SUPREME COURT: STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

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MARIA AMPARO,

Plaintiff,

-against-

CHRISTOPHER ONE CORP., MEXICO CAR SERVICE CORP., PUPILO AGENCY, INC. and P & T II CONTRACTING CORP.,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

DECISION & ORDER

Index No: 55393/2020

Motion Sequence Nos. 02, 03

The following papers (NYSCEF Doc Nos. 61-120) were read on: (1) the motion by the defendant, Mexico Car Service Corp., for an order, pursuant to CPLR 3212, granting summary judgment dismissing the claim and cross-claims asserted against it (sequence no. 02); and (2) the motion by the defendant, Christopher One Corp., for an order, pursuant to CPLR 3212, granting summary judgment dismissing the claim and cross-claims asserted against it (sequence no. 03).

Motion Sequence No. 02
Notice of Motion-Statement of Facts-Affirmation-Exhibits (A-N)
Affirmation in Opposition (by plaintiff)-Response to Statement of Facts (by plaintiff)
Reply Affirmation

Motion Sequence No. 03
Notice of Motion-Statement of Facts-Affirmation-Exhibits (A-N)-Memo of Law
Affirmation in Partial Opposition (by defendant Mexico Car Service Corp.)-
Response to Statement of Facts (by defendant Mexico Car Service Corp.)
Affirmation in Opposition (by plaintiff)-Exhibits (A-C)-Response to Statement of Facts
Reply Affirmations (2)-Exhibit (A)

Upon reading the foregoing papers, the motions are determined as follows:

Plaintiff sues to recover damages for personal injuries allegedly sustained while descending two exterior steps (subject steps) located outside the defendant car service business, Mexico Car Service Corp. (Mexico Car). Plaintiff alleges that the subject steps were not uniform in height which caused her to lose her balance and fall.

At deposition, plaintiff testified that, prior to the fall, she had ascended both steps to enter Mexico Car without issue. As she was exiting Mexico Car, plaintiff testified that when her right foot made contact with the first step, she lost her balance, and fell (*see* plaintiff deposition tr at 30-32). Plaintiff further testified that she was looking forward towards the taxicab when she lost her balance and fell (*see id.* at 34).

Mexico Car is one of several storefronts located within a commercial building known as 206 South Broadway, Yonkers, New York 10705 (Building). Mexico Car is owned by Martin Ruiz Garcia (Ruiz Garcia). The Building is owned by the defendant, Christopher One Corp. (Christopher One). Julian Kaufman (Kaufman) is the sole owner of Christopher One. The defendant, Pupilo Agency, Inc. (Pupilo), occupies a separate storefront in the Building and is a tenant of Christopher One pursuant to a lease agreement which Christopher One assumed from the prior owner/landlord of the Building, non-party Nimham Realty Corp. (Nimham). Pupilo is owned by Jimmy Lopez (Lopez).

Christopher One purchased the Building from Nimham in 2005. Pupilo has been a tenant since 1999. Mexico Car has been a subtenant of Pupilo since 1999 pursuant to a sublease agreement which had expired in 2004. Since 2004, Mexico Car has continued to make rent payments to Lopez of Pupilo. Mexico Car previously occupied storefront B but eventually changed office space and moved to storefront A in or around 2014[1] following interior renovation work of the Building by Lopez wherein a dividing wall was constructed separating the interior office spaces.

Prior to the move by Mexico Car to storefront A, there was only one entrance leading to storefronts A and B. When the storefronts were divided by construction of the interior wall by Lopez, storefronts A and B thereafter had separate entrances. According to Ruiz Garcia, the subject steps had already existed at the time of the relocation and in fact, had existed at the time Ruiz Garcia moved into the Building in or around December of 1999. Following relocation to storefront A, the subject steps led to the entrance of Mexico Car. Ruiz Garcia testified at deposition that he does not know who built the subject steps and, as outlined above, he testified that the subject steps already existed when he moved into the Building. Ruiz Garcia further testified that he never observed any work being done to the subject steps.

Following the completion of discovery, Mexico Car moves (#02) for, among other things, an order, pursuant to CPLR 3212, granting summary judgment dismissing so much of the complaint that asserts a cause of action against it. Christopher One separately moves (#03) for an order, pursuant to CPLR 3212, granting summary judgment dismissing so

[1] Ruiz Garcia testified at deposition taken October 15, 2021, that Mexico Car moved into storefront A "about seven years ago" (Ruiz Garcia deposition tr at 14, NYSCEF Doc No. 73).

much of the complaint that asserts a cause of action against it. Plaintiff opposes both motions. The motions are consolidated for joint disposition and decided as follows.

