SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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MARCIAL VASQUEZ,

Plaintiff,

- v -

PERSPOLIS REALTY LLC, AMG 2155 AMSTERDAM QUICKSERVE LLC, DUNKIN DONUTS, AMG 2155 AMSTERDAM QUICKSERVE LLC D/B/A DUNKIN DONUTS, JOSE MONTERO,

Defendant.

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INDEX NO. 158656/2014

MOTION DATE 03/28/2022

MOTION SEQ. NO. 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335

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

Plaintiff brings this action against the defendants to recover damages for injuries that he allegedly sustained on September 4, 2014, when he tripped and fell due to a sidewalk defect in front of 501 West 167th Street in Manhattan ("the premises"). The premises is owned by Perspolis Realty LLC ("Perspolis") and leased, in part, to AMG 2155 Amsterdam Quickserve LLC, Dunkin Donuts, AMG 2155 Amsterdam Quickserve d/b/a Dunkin Donuts, and Jose Montero (collectively, "AMG"), which operated a Dunkin Donuts at the premises.

AMG moves, pursuant to CPLR 3212, for summary dismissal of all claims and cross claims against it. Plaintiff opposes and Perspolis partially opposes.

PERTINENT BACKGROUND

On August 11, 2015, plaintiff filed an amended complaint, alleging, as pertinent here, that on July 14, 2014, while walking on the sidewalk in front of the premises, he tripped and fell, and that his injuries were caused by defendants' negligence, including the failure to maintain or

repair the sidewalk, and that they had both actual and constructive notice of the defect (NYSCEF 31). In neither the complaint, nor plaintiff's four bills of particulars, is it alleged that defendants created the defect or made special use of the sidewalk (NYSCEF 295-298).

Plaintiff testified at a deposition that he tripped over a 2-inch height differential on the sidewalk between the Dunkin Donuts and a barber shop, another of Perspolis's lessees (NYSCEF 275).

The sole member of Perspolis testified at his deposition that he could not recall if any sidewalk repairs were made to the subject premises or who was responsible for making them (NYSCEF 281), and Perspolis's managing agent testified that, although he was not employed on the accident date, he believed that tenants were responsible for sidewalk repairs (NYSCEF 322).

An employee of Atlantis Management, deposed on behalf of AMG, testified that Atlantis handled the day-to-day management operations for AMG and Dunkin Donuts, including ensuring that the sidewalk in front of the premises was clean and free of debris, and she did not know if AMG or any other entity ever repaired the sidewalk. While an incident log was maintained for any accidents occurring in the Dunkin Donuts located at the premises, there were no entries for July 2014 (NYSCEF 280).

DISCUSSION

On a motion for summary judgment, the moving party 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 [1986]). If the moving party produces the required evidence, the burden shifts to the nonmoving party "'to establish the existence of material issues of fact which require a trial of the action'" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], *quoting Alvarez*, 68 NY2d at 324). The party

opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized in a light most favorable to the non-moving party (*see Nicklas v Tedlen Realty Corp*., 305 AD2d 385, 386 [2d Dept 2003]).

The court's function in a summary judgment motion is issue-finding rather than issue-determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Sillman,* 3 NY2d at 404).

Section 7-210 of the Administrative Code of the City of New York ("Section 7-210") provides, in relevant part,

> "a. It shall be the duty of the owner of real property abutting any sidewalk ... to maintain such sidewalk in a reasonably safe condition.
> b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk ... shall be liable for any injury to property or personal injury ... proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include ... the negligent failure to remove snow, ice, dirt or other material from the sidewalk . . .

"Section 7-210 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]). The requirements of Section 7-210 apply to all property owners, regardless of their out-of-possession status or whether they had contracted with the lessee or another to keep the sidewalk in reasonably safe condition (*Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 173 [2019]).

While 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 Section 7-210 (*id.* at 175). Thus, contrary to Perspolis's assertion that the lease obligates AMG to repair and maintain the sidewalk, a landowner's duty under Section 7-210 is an affirmative, nondelegable obligation (*id.* at 174), and, therefore, Perspolis may be held liable for any personal injuries proximately caused by its failure to maintain the sidewalk in a reasonably safe condition.

Moreover, the opposing parties' attempt to create a triable issue by arguing that the lease between AMG and Perspolis is vague, is unavailing. The interpretation of contractual provisions is a question of law to be decided by the court (*Ruttenberg v Davidge Data Sys. Corp.,* 215 AD2d 191, 192 [1st Dept 1995]), and the "mere assertion by a party that contract language means something other than what is clear when read in conjunction with the whole contract is not enough to create an ambiguity sufficient to raise a triable issue of fact" *New York Off-Track Betting Corp., v Safe Factory Outlet, Inc.,* 28 AD3d 175, 177-178 [1st Dept 2006]).

Paragraph 4 of the lease states in relevant part:

> "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 including, without limitation, the storefront, and the fixtures and appurtenances therein, and the sidewalks adjacent thereto, and at its sole cost and expense make all non-structural repairs thereto..."

