SHORT FORM ORDER **ORIGINAL** INDEX No. 608371/2018
CAL. No. 202000144OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 8/10/20
ADJ. DATE 12/3/20
Mot. Seq. # 002 MotD

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KEZIA JUDAH-TORRES and JOSE A. TORRES,

Plaintiffs,

- against -

VINCENT DELLAFRANCA PROPERTIES, LLC, LONG ISLAND COMBO SHOPS, INC., d/b/a DUNKIN' DONUTS, and L & M AT BAYSHORE, INC.,

Defendants.

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Upon the following e-filed papers read on this motion for summary judgment: Notice of Motion and supporting papers by defendants, dated June 30, 2020; Answering Affidavits and supporting papers by plaintiffs, dated November 4, 2020; Replying Affidavits and supporting papers by defendants, dated November 25, 2020; it is

ORDERED that the motion by defendants for summary judgment dismissing the complaint against them is granted to the extent provided herein, and is otherwise denied.

This action was commenced by plaintiff Kezia Judah-Torres to recover damages for injuries she allegedly sustained on October 21, 2017, when her foot entered a hole in the ground outside a Dunkin' Donuts store located at 19 Bay Shore Road, Bay Shore, New York. By her bill of particulars, Mrs. Judah-Torres alleges that defendants "contributed to and/or caused [her] damages by causing, allowing and permitting a hole or rut and/or certain well or cesspool to sink in[,] resulting in the ground being sunken in and uneven." Plaintiff Jose A. Torres asserts a derivative claim for loss of services.

Defendants now move for summary judgment in their favor, arguing that they did not create the alleged defective condition, that they did not have actual or constructive notice thereof, and that such condition was latent. Defendant Vincent Dellafranca Properties, LLC (Dellafranca) also argues that it

was an out-of-possession landlord, that it transferred possession and control of the subject premises to defendant L & M Bayshore, Inc. (L & M), and that pursuant to the terms of a written lease, L & M was responsible for all maintenance. Further, defendant Long Island Combo Shops, Inc., d/b/a Dunkin' Donuts (Combo) argues that it did not own, lease, maintain, or control the subject premises. In support of their motion, defendants submit, among other things, transcripts of the parties' deposition testimony, a copy of a lease agreement, a copy of a lease modification, a copy of an incident report, and multiple photographs.

Kezia Judah-Torres testified that at approximately 11:35 a.m. on the date in question, she and her son, Jai-Anthoni, were at the Dunkin' Donuts/Baskin Robbins store located at the subject premises. She stated that the weather was sunny and clear, and that the ground was dry. Mrs. Judah-Torres indicated that after purchasing two beverages, they exited the store and began walking across the grassy area between it and Ocean Avenue, where she had parked her car. She testified that while she had no difficulties traversing that grassy area prior to entering the Dunkin' Donuts, after taking approximately 10 steps the ground suddenly "felt like quicksand." Mrs. Judah-Torres stated that "[t]he next thing [she] knew, part of [her], [her] right leg, went into the ground," causing her body to move forward and backward, then fall on her right side. She further stated that het right leg entered a two-foot-deep "cesspool hole," and that she "remember[s] the smell of the feces." Asked if she saw a hole prior to her accident, Mrs. Judah-Torres replied in the negative, stating that the area "was just a body of grass, just grass."

Filiz Bozkurt Gulesen testified that she is been employed as a district manager by 109 Dunkin', Inc. She indicated that at the time of Mrs. Judah-Torres's alleged accident she was working at both the incident store and at a Lindenhurst Dunkin' Donuts location. Asked if she has any familiarity with the septic system at the subject store, she answered in the affirmative and denied that any changes had been made to it between approximately 2010 and the incident date. Ms. Gulesen stated that a cesspool maintenance company serviced the subject premises once every three months, and would also respond to any service requests made in the interim. Shown photographs of the grassy area adjacent to the subject store, she testified that such location was the "access point" for its cesspool.

Ms. Gulesen testified that she was working in the subject Dunkin' Donuts store at the time of Mrs. Judah-Torres's incident and, having been informed that a woman had fallen outside, reported to the scene. She stated that she observed Mrs. Judah-Torres on the ground with her leg in a hole. Ms. Gulesen indicated that after Mrs. Judah-Torres's leg was extricated from the hole, she placed her own leg in the whole to gauge its depth, and found that it fit her leg up to the knee. Asked whether she performs inspections of the grassy area in question, she explained that she walks around the premises "to see that things are in good working order," and denied ever seeing any holes in the ground prior to Mrs. Judah-Torres's incident.

Diane Morales testified that she is the president of L & M, which operates the subject Dunkin' Donuts store. She indicated that she also holds ownership interests in 29 other Dunkin' Donuts stores including those located in Lindenhurst, New York, and Massapequa, New York, under the corporate names of 1011 Route 109, Inc., and Combo, respectively. Regarding the subject store, Ms. Morales stated that it is leased from Dellafranca pursuant to an assignment of the lease originally granted to

Dunbas, LLC, and that the lease was in effect at the time of Mrs. Judah-Torres's accident. She testified that the store's cesspool access points are in the grassy area near Mrs. Judah-Torres's incident location, and that L & M hired Help Repair and Maintenance Corp. to empty the cesspools every three months. She further testified that Dellafranca had no responsibility for operating or maintaining the septic system. Upon questioning, Ms. Morales denied knowing the age of the subject cesspools, and denied being informed of any holes forming in their vicinity. Further, while she indicated that the subject hole was remedied following Mrs. Judah-Torres's accident, she stated she does not have knowledge of its cause.

Vincent Dellafranca testified that L & M has leased the subject premises from Dellafranca since 2001, and that L & M has a responsibility to maintain the premises and did not need to obtain its permission to perform any repairs. He further stated that he is unaware of any other complaints regarding the subject premises, that Dellafranca has not performed any repairs to the septic system, and that he is unaware of any such repairs being undertaken prior to October 2017.

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

Liability for a dangerous or defective condition on property is generally "predicated upon ownership, occupancy, control, or special use of the property" (***Tilford v Greenburgh Hous. Auth.***, 170 AD3d 1233, 1235, 97 NYS3d 278 [2d Dept 2019] [internal quotations and citations omitted]). The owner or possessor of real property has a duty to maintain the property in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Milewski v Washington Mut., Inc.***, 88 AD3d 853, 931 NYS2d 336 [2d Dept 2011]). In a premises liability case, a defendant who moves for summary judgment "has the burden of making a prima facie showing that it neither (1) affirmatively created the hazardous condition nor (2) had actual or constructive notice of the condition and a reasonable time to correct or warn about its existence" (***Parietti v Wal-Mart Stores, Inc.***, 29 NY3d 1136, 1137, 61 NYS3d 523 [2017]; *see* ***Gani v Ave. R Sephardic Congregation***, 159 AD3d 873, 72 NYS3d 561 [2d Dept 2018]). A defendant has constructive notice of a hazardous condition on property "when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it" (***Torre v Aspen Knolls Estates Home Owners Assn., Inc.***, 150 AD3d 789, 790, 54 NYS3d 84 [2d Dept 2017]; *see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]). Generally, to meet its prima facie burden on the issue of lack of constructive notice, "the moving defendant must offer evidence as to when the area at issue was last cleaned or

inspected before the accident" (***Rodriguez v New York City Hous. Auth.***, 169 AD3d 947, 948, 94 NYS3d 318 [2d Dept 2019]; *see* ***Rong Wen Wu v Arniotes***, 149 AD3d 786, 50 NYS3d 563 [2d Dept 2017]). "Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice" (***Herman v Lifeplex, LLC***, 106 AD3d 1050, 1051, 966 NYS2d 473 [2d Dept 2013]). However, "[w]hen a defect is latent and would not be discoverable upon a reasonable inspection, constructive notice may not be imputed" (***Reed v 64 JWB, LLC***, 171 AD3d 1228, 1229, 98 NYS3d 636 [2d Dept 2019]; *see* ***McMahon v Gold***, 78 AD3d 908, 910 NYS2d 561 [2d Dept 2010]).

Initially, Combo established its prima facie entitlement to summary judgment in its favor (*see generally* ***Alvarez v Prospect Hosp.***, *supra*). Through the testimony of Ms. Morales, it demonstrated that it did not own, operate, maintain, or control the subject premises. Plaintiff submits no evidence in opposition to that branch of defendants' motion. Accordingly, that branch of defendants' motion for summary judgment dismissing plaintiffs' complaint against Combo is granted.

Dellafranca also established a prima facie case of entitlement to summary judgment in its favor through the testimony of Ms. Morales and Mr. Dellafranca, who stated that L & M was solely responsible for the maintenance of the area in question. "An out-of-possession landlord can be held liable for injuries that occur on its premises only if the landlord has retained control over the premises and if the landlord is contractually or statutorily obligated to repair or maintain the premises or has assumed a duty to repair or maintain the premises by virtue of a course of conduct" (***Aponte v Lee***, 191 AD3d 626, 627, 137 NYS3d 728 [2d Dept 2021]). Dellafranca having established a prima facie case, the burden shifted to plaintiffs to raise a triable issue (*see generally* ***Vega v Restani Constr. Corp.***, *supra*).

In opposition, plaintiffs, citing portions of a lease agreement submitted by defendants, argue that Dellafranca, despite being an out-of-possession landlord, "retained the right to inspect and repair structural defects." Plaintiffs refer to paragraph 35 (A) of the lease rider, wherein it states "the Tenant shall not make such repairs if they are occasioned by reasonable fair wear and tear in the use and occupancy of the premises, or shall be occasioned by a structural defect." However, plaintiff submits no evidence, beyond speculation, that the defect in question was caused by "reasonable fair wear and tear" or a "structural defect." Moreover, paragraph 56 of the same lease rider specifically provides that "Tenant shall be responsible for the landscaping, maintenance, and snow removal cost for the premises." Thus, plaintiffs fail to raise a triable issue. Accordingly, that branch of defendants' motion for summary judgment dismissing plaintiffs' complaint against Dellafranca is granted.

L & M, however, failed to establish a prima facie case of entitlement to summary judgment (*see* ***Gairy v 3900 Harper Ave., LLC***, 146 AD3d 938, 45 NYS3d 564 [2d Dept 2017]). It submitted only evidence of general cleaning and inspection practices, and, thus, did not demonstrate when the area in question was last inspected (*see* ***Clarkin v In Line Rest. Corp.***, 148 AD3d 559, 52 NYS3d 304[1st Dept 2017]; ***Herman v Lifeplex, LLC***, *supra*). Therefore, L & M did not establish prima facie lack of constructive notice of the alleged defective condition. It also failed to demonstrate, prima facie, that a more thorough inspection would not have revealed the presence of the hole (*see* ***Vargas v Lamberti***, 186 AD3d 1572, 131 NYS3d 66 [2d Dept 2020]; ***Bergin v Golshani***, 130 AD3d 767, 14 NYS3d 98 [2d Dept

2015]; *cf.* ***McMahon v Gold***, *supra*). L & M having failed to meet its initial burden on summary judgment by eliminating all triable issues, the Court need not address plaintiffs' papers in opposition (*see generally* ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Accordingly, that portion of defendants' the motion for summary judgment dismissing the complaint against L & M is denied.

Dated: JUL 06 2021

HON. JOSEPH A. SANTORELLI
J.S.C.

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