SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : **HON. ROBERT J. McDONALD** **IAS PART 34**
**Justice**

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ANITA CONFESSORE and JIMMY CONFESSORE, Index No.: 17253/10

Plaintiffs, Motion Date: 8/2/12

- against - Motion No.: 10 & 11

ROSSI PHARMACY, INC., THOMAS ROSSI, JOHN ROSSI and JOSEPH GUZZARDO, Motion Seq.: 3 & 4

Defendants.

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The following papers numbered 1 to 16 read on this motion by John Rossi and separate motion by Rossi Pharmacy, Inc. (Pharmacy), for summary judgment dismissing the complaint pursuant to CPLR 3212.

| | Papers Numbered |
|---|---|
| Notices of Motions - Affidavits - Exhibits | 1 - 8 |
| Answering Affidavits - Exhibits | 9 - 11 |
| Reply Affidavits | 12 - 16 |

Upon the foregoing papers it is ordered that the motions are granted.

Plaintiff in this negligence action seeks damages for personal injuries sustained on July 2, 2010, when she tripped and fell on the sidewalk abutting 84-01 101 Avenue, in Ozone Park, New York (the building). Plaintiff Anita Confessore (the injured plaintiff) alleges that she was caused to trip and fall by a raised metal handle on the sidewalk cellar doors on the 84th Street side of the building. The action of Jimmy Confessore is derivative. Defendant John Rossi moves to dismiss on the ground that the metal handle was not raised at the time of plaintiff's fall and, even if so, Rossi had no notice of that condition prior to plaintiff's accident. Rossi Pharmacy, Inc. moves to dismiss insofar as asserted against it on the ground that it was not the

owner of the subject property but merely a commercial tenant thereat with no responsibility to maintain or repair the cellar doors, and thus it owed no duty of care to plaintiff. Plaintiffs oppose the motions.

Facts

In their bill of particulars, plaintiffs allege that defendants were negligent in the operation, maintenance and management of the sidewalk, particularly the cellar doors in that they caused and /or allowed a hazardous condition to exist by causing the cellar door handle to be in an upward or raised position.

Plaintiff Anita Confessore testified that the accident occurred at approximately 12:00 p.m., when she was walking on the sidewalk along 84th Street, near the building. Prior to the accident, at approximately 9:30 a.m., she had visited the "Le Cage Salon" to get her hair done. After the appointment, at approximately 11:30, she proceeded to her friend's house located at 97-31 84th Street. After lunch, plaintiff and her friend, Ann Quranto, took a bus back to the original location, near the corner of 101st Avenue and 84th Street. They passed Rossi Pharmacy. The injured plaintiff testified that as they were walking past Rossi Pharmacy, her foot got caught in a handle sticking out of the cellar doors, causing her to trip and fall. Anita Confessore testified that it was only after her fall that she saw the cellar handle in an upright position. The rectangular-shaped handle was black and made out of iron. She could not measure how high the handle was raised from the ground at the time of the accident. The sidewalk itself did not pose any tripping hazard. She further testified that, prior to the accident, every time when she saw the cellar door handle, it was always down and flat with the cellar doors. In fact, she testified, when she left the salon earlier that day at around 11:30 a.m., the handle was in a flat position.

John Rossi testified as follows: he owns the building located at 84-01 101st Avenue, in Ozone Park, New York. He rents space to and operates Rossi Pharmacy in the building. There was no rental agreement between him as the building owner and the Pharmacy, however, the Pharmacy pays rent to him. There was another commercial tenant, a beauty salon named "Le Cage", on the ground floor of the building in addition to two apartments on the second floor where individual tenants live. John Rossi maintains the building premises himself; there was no superintendent or maintenance company. In the event that something needed to be repaired, he would hire someone. There was a cellar door on the sidewalk abutting Le Cage Beauty Salon, on 83rd Street. The

beauty salon's items were stored in the cellar. The cellar door remained locked at all times. The locks consisted of a bolt inside and a standard heavy-duty lock from the outside. The individual and commercial tenants would utilize the door inside the hallway to get access to the basement. Rossi himself routinely inspected the lock on the outside to make sure that it was secure. He does not keep daily logs or records of his inspections. When tenants moved heavy items in or out of the basement from the outside, they would ask permission from Rossi, who was the only person with a key to the lock.

Normally, Rossi testified, he would perform multiple inspections of the sidewalk and cellar door per day as he would pass the cellar door before getting to the Pharmacy in the morning. He would sweep the sidewalk around 11:00 a.m., and 3:00 p.m. Prior to plaintiff's accident, he had observed the lock on the cellar door. He had never observed the handle of the cellar door in a raised position. The handle goes down by gravity due to its weight, and Rossi made sure that the handle was always flat and the doors flush before the lock was put back on.

