SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD G. LATIN** **PART** **IAS MOTION 46**

Justice

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INDEX NO. 160376/2015

DIANE MORAN,

MOTION DATE 3/11/2021

Plaintiff,

MOTION SEQ. NO. 005

- v -

369 LEXINGTON BORROWER II LLC,369 LEXINGTON BORROWER LLC,

DECISION + ORDER ON MOTION

Defendant.

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369 LEXINGTON BORROWER II LLC, 369 LEXINGTON BORROWER LLC

Third-Party
Index No. 595563/2016

Plaintiff,

-against-

CIRCLE RENOVATION INC.

Defendant.

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369 LEXINGTON BORROWER II LLC, 369 LEXINGTON BORROWER LLC

Second Third-Party
Index No. 595314/2017

Plaintiff,

-against-

CALIFORNIA CRYOBANK, INC., CALIFORNIA CRYOBANK, LLC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 153, 154, 158, 159, 160

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is it is ordered that defendants' motion for summary judgment pursuant to CPLR 3212, dismissing all claims is determined as follows:

Plaintiff commenced this action to recover for injuries she allegedly sustained when she tripped and fell on aluminum tile on June 8, 2015 on the fourth floor of the building located at 369 Lexington Avenue, New York, New York. It is undisputed that the fourth floor was occupied by California Cryobank ("CCB"), a commercial tenant and plaintiff's employer, and that CCB installed the subject aluminum tiles at their own direction. Defendants are the owners of the building. They now move for summary judgment, arguing that as out-of-possession commercial landlords they were not responsible for the accident, as they had no ongoing obligation to inspect, repair, maintain, or otherwise service the tenant space on a routine basis.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form, demonstrating the absence of any triable issues of fact, and establishing entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]).

In support of the motion, the defendants submit, inter alia, the lease between defendants and CCB as well as the deposition transcripts of Raymond Stavarach, Mary Schalkoff, and Faraj Srour.

The lease states in pertinent part:

> 3. Alterations: …Subject to the prior written consent of Owner, and to the provisions of this article, Tenant, at Tenant's expense, may make alterations, installations, additions or improvements which are non-structural and which do not affect utility services…

> 4. Repairs: Owner shall maintain and repair the public portions of the building, both exterior and interior…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 nonstructural repairs thereto as and when needed to preserve them in good working order and condition…
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> 13. Access to Premises: Owner or Owner's agents shall have the right (but shall not be obligated) to enter the demised premises in any 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 purposes of complying with laws, regulations and other directions and governmental authorities.
>
> 46. Condition of Premises: Tenant has examined and inspected the premises. Tenant agrees to accept possession of the demised premises "AS IS", except as expressly provided herein. Landlord shall not be responsible for making any improvements, alterations or repairs therein…

Raymond Stavarach testified that during the time of the accident he worked as assistant to Bill Stavrach for Circle Renovation. He averred that he entered the CCB space a few times because Circle Renovation was doing certain construction on the other side of the fourth floor to make CCB a full floor tenant. Stavrach was shown pictures of the general location where plaintiff fell. He recognized the area as CCB's original space and noticed the blue and silver tiles. He alleged that CCB owned the blue and silver tiles and believed they were used to protect the floors from overflows and spills. He stated that during his time at Circle Renovation he was never made aware of any complaints concerning the blue and silver tiles, and that the complaint would not go to him as the tiles belonged to CCB. Further, he did recall that Circle Renovation did contract and install

tiling for CCB in the new space, however, that tiling pertained to fake wood planks, ceramic bathroom tiling, and the replacement of certain black tile.

Mary Schalkoff testified that at the time of the accident she was the manager of the subject CCB branch. She averred that Circle Renovation did not perform any installation of the blue and silver or white aluminum floor tiles, nor did anyone on behalf of the building or management office. She recalled that the tiles were the idea of her immediate supervisor Kaj Rydman. The purpose of the tiles was so that they could perform the filling of tanks without exposing the flooring to liquid nitrogen or vapors. Previously, the carpet had been burned or damaged as a result of filling the tanks with nitrogen. She stated that the installation of the six by six, or six by eight aluminum tiles was performed by a CCB employee without the instruction of anyone else.

Faraj Srour testified that he was both an employee of Circle Renovation as well as the managing member for the defendants at the time of the accident. As an employee for Circle Renovation, his responsibilities included design and construction work. This included, among other things, making sure employees were doing their job properly. Part of his work for Circle Renovation included work at the subject building, although work was performed elsewhere. With respect to his position with defendants, he oversaw management of the building and leasing. He stated that the building has 28 floors and is 154,000 square feet, that his office was on the 17th floor, and that there were somewhere between 35-50 tenants in the building.

He averred that, on behalf of the defendants, he worked on the modification agreement with CCB. He remembered that the purpose of the modification was that CCB wanted to expand its presence on the fourth floor when more space became available. He recalled that the project to enlarge CCB's fourth floor area included breaking through walls, plumbing work, tile work, floor work, and electrical work. As part of the modification agreement, the landlord was required to hire

a company to perform the renovation work. As a result, Srour hired Circle Renovation on behalf of defendants.

When asked about his normal pattern and practice, Srour attested that he would not conduct occasional walk throughs of the tenant spaces. He claimed he would only walk through if the tenant called him with an issue. Likewise, he would not inspect the interior of the premises without a tenant specifically having an issue or making a request to him. Additionally, he alleged that he would not do maintenance for the tenants other than maybe plumbing or air conditioning when asked, but certainly not flooring. It was not part of his policy and practice to review for New York City regulation violations, nor was he ever present for any New York City inspections. He averred that when the city showed up, that they would meet with the superintendent and that the owners on the 17th floor would not be notified. Moreover, he testified that the defendants had no written policy for how defendants' employees should deal with and look for issues concerning safety. He stated that he was concerned about general tripping hazards like the garbage, wetness, or unevenness in common spaces. He also said that he was concerned with the same tripping hazards in tenant spaces, but that after the space was delivered to the tenant in a safe condition, he would not check again.

However, he did testify that when the construction project was going on, he would appear at the site at the beginning of the week to make sure everyone would know what to do, and would visit every other day to check on the progress. He stated that he would supervise the work on behalf of the building when it involved demolition, sheetrock walls, drop ceilings, etc. He also said that whenever he checked on the progress of the work it would be in his capacity as employee for Circle Renovation but that he would also be watching out on behalf of the defendant owners.

When shown pictures of the blue and white flooring, Srour averred that he had never seen it before and that the metal plate was installed by the tenant. He also stated that no one on behalf of Circle Renovation or defendants placed the tape down around the metal plate. He further claimed that no one ever complained to him or spoke to him about the plate/tiles. Further, he stated that he was not aware that anyone from the building would have required the metal tiles. He further stated that defendants did not perform any construction or make any modifications or installations in the area where the plaintiff fell prior to and up to the date of the accident.

It is well settled law that "[a]n out-of-possession landlord is generally not liable for negligence with respect to the condition of the demised premises unless it: (1) is contractually obligated by lease or otherwise to make repairs of maintain the premises, or (2) has a contractual right to re-enter, inspect and make needed repairs" (*Henry v Hamilton Equities, Inc.*, 161 AD3d 418 [1st Dept 2018]). With respect to the second prong, even if the out-of-possession landlord had a reserved right to re-enter, and even if that defendant had constructive notice of a defective condition, there could still only be liability if the defect was "a significant structural or design defect that was contrary to a specific statutory safety provision" (*Marie D. v Roman Catholic Church of the Sacred Heart*, 161 AD3d 448 [1st Dept 2018], quoting *Devlin v Blaggards III Rest. Corp.*, 80 AD3d 497 [1st Dept 2011]). Here, defendants have met their prima facie burden establishing that they are out-of-possession landlords and that the defect was not a significant structural defect. Thus, it is incumbent on the plaintiff to raise a triable issue of fact, which she failed to do. The fact that the defendants maintained an office in the building and that Srour was involved in CCB's unrelated renovation, principally as a member of Circle Renovation, failed to transform defendants into in-possession landlords whose custom and practice was to control and maintain the subject premises (*see Gronski v County of Monroe*, 18 NY3d 374 [2011]; *Kopetic v*

Port Author. of N.Y. & N.J., 176 AD3d 530 [1st Dept 2019]; *Doino v RPS Corp.*, 2016 NY Slip Op 31279[U] [Sup Ct, New York County 2016]; *Vargas v Weishaus*, 2020 WL 3523753 [Sup Ct, Bronx Cty 2020]).

Accordingly, defendants 369 Lexington Borrower, II LLC and 369 Lexington Borrower, LLC's motion for summary judgment, dismissing the complaint is granted in its entirety.

This constitutes the decision and order of the Court.

3/12/2021
DATE

RICHARD G. LATIN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE