimony concerning Pepsi-Metro's use of the property even after the alleged transfer of ownership in January of 1992 to Pepsi-Laurel. Defendant argues that Plaintiff is merely bootstrapping evidence from the September 5, 1990 deed. In other words, Defendant appears to argue that this evidence is derived from the deed and not really other indicia of ownership as Plaintiff alleges. This Court finds that it is proper evidence indicating that Pepsi-Metro was the record owner in 1996.

4. Conclusion of Possession and Control

The Court finds that even if Pepsi-Metro transferred title to this property in 1992, a full four years prior to

Plaintiff's injury, a reasonable jury could conclude from Plaintiff's evidence that Pepsi-Metro was the possessor of land of this property when Plaintiff was injured. See Dumas v. Pike County, 642 F. Supp. 131, 136 (S.D. Miss. 1986) (concluding that summary judgment was improperly granted because an issue of fact remained of whether county exercised control over premises as "general principles of premises liability are not conditioned upon the defendant's actually owning or holding title to the land. A 'possessor' of land can include one in occupation of land with the intent to control it."). Thus, the Court must hold that a genuine issue of material fact still exists on this issue and requires a determination by a jury.

One final point, however, must still be addressed. Defendant Pepsi-Metro also argues that even if the Court finds it did own the property in 1996, then there is no basis for liability either under Pennsylvania law because Pepsi-Metro is a landlord out of possession. This Court disagrees. First, this Court did not find that Pepsi-Metro owned the property in question, but instead found that there is a genuine issue of whether it was possessor of the property in 1996. Second, as Plaintiff notes, there is absolutely no evidence of any sort that Pepsi-Metro entered into a landlord-tenant relationship with Pepsi-Laurel. Indeed, Defendant Pepsi-Metro admitted as much. See Def.'s Resp. to Pls.' Req. for Admis. at ¶ 4, 5. Therefore, the Court finds the merits of Pepsi-

Metro's landlord out of possession argument irrelevant and denies their motion for summary judgment.

B. Defendant PepsiCo

Defendant PepsiCo argues that it is entitled to summary judgment for two reasons. First, PepsiCo joins Pepsi-Metro's motion for summary judgment and argues that there is no evidence that PepsiCo owned or controlled the property upon which Plaintiff was injured. Second, PepsiCo argues that there is no evidence that any PepsiCo employees are responsible for the maintenance of the ramp that caused Plaintiff's injury.

Before the Court addresses the merits of Defendant PepsiCo's arguments, Plaintiff asks this Court to bar PepsiCo's motion for summary judgment as untimely. This Court refuses to do so. The Court issued a scheduling order requesting that the parties file dispositive motions two weeks prior to the close of discovery. Defendant PepsiCo failed to do so and submitted a motion for summary judgment several days late. Nevertheless, the Court finds that Plaintiff suffered absolutely no prejudice in this delay. Indeed, Plaintiff does not assert it suffered any prejudice by the untimeliness of Defendant's motion. The Court will therefore consider Defendant PepsiCo's motion.

The Court agrees with PepsiCo that Plaintiff offered no evidence that PepsiCo possessed or controlled the property when Plaintiff injured herself. The only evidence this Court found concerning this matter is Plaintiff's argument that the plant was

built for PepsiCo. This evidence is simply insufficient to impose a duty on Defendant under a possessor of land theory.

The Court also agrees with PepsiCo that Plaintiff offered no evidence that PepsiCo employees were responsible for the removal of ice and snow. This Court previously allowed Plaintiff to amend her complaint to name PepsiCo as a defendant based on the deposition testimony of Mueller and Sanders. This deposition testimony indicated that PepsiCo was responsible for overseeing certain day to day operations at the property where Plaintiff injured herself. While any duty owed to Plaintiff by PepsiCo based on this testimony was tenuous because this testimony did not indicate that PepsiCo employees were responsible for ice and snow removal, this Court permitted an amendment of the complaint.

After further discovery, this Court concludes that PepsiCo employees had no responsibility concerning ice and snow removal and, thus, did not owe any duty to the Plaintiff. The deposition testimony of Joseph Cugine, the Market Unit General Manager in 1996, clarifies the testimony of Mueller and Sanders. Cugine is an employee of Pepsi-Cola Personnel, Inc, ("Pepsi-Personnel"), yet another wholly owned subsidiary of PepsiCo. He made calls to Defendant Servalli to remove snow and ice from the property in 1995 and 1996. Thus, while Mueller and Sanders' testimony suggested that PepsiCo employees had responsibilities at the manufacturing plant, Cugine's testimony demonstrates that no

PepsiCo employee had any responsibilities concerning ice and snow removal on the property in question. Moreover, Plaintiff offers a litany of exhibits, affidavits and other evidence, none of which is on point. This evidence fails to address whether any PepsiCo employee was responsible for ice and snow removal, or even yet, any maintenance duties for the property.

This failure is fatal from the viewpoint of this Court because Plaintiff cannot assert that Defendant PepsiCo owed any duty to Plaintiff. Indeed, in response to PepsiCo's motion, Plaintiff fails to cite any case law of any sort suggesting that PepsiCo owes any duty under these circumstances. Therefore, this Court finds that PepsiCo could not owe any duty to the Plaintiff under these circumstances and summary judgment is warranted.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HELENE and DANIEL J. KOSTAR : CIVIL ACTION
 : :
 : :
 : :
PEPSI-COLA METROPOLITAN : :
BOTTLING COMPANY, INC., : :
PEPSICO, INC., and : :
SERAVALLI, INC. : NO. 96-7130

O R D E R

AND NOW, this 22nd day of October, 1998, upon
consideration of Defendants' Motions for Summary Judgment, IT IS
HEREBY ORDERED that:

(1) Defendant Pepsi Metro's Motion for Summary Judgment
is **DENIED**; and

(2) Defendant PepsiCo's Motion for Summary Judgment is
GRANTED.

BY THE COURT:

HERBERT J. HUTTON, J.