SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KELLY O'NEILL LEVY **PART** 19
Justice

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JOSEPHINE CORDERO,

Plaintiff,

- v -

TAVERN 29, LTD, SMITH & WEISS, INC.

Defendant.

INDEX NO. 154087/2014

MOTION DATE

MOTION SEQ. NO. 001 and 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 79, 80, 81, 82, 83

were read on this application to/for summary judgment

In this trip and fall case, defendant Tavern 29, Ltd. ("Tavern") moves for summary judgment dismissing the complaint filed by plaintiff Josephine Cordero ("Plaintiff") and any cross-claims asserted against it (mot. seq. 001). Plaintiff opposes. Defendant Smith & Weiss, Inc. ("Smith") moves for summary judgment dismissing Plaintiff's complaint and any cross-claims against it, and granting its cross-claim against Tavern (mot. seq. 002). Plaintiff and Tavern oppose. The motions are consolidated for disposition.

BACKGROUND

Plaintiff alleges that she sustained injuries on December 6, 2012 when she fell exiting the restaurant Tavern 29 located in the building at 47 East 29th Street in Manhattan. Smith owned the

subject building and leased the premises to tenant Tavern pursuant to a written lease agreement dated February 1, 2012.

Tavern had installed a "windbreaker" [1] which was in place on the day of the incident. As Plaintiff exited the restaurant, she allegedly tripped and fell over the single, one-to-two-inch step (the "step") leading from the restaurant into the windbreaker, thereby sustaining injuries. Plaintiff claims that her fall resulted from tripping on the step at the entrance which she could not see due to inadequate lighting inside the windbreaker.

Plaintiff's Deposition Testimony

Plaintiff testified that she decided to leave the Tavern at 8:30 p.m. the evening of the incident (tr. at 35, 36) and that it was dark when she entered the windbreaker in order to exit the premises (tr. at 100). The windbreaker had two doors to the street and four or five clear, plastic windows (tr. at 28, 99). There was lighting in the restaurant and outside on the street but the lighting from the street did not shine through the plastic windows of the windbreaker (tr. at 27-28, 114). Upon exiting the Tavern, she was looking forward, took a step, and fell (tr. at 39, 108, 109, 113). Plaintiff could not see where she fell because it was dark but saw the step once she stood up (tr. at 110, 113). She testified that she told the manager that there was no lighting where she fell and that it was very dangerous (tr. at 43). In response to whether there was "anything in particular about [the] step that caused [her] to fall" she testified that "[t]there was no light" and "[i]t was dark" (tr. at 44).

Deposition Testimony of Cara Tallon (Park Stone Venture General Manager)

Cara Tallon, who served as director of operations for Park Stone Venture[2] at the time of the incident, testified regarding the lighting in the windbreaker as follows: "There was lighting from

[1] A windbreaker is a temporary enclosure which may be placed immediately outside the entrance of a building to act as a buffer against cold air entering the building.
[2] According to the testimony of Ms. Tallon, Park Stone Venture leased property from Smith, in which Park Stone Venture set up the restaurant Tavern 29.

within the building that went into the windbreaker but there is no independent fixture inside the windbreaker" (tr. at 49). "We have ample lighting in the foyer. We also have lights directly on either side of the windbreaker, as well as, the bright lights from the Gansevoort from across the street. We also have lights above the awing as well" (tr. at 49). "There are multiple lights at the area by the bar. There are lights right on either side of the door and a large chandelier that hangs directly about the door, the entrance." (tr. at 50). "There are large sconces about this large (indicating) on either side. Permanent fixtures." (tr. at 51). "Above the awning there are lights as well." (tr. at 53). "It's the same level of lighting, if not brighter, than the outside street." (tr. at 56). In reference to why it would be brighter in the windbreaker than it would be outside the windbreaker, Ms. Tallon remarked, "Because of the glass panels in the doors form the inside of our building to the actual awning dormer itself." (tr. at 56).

Expert Affidavit of Stanley H. Fein, P.E.

Stanley H. Fein, a licensed professional engineer, opined that that the single step created a hazardous tripping condition in violation of New York City Building Construction Code Section 1008.1.4 for a floor or landing to not be at the same elevation on each side of the door. He stated that the subject step was two inches above the surrounding grade. Mr. Fein also opined that there was a lack of proper lighting in the enclosure creating and compounding the dangerous and hazardous condition. However, the windbreaker was not present when Mr. Fein performed his on-site inspection.

ARGUMENTS

Tavern argues that (1) it followed any requisite safety rules; (2) Plaintiff cannot show any connection between any alleged inadequacy of lighting and her fall; and (3) the step is trivial.

Moreover, Tavern argues, there was ample lighting in and surrounding the windbreaker. Rather, Tavern argues that Plaintiff's incident was caused by her own inattention and walking in high heels.

Smith argues that Plaintiff's claims against it should be dismissed because Smith is an out of possession landlord, and as such, owed no duty to Plaintiff with respect to her accident. Smith also argues that it is entitled to contractual and common-law indemnification from Tavern based on the terms of its lease with Tavern and Tavern's conduct.

DISCUSSION

On a motion for summary judgment, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that there exist material factual issues. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Ostrov v. Rozbruch*, 91 A.D.3d 147, 152 (1st Dep't 2012). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or findings of fact. *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503, 505 (2012).

Motion Sequence 001

In the instant case, there is both an issue of fact as to whether the step was a dangerous condition and as to whether there was inadequate lighting in the windbreaker which proximately caused Plaintiff to fall.

Tavern does not establish a prima facie case that the step was *de minimis*. Plaintiff provides the expert affidavit of Mr. Fein in which he states that the step was in violation of the New York

City Building Construction Code Section 1008.1.4. In addition, as Plaintiff argues, the Court of Appeals has held that "'there is no minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable." *Trincere v. County of Suffolk*, 90 N.Y.2d 976, 977 (1997); *Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165, 166, (1st Dep't 2000); *see also Hutchinson v. Sheridan Hill House Corp.*, 26 N.Y.3d 66, 77 (2015). The *Trincere* court explained that "[i]nstead, whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury." *Id.* (quotation marks and citation omitted); *see Flores v. NYCTA*, 147 A.D.3d 553 (1st Dep't 2017) (reasoning that the specific facts of the case dictate whether a defect is "trivial," not size alone).

As to the lighting, there are competing statements about the level of lighting in the windbreaker. It is undisputed that light fixtures were not present in the windbreaker. Tavern offers the testimony of Ms. Tallon in order to establish a prima facie case that there was sufficient lighting in the windbreaker. Plaintiff offers her own testimony about the poor lighting inside of the windbreaker and that of non-party witness Laura Elfenbein, who was behind Plaintiff at the time of the incident. Plaintiff testified that prior to her accident as she was exiting the restaurant, she was looking forward, and that she fell because of the step and because it was dark.[3] Ms. Elfenbein also stated that it "was dark outside, [there] was no light in this [windbreaker]" (Elfenbein tr. at 15).

Here, the testimony proffered by Plaintiff is sufficient to raise an issue of fact about the levels of lighting in the windbreaker at the time of the accident, and whether inadequacy of that light was the cause of the Plaintiff's accident.

[3] Notably, Ms. Tallon testified that Plaintiff "was her normal self" (tr. at 37).

Motion Sequence 002

Turning to Smith's motion, the lease establishes Smith as an out-of-possession landlord and charges Tavern with the duty to maintain and repair the demised premise.

It is well settled that out-of-possession landlords can typically only be held liable for a third-party accident on their premises if the accident is caused by a condition that is both a significant structural or design defect and a statutory violation. *Malloy v. Friedland*, 77 A.D.3d 583, 583 (1st Dep't 2010); *Johnson v. Urena Serv. Ctr.*, 227 A.D.2d 325, 326 (1st Dep't 1996); *Velazquez v. Tyler Graphics, Ltd.*, 214 A.D.2d 489, 489 (1st Dep't 1995). In the present case, Smith, as an out-of-possession landlord, generally has no duty to an individual unless (i) such duty is statutorily required or contractually obligated, or the landlord retained the right to re-enter, and (ii) the defect in question was a significant structural or design defect that violates a specific statutory provision. *Velazquez v. Tyler Graphics, Ltd.*, 214 A.D.2d 489, 489 (1st Dep't 1995).

Under the terms of the lease, Tavern assumed full possession of the demised premises and Smith did not retain a duty to maintain the demised premises. All of those duties were delegated to Tavern via the lease. (Lease, Page 15, Article 13, Section 13.01). However, Smith maintained the limited right to re-enter under Article 30 of the lease. Therefore, the analysis shifts to whether the defect is a significant structural or design defect.

Case law has established that the level of lighting inside the demised premises is outside the control of an out-of-possession landlord; courts have stressed that an out-of-possession landlord could not be held liable because the out-of-possession landlord does not have control over the lighting. *Peck v. 2-j, LLC*, 56 A.D.3d 277, 278 (1st Dep't 2008) (An individual brought a suit against an out-of-possession landlord alleging the proximate cause of injuries sustained was due to inadequate lighting around stairs. The court held that inadequate lighting does not constitute a

significant structural or design defect that violates a specific statutory building code provision); *see also Grimaldi v. 221 Arlington Realty, LLC*, 107 A.D.3d 670, 671 (2d Dep't 2013) ("defendant established its entitlement to judgment as a matter of law by establishing that it was an out-of-possession landlord, that it was not contractually obligated to maintain the lighting at the premises or repair the alleged hazardous condition, that it did not endeavor to perform such maintenance, and that it did not violate any relevant statute or regulation"). As Tavern controlled the lighting level at its restaurant, and inadequate lighting does not constitute a significant structural or design defect that violates a specific statutory building code provision, an out-of-possession defendant owner such as Smith, cannot be liable for the alleged inadequate lighting.

Plaintiff proffers the affidavit of expert Stanley Fein regarding the slope of the step leading into the windbreaker, that the step violates New York City Building Construction Code, and how the step itself was causally related to the Plaintiff's accident. Nevertheless, as established in *Drotar v. 60 Sweet Thing, Inc.*, 106 A.D.3d 426, 426-427 (1st Dep't. 2013), the riser heights of steps does not constitute a "significant structural or design defect." As the step is not a significant structural or design defect for the purposes of holding an out-of-possession landlord liable and Smith did not have control over the adequacy of the lighting, the Plaintiff has not raised a material issue of fact in response to Smith's motion. Accordingly, Smith's motion for summary judgment against the Plaintiff is granted.

Smith's motion for summary judgment on its cross claim against co-defendant Tavern is dismissed as moot. Because Plaintiff's complaint is dismissed against Smith, there is no need for Smith to be indemnified by Tavern.

CONCLUSION AND ORDER

Based on the information contained in the record and arguments made by each party, Tavern's motion for summary judgment is denied as it failed to show that no material fact exists. Smith's motions for summary judgement against Plaintiff is granted and against Tavern is dismissed as moot. Accordingly, it is hereby

ORDERED that Tavern 29, Ltd's motion for summary judgment is denied; and it is further

ORDERED that Smith & Weiss, Inc.'s motion for summary judgment is granted in part; the branch of the motion which seeks contractual and common-law indemnity from Tavern is dismissed as moot.

The clerk of the court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

10/25/2017
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.
HON. KELLY O'NEILL LEVY
J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED			[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED	[ ]	DENIED	[ ]	GRANTED IN PART	[X] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
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