At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 17th day of March 2021.

PRESENT:

HON. LARA J. GENOVESI,
J.S.C.

----------X

SANDRA SHEPARD,

Plaintiff,

-against-

THAMAR CORP., METROPOLITAN PROPERTY SERVICES, INC., AHMED M. ALI, ABDUL RAUF RAHIMZADA, YAMA RAHIMZADA, THE BANK OF NEW YORK MELLON CORPORATION SUPER TINA NAIL SALON, INC. and SUPER L NAIL SALON INC.,

Defendants.

----------X

THAMAR CORP.,

Third-Party Plaintiff,

-against-

MING YU ZHAO

Third-Party Defendant

----------X

Index No.: 524413/2017

DECISION & ORDER

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	NYSCEF Doc. No.:
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	74-85, 86-98
Opposing Affidavits (Affirmations)	134-141, 143-150

Reply Affidavits (Affirmations)_____ 168, 172-173

Introduction

Defendant, Super L Nail Salon, Inc., moves by notice of motion, sequence number four, pursuant to CPLR § 3212 for summary judgment on the issue of liability. Defendants, Thamar Corp., Metropolitan Property Services, Inc., and Ahmed M. Ali, move by notice of motion, sequence number five, pursuant to CPLR § 3212 for summary judgment on the issue of liability. Plaintiff, Sandra Shepard, opposes these applications.

Background

Plaintiff allegedly sustained personal injuries on December 20, 2014, when she tripped and fell on the metal cellar doors on the sidewalk abutting the premises at 1110 Rutland Road. Plaintiff left the sneaker store next to the premises and began walking towards Rockaway Parkway. She moved to her left to avoid other pedestrians on the sidewalk when the front portion of her sneaker hit something and she tripped and fell (*see* NYSCEF Doc. # 82, Shepard Examination Before Trial). Only after she fell did she notice that the edge of the cellar door is raised, approximately 1.5- 2 inches.[1] In the bill of particulars, plaintiff alleges that the "walking surface of the sidewalk and sidewalk cellar door/metal hatch were of variable heights" (*see* NYSCEF Doc. # 90).[2] On the date of the accident, the property was owned by Thamar Corp., and managed by Metropolitan

[1] A marked photograph of the defect was provided (*see* NYSCEF Doc. # 83).

[2] At oral argument, plaintiff's counsel stated that the cellar door is not uneven, but rather the sidewalk is sloped at the corner of the cellar door, creating an uneven condition.

Property Services Inc. Super L Nail Salon Inc. leased a commercial storefront at the property.[3]

Halil Ljesnjanin, property manager for Metropolitan Property Services Inc, visits the property twice a month to conduct business. During those visits, he inspects the condition of the sidewalks and had no notice of any defective condition. He has never seen a height differential during his inspections (*see* NYSCEF Doc. # 84, Examination Before Trial of Halil Ljesnjanin). Ljesnjanin conceded at his deposition that Thamar is responsible for the sidewalk and concrete (*see id.* at 70). He testified that had he known of a defective condition, he would have hired a company to fix it. In an affidavit, Ljesnjanin stated that "defendants made no changes or repairs to any portion of the cellar door" since his employment began in 2005. He further stated that no sidewalk repairs were made to the area surrounding the cellar door for three years prior to plaintiff's accident (*see* NYSCEF Doc. # 97).

Shui Jin Lin, director for Super L Nail Salon Inc., testified that although she used to sweep the sidewalk daily, maintenance of the sidewalk is the responsibility of the landlord (*see* NYSCEF Doc. # 85, Shui Jin Lin Examination Before Trial). She has never noticed a defective condition in or around the cellar doors or received any complaints

[3] The Hon. Johnny Lee Baynes granted defendant Bank of New York Mellon Corporation's motion to dismiss on October 11, 2018, and the action was discontinued as to that defendant (*see* NYSCEF Doc. # 78).

about the sidewalk or metal hatch. She testified that the cellar door is sealed shut; no person can use it to access the basement.

Pursuant to Super L Nail Salon Inc's lease with Thamar, they are only responsible to clear the sidewalk of snow, ice, garbage and debris (*see* NYSCEF Doc # 97; *see also* NYSCEF Doc. # 173, Rider at ¶ 46.8). However, with respect to repairs on the sidewalk, paragraph four of the lease provides,

> Repairs:
>
> 4. Owner shall maintain and repair the public portions of the building, both exterior and interior, except that if Owner allows Tenant to erect on the outside of the building a [illegible] or signs or a [illegible], lift or sidewalk elevator for the exclusive use of Tenant. Tenant shall maintain such exterior installations in good appearance, shall [illegible] to be operated in a good and workmanlike [illegible], shall [illegible] all repairs [illegible] necessary to keep same in good order and condition, at Tenant's own cost and expense and shall cause the same to be covered by the insurance provided for hereafter in Article 8. Tenant shall throughout the term of the 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 non-structural repairs thereto, as and when needed to preserve them in good working order and condition, reasonable wear and tear, [illegible] and damage from the elements, fire or other [illegible] excepted … The provisions of Article 4 with respect to the making of repairs shall not apply in the case of fire of other [illegible] which are dealt with in Article 9 hereof.

(*id.*).

The cellar of the premises leads to the basement. With respect to the basement, the lease provides the following:

> 50. Basement. The Basement beneath the Demised Premises may be used by Tenant for any legal purpose without owner's prior written consent. Owner makes no representation as to the legal or practical uses to which the Basement may be put. Access through the Demised Premises to any portion of the Basement required by Owner shall be made available to Owner and its representatives at all reasonable times, but only during store hours of operation or during an emergency. Tenant may close off the entrance to the Basement with a door or other means, provided that Owner be provided with all keys necessary to gain access

(*id.*, Rider at ¶ 50).

Plaintiff filed the note of issue and certificate of readiness on March 6, 2020.

Discussion

Summary Judgment

"[T]he proponent of a summary judgment motion 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" (*Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2d Dept., 2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240 [2012]; *see also Lee v. Nassau Health Care Corp.*, 162 A.D.3d 628, 78 N.Y.S.3d 239 [2 Dept., 2018]). Once a moving party has made a prima facie showing of its entitlement to summary judgment,

the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Fairlane Fin. Corp. v. Longspaugh,* 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra; see also Hoover v. New Holland N. Am., Inc.,* 23 N.Y.3d 41, 11 N.E.3d 693 [2014]).

Thamar's Motion for Summary Judgment (Seq. # 5)

Defendants Thamar Corp., Metropolitan Property Services, Inc., and Ahmed M. Ali move for summary judgment. Defendants set forth three main arguments in support of their motion. Defendants contend that they were out-of-possession owners, with no contractual duty under the lease and did not reserve a right of re-entry to make repairs (*see* NYSCEF Doc. # 87 at ¶ 3). Defendants further maintain that even assuming it maintained a right of re-entry to make repairs, they had no notice of a defect, and did not create the condition (*see id.* at ¶ 5). In addition, defendants aver that causation is speculative because plaintiff did not observe the cause of her fall (*see id.* at ¶ 4).

> A property owner, or a party in possession or control of real property, has a duty to maintain the property in a reasonably safe condition (*see Kellman v. 45 Tiemann Assoc.,* 87 N.Y.2d 871, 872, 638 N.Y.S.2d 937, 662 N.E.2d 255; *Locke v. Calamit,* 175 A.D.3d 560, 561, 104 N.Y.S.3d 908). "In order for a landowner to be liable in tort to a plaintiff who is injured as a result of an allegedly defective condition upon property, it must be established that a defective condition existed and that the landowner affirmatively created the condition or had actual or constructive notice of its existence" (*Steed v. MVA Enters., LLC,* 136 A.D.3d 793, 794, 26 N.Y.S.3d 98 [internal quotation marks omitted]). Thus, "[i]n a premises liability case, a defendant property owner who moves for summary

> judgment has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence" (*Beri v. Chung Fat Supermarket, Inc.,* 125 A.D.3d 587, 587, 999 N.Y.S.2d 748).

(*Dougherty v. 359 Lewis Avenue Associates, LLC,* 191 A.D.3d 763, -- N.Y.S.3d – [2 Dept., 2021]).

