SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART 58**

Justice

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SUSAN LIPSCHUTZ-KAUFMAN,

Plaintiff,

- v -

7-ELEVEN, INC., EQUITY ONE (1225 2ND) LLC, EQUITY ONE (METROPOLITAN) LLC, EQUITY ONE, INC.

Defendants.

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INDEX NO. 153534/2019

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81

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

In this premises liability action, defendants 7-Eleven, Inc. ("7-Eleven"), Equity One (1225 2nd) LLC, Equity One (Metropolitan) LLC, and Equity One, Inc. (collectively, "defendants") move, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against 7-Eleven and Equity One (1225 2nd) LLC. Plaintiff opposes.

Factual and Procedural Background

This case arises from an incident on November 18, 2018, in which plaintiff was allegedly injured in front of a building located at 1239 Second Avenue in Manhattan ("the premises") when she tripped after stepping in a plastic newspaper bundle wrapper on the sidewalk (NYSCEF Doc No. 1). The premises were owned by Equity One (1225 2nd) LLC ("Equity One"),[1] and leased by 7-Eleven, which then leased it out as a franchise store (Doc Nos. 64-65, 72). Plaintiff then commenced the captioned action against defendants, alleging that she was injured due to their

[1] In its notice of motion, Equity One asserts that it is being incorrectly sued herein as defendants Equity One (Metropolitan) LLC and Equity One, Inc., and that Equity One is the only entity involved in this case (Doc No. 57).

negligent ownership, control, management, and/or maintenance of the sidewalk in front of the premises (Doc No. 1). Defendants joined issue by their answer dated May 1, 2019, denying all substantive allegations of wrongdoing and asserting various affirmative defenses (Doc No. 10). They now move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint as against Equity One and 7-Eleven (Doc Nos. 57-59).

Deposition Testimony of Plaintiff

At her deposition, plaintiff testified that, on the day of the alleged incident, she tripped after her feet became caught in a plastic newspaper bundle wrapper on the sidewalk in front of the premises (Doc No. 66). She saw a newspaper vending machine situated nearby on the sidewalk (Doc No. 66). She was walking in the middle of the sidewalk, looking straight ahead, and the sidewalk was not crowded (Doc No. 66). She opined that she walked by the premises 3 to 4 times per week and that there was garbage and debris on the sidewalk roughly 75% of the time she passed by (Doc No. 66). However, she never made any complaints to 7-Eleven about the condition of the sidewalk and was unaware of any similar complaints made by others (Doc No. 67).

Deposition Testimony of Omar Sid of 7-Eleven

Omar Sid, a field consultant for 7-Eleven, testified that he oversaw a region of 7-Eleven stores that included the store located on the premises ("the subject store") (Doc No. 67). As part of his job duties, he made weekly trips to each store in his region to perform "quality visit[s]" where he spoke with store personnel to review store financial data, check the food in stock, and ensure that the floors, windows, exterior sidewalk, and other areas of the store were clean (Doc No. 67 at 10). He could not remember the last quality visit he did at the subject store prior to the date of plaintiff's incident (Doc No. 67).

He explained that the subject store was a franchise and opined that it was the franchise owner's responsibility to clean the sidewalk (Doc No. 67). Whether a store sold newspapers varied across franchised stores, but he stated that the subject store did not sell newspapers or other items on stands placed on the sidewalk — although he could not remember whether newspapers were sold inside the subject store (Doc No. 67). He could not remember whether any complaints were made about the sidewalk or whether the subject store had a policy concerning how frequently the sidewalk was cleaned (Doc No. 67).

Affidavit of Lizbeth Miskelly

In her affidavit, Lizbeth Miskelly, an employee of Regency Centers, LP, a managing member of Equity One, averred that the prior owner of the premises transferred their ownership to Equity One in October 2012 (Doc No. 71). As part of that transfer, Equity One assumed the role of landlord in the lease agreement between the prior property owner and 7-Eleven (Doc No. 71). She also averred that, according to the lease agreement, 7-Eleven was required to maintain the sidewalk since it was the tenant (Doc No. 71).

Affidavit of Kevin Jennings

In his affidavit, Kevin Jennings, another 7-Eleven employee, confirmed Sid's testimony that the subject store was leased to a franchise owner through a franchise agreement, and that the franchise owner was responsible for maintaining the sidewalk in front of the premises (Doc No. 73). He opined that 7-Eleven "had no legal duty or contractual responsibility" to maintain and clean the sidewalk (Doc No. 73).

Original Lease Agreement

The original lease was between the previous property owner and 7-Eleven (Doc No. 63). In a section entitled "Maintenance," it provides that 7-Eleven, as the tenant, is responsible for

removing ice, snow, dirt, and garbage from the sidewalk in front of the premises (Doc No. 63 at 10).

