SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

KEVIN SWEENEY,

Plaintiff,

-against-

DP 56, LLC, STORAGE DEPOT SALT LAKE LLC, SPINS BOWL WAPPINGER FALLS LLC and THE ALLEY KAT,

Defendants.

DECISION AND ORDER

Index No. 52006/18

The following papers were read on Defendants' motions for summary judgment:

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBITS A - O

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBITS A - J

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBITS A - N

AFFIRMATION IN PARTIAL OPPOSITION
EXHIBIT 1

AFFIRMATION IN PARTIAL OPPOSITION
EXHIBIT 1

AFFIRMATION IN OPPOSITION
EXHIBITS A - D

AFFIRMATION IN PARTIAL OPPOSITION
EXHIBIT A

AFFIRMATION IN PARTIAL OPPOSITION
EXHIBITS A - B

AFFIRMATION IN OPPOSITION

REPLY AFFIRMATION

REPLY AFFIRMATION

REPLY AFFIRMATION
EXHIBITS ANNEXED THERETO

This is a negligence action in which Plaintiff seeks damages for injuries allegedly sustained in a slip-and-fall accident. On March 10, 2018 at approximately 7:30 p.m. Plaintiff fell while walking through a doorway that led from a parking lot to an enclosed patio that was part of the defendant Alley Kat's restaurant. Plaintiff was carrying an approximately 70 pound bass speaker on his shoulder at the time of the fall. A security video shows Plaintiff falling forward as he enters the doorway with the bass speaker on his shoulder. He alleges that a loose patio paver moved when he stepped on it causing him to fall. The defendants move for summary judgment seeking dismissal of Plaintiff's claims and all cross-claims.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986). If a movant has met this threshold burden, to defeat the motion the opposing party must present the existence of triable issues of fact. See Zuckerman v. New York, 49 NY2d 557, 562 (1980). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion." Yelder v. Walters, 64 AD3d 762, 767 (2nd Dept 2009).

The complaint alleges that the defendants were negligent in allowing the floor of the patio area entrance to exist in an unsafe condition. A defendant moving for summary judgment in a slip-and-fall case has the initial burden of establishing that it did not create the alleged dangerous or defective condition or have either actual or constructive notice of its existence for a sufficient length of time to discover and remedy it. Quinones v. Starret City, Inc., 163 AD3d 1020 (2nd Dept 2018). In moving for summary judgment the Alley Kat has submitted copies of the pleadings, deposition testimony, photographs and video footage. The foregoing evidence establishes that the Alley Kat did not have actual notice of the alleged dangerous condition. Its owner testified that he was unaware of any defective condition with the patio flooring and had not received any complaints about such condition. His testimony further establishes that the Alley Kat did not create the condition. He testified that when the Alley Kat leased the premises from Defendant DP 56 LLC in 2016 he did not construct or perform any work on the patio floor. The owner stated that while the

Alley Kat renovated the leased space, the only improvement made to the patio was the installation of metal sheathing over an existing interior wall.

The Alley Kat, however, has failed to make a *prima facie* showing of a lack of constructive notice of the alleged dangerous condition. To meet its burden on a summary judgment motion a defendant claiming a lack of constructive notice must offer proof showing when the area in question was last inspected relative to the time of the alleged incident. See Santos v. 786 Flatbush Food Corp., 89 AD3d 828 (2nd Dept 2011). The Alley Kat's owner testified that he was exclusively responsible for maintenance of the doorway and patio area. When asked if he was aware that pavers were loose in the doorway, he replied that he did not remember or was unaware of any such condition. His testimony that he used the patio entrance to enter the restaurant is insufficient. Mere usage does not equate with inspection. Nor did the owner testify as to any specific date relative to the accident that he used the doorway or that he inspected the patio pavers. Accordingly, the Alley Kat fails to meet its burden of establishing a lack of constructive notice based on the absence of evidence regarding a specific inspection of the area in question. See Quinones v. Starret City, Inc., 163 AD3d at 1021-22.

The court rejects the Alley Kat's contention that Plaintiff may not recover in negligence because he cannot adequately determine the cause of his fall. Plaintiff testified at his deposition that he fell after stepping on a loose paver that moved. Even if he was unable to specifically identify which of the three paving stones moved as he stepped on it, this would not be fatal to his negligence cause of action. An inability to identify the specific paver could be a factor impacting his credibility and/or liability but does not demonstrate an inability to adequately identify the cause of his fall.

Based on the foregoing, it is

ORDERED that the Alley Kat's motion for summary judgment to dismiss Plaintiff's claims is denied. It is further

ORDERED that the Alley Kat's motion for summary judgment dismissing all cross-claims is denied as it failed to articulate grounds in support of that motion in its moving papers.