"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" (*Zimmer v. Cty. of Suffolk*, 190 A.D.3d 898, -- N.Y.S.3d -- [2 Dept., 2021]). "There is, however, no duty to protect or warn against conditions that are open and obvious and not inherently dangerous … Whether a dangerous or defective condition exists on the property so as to give rise to liability depends on the particular circumstances of each case and is generally a question of fact for the jury [internal citations omitted]" (*Hayward v. Zoria Hous., LLC*, 187 A.D.3d 997, 133 N.Y.S.3d 599 [2 Dept., 2020]).

> "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" (*Duggan v. Cronos Enters., Inc.,* 133 A.D.3d 564, 564, 18 N.Y.S.3d 555; *see Davidson v. Steel Equities,* 138 A.D.3d 911, 912, 30 N.Y.S.3d 275). "Even if a defendant is considered an out-of-possession landlord who assumed the obligation to make repairs to its property, it cannot be held liable for injuries caused by a defective condition on the property unless it either created the condition or had actual or constructive notice of it" (*Davidson v. Steel Equities,* 138 A.D.3d at 912,

30 N.Y.S.3d 275).

(*Washington-Fraser v. Indus. Home for the Blind*, 164 A.D.3d 543, 83 N.Y.S.3d 503 [2 Dept., 2018].)

However, "[s]ection 7–210 of the Administrative Code of the City of New York unambiguously imposes a nondelegable duty on certain real property owners to maintain City sidewalks abutting their land in a reasonably safe condition. …. The Code makes no exception for out-of-possession landowners and so we hold that the duty applies with full force notwithstanding an owner's transfer of possession to a lessee or maintenance agreement with a nonowner" (*Xiang Fu He v. Troon Mgmt., Inc.,* 34 N.Y.3d 167, 137 N.E.3d 469 [2019]).

In the instant case, defendants failed to meet their burden to establish entitlement to summary judgment as matter of law. As an initial matter, defendants' contention that plaintiff does not know what caused her fall is without merit. Defendants are correct that "[a] plaintiff's inability to identify the cause of the fall is fatal to the cause of action, because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation" (*Nativo v. Dragonetti Bros. Landscaping Nursery & Florist, Inc.*, 190 A.D.3d 981, 136 N.Y.S.3d 915 [2 Dept., 2021]). However, notwithstanding the fact that plaintiff did not see the defect before falling, she clearly testified that she tripped when her "left food hit the edge of the cellar door" (*see* NYSCEF Doc. # 82 at 15).

In addition, defendants' contention that they have no duty to keep the sidewalk and cellar door in good repair because they are out-of-possession landlords, is without merit. As owner, Thamar has a non-delegable duty to maintain the sidewalk. There is no exception to that statutory duty carved out for out-of-possession landlords (*see Xiang Fu He v. Troon Mgmt., Inc.,* 34 N.Y.3d 167, *supra*). Contrary to defendants' contentions, the lease does not completely transfer the maintenance obligation to the tenant. Notwithstanding the requirement that Super L maintain the sidewalk and make "non-structural" repairs, Thamar is obligated under paragraph four of the lease to maintain and repair all public portions of the premises, interior and exterior.[4] Further, there is evidence of a course of conduct, as Ljesnjanin, property manager for Metropolitan Property Services Inc., testified that when he visits the premises once or twice a month to collect rent and conduct other business, he inspects the sidewalk. He further testified that had he known of a defect in the cellar door, he would have hired someone to come repair it. Therefore, in order to meet their burden, defendants must establish that they did not create the condition or have actual or constructive notice of it. Here, defendants failed to meet that burden.

---

[4] See *Pugach v. Cohen Fashion Optical, Inc.*, 43 Misc. 3d 1235(A), 997 N.Y.S.2d 100 [Sup. Ct,. 2014] [where the Supreme Court, Queens County, found that the "landlord failed to show that it was not obligated, under the terms of the lease, to keep the outside cellar door which was a special use of the sidewalk portion and a part of the exterior of the building structure in good working order", where "the lease submitted by the defendants at paragraph 4 states that "the owner shall maintain and repair the public portions of the building both exterior and interior." Although the lease states that the tenant shall take good care of the sidewalks, the lease also states that the tenant is only required to make non-structural repairs to the sidewalk and to keep them in good working order. Paragraph 13 provides that the owner shall have the right to enter the demised premises to inspect and make repairs to the premises"]).

