

Christy v MSC Props., Inc.
2025 NY Slip Op 35635(U)
January 14, 2025
Supreme Court, Suffolk County
Docket Number: Index No. 605565/2022
Judge: Maureen Liccione
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SHORT FORM ORDER

INDEX No. 605565/2022SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 78 - SUFFOLK COUNTY**PRESENT:**Hon. MAUREEN T. LICCIONE
Justice of the Supreme CourtMOTION DATE 7/3/24 (003 & 004)
MOTION DATE 7/31/24 (005)
ADJ. DATE 9/18/24
Mot. Seq. # 003 MD
Mot. Seq. # 004 MD
Mot. Seq. # 005 MD-----X
HEATHER CHRISTY,

Plaintiff,

SIBEN & SIBEN, LLP
Attorney for Plaintiff
90 East Main Street
Bay Shore, New York 11706WALSH MARKUS MCDUGAL &
DEBELLIS, LLP
Attorney for Defendant MSC Properties, Inc.
229 Seventh Street, Suite 200
Garden City, New York 11530

- against -

SOBEL PEVZNER, LLC
Attorney for Defendant 7-Eleven, Inc.
464 New York Avenue, Suite 100
Huntington, New York 11743MSC PROPERTIES, INC. JMD RETAIL INC.,
d/b/a 7-ELEVEN and 7-ELEVEN, INC.,Defendants.
-----XQUIRK & BAKALOR, P.C.
Attorney for Defendant JMD Retail Inc.
1205 Franklin Avenue, Suite 110
Garden City, New York 11530

Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion and supporting papers by 7-Eleven, Inc. (003), filed June 6, 2024; Notice of Motion and supporting papers by MSC Properties, Inc. (004), filed June 18, 2024; Notice of Motion and supporting papers by JMD Retail Inc., d/b/a 7-Eleven (005), filed July 3, 2024; Answering Affidavits and supporting papers by JMD Retail Inc., d/b/a 7-Eleven (004), filed July 23, 2024; Answering Affidavits and supporting papers by plaintiff (003-005), filed August 20, 2024; Answering Affidavits and supporting papers by 7-Eleven, Inc. (004-005), filed August 21, 2024; Replying Affidavits and supporting papers by 7-Eleven, Inc. (003), filed August 28, 2024; Replying Affidavits and supporting papers by JMD Retail Inc., d/b/a 7-Eleven (005), filed August 28, 2024; Answering Affidavits

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and supporting papers by MSC Properties Inc. (005), filed September 10, 2024; Replying Affidavits and supporting papers by JMD Retail Inc., d/b/a 7-Eleven (005), filed September 16, 2024; Replying Affidavits and supporting papers by MSC Properties Inc. (004), filed September 16, 2024; Other __; it is

ORDERED that the motion (003) by defendant 7-Eleven, Inc., the motion (004) by defendant MSC Properties, Inc., and the motion (005) by defendant JMD Retail Inc., d/b/a 7-Eleven, are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendant 7-Eleven, Inc. for summary judgment dismissing the complaint and cross-claims against it is denied; and it is further

ORDERED that the motion, improperly denominated as a cross-motion, by defendant MSC Properties, Inc. for summary judgment dismissing the complaint and cross-claims against it is denied; and it is further

ORDERED that the motion, improperly denominated as a cross-motion, by defendant JMD Retail Inc., d/b/a 7-Eleven, for summary judgment dismissing the complaint and cross-claims against it is denied.