(NYSCEF 282).

Paragraph 73 provides in full:

> "Tenant shall, throughout the Lease Term, at its sole cost and expense, maintain the Demised Premises and Tenant's improvements to the Demised Premises in good repair, order and condition, reasonable wear and tear expected, and promptly at no cost or expense to Owner, shall make, or cause to be made, all necessary nonstructural repairs as foreseen as well as unforeseen, to the Demised Premises; except any repairs arising from or relating to the intentional or negligent acts or

> omissions of the Owner or any other tenant of the Building at the Demised Premises. The term "repairs" includes all necessary replacements, renewals and alternations. All repairs made by Tenant shall be of good quality. Tenant, at its sole cost and expense, shall maintain and keep the Demised Premises, and the sidewalks, entrances, passageways and adjoining areas, in a clean, neat and orderly condition and shall remove all rubbish, snow and ice therefrom. Tenant shall not be responsible for any structural repairs to the Demised Premises, or repairs to the roof"

(*id.*).

Perspolis argues that these two paragraphs conflict as to whether the tenant is required to maintain the sidewalk, and that, therefore, a triable issue remains. However, both paragraphs require the tenant to maintain and take good care of the sidewalk and make non-structural repairs to it. While the lease does not define a "structural repair," it must be interpreted according to its ordinary meaning (*Matter of Wallace v 600 Partners Co.*, 205 AD2d 202, 208 [1st Dept 1994], *affd*, 86 NY2d 543 [1995] ["It is incumbent on the court, when interpreting a contract, to give the words and phrases contained therein their ordinary, plain meaning"], and sidewalks are considered structural elements (*Cucinotta v City of New York,* 68 AD3d 682, 684 [1st Dept 2009]; *see also Wahl v JCNYC, LLC*, 133 AD3d 552, 553 [1st Dept 2015]) and sidewalk defects, such as a height differential, are structural in nature (*see 3650 White Plains Corp. v Mama G. African Kitchen Inc.*, 205 AD3d 468 [1st Dept 2022] [as tenant not required by lease to repair structural defects or keep sidewalk free from such defects, it could not be held liable for failing to repair raised and cracked sidewalk]).

Therefore, since the defect in the subject sidewalk was a structural defect, AMG bore no responsibility for its repair, and it establishes, *prima facie*, that it may not be held liable either pursuant to Section 7-210 or the parties' lease. For the same reasons, Perspolis's cross claims against AMG must also be dismissed (*see Negron v Marco Realty Assocs., L.P.*, 187 AD3d 511

[1st Dept 2020] [dismissing landlord's cross claim against tenant for indemnity as tenant not required to make structural sidewalk repair]).

Moreover, as a tenant, AMG owed no duty to a third party such as a plaintiff to maintain the sidewalk in a safe condition, unless it created the defect or made special use of the sidewalk. Here, plaintiff only alleged that defendants failed to maintain or repair the sidewalk, and never alleged that the defect was created due to an improper repair or defendants' special use. Thus, AMG may not be held liable to plaintiff (*see e.g., Choudhry v Starbucks Corp.*, 2023 WL 2025644, 2023 NY Slip Op 00925 [1st Dept 2023] [even if tenant had obligation to repair sidewalk under lease, which it did not, it would not have imposed duty on tenant toward third-party plaintiff]; *Collado v Cruz*, 81 AD3d 542 [1st Dept 2011] [even if lease obligated tenant to repair sidewalk, tenant owed no duty to third party, and it was undisputed that tenant did not create defect or make special use of sidewalk]; *Cucinotta v City of New York*, 68 AD3d 682 [1st Dept 2009] [tenant demonstrated that lease and rider did not shift responsibility for defective sidewalk from landlord to tenant, and record raised no triable issue as to whether tenant caused defect]).

Alleyne v City of New York, cited by plaintiff for the proposition that defendants were required to establish, *prima facie*, that they made no special use of the sidewalk, is inapposite as the defendants in that case were owners, not tenants, and thus had specific duties related to the sidewalk that do not apply to tenants (89 AD3d 970 [2d Dept 2011]).

Based upon the foregoing, AMG's other arguments for dismissal need not be addressed.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion for summary judgment of defendants AMG 2155 Amsterdam Quickserve LLC, Dunkin Donuts, AMG 2155 Amsterdam Quickserve d/b/a Dunkin Donuts, and Jose Montero is granted and the complaint and all cross claims are severed and dismissed as against them, and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants AMG 2155 Amsterdam Quickserve LLC, Dunkin Donuts, AMG 2155 Amsterdam Quickserve d/b/a Dunkin Donuts, and Jose Montero severing and dismissing the claims and cross claims made against them in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, on the defendant, as well as, the Clerk of the Court, who shall enter judgment accordingly; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (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 remaining parties are directed to appear for a settlement/trial scheduling conference in Part 58 on March 29, 2023 at 11:00 a.m., in person.

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2/24/2023
DATE

DAVID B. COHEN, J.S.C.

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

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