Defendants established that they did not create the condition by providing the affidavit of Ljesnjanin, property manager for Thamar, who stated that the cellar doors have not been repaired or changed since he began his employment in 2005. He further stated that no work was performed on the sidewalk near the cellar door for three years prior to the date of plaintiff's accident. They established no actual knowledge, as Ljesnjanin stated that he has no knowledge of anyone falling on the sidewalk prior to plaintiff's accident. However, defendants failed to establish that that they did not have constructive notice of the alleged defective condition.

Although defendants provided the testimony and affidavit of property manager Ljesnjanin, wherein he stated that he inspected the sidewalk on his bi-monthly visits to the property and he has never seen the raised condition, "defendants submitted no evidence as to when the subject sidewalk was last inspected prior to the accident" (*Ariza v. No. One Star Mgmt. Corp.*, 170 A.D.3d 639, 93 N.Y.S.3d 603 [2 Dept., 2019]; *see also Nsengiyumva v. Amalgamated Warbasse Houses, Inc.,* 180 A.D.3d 799, 115 N.Y.S.3d 912 [2 Dept., 2020] [where, "[i]n support of its motion, the defendant submitted, inter alia, the affidavit of its general property manager and the transcript of the deposition testimony of its assistant property manager" and the Appellate Division, Second Department, held that "[t]his evidence provided general descriptions of the duties of the defendant's employees, which, at best, established the defendant's general inspection practices. However, the defendant submitted no evidence to show when the subject

sidewalk was last inspected prior to the plaintiff's fall, and therefore failed to establish a lack of constructive notice of the alleged defective condition"]).

As defendants "failed to establish their prima facie entitlement to judgment as a matter of law, we need not examine the sufficiency of the plaintiff['s] opposition papers" (*Morace v. Commack N. Baseball Clubs, Inc.,* 181 A.D.3d 672, 117 N.Y.S.3d 868 [2 Dept., 2020], citing *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, *supra*).

Super L's Motion for Summary Judgment (Seq. # 4)

Defendant Super L Nail Salon Inc., tenant of the premises, moved for summary judgment on the issue of liability. Super L argues that they do not have a duty to maintain the sidewalk, that they did not have notice of the defective condition, and that the defect, if any, is trivial. "As a general rule, the provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party" (*Leitch-Henry v. Doe fund, Inc.,* 179 A.D.3d 655, 113 N.Y.S.3d 569 [2 Dept., 2020], quoting *Hsu v. City of New York*, 145 A.D.3d 759, 43 N.Y.S.3d 139 [2016]).

> A tenant of property abutting a public sidewalk "owes no duty to maintain the sidewalk in a safe condition, and liability may not be imposed upon it for injuries sustained as a result of a dangerous condition in the sidewalk, except where the abutting lessee either created the condition, voluntarily but negligently made repairs, caused the condition to occur because of some special use, or violated a statute or ordinance placing upon the lessee the obligation to maintain the sidewalk which imposes liability upon the lessee for injuries caused by a violation of that duty"

(*Leitch-Henry v. Doe fund, Inc.,* 179 A.D.3d 655, *supra,* quoting *Martin v. Rizzatti*, 142 A.D.3d 591, 36 N.Y.S.3d 682 [2 Dept., 2016]).

However, "[w]here a lease contract is so comprehensive regarding sidewalk maintenance as to entirely displace the landowner's duty to maintain the sidewalk, the tenant may be liable to a third party" (*Mule v. Invite Health at New Hyde Park, Inc.*, 180 A.D.3d 693, 694, 115 N.Y.S.3d 422 [2 Dept., 2020], quoting *Yanovskiy v. Tim's Diagnostic's Auto Ctr.*, 170 A.D.3d 1089, 96 N.Y.S.3d 255 [2 Dept., 2019]).

In the instant case, Super L failed to meet their burden and establish entitlement to summary judgment as a matter of law. In New York City, the statutory duty to maintain the sidewalk abutting a premises is on the owner. Such a duty will only extend to a tenant under specific circumstances. Here, there is no evidence that Super L, created the condition, voluntarily and negligently made repairs or benefited from a special use. In the instant case, this Court must look to the lease between Thamar and Super L to determine whether a duty was placed on the tenant.

Notwithstanding the illegible portions of the copies of the lease provided herein, paragraph four clearly states that the owner of the building shall maintain the interior and exterior public portions of the building and the tenant has a duty to maintain any exterior installations which they add to the sidewalk (*see* NYSCEF Doc # 97; *see also* NYSCEF Doc. # 173). The lease further states that the tenant "shall throughout the term of the 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 non-structural repairs thereto, as and when needed to preserve them in good working order

and condition" (*see* NYSCEF Doc # 97; *see also* NYSCEF Doc. # 173). The lease does not define "structural" or "non-structural".

"[I]n the interpretation of leases, the same rules of construction apply as are applicable to contracts generally" (*Arista Real Est. Holdings, Inc. v. Kemalettin*, 133 A.D.3d 696, 19 N.Y.S.3d 576 [2 Dept., 2015], quoting *Himmelberger v. 40–50 Brighton First Rd. Apts. Corp.*, 94 A.D.3d 817, 943 N.Y.S.2d 118 [2 Dept., 2012]). "[W]hile the meaning of a contract is ordinarily a question of law, when a term or clause is ambiguous and the determination of the parties' intent depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact" (*Richer v. JQ II Assocs., LLC*, 166 A.D.3d 692, 88 N.Y.S.3d 190 [2 Dept., 2018], quoting *Rapp v. 136 Oak Dr. Assoc.*, 70 A.D.3d 914, 916, 895 N.Y.S.2d 488 [2 Dept., 2010]).

Here, as the lease obligates the owner to repair interior and exterior public areas, and obligates the tenant to make "non-structural" sidewalk repairs, without defining "non-structural", the interpretation of the lease is no longer a question of law, but rather, an issue of fact. The burden is on the movant to eliminate all triable issues of fact as to whether the cellar door would be considered "non-structural" and thus whether they had a duty, under the lease, to repair it (*see Rapp v. 136 Oak Dr. Assoc.*, 70 A.D.3d 914, *supra*;[5] *see also Richter v. JQ II Assocs., LLC*, 166 A.D.3d 692, *supra*). In the instant

[5] "Here, the term 'structural repair,' while defined to a limited extent in the lease, is not so clear and unambiguous as to be subject to only one interpretation (*see Lerer v. City of New York*, 301 A.D.2d 577,

case, Super L failed to meet that burden. Super L merely relies on the deposition testimony of Lin and Ljesnjanin who both testified to their understanding that the responsibility for the cellar doors is on the owner. Super L's arguments assume that the cellar doors would be considered a "structural" repair but provide no evidence to establish that fact.

Inasmuch as questions of fact exist regarding whether Super L owed a duty to plaintiff, this Court need not address whether it had notice of the defect or whether the defect is trivial. "Foreseeability and duty are not identical concepts. Foreseeability merely determines the scope of the duty once the duty is determined to exist" (*Scurry v. New York City Hous. Auth.*, -- A.D.3d --, 2021 NY Slip Op. 00447 [2 Dept., 2021], citing *Maheshwari v. City of New York,* 2 N.Y.3d 288, 778 N.Y.S.2d 442 [2004]).

578, 756 N.Y.S.2d 217; *see also Reiner v. Wenig,* 269 A.D.2d 379, 702 N.Y.S.2d 862). Since the appellants failed to submit evidence in support of their motion sufficient to eliminate all issues of fact as to whether the alleged defective condition would entail a 'structural repair,' whether they were thus contractually obligated to repair it, and whether they had notice of the alleged condition, the Supreme Court properly denied their motion".

Conclusion

Accordingly, defendant's motions for summary judgment (seq. # 4 and # 5) are denied. The foregoing constitutes the decision and order of this Court.

ENTER:

Hon. Lara J. Genovesi
J.S.C.

To:

Brett R. Hupart, Esq.
Krieger, Wilansky & Hupart, Esqs.
Attorneys for Plaintiff
5602 Broadway, 2nd Floor
Bronx, New York 10463

Patrick T. Steinbauer, Esq.
Litchfield Cavo LLP
Attorneys for Defendants
420 Lexington Avenue, Suite 2104
New York, New York 10170

Kristen M. Boyd, Esq.
Stonberg Moran, LLP
Attorneys for Defendants
505 Eigth Avenue, Suite 2302
New York, New York 10018