At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 14th day of July 2023.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT: COUNTY OF BROOME

MONICA GLYNN,

Plaintiff,

vs.

CITY OF BINGHAMTON,
DOS RIOS HOSPITALITY GROUP, INC., and
COURT AND STATE, LLC,

Defendants.

DECISION AND ORDER

Index No. EFCA2022001241

APPEARANCES:

Counsel for Plaintiff:	Richmond Vona LLC BY: BRIAN J. ALTERIO, ESQ. 192 Seneca Street, Suite 200 Buffalo, NY 14204
Counsel for Defendant: City of Binghamton	Office of Corporation Counsel BY: BRIAN SEACHRIST, ESQ. 38 Hawley Street Binghamton, NY 13901
Counsel for Defendant: Dos Rios Hospitality Group, Inc.	Smith Sovik Kendrick & Sugnet, P.C. BY: JOHN COGHLAN, ESQ. 250 S. Clinton St., Suite 600 Syracuse, NY 13202
Counsel for Defendant: Court and State, LLC	Williamson, Clune & Stevens BY: JOHN H. HANRAHAN, 3d, Esq. 317 North Tioga Street Ithaca, NY 14851-0126

EUGENE D. FAUGHNAN, J.S.C.

This case arises out of a trip and fall accident that occurred on May 15, 2021 on a sidewalk outside a restaurant operated by Defendant Dos Rios Hospitality Group, Inc. ("Dos Rios") at 60 Court Street, Binghamton, N.Y. The premises were owned by Defendant Court and State, LLC ("Court and State") and leased to Dos Rios. The matter is before the Court to address the motion of Court and State for summary judgment dismissing the Complaint of Plaintiff Monica Glynn ("Glynn") and the cross claims of the other Defendants against Court and State. Subsequently, Dos Rios also filed a motion for summary judgment seeking dismissal of the Complaint and all cross claims against Dos Rios. Oral argument was held and counsel for all parties were present. After due deliberation, this constitutes the Court's Decision and Order.[1]

BACKGROUND FACTS

Plaintiff commenced this action by the filing of a Summons and Complaint on July 12, 2022 alleging that she fell due to an uncovered hole in a metal grate in the sidewalk. At the time, there were several small decorative trees planted on the sidewalk area of that City block and the base of those trees were surrounded by a metal grate that had a circular opening allowing the trees to grow through that opening. At some time prior to May 15, 2021, the tree in this area of the sidewalk had been removed or cut down, exposing the opening in the grate, which Glynn claims caused her to fall.

Following commencement of the action, Defendant City of Binghamton ("City") filed a Verified Answer with cross claims for indemnification and contribution from Dos Rios and Court and State. Similarly, the other two Defendants filed Answers with cross claims for indemnification and contribution from the other Defendants. Document discovery has been conducted, but no witnesses have been deposed.

Court and State moved for summary judgment, taking the position that it was an "out of possession landlord" and had no duty to the Plaintiff. In support of the motion, Court and State submitted an affidavit of Alice Kweller, an owner of Court and State, as well as an affirmation from John H. Hanrahan, 3d, Esq. Ms. Kweller stated that Court and State does not own the

[1] All the papers filed in connection with the motion and cross-motion are included in the NYSCEF electronic case file, and have been considered by the Court.

sidewalk adjacent to the premises, nor the area between the sidewalk and the street. She also attached a survey map in support of that contention. The attorney affirmation asserts that the City has not enacted an ordinance placing both a duty to maintain the sidewalks and liability on the premises owner for failing to do so.

Dos Rios has also moved for summary judgment, arguing that the duty for maintaining a public sidewalk rests with the municipality and there is no exception to that rule which would apply in this case. In support, Dos Rios submitted an affidavit of Alex Jaffe, an owner of Dos Rios, and an affirmation of Gardar G. Olafsson, Esq. Jaffe attached a copy of the lease agreement for the premises and stated that no one associated with Dos Rios cut down the tree on the sidewalk area.

Plaintiff submitted a single opposition to both motions, and included an affirmation from Brian J. Alterio, Esq., arguing that discovery is not yet complete, and that depositions should be conducted to determine if either of the moving Defendants removed the tree and created the dangerous and defective condition. Plaintiff believes the summary judgment motions are premature and after discovery is complete, then Defendants could renew their motion(s) for summary judgment. Plaintiff also included Supplemental Verified Bills of Particulars to both moving Defendants that allege those Defendants had actual and constructive notice of the alleged dangerous and defective condition, and/or created the dangerous condition.

Defendant City also submitted opposition to the motions, arguing that Defendants Court and State, and Dos Rios, enjoyed a "special use" by virtue of a City Café Permit that allowed the sidewalk to be used for an outdoor eating area; and also that depositions should be obtained with respect to the issue of who removed the tree. In support, Defendant City submitted an affidavit from Brian M. Seachrist, Esq., as well an affidavit of Tito Martinez, Assistant Director of Planning, Housing and Community Development for the City of Binghamton, and Patrick R. McGinnis, Commissioner of Parks and Recreation, and various records regarding the permit applications and City records regarding tree maintenance. Mr. Martinez attached documents concerning the permit applications and photographs and photographs taken in 2018 in relation to the applications. Mr. McGinnis attached documents concerning City tree locations and services performed concerning those trees. Both moving Defendants also filed reply papers.

LEGAL DISCUSSION AND ANALYSIS

When seeking summary judgment, "the movant must establish its prima facie entitlement to judgment as a matter of law by presenting competent evidence that demonstrates the absence of any material issue of fact." *Lacasse v. Sorbello*, 121 AD3d 1241, 1241 (3rd Dept 2014) *citing Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986) and *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (other citation omitted); *see Amedure v. Standard Furniture Co.*, 125 AD2d 170 (3rd Dept. 1987); *Bulger v. Tri-Town Agency, Inc.*, 148 AD2d 44 (3rd Dept. 1989), *app dismissed* 75 NY2d 808 (1990). Such evidence must be tendered in admissible form. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 (1979). Once this obligation is met, the burden shifts to the respondent to establish that a material issue of fact exists. *Dugan v. Sprung*, 280 AD2d 736 (3rd Dept. 2001); *Sheppard-Mobley v. King*, 10 AD3d 70, 74 (2nd Dept. 2004) *aff'd as mod.* 4 NY3d 627 (2005); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324; *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853. "When faced with a motion for summary judgment, a court's task is issue finding rather than issue determination *(see, Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]) and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact." *Boston v. Dunham,* 274 AD2d 708, 709 (3rd Dept. 2000) (citation omitted). The motion "should be denied if any significant doubt exists as to whether a material factual issue is present or even if it is arguable that such an issue exists." *Haner v. De Vito*, 152 AD2d 896, 896 (3rd Dept. 1989) (citation omitted); *Lacasse v. Sorbello*, 121 AD3d 1241; *Asabor v. Archdiocese of N.Y.*, 102 AD3d 524 (1st Dept. 2013). It "is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact." *Vega v. Restani Constr. Corp.*, 18 NY3d 499, 505 (2012) (citation omitted).

As applicable to this case, "[p]remises liability, as with liability for negligence generally, begins with duty." *Alnashmi v. Certified Analytical Group, Inc.*, 89 AD3d 10, 13 (2nd Dept. 2011), *citing Palka v. Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 584 (1994) (other citations omitted). In a premises liability action, recovery "is predicated on 'ownership, occupancy, control or special use of [a] property' where a dangerous or defective condition exists." *Martuscello v. Jensen*, 134 AD3d 4, 8 (3rd Dept. 2015) *quoting Seymour v. David W.*

Mapes, Inc., 22 AD3d 1012, 1013 (3rd Dept. 2005); *Wisdom v. Reoco, LLC*, 162 AD3d 1380 (3rd Dept. 2018); *Semzock v. State of New York*, 97 AD3d 1012 (3rd Dept. 2012). The imposition of a duty "is premised on the landowner's exercise of control over the property, as 'the person in possession and control of property is best able to identify and prevent any harm to others.'" *Gronski v. County of Monroe*, 18 NY3d 374, 379 (2011), *quoting Butler v. Rafferty*, 100 NY2d 265, 272 (2003). "[A] landowner has a duty to exercise reasonable care in maintaining his own property in a reasonably safe condition under the circumstances. The nature and scope of that duty and the persons to whom it is owed require consideration of the likelihood of injury to another from a dangerous condition on the property, the seriousness of the potential injury, the burden of avoiding the risk and the foreseeability of a potential plaintiff's presence on the property." *Galindo v. Town of Clarkstown*, 2 NY3d 633, 636 (2004) (citations omitted). Where the premises have been leased, the duty may be transferred to the tenant, in an appropriate case with sufficient facts.

1. Court and State's motion

Court and State seeks summary judgment on the basis that it is an out-of-possession landlord and owed no duty to the plaintiff. "'As a general rule, an out-of-possession landlord is not responsible for dangerous conditions existing upon leased premises after possession of the premises has been transferred to the tenant. Exceptions to this rule include situations where the landlord retains control of the premises, has specifically contracted to repair or maintain the property, has through a course of conduct assumed a responsibility to maintain or repair the property or has affirmatively created a dangerous condition' thereon". *McLaughlin v. 22 New Scotland Ave., LLC*, 132 AD3d 1190, 1192 (3rd Dept. 2015), *quoting Pomeroy v. Gelber*, 117 AD3d 1161, 1162 (3rd Dept. 2014); *see, Harkins v. Tuma*, 182 AD3d 678 (3rd Dept. 2020); *Rose v. Kozak*, 175 AD3d 1656 (3rd Dept. 2019).

Court and State is the owner of the subject premises but leased the premises to Dos Rios. The lease agreement was submitted by Dos Rios and shows that the premises were leased to Dos Rios for a term of five years, starting on January 1, 2018. The lease provides that "[t]he tenant agrees to police the exterior perimeter of its premises and its adjoining sidewalks available to pedestrians and promptly remove any debris, litter or snow." (Lease at ¶ 17). There are no

allegations that Court and State retained control of the premises or assumed a responsibility to maintain the premises. The Court notes that the lease does state that landlord reserves the right to access the premises for legitimate purposes, including inspection and repairs. "However, the fact that a landlord 'retain[s] the right to visit the premises, or even to approve alterations, additions or improvements, is insufficient to establish the requisite degree of control necessary for the imposition of liability with respect to an out-of-possession landlord.'" *Rose v. Kozak*, 175 AD3d at 1657, *quoting Grady v. Hoffman*, 63 AD3d 1266, 1268 (3rd Dept. 2009). In the absence of any indication of anything beyond a right to access the premises, Court and Street is an out-of-possession landlord with no duty to pedestrians. Thus, Court and State has made a *prima facie* case for summary judgment.

In opposition to the motion, Plaintiff submitted a Supplemental Verified Bill of Particulars, in which she alleges that Court and State removed or cut down the tree, or that Court and State had constructive notice of the defective condition. The allegation that Court and State affirmatively created the dangerous condition was first raised in the Supplemental Verified Bill of Particulars, and could be an exception to the out-of-possession landlord rule. Court and State argues that the Bill of Particulars cannot be amended or supplemented to state a new theory of liability in opposition to a motion for summary judgment, but the Court disagrees. *See, Fields v. Lambert Houses Redevelopment Corp.*, 105 AD3d 668 (1st Dept. 2013); *Bauch v. Verrilli*, 176 AD2d 1116 (3rd Dept. 1991) (prior to the filing of a Note of Issue, leave of court is not needed for the filing of either an amended Bill of Particulars, or a supplemental Bill of Particulars); *see also, Monk v. Dupuis*, 287 AD2d 187 (3rd Dept. 2001) (amended Bill of Particulars properly considered even though amended Bill of Particulars was submitted in opposition to the motion for summary judgment and raised new arguments).

Pursuant to CPLR 3042(b) a party may amend its Bill of Particulars once as of course prior to the filing of a Note of Issue.[2] Here, this would be Glynn's first amendment of the Bill of Particulars, and the trial Note of Issue has not been filed. Court and State argues that the legal

[2] A Supplemental Bill of Particulars is allowed to be filed "without leave of court at any time, but not less than thirty days prior to trial." CPLR 3043(b). That procedure is with regard to claims of continuing special damages and liabilities, and in those situations no new cause of action or new injury can be advanced. The proposed changes to the Bill of Particulars in this case are not related to special damages, and thus, Plaintiff actually seeks to serve an Amended Bill of Particulars, which is governed by CPLR 3042(b).

theory cannot be changed upon a motion for summary judgment, but the cases cited are inapplicable or support a contrary result from what it argues.

In *Anonymous v. Gleason*, 175 AD3d 614 (2nd Dept. 2019) and *Stewart v. Dunkleman*, 128 AD3d 1338 (4th Dept. 2015), the trial Note of Issue had already been filed. In that situation, "once discovery has been completed and the case has been certified as ready for trial, [a] party will not be permitted to amend the bill of particulars except upon a showing of special and extraordinary circumstances." *Schreiber-Cross v. State of New York*, 57 AD3d 881, 884 (2nd Dept. 2008) (internal quotation marks omitted). Thus, because leave of court was required in *Gleason* and *Dunkleman*, and was not obtained, the new Bill of Particulars (whether designated as amended or supplemental) could not be considered. *See, e.g., Jeannette S. v. Williot*, 179 AD3d 1479 (4th Dept. 2020) (document which alleges new injury is an amended, rather than supplemental, Bill of Particulars; since Note of Issue had already been filed, amended Bill of Particulars could not be served without leave of court).

Court and State also cited to *McElney v. Riverview Assets, LLC*, 201 AD3d 1159 (3rd Dept. 2022) in its discussion of amendment to a Bill of Particulars before a Note of Issue is filed. In fact, in *McElney,* a summary judgment motion had been made and plaintiffs cross-moved to amend the Bill of Particulars. Despite the fact that plaintiffs' motion to amend was in opposition to the summary judgment motion, the Third Department concluded that leave of court was not required because the Note of Issue had not been filed. Those are the same procedural facts as the instant case.

Court and State also cited to *Bennardi & Assoc., Inc. v. Ramsons One, Inc.*, 8 AD3d 948 (3rd Dept. 2004) to support its argument that the Plaintiff cannot change her theory of liability in response to a motion for summary judgment. *Bennardi* involved a contract to manage hotel property, which the owner sought to terminate. The management company brough an action seeking damages for, among other things, breach of contract. The court found that defendant owner had made a *prima facie* case for summary judgment, which was not rebutted by plaintiff. Instead, plaintiff raised a new argument that it was entitled to management fees earned prior to the termination of the contract. The court concluded that no issue of fact had been raised with respect to the motion for summary judgment, but the court permitted the plaintiff to apply to the trial court for leave to serve and file an amended complaint with the issues plaintiff raised in response to the summary judgment motion. Thus, even though a summary judgment motion had

been filed, the court did not disregard the new issues being raised in opposition to the motion-it simply concluded that the new issues would have to be considered by a proper application to file an amended complaint. In *Bennardi*, leave of court would be required since the time to amend the complaint without leave had expired (*See*, CPLR 3025(a) and (b)), so that is why the amendment would have needed court approval. That fact pattern is distinguishable from the present case, where leave is not required to file an amended Bill of Particulars.

The general rationale in not permitting a new theory of liability to be raised in response to a motion for summary judgment is that the party seeking summary judgment may be prejudiced by not being able to conduct discovery on that new theory. *See, Tong v. Granat*, 2023 NY Misc LEXIS 2330 (Sup. Ct., New York County 2023). That concern is not present in this case, because Court and State chose to make the motion prior to depositions being conducted. It would be an entirely different issue if discovery had been completed and then Plaintiff sought to amend the Bill of Particulars in response to a motion for summary judgment.

Court and State's argument is premised on the position that leave of court to file an amended Bill of Particulars is required. However, based on CPLR 3042(b), leave is not required. Accordingly, the Court concludes that Glynn is entitled to amend her Bill of Particulars without leave of Court, which she has done. The amended Verified Bill of Particulars are the pertinent consideration. *See, Monk v. Dupuis*, 287 AD2d 187. The allegations in the amended Bill of Particulars include a claim that representatives or agents of Court and State may have been responsible for removal of the tree. Whether those allegations can be substantiated remains to be seen. At this time, since depositions have not been conducted, the record is not complete. Therefore, Court and State's motion for summary judgment is denied at this time, with leave to make a new application upon completion of discovery.

2. Dos Rios' motion

Dos Rios has moved for summary judgment on the basis that this trip and fall occurred on a public sidewalk, and that liability for such injuries rests with the municipality. "Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner." *Hausser v. Giunta*, 88 NY2d 449, 452-453 (1996) (citations omitted);

Kuritsky v. Meshenberg, 211 AD3d 834 (2nd Dept. 2022). This is consistent with the common law rule that "the duty of maintaining the sidewalks--which are recognized as part of the street or highway--in a safe condition belonged to the municipality." *Pardi v. Barone*, 257 AD2d 42, 44 (3rd Dept. 1999), *citing Roark v. Hunting*, 24 NY2d 470, 475 (1969); *see, Coon v. Ray*, 266 AD2d 780 (3rd Dept. 1999). "'However, liability may be imposed on the abutting landowner where the landowner either affirmatively created the dangerous condition, voluntarily but negligently made repairs to the sidewalk, created the dangerous condition through a special use of the sidewalk, or violated a statute or ordinance expressly imposing liability on the abutting landowner for a failure to maintain the sidewalk.'" *Kuritsky*, 211 AD3d at 835, *quoting James v. Blackmon*, 58 AD3d 808 (2nd Dept. 2009) (other citations omitted). Dos Rios contends that the municipality is responsible for keeping public sidewalks in a safe condition, not the abutting landowner or tenant, and that no exception would remove this case from the general rule.

Dos Rios made a *prima facie* case for summary judgment through the production of evidence that this trip and fall occurred on the public sidewalk, and the affidavit of Jaffe that Dos Rios did not cut down the tree; and further, that the Binghamton City Code does not place liability on abutting property owners (or tenants) for defective conditions on the sidewalk. Thus, the burden is shifted to Plaintiff.

In opposition, Plaintiff submitted a Supplemental (Amended) Verified Bill of Particulars with allegations that representatives of one of the moving Defendants created the dangerous condition by removing the tree. Plaintiff also argues that summary judgment is premature because depositions have not been conducted.

Under CPLR 3212(f), "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just." In this case, Plaintiff argues that notwithstanding affidavits from representatives of the moving Defendants that they did not remove the tree, she should be allowed to obtain depositions to test the veracity of those affidavits, and obtain evidence concerning the circumstances of the removal of this tree. If, in fact, one of the moving Defendants was responsible for removal of the tree, that could constitute an affirmative act that created the dangerous condition, and would provide grounds to oppose the

motions. Plaintiff should be allowed to proceed with depositions to explore that issue, which is essentially the crux of the case.

Defendant City has also opposed Dos Rios' motion. First, the City argues that there is a question of whether either of the moving Defendants enjoyed a "special use". In particular, the City produced evidence that Dos Rios was granted a permit allowing it to have an outdoor eating area, and that such special use obstructed pedestrian passage. This caused the pedestrian traffic to walk in the area of the tree grates.

The City also agrees with Plaintiff that depositions are necessary on the issue of who removed the tree. In its opposition, the City produced pictures taken in 2018 that show the tree in the sidewalk area, but a picture taken in 2019 reveals that the tree is missing. Instead, white gravel had been placed in the grate area to fill in the gaps caused by removal of the tree. The City's evidence is that it was not responsible for removal of the tree. If the City did not remove the tree, then it must have been done by one of the moving Defendants. The question of who was responsible for removal of the tree is crucial to a determination of any duty owed to pedestrians on the sidewalk. The Court believes that all parties should be permitted full and complete discovery with respect to that issue.

There is also an issue that the City ordinances do not impose both an obligation on the abutting property owner to keep the sidewalk in a safe condition, and liability for failing to do so. However, even without such language in the City ordinances, the abutting owner or tenant could be liable if it created the dangerous condition. This also comes back to the question of who removed the tree, and lends further support for completing discovery.

In light of the Court's conclusion that further discovery should be obtained, the Court need not consider the City's argument that both moving Defendants enjoyed a special use on the sidewalk area. The special use question can also be further illuminated by the completion of discovery.

CONCLUSION

Based on all the foregoing, the Court finds both motions for summary judgment are premature at this time. The parties should forthwith complete any necessary depositions, following which any motion for summary judgment can be made on a fully developed record.

Accordingly, it is hereby

ORDERED, that Court and State's motion for summary judgment is DENIED, with leave to re-file upon completion of discovery, and it is further

ORDERED, that Dos Rios' motion for summary judgment is DENIED, with leave to re-file upon completion of discovery.

This Decision and Order is being electronically uploaded to the NYSCEF system. Plaintiff remains responsible for ensuring proper compliance with any service upon Defendants of the Decision and Order with Notice of Entry.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: September 26, 2023
Binghamton, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice