SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
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RICHARD GREEN,

Plaintiff,

DECISION AND ORDER (Motion # 2)

-against-

Index No.: 037154/2018

AMERICAN CONTINENTAL PROPERTIES, LLC, ROCKLAND CENTER ASSOCIATES, LLC and PET SMART, INC.

Defendants.
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Sherri L. Eisenpress, A.J.S.C.

The following papers, numbered 1 to 4, were considered in connection with Defendant Pet Smart Inc.'s (hereinafter "PetSmart") Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, granting summary judgment in their favor, and dismissing the action against it:

PAPERS	**NUMBERED**
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS A-N	1-2
AFFIRMATION IN OPPOSITION/EXHIBITS A-D	3
AFFIRMATION IN REPLY	4

Upon the foregoing papers, the Court now rules as follows:

This personal injury action arises out of a trip and fall accident on April 30, 2018, on an alleged sidewalk defect near the PetSmart store located at 155 East Route 59, Nanuet, New York. Defendant PetSmart moves for summary judgment on the ground that the alleged defect was located in an area designated part of the "Common Areas" shared by all tenants of the commercial plaza, and as such, moving Defendant owed no duty to Plaintiff.

Pursuant to Section 5.03, titled "Maintenance of the Lease Premises by Landlord," of the lease agreement dated March 12, 2003, between PetSmart and the landlord/owner, co-defendant Rockland Center Associates, LLC, the landlord shall be

responsible to repair or replace the sidewalks in front of the Leased Premises. Additionally, pursuant to the lease, there is no duty upon PetSmart to inspect, maintain or repair the subject area and any alterations or maintenance of the Common Area is solely at the Landlord's discretion.

Additionally, in response to PetSmart's Notice to Admit, co-defendant Rockland Center Associates admitted that defendant PetSmart was a tenant; that the lease agreement states that the landlord shall operate, repair and maintain the common areas; that the tenant shall have the right to use the common areas with all other tenants, including sidewalks, which are collectively referred to as the "common areas;" that PetSmart has and continues to pay its share of common area costs in addition to the rent; that the landlord shall be responsible to repair or replace the sidewalks in front of the leased premises; and that Rockland Center Associations maintained, repaired and/or replaced the sidewalk shown in the color photographs of the location of the accident.

Plaintiff opposes the summary judgment motion on the ground that the motion is pre-mature in that counsel has not had the opportunity to take the depositions of a witness from PetSmart pertaining to the maintenance and repair of the sidewalk, including whether it had actual or constructive notice of the dangerous condition of the crack which it is claimed caused the Plaintiff to fall. Plaintiff further argues that although PetSmart may not have a duty pursuant to its lease agreement, he argues that it still has a common law duty to Plaintiff to remove dangerous or defective conditions form the premises it occupies.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., *et al*., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has

been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Jacobsen v. New York City Health and Hospitals Corp., 22 N.Y.3d 824, 833, 988 N.Y.S.2d 86 (2014).

As a general rule, liability for permitting a dangerous condition to remain on real property is predicated upon ownership, occupancy, control, or special use of property. Marrone v. South Shore Properties, 29, A.D.3d 961, 963, 816 N.Y.S.2d 530 (2d Dept. 2006). Thus, a tenant may be held liable for a dangerous or defective condition on the premises it occupies, even where the landlord has explicitly agreed in the lease to maintain the premises and keep it in good repair. Cohen v. Central Parking Systems, 303 A.D.2d 353, 756 N.Y.S.2d 266 (2d Dept. 2003). However, where an accident occurs in a "common area" controlled by the owner, the individual unit owner owes no duty to the plaintiff. Rothstein v. 400 East 54th Street Company, 51 A.D.3d 431, 432, 857 N.Y.S.2d 100 (1st Dept. 2008). See also Vivas v. VNO Bruckner Plaza LLC, 113 A.D.3d 401, 978 N.Y.S.2d 150 (1st Dept. 2014)(lessee of condominium's commercial unit was not under any contractual, statutory or common law duty to maintain area of sidewalk defined as "common area."). In Marrone, 29 A.D.3d at 963, the Court held that CVS established its entitlement to judgment as a matter of law by demonstrating that it did not own and had no exclusive right to possession of the sidewalks in the strip mall where the accident occurred, and that it had no obligation or right to perform repairs or clean the sidewalks.

In the instant matter, Defendant PetSmart has demonstrated it entitlement to summary judgment in its favor, as there appears to be no triable issue of fact that the accident occurred on a defect located in an area defined as a common area shared by all tenants of the commercial plaza. Thus, it was not part of the "leased" premises over which

PetSmart would owe a common law duty. Additionally, pursuant to the lease, it is undisputed that the lessee owed no statutory or contractual duty to maintain the subject area. While Plaintiff had not yet had the opportunity to depose a witness from PetSmart, given the admissions by co-defendant that the sidewalk where the accident occurred was part of the "common area" which Rockland Center Associates would maintain and repair, additional discovery is unlikely to raise a triable issue of fact with respect to duty.

Accordingly, it is hereby

ORDERED the Notice of Motion filed by Defendant PetSmart to dismiss the action against it is GRANTED in its entirety.

The foregoing constitutes the Decision and Order of this Court on Motion #2.

Dated: New City, New York
August 17, 2020

HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

TO:

all Parties (via NYSCEF)