This is an action against defendants 7-Eleven, Inc. (hereinafter 7-Eleven), MSC Properties, Inc. (hereinafter MSC), and JMD Retail Inc., d/b/a 7-Eleven (hereinafter JMD), to recover damages for personal injuries allegedly sustained by plaintiff Heather Christy as a result of a trip and fall accident, which occurred on November 6, 2021. Plaintiff alleges that she exited a 7-Eleven store and then tripped over a pothole in the parking lot of the shopping center located on Sunrise Highway in Islip Terrace, New York. MSC owned the subject shopping center, and the premises thereat known as 3269 Sunrise Highway was leased by MSC to defendant 7-Eleven. At the time of the accident, the 7-Eleven store was being operated pursuant to a franchise agreement between 7-Eleven and JMD. By order dated August 21, 2024, this court granted a motion by JMD to vacate the note of issue and restored the case to pre-note of issue status.

7-Eleven now moves for summary judgment dismissing the complaint and cross-claims against it, arguing that it was an out-of-possession tenant with no contractual or legal duty to maintain or repair the property under its lease agreement with MSC. In support of the motion, it submits, among other things, the pleadings, a lease agreement, a franchise agreement, and transcripts of the parties' deposition testimony. MSC also moves for summary judgment dismissing the complaint and cross-claims against it, arguing that it did not cause, create, or have notice of the alleged dangerous condition, and that there are issues of fact with respect to defendants' obligations to inspect and repair the "exclusive use area" of the parking lot where plaintiff fell. Finally, JMD moves for summary judgment dismissing the complaint and cross-claims against it, arguing that it had no obligation to maintain, inspect, or repair the parking lot at the accident location. In support of the motion, it submits the affidavit of Ram Matlani.

To establish prima facie entitlement to judgment as a matter of law, a movant must come forward with evidentiary proof, in admissible form, demonstrating the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Sillman v Twentieth Century Fox*

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Film Corp., 3 NY2d 395, 165 NYS2d 498 [1957]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 48 NYS2d 316 [1985]). If such a showing is made, the burden shifts to the party opposing the motion for summary judgment, who must proffer evidence in admissible form sufficient to establish the existence of any material issue of fact which requires a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

A landowner, or a party in possession or control of real property, has a duty to maintain its property in a reasonably safe condition (see *Kellman v 45 Tiemann Assoc.*, 87 NY2d 871, 638 NYS2d 937 [1995]; *Quezada v Structure Tone, Inc.*, 226 AD3d 716, 208 NYS3d 692 [2d Dept 2024]; *Pilgrim v Avenue D Realty Co.*, 173 AD3d 788, 99 NYS3d 688 [2d Dept 2019]). “A tenant has a common-law duty to remove dangerous or defective conditions from the premises it occupies, even though the landlord may have explicitly agreed in the lease to maintain the premises and keep them in good repair” (*Sellitti v TJX Companies, Inc.*, 127 AD3d 724, 725, 6 NYS3d 559 [2d Dept 2015]; see *Gatto v Coinmach Corp.*, 172 AD3d 1176, 101 NYS3d 390 [2d Dept 2019]; *Sarisohn v 341 Commack Rd., Inc.*, 89 AD3d 1007, 934 NYS2d 202 [2d Dept 2011]). A defendant moving for summary judgment in a trip and fall case has the initial burden of making a prima facie showing that it did not create the alleged dangerous condition, and that it did not have actual or constructive notice of its existence (see *Piltie v Ofori*, 223 AD3d 688, 203 NYS3d 179 [2d Dept 2024]; *Armenta v AAC Cross County Mall, LLC*, 219 AD3d 790, 195 NYS3d 111 [2d Dept 2023]; *Pilgrim v Avenue D Realty Co.*, 173 AD3d 788, 99 NYS3d 688. To meet its initial burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff’s accident (see *Armenta v AAC Cross County Mall, LLC*, 219 AD3d 790, 195 NYS3d 111).

Nonetheless, an out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises, and has a duty imposed by statute or assumed by a contract or course of conduct (see *Grant v 132 W. 125 Co., LLC*, 180 AD3d 1005, 120 NYS3d 345 [2d Dept 2020]; *Miske v Selvaggi*, 175 AD3d 1526, 109 NYS3d 156 [2d Dept 2019]; *Khanimov v McDonald’s Corp.*, 121 AD3d 1050, 995 NYS2d 202 [2d Dept 2014]). Thus, the court must look not only to the terms of the lease agreement, but also to the parties’ course of conduct, including the landowner’s ability to access the premises to determine whether the landlord surrendered control over the premises as to extinguish his or her liability as a matter of law (see *Gronski v County of Monroe*, 18 NY3d 374, 940 NYS2d 518 [2011]).

Here, MSC failed to establish that it was an out-of-possession landlord that relinquished control over the premises and that it did not have a duty assumed by a contract or course of conduct to repair the parking lot in the area where plaintiff allegedly fell (see *Grant v 132 W. 125 Co., LLC*, 180 AD3d 1005, 120 NYS3d 345). The lease between MSC and 7-Eleven states that MSC grants to 7-Eleven “the exclusive use of those areas of the [s]hopping [c]enter in addition to the [p]remises, including . . . parking spaces,” called the “exclusive use area.” Article 61 of the lease states that MSC shall designate seven parking spaces in the front of the premises, “for the exclusive use by [t]enant or [t]enant’s employees . . . and customers.” Pursuant to the lease, MSC agrees to maintain and keep in good repair

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the exterior of the premises and of the shopping center, and is responsible for maintenance and repair of the parking areas, including the exclusive use area. At her deposition, Darlene Munoz testified that she is the property manager of MSC, that she owned a tanning salon located in the strip mall, and that she was at the strip mall “weekly.” She also testified that her duties included inspecting the parking lot, and, if she observed an issue, calling her vendor, John Cruz, to make repairs, and that the decision to repair the parking lot was hers.

MSC also failed to demonstrate its prima facie entitlement to summary judgment on the basis that it lacked constructive notice of the alleged dangerous condition in the parking lot, as it failed to submit evidence as to when the subject area of the parking lot was last inspected (*see Armenta v AAC Cross County Mall, LLC*, 219 AD3d 790, 195 NYS3d 111).

JMD failed to establish that it did not owe a duty to plaintiff to maintain the parking lot in the area where she she fell (*see Gatto v Coinmach Corp.*, 172 AD3d 1176, 101 NYS3d 390 [2d Dept 2019]; *Sellitti v TJX Companies, Inc.*, 127 AD3d 724, 6 NYS3d 559). JMD argues that MSC had the duty to repair and maintain the parking lot, and that, pursuant to the franchise agreement, parking lot repairs were also the responsibility of 7-Eleven. Although there were no signs posted in the parking lot indicating that the parking spots in front of the 7-Eleven store were for the exclusive use of 7-Eleven employees and customers, the lease agreement between 7-Eleven and MSC designates those spots as being for the exclusive use of 7-Eleven’s customers and employees (*cf. Millman v Citibank*, 216 AD2d 278, 627 NYS2d 451 [2d Dept 1995][stating that Citibank did not have an exclusive right to possession of the parking lot]). Additionally, the lease agreement states that 7-Eleven has the right to assign the lease or to sublease the “whole or any part of the [p]remises (including use of the [e]xclusive [u]se [a]rea).” As the franchise agreement is unclear as to whether the sublease includes the assignment of the seven parking spaces designated under the lease as the “exclusive use area,” JMD failed to establish that it did not have a duty to maintain the parking lot in the area where plaintiff allegedly fell (*see Gatto v Coinmach Corp.*, 172 AD3d 1176, 101 NYS3d 390). Even where a landlord expressly agrees in the lease to maintain the property in good repair, a tenant has a common-law duty to remove dangerous or defective conditions (*see Cohen v Central Parking Sys.*, 303 AD2d 353, 756 NYS2d 266 [2d Dept 2003]). As JMD failed to establish that it lacked actual or constructive notice of the alleged dangerous condition, it failed to meet its burden of establishing its prima facie entitlement to summary judgment (*see Sarisohn v 341 Commack Rd., Inc.*, 89 AD3d 1007, 934 NYS2d 202 [2d Dept 2011]).

Finally, 7-Eleven’s submissions are insufficient to establish that it was an out-of-possession tenant and franchisor that relinquished control over the premises (*see Grant v 132 W. 125 Co., LLC*, 180 AD3d 1005, 120 NYS3d 345; *Gerber v West Hempstead Convenience*, 2 AD3d 260, 769 NYS2d 527 [1st Dept 2003]; *see also Pipitone v 7-Eleven, Inc.*, 67 AD3d 879, 889 NYS2d 234 [2d Dept 2009]). Ingrid Solis testified that she is an area leader (a position that was previously called a field consultant) for 7-Eleven, but that she was not employed at 7-Eleven on the date of the accident. She testified that Eric Ferencz was the 7-Eleven field consultant for the store at issue before her, but not in November of 2021 at the time of plaintiff’s accident. Ms. Solis testified that as an area leader, she visits 14 franchises on a regular basis, that the frequency of her visits depends on the condition of the store and her agenda, and that “[i]t could be once a week, twice a week, once every three weeks.” She stated that during her

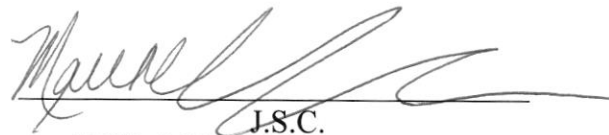
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visits, she conducts a “walk-through” of the store, which may include the exterior and parking lot. She testified that she does not look at the parking lot at the subject 7-Eleven store because it has a “common share parking lot,” but that she does “look at the front apron.” When asked about the responsibilities of the field consultants, she testified, “I’m not sure how they would do their walks because we all do them differently, so I’m not sure what that person at that specific time was looking for.” Viewing the evidence in the light most favorable to the plaintiff, 7-Eleven’s submissions are insufficient to establish that it did not retain control of the premises, as Ms. Solis was not the field consultant for the subject store at the time of the accident, and she acknowledged that each person conducts their walk-through differently (see *Gronski v County of Monroe*, 18 NY3d 374, 940 NYS2d 518). She did, however, testify that she might visit a store as much as two times per week. Accordingly, there is a question of fact as to the level of control that 7-Eleven exercised over JMD, its franchisee (see *Grant v 132 W. 125 Co., LLC*, 180 AD3d 1005, 120 NYS3d 345).

Moreover, 7-Eleven failed to establish that it did not assume a contractual duty to repair the parking lot in the area where plaintiff alleges she fell (see *Muller v City of New York*, 185 AD3d 834, 125 NYS3d 576 [2d Dept 2020]; *Robbins v 237 Ave. X, LLC*, 177 AD3d 799, 113 NYS3d 235 [2d Dept 2019]). Pursuant to the franchise agreement between 7-Eleven and JMD, JMD was obligated to maintain and repair the “Store and 7-Eleven [e]quipment.” Notably, the only specific reference to repair of the parking can be found under the subheading “maintenance performed by or through us,” wherein it states, “[w]hen we consider it necessary during the [t]erm of this [a]greement, we agree to: (1) repaint and repair the interior and exterior of the Store . . . (4) repair the floor covering, exterior walls, roof, foundation, and parking lot.” 7-Eleven failed to establish that this is merely a permissive cause, and that it did not have a duty to repair the alleged dangerous condition (see *Muller v City of New York*, 185 AD3d 834, 125 NYS3d 576). Accordingly, as 7-Eleven failed to demonstrate that it lacked actual or constructive notice of alleged dangerous condition, its motion for summary judgment dismissing the complaint against it is denied (see *Muller v City of New York*, 185 AD3d 834, 125 NYS3d 576).

The court has considered defendants’ remained contentions and finds them unavailing.

Dated: January 14, 2025



J.S.C.

HON. MAUREEN T. LICCIONE, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION