SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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RICHARD GOULD,

Plaintiff,

- v -

LEX SHAKOS, LLC, SUNSHINE FLOWER FACTORY, INC.,SUNSHINE FLOWER FACTORY, INC.

Defendant.

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INDEX NO. 154540/2019

MOTION DATE 03/01/2023

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 145, 148, 149, 152, 153, 154, 155

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

BACKGROUND

Plaintiff commenced this action seeking damages for personal injury he allegedly suffered when he tripped and fell over a rope tied between the sidewalk and a sunshade panel on April 23, 2019. Lex Shakos (Shakos) is the owner and landlord of the building abutting where plaintiff fell. SUNSHINE FLOWER FACTORY and INC., SUNSHINE FLOWER FACTORY, INC (collectively "Sunshine") was the tenant in possession of the premises in front of which plaintiff fell.

PENDING MOTION

On November 21, 2022, Shakos moved for summary judgment and an order dismissing plaintiff's claim against it as well as Sunshine's cross-claims.

On March 1, 2023, the motion was fully briefed, marked submitted and the Court reserved decision.

On March 3, 2023, the parties filed a stipulation of partial discontinuance pursuant to which all of Sunshine's claims against Shakos were discontinued without prejudice.

For the reasons stated below, the balance of Shakos' motion seeking dismissal of plaintiff's claims as against Shakos is granted.

ALLEGED FACTS

On April 23, 2019, at approximately 4:00 pm, plaintiff left the store that he was working at and was intending to walk at a shoe repair store which was on 62nd between Lex and Third. While walking on Lexington Avenue between 62nd Street and 63rd Street, at the corner of Lexington Avenue and 62nd Street, next to a flower shop, plaintiff felt as a result of a rope on the front of his left ankle. The rope was attached on the opposite end to a flap that was hanging down from the flower shop's awning. Prior to his fall, plaintiff had walked by the same area every week without incident.

Sunshine, the tenant occupying and running the flower shop, had installed an awning and plexiglass at the location. Sunshine would put down shades and tie them with rope so they did not blow around. Sunshine installed hooks in the sidewalk that the shades could be tied down to, however they removed the hooks, and filled in the holes with cement some years before plaintiff's fall.

On June 15, 2000, a lease for the flower shop was entered between Shakos and Sunshine, for a term through and including June 2020. As per the Lease article 2, Sunshine was to occupy and use the leased premises for the sale of flowers, plants and florist accessories and gifts. As per the Lease at paragraph 30, Sunshine, at its own expense, was to keep the demised premises clean and in order and to make all repairs and replacements to the sidewalk and curb adjacent thereto, and keep said sidewalk and curbs free from snow, ice, dirt and rubbish. As per the Rider

paragraph 53 (iv), Sunshine agreed to keep and maintain the sidewalk and front of the demised premises clean and free of snow and ice and debris and (v) not to use any space outside the front of the demised premises for the sale or display of its's goods or services.

DISCUSSION

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851 (1985)*; Zuckerman v. City of New York,* 49 N.Y.2d 557 (1980).

Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez,* 68 NY2d at 324). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso,* 50 AD3d 535,544 [1st Dept 2008]).

To establish a *prima facie* case of negligence, plaintiff must demonstrate (1) that defendant owed him a duty of reasonable care, (2) there was a breach of that duty, and (3) he suffered a resulting injury proximately caused by the breach (*see, Boltax v Joy Day Camp*, 67 NY2d 617 [1986]). The threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (*Espinal v Melville Snow Contractors, Inc*., 98 NY2d 136, 138 [2002]).

"Imposition of liability for a dangerous condition on property must be predicated upon occupancy, ownership, control, or special use of the premises" (*Velez v. Captain Luna's Mar.*, 74 A.D.3d 1191, 1192; *see LaGuarina v. Metropolitan Tr. Auth.*, 109 A.D.3d 793; *Logatto v. City of New York*, 51 A.D.3d 984; *Canaan v. Costco Wholesale Membership, Inc.*, 49 A.D.3d 583, 584-585; *Schwalb v. Kulaski*, 29 A.D.3d 563, 564). " 'Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property' " (*Velez v. Captain Luna's Mar.*, 74 A.D.3d at 1192, 904 N.Y.S.2d 474, *quoting Turrisi v. Ponderosa, Inc.*, 179 A.D.2d 956, 957).

Additionally, a lease provision requiring "tenant to, at its own cost and expense, keep and maintain the sidewalk 'in thorough repair and good order,' [is] so comprehensive and exclusive as to entirely displace [its] duty to maintain the sidewalk". *Paperman v. 2281 86th St. Corp.*, 142 A.D.3d 540, 541, 36 N.Y.S.3d 488 [2d Dept. 2016].

Plaintiff testified that he tripped and fell over a rope temporarily tied between the sidewalk and a shade panel, and not over anything that was part of or embedded in the sidewalk. There is no evidence that Shakos had notice of the shade panels tied by Sunshine.

Plaintiff's expert Nicholas Bellizzi P.E., found that "the store's owner, agents, servants and/or employees created and had actual knowledge of the dangerous and defective condition of the sidewalk because they created it by placing the rope in the path that it was foreseeable pedestrians would walk across". (Ex 13).

In opposition to defendant's motion, plaintiff argues Shakos had a statutory non delegable duty to maintain the sidewalk based on the fact that the hooks in the sidewalk constitute an absolute nuisance which Shakos was under a duty to abate and that Shakos had constructive notice of the alleged defective condition.

Plaintiff's reliance on *Xiang Fu He v. Troon Mgmt.*, 34 N.Y.3d 167 (2019) is misplaced. *Xiang Fu* involved a plaintiff who allegedly slipped and fell on snow and ice on the sidewalk adjacent to a property and thereafter sued the property owner and their management agent. In this action, plaintiff's fall was caused by the tied up rope and not due to a sidewalk defect and or any condition embedded in the sidewalk, and as such, the statutory duties, including duties under NYC Administrative Code § 7-210 are not applicable.

Nor is the court persuaded by the pre 1950s case law that the alleged defect was an absolute nuisance, for which Shakos it is strictly liable. In *Cuilo v. New York Edison Co.*, 85 Misc. 6, 11, 147 N.Y.S. 14, 16–17 (App. Term 1914), the Court clearly held that "when an obstruction of a … is temporary in its nature, it does not constitute a nuisance, and that unless the surrounding circumstances show conclusively that the obstruction was either unnecessary or unreasonable, the question of whether it constitutes a nuisance is a question of fact"

Plaintiff's claims that Shakos had constructive knowledge of the alleged defective condition are based on a Google photograph taken approximately four (4) years prior to the alleged occurrence which do not reflect that sunshades were tied to the sidewalk.

In fact, plaintiff himself testified that the sunshades existed on the day of the occurrence are not depicted in the Google Photograph. Additionally, Sunshine's employee testified that in the Google Photograph the sunshades were tied to the wooden flower shelf and not the sidewalk, and that he would usually tie the sunshades on the wooden flower shelves.

The nuisance argument and photograph may have applied to the hooks that were embedded in the sidewalk, but as noted above those hooks were removed years before plaintiff's fall and had nothing to do with plaintiff tripping on a rope tied to a shelf.

WHEREFORE it is hereby:

ORDERED that the motion of defendant Lex Shakos LLC for summary judgment and dismissal of the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; 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 Cases* (accessible at the "E-Filing" page on the court's website)]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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3/15/2023
DATE

SABRINA KRAUS, 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