[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Index Number : 106313/2008
LEWIS, MIRJANA
vs.
D'AGOSTINO SUPERMARKETS
SEQUENCE NUMBER : 002
DISM ACTION/INCONVENIENT FORUM

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

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

FILED
JUN 16 2010
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendants D'Agostino Supermarkets, Inc., New 56-79 IG Associates, L.P., and Bldg Management Co., Inc. for summary judgment dismissing the Complaint of the plaintiff Mirjana Lewis is granted, and the Complaint is hereby dismissed; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon plaintiff within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 6. 14. 10

HON. CAROL EDMEAD J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

MIRJANA LEWIS,

Index No. 106313/08

Plaintiff,

-against-

D'AGOSTINO SUPERMARKETS, INC.,
NEW 56-79 IG ASSOCIATES, L.P., and
BLDG MANAGEMENT CO., INC.,

Defendants.

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HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury action, defendants D'Agostino Supermarkets, Inc. ("D'Agostino"), New 56-79 IG Associates, L.P. ("IG Associates"), and Bldg Management Co., Inc. move for summary judgment dismissing the Complaint of the plaintiff Mirjana Lewis ("plaintiff").

Factual Background

Plaintiff alleges that on February 14, 2008, at approximately 12:00 p.m., she tripped and fell on a mat as she was entering the second entrance door in the vestibule of the D'Agostino supermarket store located at 431-439 East 79th Street, in New York City (the "premises"). D'Agostino leases the premises from IG Associates.

Defendants now move for summary judgment dismissing the Complaint, on the grounds that defendants did not create or have prior actual or constructive notice of the condition which plaintiff alleges caused her to trip and fall. Defendants also argue that IG Associates, as the out-of-possession owner of the premises, did not possess, repair, maintain or control the premises or the operation of the business conducted by D'Agostino on the premises, and IG Associates's right

to re-enter the property was limited to compliance with statutes and regulations.

Defendants contend that they did not create or have prior notice of the alleged dangerous condition and there is no evidence that defendants caused the condition. Plaintiff admits that the edge of the rug that was flipped over upon itself, which she claims caused her accident, was not in contact with anything else. Ultimately, neither the plaintiff nor anyone else has any knowledge as to how the corner of the mat came to flip up upon itself in the manner the plaintiff claims. Plaintiff's own testimony refutes any claim of a created condition by defendants, and it is more probable that plaintiff herself created the condition as she walked in the store by not fully lifting her feet. The record demonstrates that plaintiff has absolutely no idea how the mat within the vestibule flipped up onto itself, and plaintiff's hypothesis that the mat was incorrectly positioned, or that there was too much pedestrian traffic within the vestibule is unsubstantiated. Also, the affidavit of Elemo Rodriguez ("Rodriguez"), the store porter establishes that when the mat was placed on the floor of the vestibule in the morning, he would ensure that it was lying flat, without any lumps, or raised corners. Thus, in the absence of evidence demonstrating that defendant created the alleged hazardous condition, plaintiff can only prevail in this action if she can prove notice.

Defendants argue that the record is devoid of evidence establishing that they had actual notice of the condition. There is no evidence that defendants were aware that the corner of the mat contained within the vestibule had flipped up onto itself. In fact, the evidence affirmatively establishes that the defendants were not aware of this condition. D'Agostino's store manager, Jose Mojica ("Mojica") testified that he received no complaints from patrons about this condition prior to the accident. Moreover, he did not receive any notification from the store porters that

this condition was occurring in the vestibule. Nor did he complain to Aramark, the company that supplied the mats, that this condition was occurring. Similarly, Rodriguez, who was present within the vestibule with the frequency of at least every half hour, testified that he was unaware of any other accidents involving the mat in the vestibule. Similarly, he was unaware of any complaints regarding the mat bunching up, shifting, or folding up upon itself, and that he observed the vestibule and mat and no defect existed on the date of plaintiff's accident. Plaintiff was not aware of any prior complaints regarding the condition despite the fact that she has been a customer of the store for ten years. Inasmuch as there is no proof that defendants received a single complaint involving the corner of the mat flipping up onto itself, plaintiff cannot raise a triable issue of fact with respect to actual notice.

Defendants also maintain that there is no evidence from which constructive notice of the dangerous condition can fairly be inferred to the defendants. To the contrary, the evidence establishes a lack of constructive notice on the part of the defendants as a matter of law. The record is clear that on the date of the accident no one, including the plaintiff herself, observed any defective condition in connection with the floor mat within the vestibule until after the accident. Plaintiff admits to a complete lack of knowledge as to how long the condition existed prior to the accident, and testified that people walked into the store right in front of her without incident. Moreover, the testimony of nonparty witness Sue Ann Baiter ("Baiter") demonstrates that five to seven minutes prior to the occurrence of the accident (the amount of time that had elapsed between when she entered the store and when she discovered the plaintiff after the accident had occurred), she was able to safely walk on the mat in the vestibule. Upon entering, Baiter did not trip on the mat, or have any difficulty walking through the vestibule. Moreover,

she did not see anyone trip on the mat as she entered the store. When she walked into the store, she did not see any bunching of the mat, and knows of no one else who did. Also, although Lois Gartenberg ("Gartenberg") claims to have made complaints regarding lumps in the mat prior to the accident, she never made any complaints that the corner of the mat flipped up onto itself.

Similarly, the evidence in this matter reveals that Rodriguez performed regular, periodic inspections of the mat at least once every half an hour and of the vestibule itself. If there were any problems with the mat, he would have remedied it immediately upon discovery. While Rodriguez is unable to recall any other accidents involving the mat in the vestibule, or any complaints regarding the mat bunching up, shifting, or folding up upon itself, if this condition did occur, as the plaintiff contends, it would only have existed for less than ½ hour prior to the accident. The affidavit of the porter Rodriguez sets forth that he inspected the mat with a frequency of every half hour. Thus, the condition could not have existed for more than ½ hour prior to the accident - and if it existed at all, probably existed for much less than 1/4 hour. Rodriguez testified that at the time of his inspection, if there was any problem it would have been corrected at that time. Moreover, he testified that he is unaware of any other accidents, and did not receive any complaints about the condition of the mat prior to the accident. Thus, defendants cannot be said to have constructive notice of the condition under these circumstances.

IG Associates is an out-of-possession owner with no control over the premises or the business of D'Agostino under the lease. IG Associates did not have any responsibility to repair and maintain the premises, did not have any control over the D'Agostino supermarket, and could re-enter the premises solely to perform repairs in order to comply with a statute, which this mat did not constitute just cause to re-enter. The affidavit of Frank Argento confirms that the

landlord had no obligation concerning the mat. Any alleged defective condition in a floor mat installed by the tenant within the premises is not a structural condition which would trigger any duty on the part of the landlord to remedy. As set forth by Mr. Argento, the landlord of the premises would not have had the obligation under the lease to remedy this condition. Consequently, IG Associates, has no liability herein to the plaintiff.

In opposition, plaintiff contends that Gartenberg, who was produced was as a notice witness, made direct complaints to D'Agostino of the condition that plaintiff alleges caused her fall. Gartenberg testified that she stated to plaintiff that the entrance to the D'Agostino was dangerous. Gartenberg testified that the mat was "too small for the space. It was in the middle of the space. It couldn't go wall to wall and have a place to stop. And with all the traffic, people would walk in. There would be a bump, as you called it." Gartenberg complained to D'Agostino approximately "50 times" over the past three years prior to the date of the accident. Baiter also testified that an employee of the store straightened out the mat plaintiff tripped on and then took a picture after he straightened it out. Baiter also testified that even after the store employee straightened the mat out, the mat still had lumps in it. Further, Rodriguez admits in his Affidavit that he would check to make sure that: "If, during my inspections I found that the mat contained debris, had shifted, creased or folded over itself, I would immediately fix this condition." This statement is direct and unequivocal evidence that an employee of D'Agostino was aware that the mat in the vestibule would shift, bunch, crease, or fold over itself.

Plaintiff argues that notice is not required because the defendant caused both of the dangerous conditions. Plaintiff claims that the defendants placed a mat that was too small for the space and was not adequately bonded to the floor. Plaintiff also claims that defendant sealed the

exit door making the above condition more dangerous because people were both exiting and entering in the vestibule, increasing the likelihood that the improper mat would bunch and cause a tripping hazard.

While notice is not required since defendants caused the defective conditions, defendants had both actual and constructive notice that the mat used in the vestibule would move and become raised, thereby causing a serious tripping hazard that was the cause of the plaintiff's fall. A defendant who has actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of the condition. The evidence of actual notice is overwhelming. Gartenberg testified that she alerted D'Agostino's manager that the mat in the vestibule entrance of the store would bunch and that this hazard was more treacherous in the winter when D'Agostino would shut the exit door and required patrons to enter and exit through the same entrance. In addition, Rodriguez's Affidavit indicates that he and D'Agostino were aware that the mats in their vestibule would shift, crease, and fold over themselves. Whether the words used are "folded over," "raised," "bunched," the meaning is the same. The subject mat was not properly bonded to the floor and would become raised from patron traffic. This condition is admitted to by Rodriguez and was a recurring problem. Further, the practice of having patrons exiting and entering the store through the same entrance greatly increased the incidence of the mat becoming folded and raised. And, the case law cited by defendants relates to transient conditions that only existed on the day of the accident and ignore case law that a recurrent condition of which the defendant has notice can sustain a cause of action.

IG Associates also failed to show that they are an out-of-possession landlord with no

control over the premises. Plaintiff claims that the exit door was repeatedly in a state of disrepair and D'Agostino was forced to close it on numerous occasions. Since this claim relates to a recurrent defect in the structure of the building, IG Associates may be liable under their lease. And, the exit door, a part of the structure of the building, would periodically be closed because it froze. Therefore, under the lease, the landlord can be held responsible for this condition.

In reply, defendants point out that plaintiff testified that a flipped up corner of a floor mat caused her to trip and fall. She did not testify that the cause of her fall was the floor mat bunching up. Moreover, she did not testify that the cause of her fall was the placement of the mat too close to the wall of the vestibule. The difference in the two types of hazards is significant in this case. While the plaintiff may argue that the bunching of the mat was a recurring condition of which the defendant had notice, there is absolutely no evidence in this case to suggest that the defendants had any prior notice that the corner of the mat had flipped up over and onto itself. Similarly, there is no prior notice that this condition occurred on a recurring basis.

Gartenberg never complained about the corner of the mat having flipped up onto itself. Further, Baiter testified that she never made any prior complaints of any sort regarding the mat in the vestibule. Significantly, Baiter walked through the vestibule, and over the very same mat, without incident just minutes before the accident occurred. Had there been any problems with the mat at that time, she would have so testified. Rodriguez stated that he inspected the subject mat at least one half hour prior to the accident, and if there was any defect in the mat he would have remedied it. Thus, the flipped up corner of the mat could not have existed for more than one half hour prior to the occurrence. Any conclusion that the corner of the mat had been flipped up for any length of time prior to the subject accident is based upon pure speculation. Plaintiff

failed to rebut the defendants' *prima facie* showing of the absence of prior notice of the corner of the mat condition which caused her accident is fatal to her claims, and there is no evidence that the corner of the mat would flip up on a recurring basis. D'Agostino may have had prior notice, through the vague and unsubstantiated verbal complaints of Gartenberg, that the mat in the vestibule to the premises tended to bunch up. However, this evidence fails to demonstrate nothing more than the fact that the defendant had a general awareness of this condition. Moreover, this evidence does not demonstrate that D'Agostino had any prior notice of the flipping up of the corner of the mat. Plaintiff failed to introduce evidence that any of the defendants had prior notice of the flipped up corner of the mat, or that this was a recurring condition for which the defendant should have taken steps to prevent.

Furthermore, Rodriguez does not state that defects in the mat occurred with any regularity, consistency, or frequency. He simply states that when he observed those conditions, he would remedy them immediately. If Rodriguez were to suggest to this court that defects in the mat never occurred prior to the accident, this court would rightfully find, as a matter of law, that his affidavit is incredible. Floor mats will shift and move in conditions of pedestrian traffic. Rodriguez's affidavit acknowledges this fact. However, Rodriguez' affidavit also establishes beyond question that his actions, and the actions of D'Agostino to prevent defects in the floor mat, were reasonable as a matter of law.

Defendants' conduct must only be reasonable under the circumstances, and the plaintiff has done nothing to demonstrate that the defendants' conduct did not meet that standard. Defendants have no obligation to station an employee in the vestibule to make sure that the mat remains perfectly flat as each and every patron passes over it.

Similarly, plaintiff's claims of a created condition by reason that the mat was too small and was not properly bonded to the floor is based upon nothing more that an attorney's unsupported supposition. The report of plaintiff's expert Stanley Fein ("Fein"), who examined the vestibule seven months after the accident, is not relied upon by the plaintiff in opposition to the motion. Fein attributes the accident to the fact that the mat in place was too large and could not properly bond to the floor. However, photographs taken by Fein of the mat in place at the time of his inspection (seven months post-accident) do not support this contention, and Fein's report concludes that the mat was too large. Moreover, plaintiff fails to rebut defendants' *prima facie* showing that the mat was properly placed and maintained on the date of the accident.

Finally, plaintiff fails to establish that IG Associates had prior notice of the condition which caused the accident. Plaintiff fails to offer any proof that the exit door actually froze, and that this was the reason it was taken out of service. In fact, the testimony of the manager of D'Agostino was that the exit doorway would be purposely kept out of use to reduce the amount of cold air entering the front end of the store. The fact that the exit door was kept out of service on the date of the accident had nothing whatsoever to do with a structural defect with the premises.

Even if the exit door froze, as the plaintiff contends, plaintiff fails to demonstrate that such a defect is a structural or design defect that is contrary to a specific statutory safety provision so as to warrant the imposition of liability in the part of IG Associates. Thus, plaintiff has not demonstrated any basis for the denial of summary judgment in favor of IG Associates.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390 [U] [Sup Ct New York County, 2003]). Thus, the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr., supra*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st

Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

To establish a *prima facie* case of negligence in a trip and fall case, a plaintiff must demonstrate that the defendant created the dangerous condition that caused the accident, or that the defendant had actual or constructive notice of the dangerous condition and failed to remedy it within a reasonable time (*O'Hanlon v Bodouva*, 251 AD2d 474, 674 NYS2d 436 [2d Dept 1998] *citing Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Allen v Turyali Fast Food, Inc.*, 25 Misc 3d 1210 [Sup Ct New York County 2007]). "To constitute constructive notice of a dangerous condition, the defect or condition must be 'visible and apparent, and . . . must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it'" (*Gibbs v Port Authority of New York*, 17 AD3d 252, 255 [1st Dept 2005], *quoting Gordon* at 837). Thus, a defendant, as the proponent of a summary judgment motion, must submit evidence in admissible form that shows it did not create or have actual or constructive notice of the dangerous condition (*Colt v Great Atlantic & Pacific Tea Company, Inc.*, 209 AD2d 294 [1st Dept 1994]; *see also Giuffrida v Metro North Commuter Railroad Co.*, 279 AD2d 403, 404 [1st Dept 2001] ["Where the defendant neither created the condition nor had actual notice, a defendant seeking to dismiss the complaint must demonstrate the lack of evidence regarding how the alleged condition came into existence, how visible and apparent it

was, and for how long a period of time prior to the accident it existed"]).

Defendants established that plaintiff allegedly fell due to the "up turned corner" of the subject mat, and that defendants did not have any actual or constructive notice of this condition prior to plaintiff's fall. Plaintiff testified that her "right foot was caught in the upturned corner of the carpet." According to plaintiff, the corner of the rug was "sticking up by itself" (Exh H, pg. 30); there "was nothing holding it up" and the corner was "standing up on its own" (Exh H, pg. 32). Plaintiff also explained that three to three and a half inches of the corner of the mat was turned up onto itself (Exh H, pg. 31-32).

Further, plaintiff testified that she did not know of any prior complaints made to the store about this condition and that she did not know how the subject mat flipped up onto itself (Exh H, pgs. 34-35, 37). Also, Rodriguez the store porter indicated that he would ensure that the subject mat was lying flat, without any lumps, or raised corners, when it was placed on the floor. Thus, there is no evidence demonstrating that defendants created the alleged dangerous condition.

There is also no evidence that defendants had prior knowledge of this alleged dangerous condition, or that they were aware that the corner of the subject mat had flipped up onto itself. Mojica, D'Agostino's store manager, testified that he received no complaints from patrons about this condition prior to the accident, or any notice from the store porters that this condition was occurring in the vestibule. Similarly, Rodriguez, the store porter, testified that he was unaware of any other accidents involving the subject mat, or of any complaints regarding the mat bunching up, shifting, or folding up upon itself; Rodriguez testified that he observed the subject mat and no defect existed on the date of plaintiff's accident. Rodriguez inspected the area every half hour and would have corrected any condition of the subject if he saw one. Likewise, there is no

evidence from which constructive notice of the dangerous condition can fairly be inferred. Defendants established that on the date of the accident no one, including the plaintiff herself, observed any defective condition in connection with the floor mat within the vestibule until after the accident. Plaintiff admits that she had no knowledge as to how long the condition existed prior to her accident, and that people walked into the store in front of her without incident. Moreover, Baiter testified that five to seven minutes prior to the alleged incident, she walked on the subject mat without incident. Baiter further indicated that she did not see anyone trip on the mat and did not see any bunching of the mat. Therefore, defendants established that they did not have any actual or constructive notice of the "up turned corner" of the subject mat prior to plaintiff's alleged incident.

Plaintiff's reliance on Gartenberg's statement that she complaint to D'Agostino about the "bunching" condition of the subject mat is insufficient to constitute notice of the "turned-up" corner which plaintiff insists caused her to trip and fall. The law requires notice of the specific condition alleged at the specific location alleged (*Allen v Turyali Fast Food, Inc.*, 25 Misc 3d 1210 [Sup Ct New York County 2007]). A general awareness that a dangerous condition may exist, is insufficient to constitute notice of a particular condition alleged to have caused an accident (*Id.*). The alleged "bunching" condition of the subject mat is different from the corner of the mat being three to three and a half inches high, "standing up on its own," which allegedly caused plaintiff's accident. Therefore, plaintiff failed to raise an issue of fact as to defendants' lack of notice of the specific condition which allegedly caused plaintiff's accident.

Furthermore, with regard to IG Associates, an out-of- possession landlord with a general right of reentry, is not liable for general maintenance defects, but only for structural failures or

specific statutory violations (*Raynor v 666 Fifth Ave. Ltd. Partnership*, 232 AD2d 226, 647 NYS2d 779 [1st Dept 1996] *citing Johnson v Urena Serv. Center*, 227 AD2d 325, 642 NYS2d 897). It is undisputed that Clause "4" of the subject lease provides that:

> Tenant shall maintain and repair the public portion of the demised premises, both exterior and interior, except that if Owner allows Tenant to erect on the outside of the building a sign or signs or a hoist, lift or sidewalk elevator for the exclusive use of Tenant, Tenant shall maintain such exterior installation in good appearance and shall cause the same to be operated in a good and workmanlike manner and shall make all repairs thereto necessary to keep same in good order and condition, at Tenant's own cost and expense.... Tenant shall throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition, reasonable wear and tear, obsolesense and damage from the elements, fire and other casualty excepted. . . .

Regarding repairs to the premises, Clause "47(a)" of the lease rider provides:

> Repair: Notwithstanding anything to the contrary herein contained in the printed form of this Lease, it is agreed and understood that the Landlord is responsible for structural repairs only. If said structural repairs are caused by the negligence of the Tenant or its servants, invitees, licensees, agents or employees, than said structurally bearing repairs shall additionally be the Tenant's responsibility.

With regard to the owner's right to reenter the premises, Clause "13" of the lease provides:

> Owner or Owner's agent shall have the right (but shall not be obligated) to enter the demised premises in emergency at any time, and, at other reasonable times, to examine the same and to make such repairs, replacements and improvements as Owner may deem necessary and reasonably desirable to any portion of the building or which Owner may elect to perform, in the premises, following Tenant's failure to make repairs or perform any work which Tenant is obligated to perform under this lease, or for the purpose of complying with laws, regulations and other directions of governmental authorities. . . .

Under the terms of the subject lease, IG Associates retained a right of reentry to inspect and make repairs, and was obligated to make repairs to the structure of the premises only. Except as to structural repairs, full responsibility for maintenance and repair of the leased

premises had been placed with D'Agostino. In seeking to impose liability upon a landlord there is a significant difference between a defective structural condition and operations of the tenant of which there is no notice or control (*Lane v Oceanside Institutional Indus., Inc.*, 21 Misc 3d 1134, 873 NYS2d 512 [Sup Ct Nassau County 2008]). "Although reservation of a right of entry may constitute sufficient retention of control to impose liability upon an out-of-possession landlord for injuries caused by a dangerous condition which constitutes a violation of a duty imposed by statute, this exception applies only where a specific statutory violation exists and there is a significant structural or design defect" (*Id).* The record establishes that IG Associates, an out-of-possession landlord, is not liable for the alleged defective condition of the subject mat (*see Raynor* [out of possession landlord not liable for a hole in a carpet that lay wholly within the demised premises and was usually covered by an employee-placed runner is a nonstructural defect over which the tenant in possession has sole control]).

Even if, as plaintiff claims, the exit door was repeatedly in a state of disrepair and D'Agostino was compelled to close it on numerous occasions, and IG Associates can be held responsible for this condition under the lease, plaintiff failed to submit any evidence indicating that IG Associates created, or had any prior notice of the alleged condition of the subject mat that caused plaintiff's fall, or that the subject mat served any structural or design function of the supermarket (*see Boateng v Four Plus Corp.*, 22 AD3d 323, 802 NYS2d 418 [1st Dept 2005] ("In light of the landlords' out-of-possession status, plaintiff, to raise an issue of fact as to whether the landlords had constructive notice of and were responsible for remediating the alleged hazard, was required to show that the purported hazard constituted a structural or design defect that violated a specific statutory provision" and the crumbling cement on the garage ceiling, alleged to have

caused plaintiff's harm, had no structural or design function, but was merely coating for steel beams)). Therefore, dismissal of the Complaint against both defendants is warranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants D'Agostino Supermarkets, Inc., New 56-79 IG Associates, L.P., and Bldg Management Co., Inc. for summary judgment dismissing the Complaint of the plaintiff Mirjana Lewis is granted, and the Complaint is hereby dismissed; and it is further

ORDERED that defendants serve a copy of this order with notice of entry upon plaintiff within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: June 14, 2010

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD