At an IAS Trial Term, Part 75 of the Supreme Court of the State of New York, Kings County, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 27th day of February 2025

PRESENT: HON. ANNE J. SWERN, J.S.C.

LEOPOLDO HERNANDEZ,

Plaintiff's),

-against-

1883 PUTNAM A VENUE, LLC, TOPOS BOOKS, LLC and LUPITA'S BAKERY SHOP,

Defendant(s).

IndexNo.: 511775/2021

Calendar No.: 24

Motion Seq.: 005

Recitation of the following papers as required by CPLR 2219(a):

	Papers Numbered
Notice of Motion, Affirmation, Affidavits and Exhibits (NYSCEF 92-102)	1,2
Affirmations and Exhibits in Opposition (NYSCEF 104-112)	3
Reply Affirmation and Exhibits (NYSCEF 113-118)	4

Upon the foregoing papers and after oral argument, the decision and order of the Court is as follows:

Upon a motion for summary judgment in an action for damages arising out of a defective condition on a property, a plaintiff must establish a prima facie showing, that "the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries" *(Tsyganash* v *Auto Mall Fleet Mgt., Inc.,* 163 AD3d 1033, 1033-1034 [2d Dept. 2018]). Generally, a landowner will not be liable for injuries on a public sidewalk unless it created the defect or caused the defect to occur by some special use of the sidewalk *(Lagawo* v *Myers,* 149AD3dl056, 1056 [2nd Dept 2017]). However, an out-of-possession landowner also

has a non-delegable duty to maintain the public sidewalk in a reasonably safe condition notwithstanding a lease agreement with a non-owner/tenant (*Xiang Fu He v Troon Management, Inc.*, 34 NY3d 167, 170 [2019]; § 7-210 of the Administrative Code of the City of New York).

A lease agreement creates contractual obligations between the parties but the contractual obligation standing alone does not render the lessee liable to an injured third party (*Henry v Hamilton Equities, Inc.*, 34 NY3d 136, 142 [2019]; and *see Espinal v Melville Snow Contractors*, 98 NY2d 136, 138-139 [2002]). To hold the tenant liable, the lease agreement and contractual obligations must be comprehensive and exclusive demonstrating that (1) the lessee absorbed the landowner's entire duty to a third party (*id.* at 140-141), and (2) the lease unequivocally placed the duty on the tenant to perform the specific maintenance and repair work that is alleged to have caused the third party's damages (*Henry v Hamilton Equities, Inc.*, 34 NY3d 156).

Even if a condition is open and obvious, defendants still have this obligation to maintain the property in a reasonably safe condition (*Carasco v Schlesinger*, 222 AD3d 476, 477 [2d Dept. 2023]). Therefore, defendants can still be held liable for failing to maintain their property because "[t]he determination of whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances, and whether a condition is not inherently dangerous, or constitutes a reasonably safe environment, depends on the totality of the specific facts of each case" (*Russo v Home Goods, Inc.*, 119 AD3d 924, 925-926 [2d Dept. 2014]).

Defendant, TOPOS BOOKS, LLC, established a *prima facie* entitlement to summary judgment by demonstrating that (1) it did not owe a duty to plaintiff and (2) the sidewalk defect was not in the proximity of Topo's special use of the sidewalk. The photographs established that the defect was beyond the area where Topos' sidewalk tables were located.

In opposition to the motion, plaintiff and the landowner, 1883 Putman Avenue LLC, did not come forward with evidence that Topos unequivocally contracted in the lease to exclusively absorb the duty to perform structural repairs to the sidewalk (*Espinal v Melville Snow Contractors,* 98 NY2d 140-141; *Henry v Hamilton Equities, Inc.,* 34 NY3d 156). Therefore, plaintiff's complaint and all cross claims against TOPOS are dismissed.

However, the motion for summary judgment is denied on the issue of the open and obvious nature of the defect as to all defendants. The duty to keep the property in a reasonably safe condition is separate from the duty to warn (*DiVietro v Gould Palisades Corp.,* 4 AD3d 325). Therefore, while the fact that an open and obvious condition relieves the landowner of the duty to warn, it does not relieve the landowner of its burden of demonstrating that they "exercised reasonable care under the circumstances to remedy the condition and to make the property safe, based on such factors as the likelihood of injury to those entering the property and the burden of avoiding the risk" (*Id.*).

This is now the law of the case and the Court may not revisit this triable issue of fact through a successive motion for summary judgment by the landowner who elected to submit an affirmation joining in Topos' motion rather than serve a motion seeking this affirmative relief in its own right (*Brownrigg v New York City Housing Authority,* 29 AD3d 721, 722 [2nd Dept 2006] and *Alam v Uddin,* 160 AD3d 915, 917 [2nd Dept. 2018]).

Accordingly, it is hereby

ORDERED that defendant TOPOS BOOKS, LLC's, motion for summary judgment for summary judgment is denied on the issue of whether the sidewalk defect was open and obvious, and it is further

ORDERED that defendant TOPOS BOOKS, LLC's, motion for summary judgment is granted on the issues of duty and special use of the sidewalk, and it is further

ORDERED that plaintiff's complaint, together with co-defendants' cross claims, are dismissed in their entirety as against defendant TOPOS BOOKS, LLC.

This constitutes the decision and order of the Court.

ENTER:

Hon. Anne J. Swern, J.S.C.
Dated: 2/27/2025

For Clerks use only:
MG EXT
MD _____
Motion seq. # 5