At IAS Part 99 of the Supreme Court of the State of New York, Kings County, on the _____ day of _____2023

OCT 12 2023

PRESENT: HON. RICHARD J. MONTELIONE, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

DECSION AND ORDER

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CHRISTOPHER T. SPANO,
Plaintiff,
-against-
RICHMOND SHOPPING LLC, and
RITE AID OF NEW YORK, INC,
Defendants.
----------X
RICHMOND SHOPPING LLC,
Third- Party Plaintiff,
-against-
RITE AID OF NEW YORK, INC.,
Third-Party Defendants.
----------X

Index No.: 519648/2017
Motion Date: 7/19/2023
Motion Cal. No.: 54 & 55
Mot. Seq. 2 & 4

The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	Numbered
Defendant Richmond's Notice of Motion for Summary Judgment, Attorney Affirmation in Support for Defendant Richmond's Motion for Summary Judgment affirmed by Christopher Nahas, Esq. on December 8, 2022, Exhibits.....	44-61
Defendant Rite Aid's Attorney Affirmation in Opposition to Defendant Richmond's Motion for Summary Judgment affirmed by Aaron Gross, Esq. on February 15, 2023, Exhibits	77-81
Plaintiff's Attorney Affirmation in Opposition to Defendant Richmond's Motion for Summary Judgment affirmed by Raymond Maceira, Esq. on March 1, 2023, Exhibits	84-89
Defendant Rite Aid's Notice of Motion for Summary Judgment, Attorney Affirmation in Support of Defendant Rite Aid's Motion for Summary Judgment affirmed by Aaron Gross, Esq. on February 15, 2023, Exhibits.	93-108
Defendant Richmond's Attorney Affirmation in Opposition to Defendant Rite Aid's Motion for Summary Judgment affirmed by Fabiola Emmanuel, Esq. on March 7, 2023, Exhibits, Plaintiff's Attorney Affirmation in Opposition to Defendant Rite Aid's Motion for Summary Judgment affirmed by Raymond Maceira, Esq. on May 19, 2023, Exhibits.....	111-121, 124-132
Defendant Rite Aid's Reply Affirmation to Plaintiff's Affirmation in Opposition affirmed by Aaron Gross, Esq. on May 22, 2023, Defendant Rite Aid's Reply Affirmation to Defendant Richmond's Affirmation in Opposition affirmed by Aaron Gross, Esq. on May 22, 2023.....	133,136

In an action to recover from a trip and fall injury, defendant Richmond Shopping LLC ("Richmond") moves this court for an order, pursuant to CPLR 3212, granting summary judgment in favor of and dismissing the amended verified complaint against defendant Richmond (Mot. Seq. 2). Defendant Rite Aid of New York, Inc. ("Rite Aid") moves this court for an order, pursuant to CPLR 3212, granting summary judgment in favor of and dismissing the amended verified complaint against Rite Aid.

On August 15, 2017, Christopher T. Spano ("plaintiff") allegedly sustained personal injuries when he tripped and fell on a crushed guardrail, on top of a sidewalk, located at 2275 Richmond Avenue, Staten Island, NY ("the premises"). The guardrail in question is a metallic, cylindrical object that was meant to stop vehicles from driving on the sidewalk and hitting pedestrian. *See* NYSCEF # 80, and 60. When plaintiff allegedly tripped on the guardrail in question, it was knocked over and horizontal with the sidewalk. Defendant Rite Aid is the tenant of the premises and has been since 1998. Defendant Richmond is the owner of the premises and defendant Rite Aid's landlord, who bought the premises on January 20, 2017, and is the assignee of a 1998 lease. The lease states in relevant part:

> Landlord has constructed all automobile parking areas, driveways, entrances and exits, service drives, lighting, truckway or ways, loading docks, package pick-up stations, pedestrian sidewalks and ramps, landscaped areas, exterior stairways, and other areas and improvements as shown on Exhibit A (hereinafter referred to as "Common Areas"). Subject to changes by Landlord from time to time [sic] which changes will not materially adversely affect access to the Premises, from all curb cuts, visibility of the Premises and/or of Tenants sign(s) or parking near of the Premises, all of said Common Areas shall be for the general use, in common of tenants, their agents, employees, customers and invitees. Tenant, its agents, employees, customers and invitees are hereby granted the right to use all of said Common Areas for their intended purpose except Tenants employees shall not park in the Common Areas. Notwithstanding anything to the contrary contained in this Lease, Tenant may use the sidewalks in front or beside its buildings for seasonal outdoor sales if permitted by law. Landlord shall, at all times maintain and have adequate means of ingress and egress to and from accepted highways and public streets.
>
> Landlord shall keep (or cause to be kept) the Common Areas in the Shopping Center (excluding Tenant's sidewalks, Tenant's loading docks and Tenant's service areas) in good order and repair, reasonably free of snow, ice and debris and reasonably lighted during the normal business hours of the Shopping Center (except Tenant shall be solely responsible for non-structural repairs, cleaning, snow and ice removal, with respect to the sidewalks directly adjacent to the Premises and any loading docks, if any, used by Tenant). Landlord agrees to carry public liability insurance covering the parking areas and other Common Areas in an amount not less than One Million Dollars ($1,000,000.00) for injury to any one person and One Million Dollars ($1,000,000.00) for injuries arising out of any one accident and Two Hundred Fifty Thousand Dollars ($250,000.00) property damage. Landlord agrees to save and hold the Tenant harmless from any loss cost or suit brought by any person for injuries sustained, or property damage arising out of Landlord's negligence with respect to Landlord's duties under Article 10.

Plaintiff commenced this action by filing a summons and complaint on October 11, 2017. Issue was joined by defendant Richmond interposing a verified answer on November 21, 2017. On May 26, 2020,

plaintiff filed an amended summons and amended verified complaint. On July 2, 2020, defendant Richmond filed a verified amended answer.

A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law. CPLR 3212 (b); *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 967 (1988); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). On such a motion, the evidence will be construed in a light most favorable to the party against whom summary judgment is sought. *Spinelli v. Procassini*, 258 A.D.2d 577 (2d Dep't 1999); *Tassone v. Johannemann*, 232 A.D.2d 627, 628 (2d Dep't 1996); *Weiss v. Garfield*, 21 A.D.2d 156, 158 (3d Dep't 1964). The movant must therefore offer sufficient evidence in admissible form to eliminate all material questions of fact. *Alvarez v. Prospect Hosp*, 68 N.Y.2d 320 (1986); *Zuckerman v. City of New York, supra at 562; Friends of Animals, Inc v. Associated Fur Mfrs, Inc*, 46 N.Y.2d 1065 (1979).

Defendants Richmond and Rite Aid both contend that the other codefendant was responsible for maintaining the portion of sidewalk where plaintiff tripped, pursuant to the lease. Defendant Rite Aid maintains that the sidewalk in question is part of the common areas Defendant Richmond, as landlord was required to maintain. However, Hope Pilchik, the director of finances, property management and leasing for non-party Interstate Management Corp. testified at her deposition that the area where the accident occurred was "[o]n the sidewalk, walkway of Rite Aid" and "the Rite Aid walkway on their building." NYSCEF #60 pp. 11 and 14. Pilchik further testified that Rite Aid maintained the walkway in question. *Id* at p. 11. Rite Aid does not submit evidence that the situs of the accident was elsewhere or maintained by another entity. Accordingly, the sidewalk in question constitutes "Tenant's sidewalks" and "the sidewalks directly adjacent to the Premises" as envisioned by the lease, which Rite Aid is responsible for maintaining.

Rite Aid further argues that Richmond, through its agent, agreed to repair the guardrail in question and is therefore responsible for the accident. Specifically, Rite Aid claims that it had corresponded with the non-party management company, Interstate Management Corp. about the damaged guardrail, and that entity had sent a fax stating "the railings were ordered & they take several weeks to get delivered. This will be taken care of shortly." *See* NYSCEF # 108, p. 7. "Generally, an out-of-possession landlord is not liable for injuries sustained at the leased premises unless it has retained control over the premises or is contractually obligated to repair unsafe conditions." *Rhian v. PABR Associates, LLC*, 38 A.D.3d 637, 637-638 (2d Dep't 2007).

The court is unable to find any recent law pertaining to a landlord who agrees to gratuitously make repairs. However, a comment of the Restatement (Second) of Torts indicates a landlord is not liable "where there is no contractual obligation, but merely a gratuitous promise to repair, made after the lessee has entered into possession." Restatement (Second) of Torts § 357, Comment (a)(1). Additionally, the Court of Appeals has held, "[a] landlord who fails of full performance of a gratuitous undertaking to repair is certainly not liable on contract, for his promise to perform is not supported by consideration... Nor, without more, would there by a liability in tort." *Kirshenbaum v. General Outdoor Advertising Co.*, 258 N.Y.489, 496 (1932). Moreover, there is no indication that the management company began repairing the subject guardrail or did so in a negligent manner. *See Kirshenbaum Supra;* 85 N.Y. Jur. 2d Premises Liability § 148. Accordingly,

even if Richmond or its management company undertook to repair the guardrail, Richmond cannot be held liable if that repair never occurred.

Rite Aid also maintains that the guardrail's defect is structural in nature and falls within the ambit of Richmond's maintenance obligations, pursuant to the lease. "[W]hat will constitute a structural alteration necessarily depends upon the facts of each case and requires that the nature and extent of the proposed repair or alteration be examined in the context of and in relationship to the structure itself." *112 West 34th Street Associates, LLC v. 112-1400 Trade Properties LLC*, 85 A.D.3d 529, 534 (1st Dep't 2012) quoting *Garrow v. Smith*, 198 A.D.2d. 622, 623 (3d Dep't 1993). Sidewalk defects are considered structural in nature. *See 3650 White Plains Corp. v. Mama G. African Kitchen Inc.*, 205 A.D.3d 468 (1st Dep't 2022). Surface level defects on stair treads are not considered structural. *Regensdorf v. Central Buffalo Project Crop.*, 247 A.D.2d 931, 932 (4th Dep't 1998). Holes and pits in a surface-level, plastic like, cover over an interior step do not constitute structural defects. *Quinones v. 27 Third City King Restaurant, Inc.*, 198 A.D.2d 23, 24 (1st Dep't 1993). Broken fragments in asphalt also do no not constitute structural defects. *Uhrilch v. Canada Dry Bottling Co. of New York*, 305 A.D.2d 107, 108 (1st Dep't 2003). In the instant case, the guardrail appears to have no subterranean component and is attached to the sidewalk at its surface. *See* NYSCEF #50, Exhibits 2. The court finds that the guardrail in question does not constitute a structural defect, which Richmond would be required to repair under the lease.

Rite Aid's contention that it lacked constructive knowledge of the crushed guardrail is immaterial. Rite Aid had actual knowledge of the condition in question, as evidenced by its letters to the management company. *See* NYSCEF # 108; *Adamson v. Radford Management Associates, LLC*, 151 A.D.3d 913, 914 (2d Dep't 2017) holding "[a] defendant who moves for summary judgment... has the initial burden of establishing, prima facie, that it neither created the alleged hazardous condition nor had actual *or* constructive notice of its existence" (emphasis added). Accordingly, Rite Aid was obligated to maintain the site of plaintiff's accident and make necessary repairs under the lease, and Richmond had no such responsibility. For the foregoing reasons, it is hereby

ORDERED that defendant Richmond's motion for summary judgment (Mot. Seq. 2) is GRANTED and the amended verified complaint is DISMISSED against Richmond; and it is further

ORDERED that the third-party complaint against Richmond is DISMISSED, *see Mikulski v. Adam R. West, Inc.*, 78 A.D.3d 910 (2d Dep't 2010); and it is further

ORDERED that defendant Rite Aid's motion for summary judgment (Mot. Seq. 4) is DENIED in all respects.

This constitutes the decision and order of the court.

ENTER

Hon. Richard J. Montelione, J.S.C.

2023 OCT 16 AM 9:31
FILED

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