On the date of plaintiff's accident, the cellar door had to be opened in the late morning when one of the residential tenants, "Gabriel", was moving out. After Gabriel finished moving his belongings out of the cellar, Rossi went back to the cellar and closed the doors from outside at around 11:30 a.m. He put the handle down in a flush position. He then went back to the Pharmacy. Rossi came back outside near the cellar door when he heard a commotion. He observed plaintiff sitting on top of the cellar door, and observed that the cellar door handle was flat. Finally, Rossi testified that there had been no repairs performed to the cellar door prior to the subject accident.

Motion by Rossi Pharmacy, Inc.

It is undisputed that the building was owned by John Rossi at the time of the subject accident, and that Rossi Pharmacy was merely a commercial tenant with no obligation to maintain or repair the cellar doors abutting the property. Significantly, the accident occurred in front of the Le Cage Salon, and not the Pharmacy.

In any event, the Pharmacy demonstrated its entitlement to summary judgment dismissing the complaint insofar as asserted against it with evidence that the Pharmacy was not contractually obligated to maintain the demised premises, including the appurtenance thereto, that the Pharmacy did not endeavor to perform such maintenance, and that the Pharmacy owed no duty to the injured plaintiff by virtue of any statute upon which the

plaintiffs rely ( *see Lee v Anna Development Corp.*, 83 AD3d 545 [2011]).

Motion by John Rossi

To impose liability upon the defendant for the plaintiff's fall, there must be evidence tending to show the existence of a dangerous or defective condition and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time (*see Christopher v New York City Tr. Auth.*, 300 AD2d 336 [2002]). Rossi sustained his initial burden of establishing his prima facie entitlement to judgment as a matter of law by submitting the injured plaintiff's deposition, which revealed that she did not know what caused her to trip as she walked near metal handle on the cellar door (*see Penn v Fleet Bank*, 12 AD3d 584 [2004]). The plaintiff admitted at her deposition that she did not notice the metal handle at any time prior to the fall on the day of the occurrence, and that it was only after she fell that she observed the handle in a "raised" position. It is just as likely under these facts that the "raised" condition of the handle was caused when the plaintiff tripped and was not a preexisting condition. In the absence of proof that the metal handle was raised before the plaintiff's accident, a jury would be required to speculate as to the cause of plaintiff's trip and fall (*see Duncan v Toles*, 21 AD3d 984 [2005]; *Mullaney v Koenig*, 21 AD3d 939 [2005]; *Penn v Fleet Bank*, 12 AD3d at 584).

The court notes the affidavit of defendant's expert, Jeffrey J. Schwalje, a consulting engineer in which he avers the following: "the subject sidewalk door system was adequately designed, fabricated, installed and maintained safe for its intended use; the design and maintenance of the metal handle was proper and safe; the handle operates safely and retracts by gravity when released. The handle only maintains a raised position when manipulated. The subject sidewalk doors did not violate the NYC Building or Administrative Codes."

Rossi also proffered evidence establishing the absence of a dangerous and defective condition and the lack of notice of the condition complained of (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Brown-Phifer v Cross County Mall Multiplex*, 282 AD2d 564 [2001]; *Visconti v 110 Huntington Assoc.*, 272 AD2d 320 [2000]; *Stumacher v Waldbaum, Inc.*, 274 AD2d 572 [2000]). Rossi testified that he had just observed the metal handle "flat" about one-half hour prior to plaintiff's fall, thus further confirming plaintiff's deposition testimony that she too observed the handle was not raised at about 11:30 a.m.

In opposition, the plaintiff failed to establish the existence of an issue of fact as to whether the metal handle on the sidewalk cellar doors that allegedly caused the accident was raised prior to the accident or whether it was raised as a consequence of the fall itself (*see Christopher v New York City Tr. Auth.*, 300 AD2d 336 [2002]; *Brown-Phifer v Cross County Mall Multiplex, supra; Visconti v 110 Huntington Assoc., supra*). The plaintiff also failed to establish the existence of an issue of fact as to whether Rossi had notice of the alleged raised portion of the metal door handle under any theory of constructive notice. The plaintiff failed to present any evidence to establish that the metal door handle was raised for any appreciable length of time prior to the accident (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). Thus, in opposition, plaintiff failed to raise a triable issue of fact.

Conclusion

The motions for summary judgment dismissing the complaint are granted.

Dated: Long Island City, NY
October 24, 2012

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**ROBERT J. McDONALD**
**J.S.C.**