On a motion for summary judgment the court's function is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see* CPLR 3212 [b]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). In determining the motion, the court must view the evidence in a light most favorable to the nonmovant and is obliged to draw all reasonable inferences in the nonmovant's favor (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]; *Stukas v Streiter*, 83 AD3d 18, 22 [2d Dept 2011]). Such a motion may be granted only if the movant tenders sufficient evidence in admissible form demonstrating, prima facie, the absence of triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant satisfies its prima facie burden, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form establishing the existence of triable issues of material fact (*see Zuckerman*, 49 NY2d at 562).

The court first addresses the motion by Mexico Car. "Liability for a dangerous condition on property is generally predicated upon ownership, occupancy, control, or special use of the property" (*Pollard-Leitch v R & D Utica Realty, Inc.*, 186 AD3d 513, 514 [2d Dept 2020]). Where no such factors are present, a party cannot be held liable for injuries caused by an alleged dangerous condition (*see id.* at 514; *Gover v Mastic Beach Prop. Owners Assn.*, 57 AD3d 729, 730 [2d Dept 2008]).

Here, Mexico Car demonstrated, prima facie, that it had no contractual obligation to maintain and repair the subject steps (*see Arshinov v GR 10-40, LLC*, 176 AD3d 1019, 1019-1020 [2d Dept 2019]; *Hernandez v Dunkin Brands Acquisition, Inc.*, 136 AD3d 980, 980 [2d Dept 2016]; *Russo v Frankels Garden City Realty Co.*, 93 AD3d 708, 710 [2d Dept 2012]; *Hahn v Wilhelm*, 54 AD3d 896, 899 [2d Dept 2008]). In support of its motion, Mexico Car tendered, among other things, the lease between Pupilo and the prior owner, Nimham. Pupilo's maintenance obligations under the lease did not include maintenance of the subject steps. Mexico Car further established, prima facie, that it did not own, occupy or control the exterior steps upon which plaintiff fell (*see Russo*, 93 AD3d at 710; *Quarless v Dengler*, 48 AD3d 438, 439 [2d Dept 2008]; *Golds v Del Aguila*, 259 AD2d 942, 943 [2d Dept 1999]). Moreover, plaintiff did not allege in either the complaint or the bill of particulars that Mexico Car made special use of the stairway (*see DeCourcey v Briarcliff Cong. Church*, 104 AD3d 799, 801-802 [2d Dept 2013]; *Golds*, 259 AD2d at 943). Accordingly, the burden of going forward shifted to the plaintiff to raise a triable issue of material fact (*see Zuckerman*, 49 NY2d at 562).

In opposition, the plaintiff and Christopher One failed to raise a triable issue of material fact as to whether Mexico Car had, or was chargeable with, control of the exterior steps or that it actually created the alleged dangerous condition or that it had a contractual obligation to repair the alleged dangerous condition (*see* CPLR 3212 [b]; *Quarless*, 48

AD3d at 439; *Franks v G & H Real Estate Holding Corp.*, 16 AD3d 619, 620 [2d Dept 2005]). Based thereon, the motion by Mexico Car is granted.

The court next addresses the motion by Christopher One. It is well established that owners have a duty to maintain their property in a reasonably safe condition (*see Tagle v Jakob*, 97 NY2d 165, 168 [2001]). However, "[a]n out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct" (*Fox v Patriot Saloon*, 166 AD3d 950, 951 [2d Dept 2018] [internal quotation marks omitted]). That said, "without notice of a specific dangerous condition, an out-of-possession landlord cannot be faulted for failing to repair [or otherwise rectify] it" (*Chapman v Silber*, 97 NY2d 9, 20 [2001]). Thus, "[a]n out-of-possession landlord who has retained sufficient control over the premises may be liable for injuries caused by a dangerous condition on the property if he or she has 'actual or constructive notice of the dangerous condition for such a period of time that, in the exercise of reasonable care, he or she could have corrected it' " (*Thompson v Town of Brookhaven*, 34 AD3d 448, 450 [2d Dept 2006], quoting *Abrams v Berelson*, 283 AD2d 597, 598 [2d Dept 2001]).

"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" (*Vaughn v Triumphant Church of Jesus Christ*, 193 AD3d 1104, 1105 [2d Dept 2021]). Moreover, "[r]eservation of a right of entry may constitute sufficient retention of control to impose liability upon an out-of-possession owner or lessor for injuries caused by a dangerous condition, but only when a specific statutory violation exists and there is a significant structural or design defect" (*Rhian v PABR Assoc., LLC*, 38 AD3d 637, 638 [2d Dept 2007]). Non-uniform riser height of steps are not considered significant structural defects as a matter of law (*see Podel v Glimmer Five, LLC*, 117 AD3d 579, 580 [1st Dept 2014]; *Drotar v 60 Sweet Thing, Inc.*, 106 AD3d 426, 427 [1st Dept 2013]). A defendant moving for summary judgment has the initial burden of demonstrating, prima facie, that it did not create a dangerous condition, or have actual or constructive notice of a dangerous condition (*see Murray v Banco Popular*, 132 AD3d 743, 744 [2d Dept 2015]).

Here, Christopher One failed to establish, prima facie, that it was an out-of-possession landlord that did not have a contractual duty to maintain and repair the subject steps. The original lease entered between Nimham and Pupilo which Christopher One assumed upon purchase of the Building in 2005 explicitly excluded therefrom, the lessee's (Pupilo's) repair and maintenance obligations with respect to the "structural foundations" of the premises, which obligations belonged to the lessor (the owner, *i.e.*, Christopher One). However, even if the steps did not constitute part of the "structural foundations" of the premises as that phrase is not defined in the lease, it "is not so clear and unambiguous as to be subject only to the interpretation that [the phrase] excludes the [steps]" (*Vaughn*, 193

AD3d at 1106; *see Negri-Riglos v First N. Star, LLC*, 187 AD3d 1200, 1201 [2d Dept 2020]).

However, Christopher One demonstrated, prima facie, that it did not create the allegedly dangerous condition or have actual or constructive notice of its existence (*see Vaughn*, 193 AD3d at 1106; *Lieb v Guzman*, 134 AD3d 913, 913 [2d Dept 2015]). Christopher One demonstrated with Kaufman's deposition testimony that it did not create the alleged dangerous condition of the steps nor had actual or constructive notice thereof. Kaufman testified that he was unaware of any work performed on the steps (*see* Kaufman deposition tr at 32-33, NYSCEF Doc No. 94). Kaufman further testified that he had never received any complaints about the steps from Pupilo, Mexico Car, or anyone else (*see id.* at 30-32) (*cf. Mermelstein v Campbell Fitness NC, LLC*, 201 AD3d 923, 924 [2d Dept 2022]).

Kaufman further tendered the deposition testimony of Ruiz Garcia in support of the motion. As outlined above, Ruiz Garcia testified at deposition that since Mexico Car has occupied storefront A, he did not recall any work being done on the subject steps, that no one has ever complained about the steps, and that no one has ever tripped or fallen on the steps (*see* Ruiz Garcia deposition tr at 18-20; 22, NYSCEF Doc No. 95). Ruiz Garcia further testified that when he first moved into the Building in or around December of 1999 and occupied storefront B, the subject steps already existed and that he never witnessed any work being done to those steps (*see id.* at 33). Ruiz Garcia also testified that when the interior of storefronts A and B were divided by Lopez, he did not observe any work being done to the steps (*see id*. at 23-24). Moreover, through the expert affidavit of Stan A. Pitera, P.E., Christopher One demonstrated, inter alia, that the Building was constructed in 1925, the subject steps did not violate any enforceable building codes, did not require a handrail, and the layout did not pose any inherent hazards or risks. Accordingly, the burden of going forward shifted to the plaintiff to raise a triable issue of material fact (*see Zuckerman*, 49 NY2d at 562).

In opposition, the plaintiff failed to raise a triable issue of material fact (*see* CPLR 3212 [b]). Even viewing the record evidence in a light most favorable to the plaintiff, as nonmovant, which includes the affidavit of plaintiff's expert, William Marletta, PH.D., CSP, plaintiff's assertion that, in essence, constructive notice can be imputed to Christopher One based upon the existence of violations of the City of Yonkers 1925 Building Code (as amended by the 1960 and 1964 codes) and the State of New York 1984 Building Code has not been sufficiently established so as to preclude the grant of summary judgment in Christopher One's favor. Marletta does not dispute that the Building was constructed in 1925 but asserts that the 1984 State of New York Building Code applies because the Building underwent multiple alterations in various years from 1953 to 2001, there was a change in owner and a certificate of occupancy was issued on March 30, 1984. This is insufficient to raise a triable issue of fact as to whether the 1984 code applies (*see Lieb*, 134 AD3d at 914 ["the affidavits of the plaintiff's expert were insufficient to raise a

triable issue of fact as to whether the *subject stairs* underwent reconstruction or alterations so as to fall under the purview of the Multiple Residence Law or Building Code"] [emphasis added]; *see also Hyman v Queens County Bancorp.*, 307 AD2d 984, 986-987 [2d Dept 2003]).

In a supplemental affidavit submitted in reply, defendant's expert, Pitera, explains why the building code provisions cited by Marletta are inapplicable. Specifically, Pitera asserts that even if the 1984 State of New York Building Code applied, a fact disputed by Pitera, the subject code provision plaintiff alleges was violated (§ 765.4a of the 1984 code) is not applicable because the subject steps are not considered a "stairway" within the meaning of that code. Moreover, Pitera sufficiently rebuts the assertion by Marletta that the subject steps violated the 1925 City of Yonkers Building Code since pursuant to Article 7, Section 50 thereof, the subject steps are not considered an "exterior stairway" within the meaning of that code. Moreover, contrary to plaintiff's contention, any purported violations of the American National Standards Institute (ANSI) as cited by Marletta, and other safety guidelines which were not incorporated into the building codes of the State of New York and City of Yonkers cannot serve as a basis for liability (*see Bradley v HWA 1290 III LLC*, 157 AD3d 627, 633 [1st Dept 2018]; *Gonzalez v City of New York*, 109 AD3d 510, 512 [2d Dept 2013]; *Conti v Kimmel*, 255 AD2d 201, 201-202 [1st Dept 1998]).

Moreover, plaintiff's argument that the structure of the steps created an "optical confusion" (*see* Ashe affirmation in opp at ¶ 57, NYSCEF Doc No. 109) is unavailing. Plaintiff testified at deposition that she lost her balance and did not see the steps because she was "looking forward towards the taxi[]" (plaintiff deposition tr at 34, NYSCEF Doc No. 93). Even considering the plaintiff's affidavit submitted in opposition to the motion (*see* exhibit "A", NYSCEF Doc No. 111), notwithstanding the fact that same is not accompanied by a translator's affidavit setting forth the translator's qualifications and stating that the translation from Spanish to English is accurate (*see Raza v Gunik*, 129 AD3d 700, 700-701 [2d Dept 2015]; *Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 54 [2d Dept 2011]; *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 902 [2d Dept 2008]), the affidavit does not make reference to the plaintiff's deposition testimony that she was "looking forward towards the taxi[]" when she lost her balance and fell (*see Franchini v American Legion Post*, 107 AD3d 432, 432 [1st Dept 2013]; *Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 599-600 [1st Dept 2012]; *Outlaw v Citibank, N.A.*, 35 AD3d 564, 565 [2d Dept 2006] ["the plaintiff testified that, at the time of her fall, she was looking straight ahead and did not see the light patch before her fall. Consequently, no matter what the lighting condition, it was not a proximate cause of her fall."]). Thus, to say that plaintiff fell due to "optical confusion" in light of her earlier testimony that she was looking straight ahead at the taxicab is insufficient to raise a triable issue of fact as to whether the structure of the steps created an optical illusion (*see Langer*, 92 AD3d at 599-600). To the extent not specifically addressed herein, the court finds plaintiff's remaining arguments unavailing. Accordingly, the motion by Christopher One is granted.

All other arguments raised on the motions and evidence submitted by the parties in connection thereto have been considered by the court, notwithstanding the specific absence of reference thereto. Based on the foregoing, it is hereby:

ORDERED the motion by Mexico Car is granted, and so much of the complaint and the cross-claim that assert a cause of action against it, is dismissed; and it is further

ORDERED the motion by Christopher One is granted, and so much of the complaint and the cross-claim that assert a cause of action against it, is dismissed.

E N T E R,

Dated: White Plains, New York
June 29, 2022

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HON. JOAN B. LEFKOWITZ, J.S.C.

To:

Counsel of record via NYSCEF