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SHORT FORM ORDER

INDEX No. 09-36325
CAL. No. 11-01265OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 9-23-11 (#003 & # 004)
MOTION DATE 10-13-11 (#005)
MOTION DATE 10-19-11 (#006 & #007)
ADJ. DATE 10-19-11
Mot. Seq. # 003 -MG # 004 -MG
005 - MG # 006 - XMD
007 - XMG

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THOMAS BORRUSO and BARBARA BORRUSO,

Plaintiffs,

- against -

JOE MALENDA, THE PLAZA at HOLBROOK, NEW CENTURY KITCHEN, NATURES DESIGN GROUP, RAMI'S BARBER SHOP, TRENDY NAILS, TOWN OF BROOKHAVEN, SUNRISE MEDICAL LABS, UPS STORE, JELLY BEAN, HOLBROOK BAGEL, THE 10th INNING PUB and JOHN DOES 1 through 10,

Defendants.

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CA

Upon the following papers numbered 1 to 71 read on these motions and cross motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; 18 - 31; 32 - 47 ; Notice of Cross Motion and supporting papers 48 - 51; 52 - 56 ; Answering Affidavits and supporting papers 57 - 61 ; Replying Affidavits and supporting papers 62 - 64; 65 - 66; 67 - 68; 69 - 71 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions by defendants Sunrise Medical Labs Inc. i/s/h/a Sunrise Medical Labs, Nature's Design Group, New Century Kitchen and Holbrook Bagel for summary judgment are consolidated for the purposes of this determination and are decided together with the cross motions by plaintiffs and defendant DQ Tavern Corp. t/a The 10th Inning for summary judgment; and it is further

ORDERED that the motion (003) by defendant Sunrise Medical Labs Inc. i/s/h/a Sunrise Medical Labs for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims as against it is granted; and it is further

ORDERED that the motion (004) by defendant Nature's Design Group for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims as against it is granted; and it is further

ORDERED that the motion (005) by defendants New Century Kitchen and Holbrook Bagel for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims as against them is granted; and it is further

ORDERED that the cross motion (006) by plaintiffs for an order pursuant to CPLR 3212 granting summary judgment on the issue of liability as against defendants Joe Malenda and The Plaza at Holbrook is denied; and it is further

ORDERED that the cross motion (007) by defendant DQ Tavern Corp. t/a The 10th Inning for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims as against it is granted.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Thomas Borruso on May 23, 2009 when he tripped and fell on a raised sidewalk slab in front of Nature's Design Group, a florist shop, located at 1077 Main Street, Holbrook, New York in The Plaza at Holbrook. The Plaza at Holbrook is a shopping center/strip mall owned by the corporation of defendant J. A. Malenda s/h/a Joe Malenda (Malenda), J.A. Malenda, Inc. Defendants are lessees of stores in the shopping center/strip mall. Plaintiffs allege that the height differential between the elevated sidewalk slab and the adjacent slab was approximately one-and-a-half to two inches. In addition, plaintiffs allege that defendants were negligent in, among other things, the construction and maintenance of the premises, permitting said sidewalk to remain in an unsafe and dangerous elevated condition, and failing to warn of said dangerous and defective condition. Plaintiffs further allege that defendants had actual and constructive notice of said condition.

Defendant Sunrise Medical Labs Inc. i/s/h/a Sunrise Medical Labs (Sunrise Medical) requests summary judgment on the grounds that the incident did not occur at or near its location at 1067 Main Street, Holbrook, New York; and that it did not own, maintain or repair the subject area, nor was it responsible to maintain or

repair said area or to make structural repairs of the sidewalk pursuant to its lease with the owner of the shopping center. Defendant Sunrise Medical asserts that it was the responsibility of the owner, J.A. Malenda, Inc., to maintain and repair the subject sidewalk. In support of its motion, defendant Sunrise Medical submits, among other things, the pleadings; plaintiffs' bill of particulars; the deposition transcripts of plaintiff Thomas Borruso and Trishia Hiller on behalf of defendant Nature's Design Group; a copy of the lease dated May 24, 2002 between J.A. Malenda, Inc., as owner, and defendant Sunrise Medical, as tenant; and the affidavit of the General Counsel of Sunrise Medical, Robert S. Gold.

Defendant Nature's Design Group seeks summary judgment on the grounds that it occupied premises known as 1077 Main Street, Holbrook, New York pursuant to a "Standard Form of Store Lease" and that the landlord, J.A. Malenda, Inc., retained responsibility for all structural repairs to the public portion of the building, which included maintenance and repairs to the sidewalk that abutted the stores within the shopping center. In support of its motion, defendant Nature's Design Group submits, among other things, the pleadings; plaintiffs' bill of particulars; the deposition transcripts of plaintiff Thomas Borruso, Trishia Hiller on behalf of defendant Nature's Design Group, Sau Lung on behalf of defendant New Century Kitchen of 1079 Inc. s/h/a New Century Kitchen, Lawrence Walker on behalf of defendant Holbrook Bagels, and defendant Malenda; photographs of the subject shopping center and area where plaintiff allegedly fell; and a copy of the lease dated October 15, 1999 between J.A. Malenda, Inc., as owner, and Lisa's Little Flower Shoppe, Ltd.

Defendants New Century Kitchen and Holbrook Bagel request summary judgment on the grounds that the subject sidewalk was under the sole control of the owner/landlord, J.A. Malenda, Inc., pursuant to the terms of its lease. The submissions of defendants New Century Kitchen and Holbrook Bagel include the pleadings; plaintiffs' bills of particulars; the deposition transcripts of plaintiff Thomas Borruso, Sau Lung Wong on behalf of defendant New Century Kitchen, Lawrence Walker on behalf of defendant Holbrook Bagels, and defendant Malenda; and their leases with J.A. Malenda, Inc.

Plaintiffs seek summary judgment on the issue of liability as against defendants Malenda and The Plaza at Holbrook pursuant to the lease provisions, based on ownership and sole responsibility for the structural repair of the sidewalk where plaintiff fell. In addition, plaintiffs seek summary judgment on the issue of liability premised upon defendants Malenda and The Plaza having received actual notice of the dangerous and defective condition by virtue of complaints from tenants. Plaintiffs adopt the submitted exhibits of defendants New Century Kitchen and Holbrook Bagel and Nature's Design Group, and submit photographs of the area where plaintiff allegedly fell including a ruler to show the height differential of the two sidewalk slabs.

Defendant DQ Tavern Corp. t/a The 10th Inning (DQ Tavern) requests summary judgment on the grounds that J.A. Malenda, Inc. was the owner of the premises and responsible for structural repairs of the sidewalk in front of the leased premises and that DQ Tavern had no control over the subject area nor any responsibility to maintain or repair that area of the sidewalk. DQ Tavern informs that it is located at 1083 Main Street in Holbrook, which is several stores away and at the far left of the strip mall from where plaintiff's accident occurred. It adds that plaintiffs and co-defendants New Century Kitchen and Holbrook Bagel executed a stipulation of discontinuance with prejudice dated May 11, 2011 as to defendant DQ Tavern. DQ Tavern adopts the procedural history submitted by defendants New Century Kitchen and Holbrook Bagel and submits a copy of its answer and the stipulation of discontinuance.

In opposition to the motions and cross motions, defendant Malenda argues that although the lease

provisions obligate Malenda to perform structural sidewalk repairs and the co-defendant lessees to make all non-structural sidewalk repairs, there are questions of fact as to whether a structural repair, such as the complete replacement of a sidewalk flag, or a non-structural repair such as grading the elevation difference with a cement patch or wood, was required to fix the condition of the subject sidewalk. In addition, Malenda argues that there are questions of fact as to whether the alleged defect was too trivial to be actionable, and with regard to actual and constructive notice. In support of his opposition, defendant Malenda submits photographs of the subject shopping center and area where plaintiff allegedly fell and his own deposition transcript as well as that of plaintiff.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (see Alvarez v Prospect Hosp., 68 NY2d 320; Zuckerman v City of New York, 49 NY2d 557; Friends of Animals, Inc. v Associated Fur Mfrs., Inc., 46 NY2d 1065). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (Alvarez v Prospect Hosp., supra at 324, citing to Zuckerman v City of New York, supra at 562).

As a general rule, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of that property (see Forbes v Aaron, 81 AD3d 876). "An out-of-possession landlord may not be held liable for injuries occurring on its premises unless it is contractually obligated to perform maintenance and repairs or it has retained control over the premises" (Salaices v Gar-Ben Assocs., 82 AD3d 740, 741; see Sciammarella v Manorville Postal Assocs., 87 AD3d 530, 530-531). If a landlord is contractually responsible for repairs, to establish its entitlement to judgment as a matter of law on the issue of liability, the landlord must show that it did not cause the defect and had no actual or constructive notice of the alleged defect in reasonably sufficient time to remedy it (see Ever Win, Inc. v 1-10 Industry Assocs., LLC, 33 AD3d 845). "A photograph may be used to prove constructive notice of an alleged defect shown in the photograph if it was taken reasonably close to the time of the accident and there is testimony that the condition at the time of the accident was substantially as shown in the photographs" (see Bolloli v Waldbaum, Inc., 71 AD3d 618, 619, quoting Lustenring v 98-100 Realty, 1 AD3d 574, 577).

Property owners (and tenants) may not be held liable for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip (see Trincere v County of Suffolk, 90 NY2d 976; Milewski v Washington Mut., Inc., 88 AD3d 853, 855; Dery v K Mart Corp., 84 AD3d 1303; Vani v County of Nassau, 77 AD3d 819, 819). In determining whether a defect is trivial, the court must examine all of the facts presented, including the "width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury" (Trincere v County of Suffolk, supra at 978, quoting Caldwell v Village of Is. Park, 304 NY 268, 274; see Vani v County of Nassau, supra at 819). "[T]here is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" (Trincere v County of Suffolk, supra at 977; see Vani v County of Nassau, supra at 819). In addition, a condition that is generally apparent "to a person making reasonable use of their senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" (Mazzarelli v 54 Plus Realty Corp., 54 AD3d 1008, 1009; see Clark v AMF Bowling Centers, Inc., 83 AD3d 761, 761). The determination of "whether an asserted hazard is open and obvious cannot be divorced from the surrounding

circumstances" (id.).

Plaintiff testified at his deposition on November 22, 2010 that he had gone to the subject florist, Nature's Design Group, once every year for the three years prior to the accident, and that on the date of the accident he had gone to the florist to pay for wreaths for Memorial Day delivery. In addition, he testified that he was wearing sneakers, and that the accident occurred as he was leaving the florist and walking towards his car, which was parked close to the restaurant next door, New Century Kitchen. According to plaintiff, the elevation differential of the raised sidewalk slab increased towards the curb, he was looking towards the location of his car, his right foot hit the raised slab, rolled, and he lost his balance and fell.

Sau Lung Wong testified on behalf of defendant New Century Kitchen at his deposition on November 22, 2010 stating that he and his wife had been running the Chinese restaurant for approximately nine years and that the condition of the elevated sidewalk between the restaurant and the florist depicted in the photographs shown to him accurately depicted the area as it existed in May 2009 and when they first took possession of the premises pursuant to the lease. Mr. Wong also testified that he spoke to the landlord, Malenda, about the condition of the sidewalk, that it was not level.

Defendant Malenda testified at his deposition on December 23, 2010 that he is the president of J. A. Malenda, Inc. which is the owner of The Plaza at Holbrook and that he bought the property under the name of the corporation and built the shopping center in 1980 or 1981. He explained that the shopping center or strip mall expanded in about 1987 from 10 stores to 14 stores; at said time, the parking lot was expanded and the sidewalk was extended to accommodate the new stores. He further explained that looking at the shopping center from the road entrance, New Century Kitchen and Holbrook Bagel would be towards the left, Nature's Design Group towards the center, DQ Tavern would be the last store on the left, and the stores added in about 1987 would be to the far right. Defendant Malenda stated that there was a boilerplate lease for the tenants of the shopping center and a printed rider. He also stated that on occasion he would go to the shopping center to collect rental payments from tenants, including the Chinese restaurant, New Century Kitchen. In addition, defendant Malenda testified that he never saw a difference in elevation between any of the sidewalk slabs at the shopping center prior to May 2009 and that if any work had been performed in the area of the sidewalk between the Chinese restaurant and florist with the elevated slab that plaintiff allegedly tripped on, it would have been performed by him. He did not recall the tenants of the Chinese Restaurant complaining to him about the condition of the sidewalk shortly after taking occupancy approximately nine years before. He also testified that he did not receive complaints from anyone concerning the condition of the subject sidewalk prior to May 2009 and that no structural repairs were made of the subject sidewalk between 2000 and 2009.

"The Standard Form of Store Lease" used by the owner of the subject shopping center provides under section 4, entitled "Repairs," that "Tenant shall, throughout the term of this lease, take good care of the devised 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, obsolescence and damage from the elements, fire or other casualty, excepted." Paragraph 1 of the "Rider to Lease" provides that "The use and occupation by the tenant of the leased premises shall include the use in common with others entitled thereto, of the common areas, parking areas, service roads and sidewalks, and other facilities as may be designated from time to time by the owner ... Such additional areas are specifically not included in the leased premises and are in sole control of the landlord ... Landlord shall maintain the common areas ..." Paragraph 15 of the Rider provides that "...the tenant agrees

that it will maintain the sidewalk in front of the demised premises to its respective building lines, by sweeping same and keeping the same clear of snow and provide whatever janitorial services may be necessary to keep the interior of the premises and exterior walks clean ... structural portions of the premises ... shall be maintained by the landlord ..."

There is no ambiguity in the terms of the standard lease and rider concerning repair of a raised sidewalk slab at the shopping center. It is clear from the express terms of the standard lease and rider that the tenant defendants were not required under their leases to repair the alleged defect, a raised sidewalk slab, inasmuch as such a defect is structural, and the sidewalks were in the sole control of the landlord (see Berkowitz v Dayton Constr., Inc., 2 AD3d 764; see also Hahn v Wilhelm, 54 AD3d 896). Therefore, the motions and cross motion by defendants Sunrise Medical Labs Inc. i/s/h/a Sunrise Medical Labs, Nature's Design Group, New Century Kitchen and Holbrook Bagel, and DQ Tavern Corp. t/a The 10th Inning for summary judgment dismissing the complaint and all cross claims as against them are granted.

With respect to plaintiffs' cross motion for summary judgment on the issue of liability, plaintiffs have established that the owner/landlord defendant Malenda would be liable for failing to repair the raised sidewalk slab pursuant to the provisions of the standard lease and rider if the defect is not trivial. However, plaintiffs have failed to demonstrate that the subject defect is not trivial, and thus have failed to meet their burden for summary judgment. Although plaintiffs submitted photographs of the alleged defect, including one with a ruler to indicate the height differential between the two slabs, there is no affidavit from someone with personal knowledge of the taking of the photographs and the measurement of the height differential, and plaintiff testified at his deposition that someone else took the photographs and that he did not know who placed the ruler shown in the photograph (see Coleman v Maclas, 61 AD3d 569; Stahl v Stralberg, 287 AD2d 613). In addition, the proffered proof raised issues of fact as to how long the condition existed and whether the condition could have been readily discovered by defendant Malenda when he came to collect rent (see Bernardo v 444 Rte. 111, LLC, 83 AD3d 753; Hahn v Wilhelm, supra). Therefore, plaintiffs' cross motion for summary judgment is denied.

Dated: January 11, 2011

HON. JOSEPH C. PASTORESSA

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

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