Franchise Agreement

The franchise agreement listed Himanshu Patel as the franchise owner and 7-Eleven as the franchisor, while detailing that the franchise owner controlled the daily operations of the subject store and was responsible for maintaining it and its surrounding areas (Doc No. 65).

Legal Analysis and Conclusions

Defendants argue that they are entitled to summary judgment and dismissal of the complaint as against Equity One and 7-Eleven for two reasons: (1) neither Equity One nor 7-Eleven owed plaintiff a duty to maintain the sidewalk given their status as an out-of-possession landlord and out-of-possession franchisor, respectively, and (2) neither Equity One nor 7-Eleven had actual or constructive notice of the allegedly dangerous condition.

Plaintiff opposes, arguing that defendants failed to satisfy their initial burden. With respect to Equity One, she contends that it owed her a duty under Administrative Code of the City of New York § 7-210, despite its out-of-possession landlord status, and that it failed to prove that it had no actual or constructive notice of the allegedly dangerous sidewalk condition. Regarding 7-Eleven, she contends that it owed her a duty based on its lease agreement with Equity One, and that it also failed to prove that it had no actual or constructive notice. She also argues that, even assuming defendants satisfied their prima facie burden, she has demonstrated that questions of fact exist regarding the "recurring debris condition on the sidewalk" (Doc No. 76 at 14-15).

Claims Against Equity One

Section 7-210 of the Administrative Code of the City of New York "unambiguously imposes a duty upon owners of certain real property to maintain the sidewalk abutting their

property in a reasonably safe condition, and provides that said owners are liable for personal injury that is proximately caused by such failure" (*Sangaray v West Riv. Assoc., LLC*, 26 NY3d 793, 797 [2016]; *see Mercedes v 680 SN LLC*, 210 AD3d 477, 477 [1st Dept 2022]). "[It] makes no distinction for those owners who are out of possession" (*Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 172 [2019]; *see Vargas v Weishaus*, 199 AD3d 620, 624 [1st Dept 2021] ["Th[e] duty, on in- and out-of-possession landlords alike, is nondelegable."]). "[Although] an owner can shift the work of maintaining the sidewalk to another, the owner cannot shift the duty, nor exposure and liability for injuries caused by negligent maintenance, imposed under [the code]" (*Xiang Fu He*, 34 NY3d at 174).

Thus, on a motion for summary judgment, an out-of-possession landlord must still establish prima facie that it neither created the allegedly hazardous condition, nor that it had actual or constructive notice of its existence (*see Arias v Sanitation Salvage Corp.*, 199 AD3d 554, 556-557 [1st Dept 2021]; *see Velocci v Stop & Shop*, 188 AD3d 436, 439 [1st Dept 2020]). A lack of actual notice can be established when a defendant "produces a witness who can testify that no complaints about the location were received before the accident, and there were no prior incidents in that area before the plaintiff fell" (*Velocci*, 188 AD3d at 439). Similarly, a lack of constructive notice can be shown "by producing evidence of . . . maintenance activities on the day of the accident, and specifically showing that the alleged condition did not exist when the area was last inspected or cleaned before the plaintiff fell" (*id.*).

Here, defendants fail to make a prima facie showing that Equity One did not have actual or constructive notice. Regarding actual notice, despite plaintiff's testimony that she never made any complaints to Equity One and that she was unaware of any complaints made by others, there is no testimony from Equity One or 7-Eleven that no complaints about the sidewalk condition were

ever received. Sid testified that he could not remember whether there were any complaints, which is fundamentally different from stating that there were no complaints. Without such testimony that Equity One or 7-Eleven never received a complaint about the sidewalk, defendants have not established that there was no actual notice (*see Schulman v City of New York*, 157 AD3d 548, 548 [1st Dept 2018] [finding no actual notice where defendant unaware of any complaints about sidewalk condition]; *Velocci*, 188 AD3d at 440 [similar]).

With respect to constructive notice, although Sid testified that the condition of the sidewalk was checked during quality visits, he could not specify when he last conducted a quality visit at the subject store before the date of plaintiff's accident. Sid was also unsure of whether the subject store had a policy in place regarding the frequency that the sidewalk was cleaned. Thus, there is no testimony regarding when the sidewalk was last cleaned or inspected prior to the date of plaintiff's fall, and defendants' request for summary judgment dismissing the complaint against Equity One must be denied (*see e.g. Powell v BLDG 874 Flatbush LLC*, 201 AD3d 534, 535 [1st Dept 2022] [concluding that defendant failed to make prima facie showing that it lacked constructive notice where no evidence of most recent sidewalk inspection presented]; *Graham v YMCA of Greater N.Y.*, 137 AD3d 546, 547 [1st Dept 2016] [finding no lack of constructive notice where no evidence of date of last cleaning or inspection of floor where plaintiff slipped]).

Even assuming defendants made a prima facie showing, plaintiff has demonstrated that issues of fact exist. "[A] plaintiff may raise a triable issue of fact regarding constructive notice by adducing sufficient evidence that an ongoing and recurring dangerous condition existed in the area of the accident that was routinely left unaddressed by the landlord" (*Irizarry v 15 Mosholu Four, LLC*, 24 AD3d 373, 373 [1st Dept 2005] [finding evidence of garbage accumulating on stairs sufficient to raise question of fact and prevent summary judgment to landlord]; *see O'Connor-*

Miele v Barhite & Holzinger, 234 AD2d 106, 106-107 [1st Dept 1996] ["[A] plaintiff may satisfy it[s burden] by [presenting] evidence that an ongoing and recurring dangerous condition existed in the area of the accident which was routinely left unaddressed by the landlord."]). Here, plaintiff testified that she passed by the premises regularly and that garbage was routinely present on the sidewalk. Therefore, plaintiff has demonstrated that there is a question of fact about whether the garbage was a "frequently unremedied recurring condition" that gave Equity One constructive notice (*Irizarry*, 24 AD3d at 374; *see Verges v Concourse Residential Hotel, Inc.*, 187 AD3d 532, 533 [1st Dept 2020] [finding testimony that liquid substance was "constantly present on . . . staircase" sufficient to raise question of fact]; *O'Connor-Miele*, 234 AD2d at 107 [finding evidence that debris was "frequently present" in stairwell "confirm[ed] the existence of a question of fact"]).

Claims Against 7-Eleven

Unlike a property owner, a franchisor may delegate the responsibility for maintaining a sidewalk to a franchisee; and it may establish entitlement to judgment as a matter of law by demonstrating that it "relinquished control of the day-to-day operations of the store, including maintenance" (*O'Sullivan v 7-Eleven, Inc.*, 151 AD3d 658, 659 [1st Dept 2017] [concluding 7-Eleven not liable in personal injury action because franchise agreement made franchise owner responsible for maintenance]; *see De Felix v 590 E. Fordham Rd. Corp.*, 199 AD3d 453, 453 [1st Dept 2021] [granting summary judgment dismissing complaint after concluding 7-Eleven demonstrated that franchise owner "was solely responsible for all maintenance and repairs solely related to the subject store('s sidewalk)"]).

Here defendants have made a prima facie showing that 7-Eleven had no duty to maintain the sidewalk. The franchise agreement identifies the subject store as a franchise and explains that

the franchise owner is an independent contractor who controls the "day-to-day operations" of the subject store. Although the lease agreement between Equity One and 7-Eleven lists 7-Eleven as the tenant and indicates that it is responsible for maintaining the sidewalk, the franchise agreement clearly delegates that responsibility to the franchise owner. Jennings' affidavit confirms that the subject store is a franchise "independently operated, controlled, maintained and supervised by the franchise owner[,]" and that the franchise owner is responsible for cleaning the premises. Lastly, Sid's testimony also confirmed that the subject store is a franchise and that the franchise owner was responsible for cleaning the premises. Therefore, defendants have met their burden (*see De Felix*, 199 AD3d at 453; *O'Sullivan*, 151 AD3d at 659).

Plaintiff fails to demonstrate that questions of fact exist regarding 7-Eleven's duty. Although she points to the lease agreement between Equity One and 7-Eleven, as stated above, 7-Eleven delegated its duty to maintain the sidewalk to a franchise owner and therefore may not be held liable (*see De Felix*, 199 AD3d at 453).

The parties remaining contentions are either without merit or need not be addressed in light of the findings above.

Accordingly, it is hereby:

ORDERED that the branch of defendants' motion seeking summary judgment dismissing the complaint as against defendant Equity One (1225 2nd) LLC pursuant to CPLR 3212 is denied; and it is further

ORDERED that the branch of defendants' motion seeking summary judgment dismissing the complaint as against defendant 7-Eleven, Inc. pursuant to CPLR 3212 is granted, and the complaint is dismissed as against defendant 7-Eleven, Inc., with costs and disbursements to defendant 7-Eleven as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Case* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the parties shall appear for an in-person status conference at 71 Thomas Street, Room 305, on Tuesday, February 28, 2023, at 10:00 a.m., unless the parties provide a stipulation by 3:00 p.m. the day before in accordance with the Part rules.

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2/1/2023
DATE

DAVID B. COHEN, J.S.C.

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