Defendants Spins Bowl Wappinger Falls LLC ("Spins Bowl"), DP 56 LLC and Storage Depot Salt Lake LLC move for summary judgment claiming they owed no duty to Plaintiff. To prove a *prima facie* case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach was the proximate cause of his or her injuries. Bernstein v. Starrett City, Inc., 303 AD2d 530 (2nd Dept 2003). Absence a duty of care, there is no breach and no liability. Id. The lease agreements and deposition testimony submitted in support of their motions establishes that DP 56 LLC and Storage Depot Salt Lake LLC owned the real property located at 1677 Route 9, Wappingers Falls, New York. In 2014 those entities leased the entire property to Spins Bowl to operate a bowling alley in a portion of the premises. At that time the Alley Kat was not a tenant. In May 2016 DP 56 LLC leased the remaining portion of the premises to the Alley Kat. It was a triple net lease under which Alley Kat assumed responsibility for all maintenance and repairs

to the premises. The lease specifically delineated the patio adjacent to the restaurant as part of the leased premises. It is undisputed that the patio was used exclusively by the Alley Kat and its patrons. The foregoing evidence establishes Spins Bowl's entitlement to summary judgment as it had no actual or constructive control over the portion of the premises where Plaintiff fell. Accordingly, it owed no duty to the plaintiff to maintain that location in a safe condition. Wherefore, it is

ORDERED that the motion of Defendant Spins Bowl Wappinger Falls LLC for summary judgment dismissing Plaintiff's claims is granted. It is further

ORDERED that the motion of Spins Bowl Wappinger Falls LLC dismissing all cross-claims against it for indemnification is granted. As Spins Bowl had no responsibility to repair or maintain the patio, a claim of common law indemnification against it does not lie. Nor is there any language in the lease between DP 56 LLC and Spins Bowl requiring it to contractually indemnify DP 56 under the facts presented here. The indemnification provision in that lease required Spins Bowl to indemnify DP 56 LLC from all liability and claims asserted by "reason of any work or thing done in, on or about the Demised Premises or any part thereof by or on behalf of Tenant...." In claiming a right to contractual indemnification, DP 56 LLC relies on this language and terms of the lease requiring Spins Bowl to keep the premises in good condition and repair and to assume responsibility to maintain and repair the roof, structure and exterior of the building including common areas. "Common areas" are defined in the lease as "parking areas, driveways and sidewalks...and other Building facilities that service multiple Building tenants." The foregoing fails to establish grounds for contractual indemnification. It is undisputed that under its lease with DP 56 LLC, Alley Kat had exclusive use and occupancy of the patio area. Plaintiff fell while stepping from the parking area into the patio area. Plaintiff's claim is that the flooring of the enclosed patio constituted a defective condition. This flooring, located within the doorway threshold, does not constitute a common area as defined in the lease. It is not a parking area, driveway, sidewalk or lobby. Nor is it a building facility that services multiple building tenants. Hence, there are no facts that would require Spin Bowl to contractually indemnify DP 56 LLC.

DP 56 LLC and Storage Depot Salt Lake LLC move for summary judgment based on their status as an out-of-possession landlord. An out-of-possession landlord is not liable for injuries sustained at the leased premises unless it has retained control over the premises or is contractually obligated to repair unsafe conditions. Rhian v. PABR Assocs., LLC, 38 AD3d 637 (2nd Dept 2007). A reservation of a right of entry constitutes sufficient retention of control to impose liability only when a specific statutory violation exists and there is a significant structural or design defect.

The record before the court establishes that DP 56 LLC was an out-of-possession landlord. Its lease with the Alley Kat provides that Alley Kat was responsible for maintenance and repairs to the premises. The Alley Kat's owner testified at his deposition that he was responsible for maintaining and making any improvements to the patio. In fact, as testified by Alley Kat's owner and pursuant to the lease, the Alley Kat completely built out and renovated the leased premises upon taking possession. While the lease contained a reservation of a right of entry, there is no evidence of a statutory violation or that Plaintiff's fall was caused by a significant structural or design defect.

Under such circumstances, DP 56 LLC has demonstrated that it was an out-of-possession landlord and may not be held liable to the plaintiff for injuries sustained at the leased premises. Wherefore, it is

ORDERED that DP 56 LLC's motion for summary judgment dismissing all claims and cross-claims against it is granted. As DP 56 LLC cannot be found liability and negligent, a claim for common law indemnification does not lie. Moreover, its co-defendants fail to cite any language in the lease agreements which would form a basis for contractual indemnification. It is further

ORDERED that the motion of Storage Depot Salt Lake LLC for summary judgment dismissing all claims and cross-claims against it is granted. Its mere status as a partial owner of DP 56 LLC does provide a basis to impose liability in this action. It is further

ORDERED that **the caption of this action is hereby amended to remove DP 56 LLC, Storage Depot Salt Lake LLC and Spins Bowl Wappingers Fall LLC as defendants.**

The foregoing constitutes the decision and order of the Court. A pretrial conference will be held on August 5, 2020 at 11:00 a.m. If Plaintiff's counsel has a demand for settlement it should be communicated to all counsel as soon as possible before the conference.

Dated: July 16, 2020
Poughkeepsie, New York

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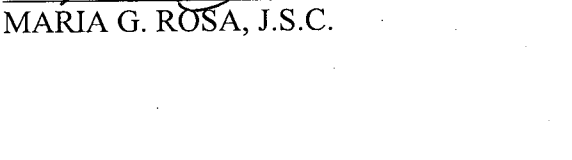

MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

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